Clarke, Jeffrey J Dr CMH

From: Clarke, Jeffrey J Dr CMH
Sent: Wednesday, March 08, 2000 7:38 AM
To: Phillips, R Cody Mr CMH; Laurie, Clayton D Dr CMH
Cc: Mittelstedt, Paulette A LTC ASA-MRA; 'rpgdmm@bellatlantic.net'
Subject: FW: Presentation discussed with you today

Cody: an interesting piece, which explains somewhat the criticism of the Army's handling of Jewish DPs noted in that background study presented at the last HA Commission meeting. Print out a copy for your files (I sent a copy to MHI). Dr. C

-----Original Message-----
From: Irving heymont [mailto:weym@erols.com]
Sent: Tuesday, March 07, 2000 4:48 PM
To: clarkjj@hqda.army.mil
Subject: Presentation discussed with you today

Attached is the text of a presentation I made at the US Holocaust Memorial Museum Symposium "Life Reborn" on January 15, 2000. Colonel I. Heymont, USA RET

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THE US ARMY AND THE LANDBERG JEWISH DP CAMP –1945

My remarks about the US Army and the Jewish DPs in Landsberg, Germany in the fall of 1945 are based on absolute facts-at least as I remember them more than 54 years later.

The Army then was demobilizing and faced with vast occupation tasks including rebuilding Germany and coping with large population transfers. For the Jewish DPs, the Army desired order, sanitation, and no public criticism such as resulted from a few instances of improper treatment immediately after the liberation. The Jewish DPs, in addition to shelter and physical care, needed understanding and tolerance to repair emotional and cultural ties. At times, these needs conflicted with those of the Army.

In September 1945, while I was away, the infantry battalion that I commanded moved to Landsberg. I arrived two days later and that morning Gen. Onslow Rolfe, my assistant division commander visited me. He informed me that I was responsible for the large displaced persons camp in the town. His orders were few and simple: get the camp cleaned up, and hold an election for a committee to represent the people of the camp. He added that on matters regarding the camp orders would come from him and not from my regimental commander. Further, he said that if I caused any unfavorable publicity my Army career would be in peril. I was 27, a Major, a Regular Army infantry officer and had been in the Army since early 1940.

It was obvious to me that Jewish DPs were now of serious concern to the Army. I did not know then of the Harrison Report which was a scathing criticism oft the Army's treatment of Jewish DPs or that Gen. Eisenhower had recently issued orders to Gen. George Patton on treatment of Jewish DPs that were not carried out.

If Gen. Rolfe knew of the Harrison Report and these orders he did not tell me. The Report was made public several weeks after I arrived in Landsberg. Gen. Rolfe's orders embodied the Army policy in regard to the Landsberg Jewish DPs. I will only cover the implementation of that policy. The American Jewish Archives published an account of all my actions in the camp.

This is what Gen. Rolfe and I found on our first visit to the camp.. The camp was in a former German Army post in the town and consisted of stone barracks and buildings surrounded by fences topped with barbed wire. A few weeks earlier, a small UNRRA (United Nations Relief and Rehabilitation Agency) and a smaller AJDC (American Join Distribution Committee-known as "Joint") had arrived to assist and supervise. The head of the UNRRA team did not understand German or Yiddish. American soldiers were on guard at the entrance with orders to allow no one to leave without a written pass-a policy inherited from the battalion we had replaced.

The camp was filthy. The grounds were littered with debris left by the Germans. The buildings where the DPs lived had a terrible smell. Wash rooms were filthy and many commodes and sinks were inoperable. It was obvious that some were defecating and urinating in stairwells and in hall corners. Garbage containers were overflowing.

The camp was greatly overcrowded with almost all rooms double or triple bunked. Many people seemed unoccupied and it was disheartening to see some staring through the fence at the Germans moving freely on the streets.

The population was estimated to be about 6,000. About 85% were Jews-mostly adults. The Jews had created a sort of little city within the camp headed by a committee of survivors primarily originally from Lithuania. They had created community organizations including a police force, a hospital, and schools.

Gen. Rolfe acted quickly on my requests. I asked that all non-Jews be moved elsewhere. Years later I learned that Gen. Eisenhower's earlier order that Jewish DPs be housed in separate camps had not been carried out at Landsberg. I requested that the UNRRA team chief be replaced by some one who could understand Yiddish or German and, if possible, be Jewish. The replacement, Dr. Abraham Glassgold was outstanding. I also asked for volunteers from my Division who can speak Yiddish or German be attached to my battalion to augment the small UNRRA and Joint teams. A small group of volunteers was assigned and were a great help in many ways.

At a mass meeting of the camp residents I urged efforts be made to keep the camp clean. In conclusion I said that the Army did not come to stand guard over Jewish survivors and they were now free to come and go as they please and the American soldiers at the camp gate would remain only to keep unauthorized persons out. I also asked them to take down the barbed wire from the fences. The decision to abolish the pass system was mine. Again, I learned later that Gen. Eisenhower had previously issued orders—again not carried out—that the movement of Jewish DPs be unrestricted. The use of mass meetings to communicate with the camp residents was obviously impractical. Dr. Glassgold agreed with me that a camp newspaper would be the ideal medium. My suggestion to the camp committee that they publish a newspaper was greeted with great enthusiasm. This was the origin of the *Landsberger Lager Cajtung*. We failed to find Hebrew type that could be bought, borrowed, or stolen. As a result the newspaper was written in Yiddish and printed in Roman type,

Carrying out the order to have the camp cleaned up was difficult and not fully accomplished primarily because the camp plumbing system was inadequate for so large a population. Complicating this was a shortage of toilet paper and the resulting use of newspapers and rags as substitutes.

Since there was no central dining hall, people ate in their rooms and washed utensils and disposed of refuse in the toilets and washrooms further aggravating the problem. With many commodes inoperative some used hallways and stairwells to relieve themselves. This was most likely due to lack of adequate toilet facilities and not a carry over from concentration camp habits as some claimed.

It was also difficult to get people to do sanitation work and other distasteful tasks. Some claimed that they had been nearly worked to death by the Germans and now the Germans should do the hard work for them. When I suggested that they clear the streets of the debris left behind by the German Army, they replied that it did not bother them. They suggested that if it left a bad impression on the visiting American generals (of which there were many) then Germans should clean it up. I finally brought in prisoners of war to clean up the debris.

Because the local supply of toilet paper was inadequate, I instructed my supply officer to go to the Army supply complexes around Antwerp and come back with a truck and trailer load of toilet paper. He did and I was proud of my initiative and his ability to promote a load of toilet paper without an approved requisition..

Getting the camp committee to establish a central dining hall was not easy.. They argued that it would be difficult to get enough people for the work and it would not succeed because people would take the food back to their rooms to eat. This they claimed was a treasured means of restoring a semblance of family life. We obtained the necessary china and equipment and enough people were found to do the necessary work. This was helped by our ability to offer some payment in cigarettes. The establishment of the central dining hall helped to reduce the sanitation problem.

The camp committee was immediately opposed when told that the Army insisted that an election be held to disprove accusations of having arbitrarily appointed camp committees. They sincerely saw no need for it.

I often wondered how these mature and talented survivors felt when told by a 27 year-old soldier that they now had to stand for election. The committee wanted voting for a party list in the manner now used in Israel. I insisted that the election be American style with voting for named individuals. With this settled, electoral slates sprang up reflecting the spectrum of political, religious, and Zionist divisions among the DPs. They were all Jews united in wanting to leave Europe but otherwise divided. There was great election fervor with many rallies, posters and leaflets. The existing committee members were elected. I had carried out Gen. Rolfe's order and fortunately I did not have a new committee to deal with.

The overcrowding problems were well known to the Army. Generals visited frequently to inspect and monitor progress—particularly after the publication of the Harrison Report. Gen. Horace McBride, the commander of my division's next higher headquarters, apparently was under pressure to improve the conditions of the Jewish DPs. In his area the Landsberg overcrowding was a major concern.

To accommodate the constant stream of Jews fleeing into the US Zone the apparent Army policy was to maximize use of former German military installations and avoid impeding economic recovery by requisitioning German civilian housing which was in short supply. However, the new refugees for a number of reasons flocked to the established camps whenever possible.

The population of the Landsberg camp continued to grow. To remedy this situation the Army made available an area called Fohrenwald in the vicinity of Munich. The accommodations here were superior to those at Landsberg, especially for families but our efforts to persuade a significant number of people to move there from Landsberg failed. I provided transportation for people to see for themselves the better housing. The transportation was fully used –but mostly by people looking for a ride to Munich. Landsberg had fine institutions and many DPs now had close friendships there.

Few were willing to forsake them for a new camp-even one with better physical accommodations. I was also told that to some a move of this sort smacked of a Nazi period "transport" and was a psychological barrier.

The Landsberg population continued to grow despite the space made available at Fohrenwald. Gen. McBride insisted that the population growth be curbed and he threatened to have people moved by force if necessary. Gen. Rolfe and I knew that this had to be an empty threat. The camp committee was in a quandary. They reacted to the threat by arbitrarily lowering the population count gradually over the next few days. The reasons for the decrease were not explored and Gen. McBride was mollified. No food shortage resulted from the lower count even though the camp food supply was affected by the population figures because the reported figures were always greater than the actual population. This did not detract from the fact that the camp was overcrowded.

The camp population continued to increase with the continued flow of Jewish refugees from the East and the growing reputation of Landsberg as one of the best Jewish DP camps. Fohrenwald had been filled to capacity with incoming refugees. Gen. McBride suddenly ordered me to immediately take over some German civilian housing for the camp. This probably was the last time German civilians were evicted to make room for Jewish DPs. An Army engineer unit in town that had been of help to the camp was also ordered to immediately turn over their quarters to the camp. This was probably the only time an American unit had to give up its billets to make room for Jewish DPs. I never knew the motivation for Gen. McBride's sudden and drastic order.

The DPs gathered to watch and gloat over Germans being evicted on their behalf. Rioting soon broke out because some of the younger and more aggressive DPs claimed that the Germans were taking too much furniture with them. To stop the rioting I ordered all the Jews to be temporarily confined to the camp.

Not long after this action UNRRA took over from the Army the responsibilities for all DP camps. The overcrowding at Landsberg and other Jewish DP camps continued as Jews continued to flee from the East. In my division area a new camp for incoming Jewish DPs was set up at Leipheim, a former German air base. The overcrowding at Landsberg persisted as shown in the movie, *"Lang Ist Der Weg* that was filmed there in 1947.

Looking back, I believe that the Army policy on Jewish DPs was correct. Mistakes were made at first in some instances as noted in the Harrison Report. As events unfolded, the Army modified policies and tactics in recognition of the changing circumstances. The Jewish DPs fleeing from the East were accepted and cared for. It was not easy in view of the existing conditions and the Army's many tasks. Could the Army policies applied at Landsberg in the fall of 1945 have been better? Perhaps, but suffice it to say that, overall, the Army performed creditably.

 , V.255, JAN, 1948

United States, and but little more in American universities concerning these elements in Mexico. There are practically no courses given on the natural history of Mexico, and but a few dissertations (chiefly in economic geology) have been submitted on Mexican subjects. In the fields of the earth and biologic sciences there is especial need for fomenting exchanges of professors, students and publications. Some advance has been made in Mexican membership in scientific societies of the United States, and a sprinkling of American[2] members are to be found in the various Mexican scientific societies.

CONCLUSION

It is apparent that among the academic disciplines discussed, history and historians dominate numerically. In terms of close co-operation with Mexicans, the anthropologists lead. The fields with the brightest future at the moment are economics and all of the applied sciences. Glaring weaknesses appear in the study of the internal history of independent Mexico, in that of local and state government, in nearly all phases of geography and sociology, in rural economics, and in physical anthropology. Outside of history there are exceedingly few regional courses on Mexico offered in the United States, and in Mexico there are practically no regional courses on the United States. Only in anthropology has there been reached even a minimum of desirable co-operation, acquaintance, membership in societies, exchange of publications, or interchange of professors and students.

If I were to suggest methods of improving scientific and cultural relations between the United States and Mexico I would make five: (1) reduce the number of American tourists and summer school students; (2) prohibit the publication of popular articles on Mexico by anyone who has lived less than a year in Mexico, or who does not have the Spanish; (3) increase and improve the teaching of Spanish in the United States and of English in Mexico; (4) increase manifold the exchanges of mature graduate students and of competent bilingual professors; and (5) improve to parity with Anglos the treatment and standard of living of Mexicans and Spanish-Americans in the United States. I realize that most of the above suggestions are not feasible and some are even absurd—but they illustrate my feelings in the matter. Actually, I believe that there will not be mutual understanding, respect and admiration between the masses of the United States and Mexico as long as the United States and Mexico are contiguous, or as long as the United States is English-speaking, predominantly Protestant, and larger and richer and more powerful than Mexico, or as long as the memory of history endures.

[2] Should any Latin Americans chance to read these lines, they should be advised that I used the terms "America" and "Americans" instead of "the United States" and "citizens of the United States" for the sake of brevity and because this paper was originally delivered before an audience of North Americans.

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What Is Our Purpose in Germany?

By JOHN H. HILLDRING

IN THE summer of 1945 it was said, both by those who agreed with it and by those who did not, that our purpose in Germany was to reduce that defeated nation to a pastoral economy. It was a lively debate, and it is my recollection that on public support as indicated in editorial comment, letters to the editor, and popular polls, the pastoral policy had it. As I understood it, the proponents of the pastoral policy contended that the economic stability and self-sufficiency of Europe could be achieved without regard to the industrial contribution of Germany to that stability. Whether that attitude is right or wrong, it has never been the view of our Government that Europe could ever get on its economic feet without bringing to bear on the problem the economic forces of Germany after they had been demilitarized and decartelized.

Be that as it may, it is certainly true that the pastoral policy has had its effect on public debate right down to the present. After it became generally understood that the proponents of the pastoral policy had been unable to get their views accepted by the Government, that policy nevertheless continued to intrude itself into the discussion. Unquestionably the senseless debate that raged for many months and which judged our German policy on its hardness must have been an effort on the part of the public to compare the United States policy and program in Germany with the rejected pastoral approach.

DISCUSSION BECOMES SERIOUS

In the beginning I paid very little attention to this discussion. It seemed to me to be irresponsible. I admit that I did not understand it, and being human, I am prone to regard as irresponsible anything I do not understand. However, one evening in the fall of 1945 I was jolted out of my lethargy by reading in the evening paper that one of our major networks was having a world-wide roundup of opinion by its leading commentators on the United States policy in Germany. When I read the title of the broadcast, I nearly fell out of my chair. The title was "Is Our Policy in Germany Soft?" Well, with that title, I knew that the answer would be yes.

The only thing about that broadcast that I remember today had to do with one element of the proof that our policy was soft. Said the commentator, "General Clay has prohibited the use of coal for home heating this winter." That sounded rather harsh to me, but this was only background material for the commentator. He continued, "In lieu of that, the Berliners have got to go out and gather up their own firewood, and it is the firewood they gather that will keep them warm this winter if they are to be warm." Well, there were three million people in Berlin at that time, and it seemed that in any city of that size, people would have a hard time finding firewood. That seemed particularly true of Berlin, which was at that time and now is as flat as a pancake. So, it was developed in the broadcast that the people of Berlin would have to go to the suburbs of the city to get their firewood. However, here was the nefarious revelation. To assist the Germans in collecting their firewood, the Army Engineers were going to lend them some power saws,

make available some trucks to haul the firewood into Berlin. *Ipso facto*, our policy was soft.

That did not make much sense to me, but it was the beginning of the serious discussion of the "too soft" and the "too hard" policy. That particular broadcast took the subject out of its amateur standing. It became thereafter a dignified and professional discussion of Germany that lasted for many months.

After that came many other debates and discussions about what we were up to in Germany. At times we were building a barrier against the Bolsheviks in western Germany, and at other times we were conniving to get agreement with the Soviets on the economic and political unity of Germany, regardless of what it did to Germany or all the rest of Europe.

In surveying what has been said and written in the past two years on the subject of Germany, and in trying from that survey to ascertain why so many conflicting statements and debates have occurred among Americans who otherwise agree, or who otherwise at least agree on the differences in their views, I believe I have stumbled upon the root cause of the trouble. I believe that we as a people do not really understand our purpose in Germany.

POLICY DEFINED

Before V-E Day, General Eisenhower had in his hip pocket Joint Chiefs of Staff's Directive 1067, which was the policy he put into effect on V-E Day. That basic policy has never changed, though its implementation has undergone some changes and unquestionably will undergo more.

I should like to quote a very few excerpts from several documents—with their dates. JCS 1067, which was given to General Eisenhower in April 1945, has this to say with respect to the economic policy he was to follow: "You will take no action that would tend to support basic living standards in Germany on a higher level than that existing in any one of the neighboring United Nations. . . ." It must be understood that these instructions were given to a combat commander in our Army before he had defeated the army that had almost destroyed us. It is true that his instructions were stated negatively, but the obvious intention of them is clear. He was to permit the Germans a standard of living no higher than that of any one of the surrounding United Nations. That, I say, is not a vindictive policy.

In July 1945 the heads of state met at Potsdam. One paragraph from the Potsdam agreement which was offered by the President of the United States and was agreed to by the three heads of state reads as follows:

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

EXPLANATION TO THE PUBLIC

However, the spirit of these documents was not understood by our people. That is particularly true with respect to the reparations settlement and the economic provisions of our directives. So on December 12, 1945, the Secretary of State, Mr. Byrnes, sent a new set of instructions to Clay which on the same day were published to the American people with a covering note. In the directive Mr. Byrnes said:

> The present determination, however, is not designed to impose permanent limitations on the German economy.
>
> . . . . . .
>
> While reparation removals will undoubtedly retard Germany's economic recovery, the United States intends ultimately, in cooperation with its allies, to permit the German people under a peaceful democratic government of their own choice to develop their own resources and to work toward a higher standard of living subject only to such restrictions designed to prevent production of armaments as may be laid down in the peace settlement.

In the note transmitting the directive to the American public, Mr. Byrnes said:

> That settlement also requires, in the interests of European rehabilitation and security, the removal from Germany of a large part of the industrial war-making capacity, which never served the German civilian, but which, from 1933 on, served to prepare for war and to make war.

In conclusion he quotes the pertinent paragraph of the Potsdam agreement which I have quoted above.

These excerpts from official documents portray what our purpose in Germany is. In some parts the purpose was stated negatively, but considering the fact that these directives were prepared and issued during, or soon after the end of, hostilities, some portions of the program simply had to be stated negatively. However, it was clearly the intent and purpose of the United States from the very beginning to see to it that Germany would not again threaten the peace of Europe or the world, and we have continuously directed our program toward that primary objective. It is not our purpose, and it never has been, to destroy or pauperize or otherwise degrade Germany. Denazification, demilitarization, decartelization, reparations, re-education, and other elements of our implementation

structive in nature and therefore unwise if our purpose really was future peace in Europe.

POPULAR CONTROL DESIRED

Our policy is the natural outcome of the combat phase of the war. We did not fight World War II in order to win battles. We did not fight World War II in order to defeat Hitler's armies. We fought World War II, in my judgment, in order that we and other peace-loving nations might thereafter be permitted to live the kind of lives in the kind of country we or other peace-loving peoples desired. Our policy has been a continuation of that basic objective. Denazification, which has been said in many places to be purely destructive, is not destructive in the slightest.

In essence, what we are trying to do is to turn the control of Germany over to the eighty million Germans who live in it. If anything will ensure peace in central Europe and make for a peaceful Germany, it is the will of the German people not to make war. Only on that basis can we hope to achieve any lasting benefit from the lives and treasure we expended in such lavish measure in order to win the war. As long as several million soldiers are sitting in Germany, Germany is no threat to anybody. The days we must worry about are the days and the months and the years after our troops are withdrawn.

We in the State Department believe it is not unreasonable to assume that the German in Germany is not so unlike his cousin in St. Louis or Milwaukee that he will not, if given the proper atmosphere and the proper length of time to think about it, take control of his own destiny and be just as peaceful and just as peace-loving as his St. Louis or Milwaukee cousin. The heart and soul of our policy in Germany is to turn the

ously must be to remove from control those National Socialists who have been in control of all sections of German society for the last fifteen years, and see that they are replaced by Germans who are sympathetic to our way of life, or more sympathetic than the Nazis.

PROGRAM NOT VINDICTIVE

It may be thought by some that the above-quoted extracts from official documents are open to more than one interpretation. Well, here is one bit of proof of my contention that is susceptible of no misinterpretation. As early as the summer of 1944, we went through our 300,000 prisoners of war and culled out 4,000 Germans who had long records of opposition to National Socialism, and we bedded these Germans down in three Army posts in Rhode Island. We called it "The Getty Experiment" after Fort Getty, and we sent these Germans to schools in democracy. Most of the instructors were pedagogues in uniform. That experiment taught us many things. One of the things it taught us was that even those Germans who had opposed National Socialism did not, on the other hand, understand democracy—certainly did not understand the practical operation of democracy. We prolonged the course and got down to brass-tack problems that initially we had never dreamed of dealing with. These characteristics and shortcomings are, of course, also true of the German in Germany.

The point I am trying to make is that our denazification program is not in any sense vindictive. It is simply the first step in our democratization program, putting in charge of the press, of education, of government, of industry, of labor, and of the other facets and sections of German society the most decent Germans that are available. We removed 400,000 Germans and replaced them with 400,000 good, or at least better, punitive, or senseless. That was the first important step in the direction of our primary purpose, a peaceful German democracy.

Another thing, we have not cast out all the Nazis. I do not know just how many German adults in our zone were Nazis, but the number is tremendous and the proportion is large. We have removed from positions of leadership those who were more than nominal members of the National Socialist Party, but I think it is important to bear in mind that simply by removing 400,000 of the top layer we did not remove all the Nazis. There is still a lot of sin to be cast out, and that sin can only be cast out by the Germans. We, the American Government, or we, the Military Government, are with respect to the Germans in this particular in much the same relationship as the preacher to his congregation. He can encourage, he can implore, he can enjoin; but if any sin is to be flushed out, it must be done by the individuals of the congregation themselves. The redemption of Germany, the establishment of decency and democracy in Germany, are tasks that must be done by Germans; they can never be done by our proconsuls, American or otherwise.

DEMOCRATIC FORM ESTABLISHED

In the political regeneration of Germany, have we accomplished anything? Yes, we have. I want to pay tribute to Dr. James K. Pollock, a distinguished member of the University of Michigan, for the enormously important job he has done for his Government, for Clay, and for me in the last two and a half years. I feel particularly indebted to him because it was I, back in the spring of 1945, that induced him to take this terrific job in Germany. What has Dr. Pollock done? He has established the democratic form in our three states. He

the creation of three state constitutions creditable to any democracy. Under these constitutions he has supervised elections in all three states. Elected German officials now serve from the Minister-President down to the lowest levels.

Now please do not misunderstand me—neither Dr. Pollock nor I nor any other United States official says that democracy exists in our zone. We do say, however, that there has been established in our zone the democratic form. Also, there is developing an appetite and an aptitude for democracy. It is very encouraging today to ask a German citizen what he thinks of his Burgomeister. He sticks out his chin and his chest and says that he is doing pretty well. He also tells you, "If he doesn't satisfy us, we won't re-elect him." That from a German who has had his officials picked for him or certified for him from Berlin for hundreds of years is encouraging.

GERMAN SUBSERVIENCE

During my visit to Darmstadt in August 1945, I spent an afternoon with a German who had been my brother's instructor at the University of Frankfort in the twenties. He was a socialist. He was a good German from our point of view, but he was a German. I will tell you his story because it is significant. The Americans had appointed him as Burgomeister of Darmstadt. I asked, "What happened to you, Doctor?" He said, "You know I was a socialist and outspoken against Hitler. One of the first things Hitler did in 1933 was put me in a concentration camp." "Then what happened?" He answered, "I got out after a year by behaving myself." I said, "Then what did you do?" He said, "I got a job as a janitor in a convent and I stayed there until your Army came along."

problem. Any self-respecting American under similar circumstances with the same convictions as the good doctor, once he was out of that concentration camp, would have done anything but become a janitor in a convent. He might have carried a soap box to the town square and talked until they put him back in the concentration camp. Or he might have organized an underground, or shot Hitler, or done anything except hide away in a convent. That typifies one of our jobs in Germany.

This fellow is a good German. He just hasn't yet got what it takes to do his part in a democracy, but he is learning. Later in the afternoon, I asked the Doctor, "Have you any trouble?" He said, "Yes, I have troubles." I said, "What are they?" He told me, "I don't think I please Colonel Wilson." Wilson was the Military Government officer in Darmstadt who in civil life was superintendent of schools in a midwestern city. I said, "Oh, I think he is well enough pleased with you." He was not so sure, as was indicated by his next statement. "I have a problem next Sunday afternoon. There is a fellow that wants to have a meeting out in the town square." I said, "What about it?" He answered, "He hasn't been to the police for permission yet." I said, "Is he going to incite a riot; is he going to create any disorders?" He said, "Oh, no, but I don't know what he is going to say." I then said, of course, "Doctor, never mind, let him have his meeting. That will not displease the Colonel."

Our democratization program is not going fast for these and similar reasons, but it is progressing. I cannot say that Germany is in such a state that a handful of tyrants could not take control of the country away from the German people if we moved out tomorrow or

some time, perhaps, before the German loses his blind and unreasoning respect for constituted authority, which is one of his weaknesses. I have great trouble on my infrequent visits to Germany to impart the notion to German officials that their people must lose a lot of this idolatrous respect before we will like them as much as they would like us to like them.

The Germans have great difficulty in understanding this. I have explained my own case to them and have seen the wildest amazement in their eyes. I tell them that on speaking tours I almost never confront a group of American citizens without encountering initial resistance toward me. That I do not take as a personal affront. It is the good American custom of doubting every word that issues forth from Washington. It is perhaps one of the strongest anchors this democracy has. It could never happen that a handful of bureaucrats in Washington could do anything with your Government that you did not like. It just is not possible. That attitude toward their own destiny is not yet in the soul of the Germans, but they are making headway.

LABOR AND EDUCATION POLICIES

Our labor policy has been opposed for various reasons, but it is simply another device to implement our basic policy and purpose of trying to turn Germany's destiny over to the people who reside in Germany. We began with the organization of locals and held it at that point for over a year. It took six or eight months before the German laboring man decided that a free labor movement was good and right and proper and in his own interest. We are moving now toward a higher organization in German labor, but considering that syndicalism has been the labor establish a truly democratic labor movement with deep roots.

I could go down the whole list of our policies and programs in Germany—industry, the press, social welfare, education, and so forth—but I will limit myself to just a word about re-education. We are progressing, but we are proceeding more slowly than many people believe is desirable, because we are not making any use of the propaganda device in Germany. Many people are saying that we have in our hands people who are accustomed and addicted to the propaganda device. Why do we not use it to pump democracy into their minds? We have purposely discarded that device. We want to inure the Germans against propaganda. We want to develop in the German mind a callousness against words issuing from Berlin, and if we use the propaganda device to sell Jeffersonian Democracy or any other kind of democracy, certainly it can be utilized by others after we withdraw from Germany to upset democracy completely.

There is no merit in the contention that the United States Army or American Military Government officials or anybody else from outside of Germany can create a nonwarlike state in place of the old warlike Germany by any device such as the destruction of steel plants or nitrogen plants or by sinking ships. We can remove, and we are removing, those industries and those plants which are not required in a peacetime German economy; but there is in these actions no assurance whatever of the accomplishment of our main purpose in Germany, which is to create there a peaceful democracy.

THE NEW DIRECTIVE

It has obviously been my intention to present the point of view that our pur-

changed since the issuance of Joint Chiefs of Staff's Directive 1067 in the spring of 1945. This is true despite the new directive which the United States Government issued to General Clay on July 15, 1947. No official has been more intimately involved with this directive than I have. It does not contain an idea, a sentence, or a single phrase that I have not examined from four directions. You can understand, then, my consternation when I read in the headlines on July 16, "New Policy for Germany. Potsdam is Scrapped." And the two-column story pretty well supported the headline.

The truth simply and concisely is this. This is the first complete directive that has gone to our Commander in Germany since we gave 1067 to Eisenhower in 1945. But it is not the first directive that has gone to Germany since 1945. Never a day goes by that some instruction is not dispatched to Clay, and certainly every month he receives at least one order that contains a significant change in emphasis or manner of implementation. However, in none of our instructions to Clay have we abandoned our original purpose toward Germany, abrogated the Potsdam agreement unilaterally, or made Germany the forty-ninth state of the American Union. We have simply brought up to date our basic German directive. We have incorporated in it changes in emphasis and implementation that have been issued and widely publicized in the meantime. We have altered the method of expression from a negative form to a positive one. But in essence our policy and purpose is the same as it has always been.

This new directive is a new statement of policy, but it is not a statement of new policy. The work that the American Military Government has been doing since V-E Day in pursuance of 1067 has been almost exclusively concerned with laying the foundation for democracy in Germany. The new directive merely provides for carrying this work along.

. . . . . .

If, as a result of our winning of the war and our occupation of Germany, we can establish in the center of Europe a peaceful, democratic Germany, we shall have accomplished our purpose both in fighting the European war and in occupying Germany. If we do not do that, we shall have accomplished in Germany very little of any lasting effect. We shall have no more assurance that a future Germany will not again be troublesome than we had after World War I.

John H. Hilldring is Assistant Secretary of State, Washington, D. C. From 1917 to 1946 he was a Regular Army officer, being retired in the grade of Major General. During World War II he served as Assistant Chief of Staff of the Army under General Marshall, as Commanding General of the 84th Infantry Division, and from 1943 to 1946 as Director of Civil Affairs in the War Department, in which assignment he organized and controlled military government in all theaters of operations.

Independent Commission of Experts
Switzerland – Second World War

Switzerland and Gold Transactions in the Second World War

Interim Report

Embargo until Monday, 25 May 1998, 3:00 p.m.

Bern, May 1998

made every transfer of gold subject to its approval. In 1939, the Ministry of Economy upgraded the former Supervisory Authority to the «Reich Office for Precious Metals». In wartime it was responsible for «an especially economical use of expensive raw materials dependent on foreign exchange»[32] and for the supervision of the gold and silver refineries.

Gold transactions were also undertaken by private firms. In this respect, the German Gold and Silver Refinery [Deutsche Gold- und Silberscheidenanstalt Degussa], should be mentioned first of all, as well as the Deutsche Bank, the Dresdner Bank and the Bankhaus Sponholz & Co. There is little knowledge at present about the gold dealings of these companies. Apart from certain comments in the investigations by the Allied occupation authorities which were carried out immediately after the war,[33] no further details have become available.

In the middle of 1942, the Reich Office for Precious Metals also took over management of industrial diamonds and the means of payment necessary for their import. Although this subject is outside the scope of this interim report, the acquisition of industrial diamonds sheds light on the overlapping jurisdictions which was typical of the Third Reich. The Office of the Plenipotentiary of the Four-Year Plan (Hermann Göring), the Trading company for Raw Materials (Roges), and the Reich Ministry of Armaments and War Production (Albert Speer) bought diamonds on the black market, namely in France and in Switzerland. Neither the Reich Office for Precious Metals nor the Reichsbank had specific knowledge of these transactions.

The examples show that an analysis of gold transactions in the Nazi state should not be limited to the Reichsbank alone. The polycratic structure of the Third Reich is reflected especially in the gold trade. The complexity of the facts must be taken into account, resulting in distinctions in conceptual terms between the various forms of using gold.

1.2 Terminology and Presentation

The literature often distinguishes between «monetary» and «non-monetary» gold. The former was at the disposal of central banks. It served as a national currency reserve and was an integral part of monetary systems based on a gold or a gold-foreign exchange standard. The term «non-monetary» relates to a less differentiated residual category in which all other gold, obtained or traded from private persons or companies, is subsumed. The distinction also formed the basis after the war for the restitution efforts of the *Tripartite Commission for the Restitution of Monetary Gold (TGC)*.

Focusing on the central banks demonstrates that the entire problem of restitution, raised by the Third Reich's economic system of looting and plundering, has been primarily defined by states

[32] From the Reich Office to dealers and smelters, 20 July 1939; BAB R 8 X/253.

[33] OMGUS 1985; OMGUS 1986. Both of the commercial banks, as well as Degussa, have in the meantime initiated research projects in which gold transactions will also be examined. See first meeting of the working group of the «Gesellschaft für Unternehmensgeschichte» on the role of enterprises and industrialists in national socialism, Munich, 6–7 February 1998.

Security was informed by an American news agency report in April 1944 that SS-Reichsführer Heinrich Himmler had deposited assets of about $2 million in South American accounts and invested another $640.000 in life insurance policies.[36] The accuracy, the origin of the alleged assets, and the way in which they reached South America is still being questioned. More detailed remarks at the end of this section indicate the complexity of the subject (1.2.2).

4. *Gold from currency reserves of central banks.* Already before the war, the Third Reich was able to appropriate gold reserves of other states through its territorial expansion. During the *Blitzkrieg* in the spring and summer of 1940, substantial gold holdings came under the control of the national socialist state. In the years of occupation by the German Wehrmacht which followed, gold continued to flow from the monetary reserves of the European central banks to the Reichsbank.

The last three categories (2, 3, 4) indicated here are globally referred to as «looted gold».[37] Apart from these, a category of non-looted gold must be defined:

5. *Gold* from holdings which came into the possession of the Reichsbank *before 1933* or which were *acquired* through regular transactions *before the outbreak of war.*

1.2.2 The Question of Victim Gold

The looting of gold and other private valuables has up to now been dealt with primarily from the perspective of the persecution of Jews and other minorities subjected to discrimination within the framework of the Nazi racial policy.[38] With the use of the term «victim gold», the idea is first of all to replace the too narrow designation of «gold from the deceased» and thus to encompass the totality of (persecutee-origin) looted gold. The primary question to be clarified is the channels through which the victim gold was collected and disposed of.[39]

To this day, there is no comprehensive study about the Third Reich's looting and its consequences on all segments of the population in German-occupied areas. Neither has the plundering of Jewish victims been sufficiently researched.[40] On the other hand, there are many monographic studies for individual countries.[41]

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36 Copy of a confidential special report by the U.S. news agency Exchange Telegraph relating to German assets abroad, 27 April 1944, BAB R 58/3490.

37 The Commission is using the term «looted gold» to denote a historical fact. At the present time, it is not commenting on the question of the juridical (il)legality of the German Reichsbank's appropriation of gold from central banks (category 4).

38 Arndt 1966; Hilberg 1990, p. 97ff., 251ff.; vol. 2, p. 493ff., 1013ff.

39 The issue of victim gold shipped to Switzerland («Melmer-Gold») will be dealt with in part 1.5 of this Chapter.

40 The standard work by Hilberg is the closest to fulfilling the requirements of a global presentation: Hilberg 1990.

41 See for instance: for the Third Reich with respect to «Aryanization» Bajohr 1997; Barkai 1988; Hayes 1994; for the policies of occupation and extermination in Poland Madajczyk 1988; Pohl 1993; Sandkühler 1996; for «Jewish policy» in France, Mattéoli Report 1997; Poznanski 1997; Klarsfeld 1989; for Italy, Steinberg 1992; for Eastern Europe, Manoschek 1993; for Austria, Safrian 1993.

> «He had a book, and I had a book, and we each signed the other's in receipt. Then we left them lying there in a little carton. There they lay until more teeth were assembled, whereupon we sent them by courier to Berlin.»[47]

Other valuables were also taken from the *T4* victims using the same methods as in the extermination camps of the East. A later court judgment stated that:

«Ultimately, it was the central economic department that was responsible for registering money and valuables that *T4* couriers brought to Berlin, and in at last one instance, that the defendant himself brought to Berlin from extermination camps in the East. The defendant stated the value of this «booty» was approximately 180,000 Reichsmarks in 1942 and consisted mostly of dental gold, but also included coins and jewelry. He therefore brought objects to the Criminal Technical Institute where the dental gold was resmelted and subsequently sold to Degussa ...»[48]

It is not known whether dental gold from the *T4* operation ended up in the possession of the Reichsbank.

Immediately after the German invasion of the Soviet Union in 1941,[49] mobile killing units conducted mass executions. Thereupon, ghettos were created where Jews selected for work and later for elimination were brought. These ghettos were later «cleaned up», and the persons who had been thrown together in them were either murdered at once or deported elsewhere.

From the start of the German occupation until 1942, Jewish communities as well as other groups of the local population became victims of extortion. Extremely high contributions, usually calculated in precious metals, were demanded by the German administration. The confiscation of Jewish property was the task of military economic offices in the areas under military administration, and under civil offices, i.e., the regional commissars, in the so-called Reich Commissariats of the Eastern Territories (hereafter Ostland) and the Ukraine. In any event, the security police seized the most valuable objects. Whether they were successful in doing so depended on local power arrangements

The victim gold was shipped to Berlin in the form of jewelry, such as rings or watches, gold coins, and also in the form of dental gold. The civil administration kept accounts with a

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47 Hessisches Hauptstaatsarchiv Wiesbaden (Hessian Main State Archives), 461/32061/7: Frankfurt state court against Wahlmann, Gorgass, Huber 4a Kls 7/47 (4a Js 3/46), protocol of the public session of the 4th Criminal Division, 3 March 1947, p. 32 (testimony of the defendant Ingeborg Seidel).

48 Frankfurt state court, judgement and sentence Hans-Joachim Becker and Friedrich Robert Lorent, Ks 1/69 (GStA), 27 May 1970, p.115. Other trials containing information about looting of victims and the resmelting of gold crowns into gold bars are: State Attorney Düsseldorf, trial of Albert Widmann, 8 Ks 1/61 (8 Js 7212/59), Interrogation Widmann 15 January 1960, p. 5 as well as State Attorney Stuttgart, trial of Albert Widmann, Ks 19/62 (19 Js 328/60), testimony of the witness Klara Mattmüller in the *T4* Economic Department in Berlin (Freiburg, 17 February 1966, StA Frankfurt Js 7/63 and Js 15/63 GStA). These two documents, as well as those cited in note *47*, are found in the Central Office of the State Justice Administrations [Zentrale Stelle der Landesjustizverwaltungen in Ludwigsburg].

49 For material about the conditions in the Soviet Union, we thank Christoph Dieckmann, Frankfurt am Main, and Christian Gerlach, Berlin.

gold and currencies valued at about 32,000 Rubles[56] to the Reich Main Accounting Office, and an additional shipment of 12 hundredweights of silver direct to the SS Central Budget and Facilities Office[57].

Poland was occupied by Germany and by the Soviet Union at the beginning of World War II, and subdivided into several sections as early as 1939. In the north annexed by Germany, the Danzig-West Prussia District was created; and in the west, the Posen Administrative District, latter named Wartheland (or Warthegau) District was constituted. The Upper Silesian industrial region almost up to Cracow, encompassing also the city of Oswiecim (Auschwitz) as well, was incorporated into the Silesia District and divided at the beginning of 1941, into Upper and Lower Silesia. The remaining regions formed the so-called General Government with the districts of Cracow, Radom, Warsaw, and Lublin. From August 1941, to these was added the District of Galicia with the area around the city of Lvov which had been occupied by the Soviet Union in 1939.

In these areas, a comprehensive system of camps was built up (work camps, transit camps, concentration camps, and after December 1941, extermination camps). Here a distinction must be made between killing centers like Chelmno in the Warthegau, the camps of the so-called *Operation Reinhardt* – the name given to the program begun in early-1942 for the deportation and the killing of Polish Jews from the General Government,[58] and the largest extermination camp, Auschwitz-Birkenau, which lay in the so-called annexed areas and thus belonged directly to the Reich.[59]

In the annexed areas, precious metals belonging to both Jews and non-Jews was also confiscated by the Main Trusteeship Office East [Haupttreuhandstelle Ost] and the Trusteeship Office for the General Government.[60] These offices reported to the Four-Year Plan Office, namely Hermann Göring. Only in 1944 were they directed to ship the objects they had sequestered to the Reichsbank. The Lodz ghetto was an exception since the local municipal administration was responsible. *Operation Reinhardt* came under the General Government. Here such deportation, killing and plundering operations took place as those which were applied in the occupied areas of the Soviet Union. As a result, conflicts ensued between Reich Leader of the SS and Police Heinrich Himmler and General Governor Hans Frank, with the latter emerging victorious in autumn 1942.[61]

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56 According to the exchange rate in vigor at the time, 1 Reichsmark = 10 Rubles.

57 Telegram from von dem Bach-Zelewski to Himmler, 29 December 1941, Public Records Office, HW 16/32.

58 See Kogon et al. 1989, p. 146ff.

59 Ibid., p. 194ff.; as well as Gutman/Berenbaum 1994.

60 See the order on the safeguarding of the assets of the former Polish state dated 15 January 1940, and the order on the handling of assets of the members of the former Polish state of 17 September 1940, printed in the official list of the General Government 1940.

61 Hilberg 1990, p. 1013ff.

also began, in November 1942, to deliver dental gold extracted from those who had been murdered.

This gold was for the most part smelted down and processed into bars of a type designated «various». In this connection, it should moreover be noted that within the deployment area of *Operation Reinhardt* in the General Government, the process of melting down was carried out prior to dispatch to Berlin, whereas for Auschwitz-Birkenau, such a procedure is not known to have taken place.[69]

The precious metals carrying the designation of «Melmer» in the records of the Reichsbank, did not, however, originate solely in *Operation Reinhardt*. Considerable amounts of gold came, on the contrary, from the Auschwitz-Birkenau extermination camp. These shipments were after all so voluminous that Auschwitz was exempted from a new regulation on the disposal of victim gold that, according to a declaration made by the head of Amtsgruppe D of the WVHA, Willi Burger, was introduced around the end of 1943. According to this new regulation, the WVHA ordered that in the future, valuables and dental gold were no longer to be shipped directly to the Office A-II headed by SS Captain [SS-Hauptsturmführer] Melmer, but rather to the Concentration Camp Administration (Office D), which would deliver them to Melmer. Auschwitz, on the other hand, continued making its shipments directly to Melmer.

To summarize, the disposal of looted gold had several routes: from the *T4* killing centers in the form of already melted down gold to Degussa; from the Soviet Union direct to the Reichsbank and to the Pawn Shop; from military authorities in all the areas occupied by Germany, as booty, via the Reich Main Accounting Office to the Reichsbank; as already purified precious metal from Lublin to the WVHA and on to the Reichsbank; as unrefined precious metal from Auschwitz-Birkenau to the WVHA. It must be noted that we know very little about the security police. In addition, the above-mentioned September 1942 order issued by the Ministry for the Eastern Territories is a strong indication that looted gold could also bypass the Reichsbank. For a long time, the paths taken by victim gold, as well as the manners in which it was disposed, have only been very partially researched. Due to the absence of sources, the elucidation of these points is to a certain extent doomed to failure.

* * *

for the next five years. For this reason, he wanted to ship this gold to the Reichsbank in the future in return for acknowledgment from the latter. Frank to Himmler, 8 October 1942, BAB NS 19/3929.

69 That the practice of melting down was carried out in Poland is confirmed by the comparison of two documents, i.e., by the concluding report of the Lublin SS and Police Leader Odilo Globocnik on the economic aspect of *Operation Reinhardt* dated 5 January 1944, as well as the concluding report of the Galicia District SS and Police Leader Friedrich Katzmann on the local «solution to the Jewish question» dated 30 June 1943. According to these documents, Katzmann shipped scrap gold, earrings, dental gold etc. to Globocnik's «Special Headquarters», while the latter's statement of accounts showed only gold and silver bars. See Jewish Historical Institute Warsaw 1961, p. 421f. (Globocnik); Trial of High War Criminals, Vol. 37, p. 402f. (Nuremberg Document Nr. L-105) (Katzmann).

INTER-ALLIED REPARATION AGENCY

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REPORT OF THE ASSEMBLY OF THE INTER-ALLIED REPARATION AGENCY TO ITS MEMBER GOVERNMENTS

*

WITH A COVERING LETTER FROM THE PRESIDENT OF THE ASSEMBLY

*

PRINTED BY
THE INTER-ALLIED REPARATION AGENCY
BRUSSELS,
JUNE 1951

with the neutrals by these countries. The net proceeds of liquidation or disposition shall be made available to the Inter-Allied Reparation Agency for distribution on reparation account.

D. In applying the provisions of paragraph A above, assets which were the property of a country which is a member of the United Nations or its nationals who were not nationals of Germany at the time of the occupation or annexation of this country by Germany, or of its entry into war, shall not be charged to its reparation account. It is understood that this provision in no way prejudges any questions which may arise as regards assets which were not the property of a national of the country concerned at the time of the latter's occupation or annexation by Germany or of its entry into war.

E. The German enemy assets to be charged against reparation shares shall include assets which are in reality German enemy assets, despite the fact that the nominal owner of such assets is not a German enemy.

Each Signatory Government shall enact legislation or other appropriate steps, if it has not already done so, to render null and void all transfers made, after the occupation of its territory or its entry into war, for the fraudulent purpose of cloaking German enemy interests, and thus saving them harmless from the effect of control measures regarding German enemy interests.

F. The Assembly of the Inter-Allied Reparation Agency shall set up a Committee of Experts in matters of enemy property custodianship in order to overcome practical difficulties of law and interpretation which may arise. The Committee should in particular guard against schemes which might result in effecting fictitious or other transactions designed to favour enemy interests, or to reduce improperly the amount of assets which might be allocated to reparation.

ARTICLE 7

Captured supplies

The value of supplies and other materials susceptible of civilian use captured from the German Armed Forces in areas outside Germany and delivered to Signatory Governments shall be charged against their reparation shares in so far as such supplies and materials have not been or are not in the future either paid for or delivered under arrangements precluding any charge. It is recognised that transfers of such supplies and material by the United Kingdom and United States Governments to other Governments are agreed to be subject to such final approval by the legislature of the United Kingdom or the United States of America as may be required.

ARTICLE 8

Allocation of a Reparation Share to Non-repatriable Victims of German Action

In recognition of the fact that large numbers of persons have suffered heavily at the hands of the Nazis and now stand in dire need of aid to promote their rehabilitation but will be unable to claim the assistance of any Government receiving reparation from Germany, the Governments of the United States of America, France, the United Kingdom, Czechoslovakia and Yugoslavia, in consultation with the Inter-Governmental Committee on Refugees, shall as soon as possible work out in common agreement a plan on the following general lines:

A. A share of reparation consisting of all the non-monetary gold found by the Allied Armed Forces in Germany and in addition a sum not exceeding 25 million dollars shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action.

B. The sum of 25 million dollars shall be met from a portion of the proceeds of German assets in neutral countries which are available for reparation.

C. Governments of neutral countries shall be requested to make available for this purpose (in addition to the sum of 25 million dollars) assets in such countries of victims of Nazi action who have since died and left no heirs.

D. The persons eligible for aid under the plan in question shall be restricted to true victims of Nazi persecution and to their immediate families and dependants, in the following classes:

(i) Refugees from Nazi Germany or Austria who require aid and cannot be returned to their countries within a reasonable time because of prevailing conditions;

(ii) German and Austrian nationals now resident in Germany or Austria in exceptional cases in which it is reasonable on grounds of humanity to assist such persons to emigrate and providing they emigrate to other countries within a reasonable period;

(iii) Nationals of countries formerly occupied by the Germans who cannot be repatriated or are not in a position to be repatriated within a reasonable time. In order to concentrate aid on the most needy and deserving refugees and to exclude persons whose loyalty to the United Nations is or was doubtful, aid shall be restricted to nationals or former nationals of previously occupied countries who were victims of Nazi concentration camps or of concentration camps established by regimes under Nazi influence but not including persons who have been confined only in prisoners of war camps.

E. The sums made available under paragraphs A and B above shall be administered by the Inter-Governmental Committee on Refugees or by a United Nations Agency to which appropriate functions of the Inter-Governmental Committee may in the future be transferred. The sums made available under paragraph C above shall be administered for the general purposes referred to in this article under a programme of administration to be formulated by the five Governments named above.

F. The non-monetary gold found in Germany shall be placed at the disposal of the Inter-Governmental Committee on Refugees as soon as a plan has been worked out as provided above.

G. The Inter-Governmental Committee on Refugees shall have power to carry out the purposes of the fund through appropriate public and private field organisations.

H. The fund shall be used, not for the compensation of individual victims, but to further the rehabilitation or resettlement of persons in the eligible classes.

I. Nothing in this article shall be considered to prejudice the claims which individual refugees may have against a future German Government, except to the amount of the benefits that such refugees may have received from the sources referred to in paragraphs A and C above.

PART II

Inter-Allied Reparation Agency

ARTICLE 1

Establishment of the Agency

The Governments Signatory to the present Agreement hereby establish an Inter-Allied Reparation Agency (hereinafter referred to as "The Agency"). Each Government shall appoint a Delegate to the Agency and shall also be entitled to appoint an Alternate who, in the absence of the Delegate, shall be entitled to exercise all the functions and rights of the Delegate.

ARTICLE 2

Functions of the Agency

A. The Agency shall allocate German reparation among the Signatory Governments in accordance with the provisions of this Agreement and of any other agreements from time to time in force among the Signatory Governments. For this purpose, the Agency shall be the medium through which the Signatory Governments receive information concerning, and express their wishes in regard to, items available as reparation.

B. The Agency shall deal with all questions relating to the restitution to a Signatory Government of property situated in one of the Western Zones of Germany which may be referred to it by the Commander of that Zone (acting on behalf of his Government) in agreement with the claimant Signatory Government or Governments, without prejudice, however, to the settlement of such questions by the Signatory Governments concerned either by agreement or arbitration.

ARTICLE 3

Internal Organization of the Agency

A. The organs of the Agency shall be the Assembly and the Secretariat.

B. The Assembly shall consist of the Delegates and shall be presided over by the President of the Agency. The President of the Agency shall be the Delegate of the Government of France.

C. The Secretariat shall be under the direction of a Secretary-General, assisted by two Deputy Secretaries General. The Secretary-General and the two Deputy Secretaries General shall be appointed by the Governments of France, the United States of America and the United Kingdom. The Secretariat shall be international in character. It shall act for the Agency and not for the individual Signatory Governments.

ARTICLE 4

Functions of the Secretariat

The Secretariat shall have the following functions:

A. To prepare and submit to the Assembly programmes for the allocation of German reparation;

B. To maintain detailed accounts of assets available for, and of assets distributed as, German reparation;

C. To prepare and submit to the Assembly the budget of the Agency;

D. To perform such other administrative functions as may be required.

ARTICLE 5

Functions of the Assembly

Subject to the provisions of Articles 4 and 7 of Part II of this Agreement, the Assembly shall allocate German reparation among the Signatory Governments in conformity with the provisions of this Agreement

Committee on Refugees as soon as a plan has been worked out as provided above.

G. The Inter-Governmental Committee on Refugees shall have power to carry out the purposes of the fund through appropriate public and private field organisations.

H. The fund shall be used, not for the compensation of individual victims, but to further the rehabilitation or resettlement of persons in the eligible classes.

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Subject to the provisions of Articles 4 and 7 of Part II of this Agreement, the Assembly shall allocate German reparation among the Signatory Governments in conformity with the provisions of this Agreement

and of any other agreements from time to time in force among the Signatory Governments. It shall also approve the budget of the Agency and shall perform such other functions as are consistent with the provisions of this Agreement.

ARTICLE 6

Voting in the Assembly

Except as otherwise provided in this Agreement, each Delegate shall have one vote. Decisions in the Assembly shall be taken by a majority of the votes cast.

ARTICLE 7

Appeal from Decisions of the Assembly

A. When the Assembly has not agreed to a claim presented by a Delegate that an item should be allocated to his Government, the Assembly shall, at the request of that Delegate and within the time limit prescribed by the Assembly, refer the question to arbitration. Such reference shall suspend the effect of the decision of the Assembly on that item.

B. The Delegates of the Governments claiming an item referred to arbitration under paragraph A above shall select an Arbitrator from among the other Delegates. If agreement cannot be reached upon the selection of an Arbitrator, the United States Delegate shall either act as Arbitrator or appoint as Arbitrator another Delegate from among the Delegates whose Governments are not claiming the item. If the United States Government is one of the claimant Governments, the President of the Agency shall appoint as Arbitrator a Delegate whose Government is not a claimant Government.

ARTICLE 8

Powers of the Arbitrator

When the question of the allocation of any item is referred to arbitration under Article 7 of Part II of this Agreement, the Arbitrator shall have authority to make final allocation of the item among the claimant Governments. The Arbitrator may, at his discretion, refer the item to the Secretariat for further study. He may also, at his discretion, require the Secretariat to resubmit the item to the Assembly.

ARTICLE 9

Expenses

A. The salaries and expenses of the Delegates and of their staffs shall be paid by their own Governments.

B. The common expenses of the Agency shall be met from the funds of the Agency. For the first two years from the date of the establishment of the Agency, these funds shall be contributed in proportion to the percentage shares of the Signatory Governments in Category B and thereafter in proportion to their percentage shares in Category A.

C. Each Signatory Government shall contribute its share in the budget of the Agency for each budgetary period (as determined by the Assembly) at the beginning of that period; provided that each Goverment shall, when this Agreement is signed on its behalf, contribute a sum equivalent to not less than its Category B percentage share of £ 50,000 and shall, within three months thereafter, contribute the balance of its share in the budget of the Agency for the budgetary period in which this Agreement is signed on its behalf.

D. All contributions by the Signatory Governments shall be made in Belgian francs or such other currency or currencies as the Agency may require.

ARTICLE 10

Voting on the Budget

In considering the budget of the Agency for any budgetary period, the vote of each Delegate in the Assembly shall be proportional to the share of the budget for that period payable by his Government.

ARTICLE 11

Official Languages

The official languages of the Agency shall be English and French.

ARTICLE 12

Offices of the Agency

The seat of the Agency shall be in Brussels. The Agency shall maintain liaison offices in such other places as the Assembly, after obtaining the necessary consents, may decide.

Any Signatory Government, other than a Government which is responsible for the control of a part of German, territory, may withdraw from the Agency after written notice to the Secretariat.

ARTICLE 14

Amendments and Termination

This Part II of the Agreement can be amended or the Agency terminated by a decision in the Assembly of the majority of the Delegates voting, provided that the Delegates forming the majority represent Governments whose shares constitute collectively not less than 80 per cent. of the aggregate of the percentage shares in Category A.

ARTICLE 15

Legal Capacity. Immunities and Privileges

The Agency shall enjoy in the territory of each Signatory Government such legal capacity and such privileges, immunities and facilities, as may be necessary for the exercise of its functions and the fulfilment of its purpose. The representatives of the Signatory Governments and the officials of the Agency shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Agency.

PART III

Restitution of Monetary Gold

Single Article

A. All the monetary gold found in Germany by the Allied Forces and that referred to in paragraph G below (including gold coins, except those of numismatic or historical value, which shall be restored directly if identifiable) shall be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany.

B. Without prejudice to claims by way of reparation for unrestored gold, the portion of monetary gold thus accruing to each country participating in the pool shall be accepted by that country in full satisfaction of all claims against Germany for restitution of monetary gold.

C. A proportional share of the gold shall be allocated to each country concerned which adheres to this arrangement for the restitution of monetary gold and which can establish that a definite amount of monetary gold belonging to it was looted by Germany or, at any time after March 12th, 1938, was wrongfully removed into German territory.

D. The question of the eventual participation of countries not represented at the Conference (other than Germany but including Austria and Italy) in the above-mentioned distribution shall be reserved, and the equivalent of the total shares which these countries would receive, if they were eventually admitted to participate, shall be set aside to be disposed of at a later date in such manner as may be decided by the Allied Governments concerned.

E. The various countries participating in the pool shall supply to the Governments of the United States of America, France and the United Kingdom, as the occupying Powers concerned, detailed and verifiable data regarding the gold losses suffered through looting by, or removal to, Germany.

F. The Governments of the United States of America, France and the United Kingdom shall take appropriate steps within the Zones of Germany occupied by them respectively to implement distribution in accordance with the foregoing provisions.

G. Any monetary gold which may be recovered from a third country to which it was transfered from Germany shall be distributed in accordance with this arrangement for the restitution of monetary gold.

PART IV

Entry into Force and Signature

ARTICLE 1

Entry into Force

This Agreement shall be open for signature on behalf of any Government represented at the Paris Conference on Reparation. As soon as it has been signed on behalf of Governments collectively entitled to not less than 80 p. 100 of the aggregate of shares in Category A of German reparation, it shall come into force among such Signatory Governments. The Agreement shall thereafter be in force among such Governments and those Governments on whose behalf it is subsequently signed.

ARTICLE 2

Signature

The signature of each contracting Government shall be deemed to mean that the effect of the present Agreement extends to the colonies and overseas territories of such Government, and to territories under its protection or suzerainty or over which it at present exercises a mandate.

1. Resolution on the subject of Restitution.

The Albanian, Belgian, Czechoslovak, Danish, French, Greek, Indian, Luxembourg, Netherlands and Yugoslav Delegates agree to accept as the basis of a restitution policy the following principles:

(*a*) The question of the restitution of property removed by the Germans from the Allied countries must be examined in all cases in the light of the United Nations Declaration of 5th January, 1943.

(*b*) In general, restitutions should be confined to identifiable goods which (i) existed at the time of the occupation of the country concerned, and were removed with or without payment; (ii) were produced during the occupation and obtained by an act of force.

(*c*) In cases where articles removed by the enemy cannot be identified, the claim for replacement should be part of the general reparation claim of the country concerned.

(*d*) As an exception to the above principles, objects (including books, manuscripts and documents) of an artistic, historical, scientific (excluding equipment of an industrial character), educational or religious character which have been looted by the enemy occupying Power shall, so far as possible, be replaced by equivalent objects if they are not restored.

(*e*) With respect to the restitution of looted goods which were produced during the occupation and which are still in the hands of German concerns or residents of Germany, the burden of proof of the original ownership of the goods shall rest on the claimants and the burden of proof that the goods were acquired by a regular contract shall rest on the holders.

(*f*) All necessary facilities under the auspices of the Commanders-in-Chief of the occupied Zones shall by given to the Allied States to send expert missions into Germany to search for looted property and to identify, store and remove it to its country of origin.

(*g*) German holders of looted property shall be compelled to declare it to the control authorities; stringent penalties shall be attached to infractions of this obligation.

2. Resolution on Reparation from Existing Stocks and Current Production.

The Delegates of Albania, Belgium, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, the Netherlands, Norway and Yugoslavia.

In view of the decision of the Crimea Conference that Germany shall make compensation to the greatest possible extent for the losses and suffering which she has inflicted on the United Nations.

Considering that it will not be possible to statisfy the diverse needs of the Governments entitled to reparation unless the assets to be allocated are sufficiently varied in nature and the methods of allocation are sufficiently flexible.

Express the hope that no category of economic resources in excess of Germany's requirements as defined in Part III article 15 of the Potsdam Declaration, due account being taken of article 19 of the same Part, shall in principle be excluded from the assets, the sum total of which should serve to meet the reparation claims of the Signatory Governments.

It thus follows that certain special needs of different countries will not be met without recourse in particular to German existing stocks, current production and services, as well as Soviet reciprocal deliveries under Part IV of the Potsdam Declaration.

It goes without saying that the foregoing shall be without prejudice to the necessity of achieving the economic disarmament of Germany.

The above named Delegates would therefore deem it of advantage were the Control Council to furnish the Inter-Allied Reparation Agency with lists of existing stocks, goods from current production and services, as such stocks, goods or services become available as reparation. The Agency should, at all times, be in a position to advise the Control Council of the special needs of the different Signatory Governments.

3. Resolution regarding Property in Germany belonging to United Nations or their nationals.

The Delegates of Albania, Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway and Yugoslavia, taking into account the fact that the burden of reparation should fall on the German people, recommend that the following rules be observed regarding the allocation as reparation of property (other than ships) situated in Germany:

(*a*) To determine the proportion of German property available as reparation account shall be taken of the sum total of property actually constituting the German economy, including assets belonging to a United Nation or to its nationals, but excluding looted property, which is to be restored.

(*b*) In general, property belonging legitimately to a United Nation or to its nationals, whether wholly owned or in the form of a shareholding of more than 48 per cent., shall so far as possible be excluded from the part of German property considered to be available as reparation.

(*c*) The Control Council shall determine the cases in which minority shareholdings of a United Nation or its nationals shall be treated as forming part of the property of a German juridical person and therefore having the same status as that juridical person.

(*d*) The foregoing provisions do not in any way prejudice the removal or destruction of concerns controlled by interest of a United Nation or of its nationals when this is necessary for security reasons.

(*e*) In cases where an asset which is the legitimate property of one of the United Nations or its nationals has been allocated as reparation or destroyed, particularly in the cases referred to in paragraphs (*b*), (*c*) and (*d*) above, equitable compensation to the extent of the full value of this

asset shall be granted by the Control Council to the United Nation concerned as a charge on the German economy. This compensation shall, when possible, take the form of a shareholding of equal value in German assets of a similar character which have not been allocated as reparation.

(*f*) In order to ensure that the property in Germany of persons declared by one of the United Nations to be collaborators or traitors shall be taken from them, the Control Council shall give effect in Germany to legislative measures and juridical decisions by courts of the United Nation concerned in regard to collaborators or traitors who are nationals of that United Nation or were nationals of that United Nation at the date of its occupation or annexation by Germany or entry into the war. The Control Council shall give to the Government of such United Nation facilities to take title to and possession of such assets and to dispose of them.

4. *Resolution on captured War Material.*

The Delegates of Albania, Belgium, Denmark, Luxembourg, the Netherlands, Norway, Czechoslovakia and Yugoslavia, taking account of the fact that part of the war material seized by the Allied Armies in Germany is of no use to these Armies but would, on the other hand, be of use to other Allied countries recommend:

(*a*) That, subject to Resolution I of this Annex on the subject of restitution, war material which was taken in the Western Zones of Germany and which has neither been put to any use nor destroyed as being of no value, and which is not needed by the Armies of Occupation or is in excess of their requirements, shall be put at the disposal of countries which have a right to receive reparation from the Western Zones, of Germany, and

(*b*) That the competent authorities shall determine the available types and quantities of this material and shall submit lists to the Inter-Allied Reparation Agency, which shall proceed in accordance with the provisions of Part II of the above Agreement.

5. *Resolution on German Assets in the Julian March and the Dodecanese.*

The Delegates of Greece, the United Kingdom and Yugoslavia (being the Delegates of the countries primarily concerned), agree that:

(*a*) The German assets in Venezia Giulia (Julian March) and in the Dodecanese shall be taken into custody by the military authorities in occupation of those parts of the territory which they now occupy, until the territorial questions have been decided; and

(*b*) As soon as a decision on the territorial questions has been reached, the liquidation of the assets shall be undertaken in conformity with the provisions of Paragraph A of Article 6 of Part I of the foregoing Agreement by the countries whose sovereignty over the disputed territories has now been recognized.

6. *Resolution on Costs relating to Goods Delivered from Germany as Reparation.*

The Delegates of Albania, Australia, Belgium, Canada, Denmark, Egypt, France, Greece, India, Luxembourg, Norway, New Zealand, the Netherlands. Czechoslovakia and Yugoslavia recommend that the costs of dismantling, packing, transporting, handling, loading and all other costs of a general nature relating to goods to be delivered from Germany as reparation, until the goods in question have passed the German frontier, and expenditure incurred in Germany for the account of the Inter-Allied Reparation Agency or of the Delegates of the Agency should, in so far as they are payable in a currency which is legal tender in Germany, be paid as a charge on the German economy.

7. *Resolution on the Property of War Criminals.*

The Delegates of Albania, Belgium, France, Luxembourg, Czechoslovakia and Yugoslavia express the view that:

(*a*) The legislation in force in Germany against German war criminals should provide for the confiscation of the property in Germany of those criminals, if it does not do so already;

(*b*) The property so confiscated, except such as is already available as reparation or restitution, should be liquidated by the Control Council and the net proceeds of the liquidation paid to the Inter-Allied Reparation Agency for division according to the principles set out in the foregoing Agreement.

8. *Resolution on Recourse to the International Court of Justice.*

The Delegates of Albania, Australia, Belgium, Denmark, France, Luxembourg, the Netherlands, Norway, Czechoslovakia and Yugoslavia recommend that:

Subject to the provisions of Article 3 of Part I of the foregoing Agreement, the Signatory Governments agree to have recourse to the International Court of Justice for the solution of every conflict of law or of competence arising out of the provisions of the foregoing Agreement which has not been submitted by the parties concerned to amicable solution or arbitration.

La présente copie certifiée conforme à l'exemplaire original unique en langues anglaise et française signé à Paris le 21 décembre, 1945, et déposé dans les Archives de la République Française.

Le Ministre Plénipotentiaire, Chef du Protocole:

JACQUES DUMAINE

PROTOCOL

attached to the Paris Agreement of 14 January 1946

ON REPARATION FROM GERMANY

ON THE ESTABLISHMENT OF AN INTER ALLIED REPARATION AGENCY

and

ON THE RESTITUTION OF MONETARY GOLD

The Governments of Albania, United States of America, Australia, Belgium, Canada, Denmark, Egypt, France, United Kingdom, Greece, India, Luxembourg, Norway, New Zealand, Netherlands, Czechoslovakia, Union of South Africa and Yugoslavia, having taken note of the Arrangement of 22 January 1948 under which the Governments of the Dominion of India and the Dominion of Pakistan have agreed to the apportionment between them, in the following manner, of the reparation percentage shares allotted to the Government of India under Article 1 B of the Paris Agreement of 14 January 1946:

India:	Category A	1.65	Category B	2.39
Pakistan:	Category A	0.35	Category B	0.51

Having noted that the Government of the Dominion of India and the Government of the Dominion of Pakistan have agreed that the value of Reparation assets in Category B allocated to the Government of India up to and including 14 August 1947, and amounting, subject to such accounting adjustments by the Inter-Allied Reparation Agency as may become necessary, to RM. 10.900.000, will be considered to have been apportioned in the following manner:

Dominion of India: RM. 8.983.000
Dominion of Pakistan: RM. 1.917.000

it being understood that the above apportionment is susceptible of adjustment by mutual agreement between the Governments of the Dominions of India and Pakistan.

Having noted that the Government of the Dominion of India and the Government of the Dominion of Pakistan have agreed that the value of Reparation Assets in Category B allocated to the Government of India between 15 August 1947, and 22 January 1948, and amounting, subject to such accounting adjustments by the Inter-Allied Reparation Agency as may become necessary, to RM. 1.068.000, will be considered to have been allocated to the Government of the Dominion of India, it being understood that the above allocation is susceptible of adjustment by mutual agreement between the Governments of the Dominions of India and Pakistan.

Have agreed as follows:

UPON THE SIGNATURE OF THE PRESENT PROTOCOL BY THE GOVERNMENTS SIGNATORIES OF THE PARIS AGREEMENT AND BY THE GOVERNMENT OF THE DOMINION OF PAKISTAN, THE DOMINION OF PAKISTAN SHALL BE DEEMED TO HAVE BEEN A GOVERNMENT SIGNATORY OF THE PARIS AGREEMENT, AS FROM THE DATE OF THE ENTRY INTO FORCE OF THE SAID AGREEMENT, WITH CORRESPONDING RIGHTS AND OBLIGATIONS, AND TO HAVE ADHERED TO THE UNANIMOUS RESOLUTIONS OF THE PARIS CONFERENCE ON REPARATION. THE GOVERNMENTS OF THE DOMINION OF INDIA AND THE DOMINION OF PAKISTAN SHALL RESPECTIVELY BE ENTITLED TO RECEIVE THE FOLLOWING REPARATION SHARES:

INDIA:	CATEGORY A	1.65	CATEGORY B	2.39
PAKISTAN:	CATEGORY A	0.35	CATEGORY B	0.51

In witness thereof, the undersigned, duly authorised by their respective Governments, have signed on 15 March 1948 in Brussels the present Protocol, in the English and French languages, the two texts being equally authentic, in a single original which shall be annexed to the Paris Agreement and deposited in the Archives of the Government of the French Republic, a certified copy thereof being furnished by that Government to each Signatory Government, and a certified copy of the Paris Agreement to the Government of the Dominion of Pakistan.

For Albania
For United States of America
For Australia
For Belgium
For Canada
For Denmark
For Egypt
For France
For United Kingdom of Great Britain and Northern Ireland
For Greece
For India
For Luxemburg
For Norway
For New Zealand
For Pakistan
For Netherlands
For Czechoslovakia
For the Union of South Africa
For Yugoslavia

became final. Some of the named defendants had interests adverse to the class,[31] and all had small liabilities that may well have influenced the spirit of the defense and the ease of settlement. Since the underlying premise of a true class action is that the parties actually joined will fairly represent the interests of the class, judicial approval of so limited a sampling as that in the *Richardson* case seems unfair and suggests the need for stricter standards of representation.[32]

RUSSELL P. DUNCAN†

JUDICIAL REVIEW OF ALIEN PROPERTY CONTROL*

UPON the 1917 Trading with the Enemy Act [1] a broad system of foreign property control was built by amendment [2] during World War II. Two principal tools were employed, "freezing" [3] and "vesting." [4] The latter is the transfer of title and possession of property in the United States of desig-

31. Apparently, some of the named defendants in the class suit had insurance claims against the receiver, thereby benefiting from the receiver's successful prosecution of the suit. 15 Tex. Sup. Ct. Rep. 118, 132 (1945).

32. Petitioner-subscribers are seeking a writ of certiorari from the Supreme Court of the United States. That Court has said that "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." Hansberry v. Lee, 311 U. S. 32, 45 (1940), (1941) 39 MICH. L. REV. 829, 89 U. OF PA. L. REV. 525. Although under the doctrine of the *Hansberry* case it might be expected that the Supreme Court will grant certiorari, it may be suggested that the writ will be denied since *Richardson v. Kelly* was heard at length on the merits in the lower court and certainly with adequate representation.

† Third Year Class, Yale Law School of Law.

*Josephberg v. Markham, Alien Property Custodian, 152 F. (2d) 644 (C. C. A. 2d, 1945).

1. 40 STAT. 411 (1917), 50 U. S. C. (App.) §§ 1–31 (1940), 55 STAT. 839, 50 U. S. C. (App.) § 5 (Supp. I, 1941), cited hereafter by section number only.

2. In 1933 Section 5(b) was amended to strengthen the President's foreign exchange controls. 48 STAT. 1 (1933), 12 U. S. C. § 95(a) (1940). In 1940 Section 5(b) was amended to confirm the authority of the first presidential freezing orders, which had been based on the section as amended in 1933. 54 STAT. 179, 50 U. S. C. (App.) § 5 (1940); Comment, *Foreign Funds Control Through Presidential Freezing Orders* (1941) 41 COL. L. REV. 1039, 1041. In 1941 the vesting power was added. See note 4 *infra*.

3. Inaugurated April 10, 1940, when Germany overran Denmark and Norway. EXEC. ORDER 8389, 3 CFR, CUM. SUPP. (1943) 645. Successive German conquests were met with extensions of the controls culminating on June 14, 1941, with their application to virtually all of Europe. EXEC. ORDER 8785, 3 CFR, CUM. SUPP. (1943) 948. See ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT (U. S. Treasury Department 1942); Littauer, *The Unfreezing of Foreign Funds* (1945) 45 COL. L. REV. 132; Reeves, *The Control of Foreign Funds by the United States Treasury* (1945) 11 LAW & CONTEMP. PROB. 17.

4. The vesting power was written into § 5(b) by Title III of the First War Powers

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nated foreign and enemy countries and their nationals [5] to the Alien Property Custodian [6] to be ". . . held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States. . . ." [7] Passed under the pressure of the need for executive action to wage economic warfare, the amendment containing the vesting authority restricted it only to ". . . any property or interest of any foreign country or national thereof . . ." [8] Leaving the definitions and details to be filled in by executive orders and administrative rulings[9] has made the vesting power a controversial issue.

Act, 1941. 55 STAT. 839, 50 U. S. C. (App.) § 616 (Supp. I 1941). The Office of Alien Property Custodian was established and the vesting power delegated by EXEC. ORDER 9095, 3 CFR, CUM. SUPP. (1943), 1121, March 11, 1942, as amended by EXEC. ORDER 9193, 3 CFR, CUM. SUPP. (1943) 1174, July 6, 1942. The latter order allocated the foreign property controls between the Secretary of the Treasury and the Alien Property Custodian. See *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840*, 78th Cong., 2d Sess. (1944) 71–74; Lourie, *The Trading with the Enemy Act* (1943) 42 MICH. L. REV. 205; Comment, *The Powers and Duties of the Alien Property Custodian* (1943) 11 GEO. WASH. L. REV. 357.

5. For the definition of "national" see note 9 *infra*. The Custodian is empowered to vest six categories of property, three of which involve foreign countries and their nationals, three of which involve enemy countries and their nationals. EXEC. ORDER 9193, 3 CFR, CUM. SUPP. (1943), 1174, July 6, 1942; ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 3.

6. Property valued at about $8,500,000,000 was subjected to foreign property control during the war. *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840*, 78th Cong., 2d Sess. (1944) 105. About $200,000,000 of this was vested. ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 16.

7. Section 5(b). "It is the intention of the Custodian to reduce to cash as large a proportion as possible of the property vested in him." ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 19.

8. Section 5(b). A survey of the Congressional debates reveals little conception of the true scope and meaning of the measure being passed. Frequent references were made to the applicability of the vesting power to the property of "aliens" and "enemies" only, despite the fact that the authority being granted clearly extended to the property of citizens and non-enemies in some cases. See 87 CONG. REC. 9838, 9856, 9859, 9865 (1941). The impression seems to have been that the purpose of the addition of the vesting power was to make possible unrestricted use by the United States of property as to which the power of "seizure" already existed. 87 CONG. REC. 9845, 9856, 9865 (1941).

9. The term "national" was first used in EXEC. ORDER 8389, 3 CFR, CUM. SUPP. (1943) 645, April 10, 1940. The definition includes "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order, . . . (iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and (iv) Any other person who there is a reasonable cause to believe is a 'national' as herein defined." EXEC. ORDER 8389, *supra*, as amended by EXEC. ORDER 8785, 3 CFR, CUM. SUPP. (1943) 948, 950, June 14, 1941. The term first appeared in the Act in the amendment of § 5(b) by the Joint Resolution of May 7, 1940, 54 STAT. 179, 50 U. S. C. (App.) § 5 (1940). The above definition was adopted for vesting purposes by EXEC. ORDER 9193, 3 CFR, CUM. SUPP. (1943) 1174, 1177, July 6, 1942. Certain additional findings must be made by the Custodian in determining that a person not within a designated enemy country is a national of that country.

In its haste Congress created two major judicial problems in the construction of the statute. First, the incomplete meshing of the new provisions with the old ones, some of which are inapplicable and others doubtfully applicable to World War II,[10] has forced the courts to do the job of the draftsman in interpreting the Act. The courts have undertaken this task to a limited extent. For example, in *Markham v. Cabell*[11] the Supreme Court held that Section 9(e), barring debt claims acquired after October 6, 1917, could have no application to a current creditor's suit under Section 9(a).[12] Second, Congress failed to provide specifically for any judicial review of the exercise of the vesting authority[13] and has failed to remedy this defect despite ample opportunity to do so. To avoid the consequent spectre of unconstitutionality, one district court has remedied the apparent lack of judicial review of vestings by holding[14] that Section 9(a), which authorized a suit to recover property "seized" under Section 7(c) during World War I,[15]

10. H. R. REP. No. 1507, 77th Cong., 1st Sess. (1941) 2. A forceful argument has been made that § 5(b), as amended in 1941, was intended to stand alone as an autonomous, unitary system of foreign property control. See Lourie, *supra* note 4 at 218–219; McNulty, *Constitutionality of Alien Property Controls* (1945) 11 LAW & CONTEMP. PROB. 135, 146. But see Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245. For a review of the permanent and temporary provisions of the Act see Mr. Justice Burton's concurring opinion in Markham v. Cabell, 66 Sup. Ct. 193, 198 (U. S. 1945).

11. 66 Sup. Ct. 193 (U. S. 1945).

12. The inconsistencies of the Act were pointed out by the Custodian when he urged that the suit should be barred because no creditors may recover against frozen property, unless licensed by the Secretary of the Treasury, and because § 9(a) is in terms of creditors of enemies or allied of enemies only, thus barring creditors of foreign nationals; he also pointed out the administrative inconvenience resulting from allowance of such suits. The court's answer was ". . . however meritorious these considerations are, they raise questions of policy for Congress." *Id.* at 196. The court expressly limited its decision to recognition of the right to sue on a debt; the questions of whether the amended § 5(b) nullifies the § 9(a) procedures for satisfaction of a judgment creditor's debt and for suit to reclaim property which has been taken were not decided. *Id.* at 197.

13. The 1941 amendment of § 5(b), adding the vesting power, included no provision for judicial review of vestings. 55 STAT. 839, 50 U. S. C. (App.) §§ 616–618 (Supp. I, 1941). Much controversy over the constitutionality of the vesting authority has focused on the question of judicial review. See DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943) c. 17; ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 144–7; Carlston, *Foreign Funds Control and the Alien Property Custodian* (1945) 31 CORN. L. Q. 1, 21; Dulles, *supra* note 10 at 255; McNulty, *supra* note 10 at 142; Wechsler, *Constitutionality of Alien Property Controls: A Comment on the Problem of Remedies* (1945) 11 LAW & CONTEMP. PROB. 149.

14. Draeger Shipping Co. v. Crowley, 49 F. Supp. 215 (S. D. N. Y. 1943).

15. It was held that the existence of the provision for judicial review of the taking satisfied the constitutional requirements of the due process clause of the Fifth Amendment. Stoehr v. Wallace, 255 U. S. 239 (1921); Central Union Trust Co. of New York v. Garvan, 254 U. S. 554 (1921). It was also recognized that the seizure conferred the immediate right to possession on the Custodian unfettered by judicial interference but in the subsequent § 9(a) suit for the return of the property the validity of the seizure would be fully tested de novo. Stoehr v. Wallace, *supra;* Central Union Trust Co. of New York v. Garvan, *supra;* American Exchange National Bank v. Garvan, 273 F. 43 (C. C. A. 2d, 1921).

applied to Section 5(b) "vestings"[16] despite the verbal incompatability of the two sections.[17] However, the problem of how much was reviewable in such a suit remained.[18]

In the recent case, *Josephberg v. Markham*,[19] the Second Circuit Court of Appeals extended its review beyond the question of whether the property owner was included within the literal terms of the statute and definitive executive orders to reexamine the initial propriety of the vesting action. In 1943 the Alien Property Custodian, "deeming it necessary in the national interest," vested[20] the property of Alfred Cerutti, a naturalized United States citizen living in Italy, whom he found to be a "national of a designated enemy country."[21] Prior to the taking, the property had been in the hands of a committee appointed by the Supreme Court of New York[22]

16. Various suggestions have been made for avoiding this result. See Carlston, *supra* note 13 at 21–2 (administrative claims procedure within the Office of Alien Property Custodian sufficient); Dulles, *supra* note 10 at 255 (common law right to bring an *in rem* proceeding in the nature of replevin, to recover property which has wrongfully been taken into the custody of an officer of the United States); McNulty, *supra* note 10 at 142 (allow "alien friends" to sue for compensation under the Tucker Act).

17. Section 9(a) provides for suits by "any person not an enemy or ally of enemy" to recover property which has been ". . . conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him. . . ." This plainly refers to § 7(c) which provides that the property of enemies or allies of enemies ". . . shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian. . . ." The § 5(b) language is ". . . and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President. . . ." A literal reading and application of § 9(a) would have allowed the recovery of any property vested from foreign nationals not enemies or allies of enemies, thus nullifying much of the vesting program. The courts have, however, read § 9(a) as modified by § 5(b). Draeger Shipping Co. v. Crowley, 55 F. Supp. 906 (S. D. N. Y. 1944).

18. Other cases of suits under § 9(a) for the return of vested property have not fully clarified this. In the Draeger case the plaintiff had been found by the Custodian to be a national of Germany by reason of acting for the benefit or on behalf of German nationals. Thus the determination of the plaintiff's status required judicial examination of the evidence that he had been so acting, but not of the necessity of the vesting. Draeger Shipping Co., Inc. v. Crowley, 55 F. Supp. 906 (S. D. N. Y. 1944). In Standard Oil Company (New Jersey) v. Markham, 67 U. S. P. Q. 263 (S. D. N. Y. 1945) the property had been vested as owned by a German corporation and the judicial inquiry was into the true ownership, not the necessity for the vesting.

19. 152 F. (2d) 644 (C. C. A. 2d, 1945).

20. Vesting Order No. 1911, 8 Fed. Reg. 11187, Aug. 3, 1943.

21. "2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, . . . the power to . . . vest . . . (f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision . . . and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof." EXEC. ORDER 9193, 3 CFR, CUM. SUPP. (1943) 1174, 1175, July 6, 1942.

22. "The Custodian vests all enemy rights in property which is being administered by persons acting under judicial supervision. . . ." ANNUAL REPORT OFFICE OF ALIEN PROPERTY CUSTODIAN (1944) 10.

which had adjudged Cerutti an incompetent in 1939. After complying with the Custodian's order the committee sued under Section 9(a) to recover the property in the District Court for the Southern District of New York, challenging the finding that Cerutti was a national of Italy. The district court dismissed the complaint,[23] holding that Cerutti had established "actual residence" in Italy in the sense that he intended to reside there temporarily and was therefore an enemy [24] and a national [25] of Italy. The appellate court reversed,[26] rejecting the district court's definition of "residence," and held that because the property was in the hands of a judicially supervised committee and because the type of property (cash and securities) would not lend itself to war production purposes there was no need to hold Cerutti to be a "resident" of Italy. This policy determination was doctrinally supported by saying that Cerutti, due to his mental incapacity, lacked the requisite intent to establish even temporary "residence." Cerutti was thus found to be not subject to vesting control [27] and his representatives were allowed to sue and recover the property.[28]

The facts of the existing judicial supervision of the property and the innocuous character of the property, which refute any finding that it was in danger of falling into enemy hands or that it need be put under government control for war purposes,[29] logically are relevant to determining whether the

23. Josephberg v. Markham, Alien Property Custodian, U. S. Dist. Co., S. D. N. Y., Civil 31-395, July 18, 1945.

24. "Any individual . . . of any nationality, resident within the territory . . . of any nation with which the United States is at war." § 2(a).

25. See note 9 *supra*.

26. Josephberg v. Markham, 152 F. (2d) 644 (C. C. A. 2d, 1945).

27. Because he was not a "resident of" Italy within the meaning of the definition of a "national." See note 9 *supra*. "We are bound to construe the term 'resident' in so far as reasonably possible in a way to avoid . . . raising a serious doubt as to . . . constitutionality. . . . If the term 'resident' is held to include a . . . citizen in the situation of Cerutti . . . the failure to provide any remedy . . . other than what § 9(a) affords would create such a doubt." *Id.* at 649. The court's doubts as to the constitutionality of this vesting arise from its belief that something more than sequestration is involved. *Ibid.* As to whether vesting amounts to confiscation see Carlston, *supra* note 13 at 5; Dulles, *supra* note 10 at 250; Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and His Property* (1943) 37 AM. J. INT. L. 58; Turlington, *Vesting Orders under the First War Powers Act* (1942) 36 AM. J. INT. L. 460. The Supreme Court has stated that power exists to confiscate enemy private property. See Miller v. United States, 11 Wall. 268, 305 (U. S. 1870); United States v. Chemical Foundation, Inc., 272 U. S. 1, 11 (1926). For the opposition to the exercise of this power see GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940); Borchard, *Nationalization of Enemy Patents* (1943) 37 AM. J. INT. L. 92; Sommerich, *A Brief Against Confiscation* (1945) 11 LAW & CONTEMP. PROB. 152.

28. Because Cerutti was not "resident within" Italy within the meaning of the definition of an "enemy." See note 24 *supra*. If Cerutti had been an "enemy," suit under § 9(a) would have been barred. See note 17 *supra*.

29. For the statement of these basic purposes of trading with the enemy legislation see iller v. United States, 11 Wall. 268, 305 (U. S. 1870); United States v. Chemical Foundan, Inc., 272 U. S. 1, 9 (1926). With respect to these purposes an interpretation of the

Custodian's action was "necessary in the national interest." Had Congress clearly established the requirement of a finding that each vesting be "necessary in the national interest" [30] and empowered the courts to review that finding, a strained construction of the term "residence" would not have been necessary in this case. But as Congress had not provided a standard, the Second Circuit was compelled to turn the case on "national," the only word of delimitation in the statute, to effectuate a review of the compliance of the Custodian's action with the purposes of alien property control.[31]

Although the courts have remedied some of the defects in the Act by forced interpretation, the judiciary seems unsuited for such a procedure. Continued congressional inattention toward the definition of the relation between the courts and the Custodian can no longer be justified on the ground of war-time emergency. Yet, the most recent amendment of the Act,[32] providing for the return of vested property to a limited group of

war powers, U. S. Const. Art. I, § 8, not discussed in the Josephberg case, is important. If the Trading with the Enemy Act is classed as an exercise of the power to ". . . make rules concerning captures on land . . ." no court review of the necessity for such "captures" would be possible. If interpreted as an exercise of the power to ". . . make all laws which shall be necessary and proper for carrying into execution . . ." the power ". . . to declare war . . ." an inquiry into necessity becomes possible. See Littauer, *Confiscation of the Property of Technical Enemies* (1943) 52 YALE L. J. 739. In *Stoehr v. Wallace* the court classed "seizures" under § 7(c) as "captures on land." 255 U. S. 239, 242 (1940). But see Littauer, *supra*, at 754 (Trading with the Enemy Act construed as an exercise of the general war powers, not the power to regulate captures).

30. Section 5(b) contains no requirement that the vesting be "necessary in the national interest." It is in the delegation of authority by the President to the Custodian that the phrase appears. See note 21 *supra*.

31. In view of the origin of the definition of the term "national" in the initial freezing orders when Germany was overrunning Europe there seems little doubt that the word "resident" in the definition was intended to mean mere physical presence in a designated country. This was necessary to forestall Axis control of property by control of the person of the owner. See Lourie, *"Enemy" under the Trading with the Enemy Act and Some Problems of International Law* (1943) 42 MICH. L. REV. 383, 89. With respect to freezing the court in the instant case recognizes this by stating that the property of Cerutti was subject to freezing control. Josephberg v. Markham, 152 F. (2d) 644, 648 (C. C. A. 2d, 1945). The result is a definition of "national" in the field of freezing controls inconsistent with its definition in the field of vesting. The court relied on three World War I precedents in determining that mere physical presence is not equivalent to residence for purposes of the definitions of "national" and "enemy." *Id.* at 649. Of these, Miller v. Sinjen, 289 Fed. 388 (C. C. A. 8th, 1923), was a suit for the return of property the seizure of which was admittedly valid. The issue was the plaintiff's citizenship, not his residence. In Vowinckel v. First Federal Trust Co., 10 F. (2d) 19 (C. C. A. 9th, 1926), the court interpreted "residence" as equivalent to domicile "for trade or otherwise." Stadtmuller v. Miller, 11 F. (2d) 732 (C. C. A. 2d, 1926), the leading case, did hold that mere physical presence within is not equivalent to "residence within." But in each of these cases control of the property involved was open to Germany through control of the person of the owner—the exact situation the new concept of "foreign national" was designed to meet.

32. Pub. L. No. 322, 79th Cong., 2d Sess. (March 8, 1946); C. C. H. War Law Service ¶6232 (1946).

"non-hostiles," [33] while clarifying some difficulties, still fails to deal with the problem of judicial review.[34] Earlier drafts of the legislation included a provision granting to claimants the right to sue for the return of vested property, or for compensation,[35] but this safeguard was omitted in the final bill, apparently the result of pressure for some immediate returns.[36] However, piece-meal amendment does not seem to be optimum in view of the present confusion regarding the statute, and this fact suggests a complete reappraisal of the Act by Congress, an elimination of obsolete sections, and an integration of the remainder, with the insertion of necessary provisions to effectuate adequate judicial supervision of such broad administrative powers of private property control.

THE DOCTRINE OF ESTOPPEL IN PATENT LITIGATION*

ALTHOUGH restricted in theory to original contributions to science and the useful arts,[1] patents have, in practice, often been granted by an under-

33. Persons to whom the return of property is planned include ". . . friendly citizens of the various countries that were overrun by the enemy, friendly neutrals, American citizens who were caught, by the outbreak of war, behind enemy lines . . . citizens of enemy nations who left their countries prior to 1941 and who, it is now clear, are and have been loyal to the United States." SEN. REP. No. 920, 79th Cong., 2d Sess. (1946) 1–2.

34. The new legislation makes returns discretionary with the president or his designated agent except for specified categories of claimants to whom no returns may be made. These barred groups include: enemy governments; corporations organized under the laws of enemy nations; individuals voluntarily resident at any time since December 7, 1941, in enemy territory, other than United States citizens and diplomatic and consular officers of non-enemy nations; citizens and subjects of enemy nations present in enemy or enemy-occupied territory or engaged in business in such territory at any time since December 7, 1941; certain foreign corporations or associations. In addition, property which was held under a "cloaking" arrangement when vested is not to be returned, and a positive finding must be made that the return is "in the interest of the United States." Pub. L. No. 322, 79th Cong., 2d Sess. (March 8, 1946); C. C. H. War Law Service 6232 (1946). See SEN. REP. No. 920, 79th Cong. 2d Sess. (1946) 1–2.

35. H. R. 4840 and H. R. 5031, 78th Cong., 2d Sess. (1944). Persons who were not "foreign nationals" were to be allowed to sue for the return of their property, or the proceeds if the property had been liquidated; "foreign nationals" were to be allowed to sue for compensation in the court of claims under 24 STAT. 505 (1887), as amended, 28 U. S. C. §§ 41(20) and 250 (1940). *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4870*, 78th Cong., 2d Sess. (1944) 19, 22.

36. H. R. 4571, 79th Cong., 1st Sess. (1945), the bill which finally passed, was the result of strong pressure from the governments of the liberated countries of Europe for the release of the property of their nationals. See SEN. REP. No. 920, 79th Cong., 2d Sess. (1946) 2; H. R. REP. No. 1269, 79th Cong., 1st Sess. (1945) 8 (joint letter from the acting Secretary of State, the Attorney General, and the Alien Property Custodian).

* Scott Paper Co. v. Marcalus Mfg. Co., 66 Sup. Ct. 101 (U. S. 1945).

1. U. S. CONST. Art. I, § 8; 16 STAT. 201 (1870), as amended, 35 U. S. C. § 31 (1940); 1 WALKER, PATENTS (Deller's ed. 1937) §§ 8, 9.

ridden and inefficient Patent Office for devices lacking in novelty.[2] And these oversights have frequently been perpetuated by courts in patent litigation by adherence to the principle of estoppel.[3] Under this concept, the assignor of a patent when sued by his assignee for infringement is estopped to deny the novelty or validity of the patent in issue.[4] The theory was fashioned in the lower federal courts [5] and received the qualified approval of the Supreme Court in *Westinghouse Electric and Manufacturing Company v. Formica Insulation Company*.[6] There, the assignor of a patent, in a suit for infringement by his assignee, was permitted to introduce evidence of the prior art to narrow the scope of the patent, while conceding its validity.[7] But, by way of dictum, the Court warned that such evidence was inadmissible to destroy the patent because of the doctrine of estoppel.[8]

Under this rule, however, it was difficult to identify the point at which "narrowing" of scope shaded into invalidation of the patent itself.[9] And in cases of complete anticipation of the assigned patent, lower federal courts reached conflicting results as to whether the assignor was trying to limit [10] or destroy [11] the patent.

2. For a discussion of the "confusion which exists as to the very definition of invention" and the resultant issuance of invalid patents, see Posnack, *Invention, The Law and Society* (1945) 27 J. PAT. OFF. SOC. 361, 369–75.

3. See Note (1943) 11 GEO. WASH. L. REV. 521, 529.

4. 2 WALKER, *op. cit. supra* note 1, at § 349.

5. Babcock v. Clarkson, 63 Fed. 607 (C. C. A. 1st, 1894); Woodward v. Boston Lasting Mach. Co., 60 Fed. 283, 284 (C. C. A. 1st, 1894) and cases cited therein; Faulks v. Kamp, 3 Fed. 898 (C. C. S. D. N. Y. 1880); Curran v. Burdsall, 20 Fed. 835 (N. D. Ill. 1883).

6. 266 U. S. 342 (1924), (1925) 38 HARV. L. REV. 692, 13 CALIF. L. REV. 504.

7. 266 U. S. 342, 350 (1924). This had been the view of the lower federal courts with the exception of the Seventh Circuit. See Martin & Hill Cash-Carrier Co. v. Martin, 67 Fed. 786, 787 (C. C. A. 1st, 1895); Standard Plunger Elevator Co. v. Stokes, 212 Fed. 941, 943 (C. C. A. 2d, 1914); Piano Motors Corp. v. Motor Player Corp., 282 Fed. 435, 437 (C. C. A. 3d, 1922); Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 377 (C. C. A. 4th, 1916); Schiebel Toy & Novelty Co. v. Clark, 217 Fed. 760, 763 (C. C. A. 6th, 1914); Moon-Hopkins Billing Mach. Co. v. Dalton Adding Mach. Co., 236 Fed. 936, 937 (C. C. A. 8th, 1916); Leather Grille & Drapery Co. v. Christopherson, 182 Fed. 817 (C. C. A. 9th, 1910). *Contra:* Foltz Smokeless Furnace Co. v. Eureka Smokeless Furnace Co., 256 Fed. 847 (C. C. A. 7th, 1919); Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co., 142 Fed. 157 (C. C. A. 7th, 1905).

8. "The distinction may be a nice one but seems to be workable." 266 U. S. 342, 351 (1924).

9. "If no limitation at all, by reference to the specification, be imposed upon this claim we reach the point where the distinction which the Court spoke of in the *Formica* case—that is, using the prior art to construe and narrow a claim without letting it affect its validity—remains nice but becomes unworkable. The situation is that of a claim, completely anticipated by the prior art." Timken-Detroit Axle Co. v. Alma Motor Co., 47 F. Supp. 582, 588 (D. Del. 1942).

10. Some courts held that the assignor could show complete anticipation although this narrowed the claims to nought. Casco Products Corp. v. Sinko Tool & Mfg. Co., 116 F. (2d) 119 (C. C. A. 7th, 1940); Timken-Detroit Axle Co. v. Alma Motor Co., 47 F. Supp. 582 (D. Del. 1942).

11. Some cases held that the assignor could not evade the doctrine by this indirect

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THE LEGAL STATUS OF GERMANY ACCORDING TO THE DECLARATION OF BERLIN

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I

According to the Declaration made at Berlin on June 5, 1945, by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic, these Governments have assumed "supreme authority with respect to Germany including all the powers possessed by the German Government, the high command, and any state, municipal, or local government or authority." This means that the German territory, together with the population residing on it, has been placed under the sovereignty of the four powers. It means further that the legal status of Germany is not that of "belligerent occupation" in accordance with the Articles 42 to 56 of the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 1907. After Germany's unconditional surrender and especially after the abolition of the last German Government, the Government of Grand Admiral Doenitz, the status of belligerent occupation has become impossible. This status presupposes that a state of war still exists in the relationship between the occupant state and the state whose territory is under belligerent occupation. This condition implies the continued existence of the state whose territory is occupied and, consequently, the continued existence of its government recognized as the legitimate bearer of the sovereignty of the occupied state. This is the reason why it is generally assumed that belligerent occupation does not confer upon the occupant power sovereignty over the occupied territory. By belligerent occupation the legitimate government is made incapable of exercising its authority and is only substituted for the period of occupation by the authority of the occupant power. The legitimate government of the occupied state, especially the head of the state, may be expelled from the occupied territory and may have established his seat on the territory of an ally; the government, and especially the head of the occupied state, may even be made prisoners of war. But the government must continue to exist and must be recognized as such by the occupant power. The latter must be willing to conclude with this government a treaty of peace and to hand back to it the whole or a part of the occupied territory.

It can hardly be doubted that Germany, after the unconditional surrender of her armed forces, did not fulfill the conditions essential to belligerent occupation. For the legitimate Government of Germany had ceased to exist. The unconditional surrender signed by the representatives of the last legitimate Government of Germany may be interpreted as a transfer of Germany's sovereignty to the victorious powers signatories to the surrender treaty. But even if Germany's unconditional surrender is not interpreted in this way, and even if it is assumed that the victorious powers, by accepting the signatures of the plenipotentiaries of the Doenitz Government on the document of surrender, have, at least indirectly and *de facto*, recognized this Government and allowed it to function as such for a certain time, it must be assumed that the victorious powers, by arresting Grand Admiral Doenitz and his staff, have abolished this Government. In the Declaration of Berlin it is expressly stated that "there is no central government or authority in Germany capable of accepting the responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers." The existence of an independent government is an essential element of a state in the eyes of international law. By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz Government, Germany has ceased to exist as a state in the sense of international law. Germany having ceased to exist as a state, the status of war has been terminated, because such a status can exist only between belligerent states. Since Germany's surrender, at least since the abolition of the Doenitz Government, the Hague Regulations are not applicable, and the legal status of the territory occupied by the victorious powers cannot be that of belligerent occupation.

It can easily be shown that this status, even if possible, would not be desirable. It is generally deemed to be beyond the competence conferred upon the occupant power by the Hague Regulations to engage in changes in regard to fundamental institutions. An occupant may not transform a democratic republic into an absolute monarchy or a fascist dictatorship into a democracy. The occupant, it is true, may alter certain political laws, but only in so far as this is necessary for its military purposes. Art. 43 of the Hague Regulations expressly stipulates that the occupant is obliged to respect "unless absolutely prevented, the laws in force in the country." It is generally accepted that the occupant has no right to divide the country into new administrative districts for political purposes, and certainly not the right to make territorial changes such as the transfer of parts of the territory to other states. There can be little doubt that the status of belligerent occupation would not be compatible with the intention of the victorious powers to reorganize Germany politically as well as economically and to reduce her territory in favor of her neighbors. All this, of course, could be achieved by a treaty concluded with the legitimate Government of Germany. Such a treaty, however, is, at least for the time being, impossible since no legitimate government of Germany exists. If later on the victorious powers allow a national German Government to be established, it will certainly not be advisable to burden this new and, as we hope, democratic government with the political

responsibility for all the hard measures which it will be necessary to enforce upon Germany. It is well known that the political responsibility for the Treaty of Versailles was a main cause for the breakdown of the Weimar Republic and the rise of national socialism.

II

Since the German territory together with its population has been placed under the sovereignty of the occupant states, the whole legislative and executive power formally exercised by the German Government has been taken over without any restriction by the governments of the occupant states. The Declaration of Berlin, it is true, states expressly that the supreme authority with respect to Germany has been assumed for certain purposes and that it "does not effect the annexation of Germany." The purposes for which "supreme authority with respect to Germany" has been assumed are determined by the Declaration as follows: "to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany, and for the administration of the country." "Further hostilities on the part of the German armed forces" are practically impossible. The Declaration of Berlin expressly states: "The German armed forces on land, at sea, and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious powers." This means that a so-called *deballatio* of Germany has taken place, which is the essential condition of "assuming supreme authority with respect to Germany including all the powers possessed by the German Government, the high command, and any state, municipal, or local government or authority," that is to say, of placing the German territory together with its population under the sovereignty of the occupant powers. The purpose of making further hostilities on the part of the German armed forces impossible has already been achieved, so that the main purposes for which the occupant powers have assumed supreme authority with respect to Germany are the maintenance of order and the administration of the country. These are the normal functions of a government. There is no restriction of sovereignty with respect to the purposes for which the "supreme authority" assumed by the occupant powers shall be exercised. But the assumption of the supreme authority does not, according to the Declaration, "effect annexation of Germany."

This seems to be not quite in conformity with the traditional doctrine according to which the establishment of the sovereignty of the conqueror over the conquered territory is possible only by subjugation; and "subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroyed his existence by annexing the conquered territory." [1] The only way to destroy the existence of

[1] L. Oppenheim, *International Law*, 1940 (6th ed.), Vol. II, p. 467.

the enemy as a sovereign state seems to be, according to this doctrine, annexation of his territory; and annexation means incorporation of the territory into the domain of the conqueror with the latter's intention and capacity to hold it permanently. As the victorious powers expressly declare that they do not have the intention of annexing Germany, there is—according to this doctrine—no "subjugation" of Germany and consequently no sovereignty of the occupant powers over the occupied territory. This doctrine, however, is untenable. Germany certainly has ceased to exist as a sovereign state and, since the territory is not under Germany's own sovereignty, it would be no state's land if it were not under the sovereignty of the occupant powers. To consider a territory which, after the abolition of the legitimate government and the destruction of its armed forces, is placed under the military government and administration of one or several victorious powers as no state's land, would be simply absurd. It is not true that the existence of the enemy as a sovereign state can be destroyed and its territory placed under the sovereignty of the conqueror only by the latter annexing the territory, in the sense of permanent incorporation. The existence of a state is destroyed by its adversary when the latter has not only annihilated the armed forces but also abolished the government of the former. The establishment of territorial sovereignty does not depend on the new sovereign's intention to hold the territory for good. He may have the intention to cede the territory or part of it later on to another state. Such an intention does not prevent the acquisition of sovereignty. The establishment of sovereignty over conquered territory depends exclusively upon the capacity of the conqueror to hold the territory acquired by conquest, on the firm possession of the territory, based on the fact that any possible resistance of the enemy has been overcome, his armed forces being completely annihilated. If there is a difference at all between formal annexation and placing the territory under the conqueror's sovereignty without the latter's intention to hold it permanently, it is rather a political than a legal one. The rights and duties of the territorial sovereign are the same in both cases. If a belligerent does not intend to destroy the existence of his adversary as a state in the sense of international law, he must not abolish its government. If he does so, and at the same time does not intend to let the territory become no state's land open to occupation by any other state, he must establish his own sovereignty over the territory. It is true that the conqueror can not be transformed into the territorial sovereign without or against his own will. But the declaration that the occupant powers "assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the high command, and any state, municipal, or local government or authority" is equivalent to the declaration that the occupant powers place the German territory under their sovereignty. This results clearly from the fact that the occupant powers declare that they "will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at

present being part of German territory." The occupant powers intend to determine the future boundaries of Germany not by a peace treaty concluded with a German Government but by a unilateral act of the occupant powers. Only the territorial sovereign has the power to dispose of the territory.[2] Whether the term "sovereignty" is used or not, is of no importance. What counts is whether the fact has been established; and it is established when the conqueror assumes "supreme authority," that is to say unrestricted power, over the conquered territory and its population. It is even more correct not to use the term "sovereignty" because this is one of the most problematic terms in international law; as a matter of fact it has lost any precise meaning.

To place a conquered territory under the sovereignty, that is, under the unrestricted sovereignty, of the conqueror does not necessarily imply that the Constitution of the occupant state and its laws automatically extend to the occupied territory or that the inhabitants of this territory automatically acquire the citizenship of the occupant state. The occupant power may place the occupied territory and its population under special laws issued by the military government in its capacity as legislator. The military government established by the occupant power may allow that certain laws which were in force prior to the occupation remain in force during the occupation; but the reason of their validity is no longer the constitution of the country in force prior to the occupation but the express or tacit reception by the military government of these laws into the legal order of the occupied country. The persons who were citizens of the state which has ceased to exist since its territory has been placed under the sovereignty of the occupant power, become "subjects" of the occupant state in so far as

[2] After the Spanish-American War Cuba was occupied by and placed under the sovereignty of the United States without being annexed by the latter. The case of Cuba differs however from that of Germany: 1. The occupation of Cuba took place in accordance with a treaty concluded between Spain and the United States, the Treaty of Paris of December 10, 1898; 2. The exercise of the United States' sovereignty over Cuba was restricted to a definite purpose, the pacification of the island. The fourth point of the joint resolution of both houses of Congress of April 20, 1898, runs as follows: "that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people." This declaration was incorporated in the ultimatum forwarded to Spain. The Supreme Court characterized the relationship between the United States and Cuba by declaring that the island "is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs." (*Neeley* v. *Henkel*, 180 U. S. 109, 120). This is a political rather than a legal definition of the status of Cuba. According to international law a territory "belongs" to a state, not to a people, that is to say, only a state, not a people, can be the territorial sovereign. During the occupation by the United States, Cuba was certainly not a sovereign state, neither was it no state's land. The only state under whose sovereignty the island could be, and actually was, placed was the United States; the self-imposed restriction, whether called trusteeship or otherwise, was of no legal importance for the status of Cuba from the point of view of international law.

they are subjected to the laws issued by the military government. Their "citizenship" depends on the rights conferred and the duties imposed upon them by the military government. For "citizenship" is a legal status determined by the specific rights and duties of which this status is the condition. Citizen of a state (in contradistinction to mere "subject") is he who has political rights in, the duty of military service for, and the diplomatic protection abroad by the state concerned. Since the occupant state does not intend to "annex" the occupied territory placed under its sovereignty, it will not confer upon the former citizens of the occupied state political rights with respect to its own legislative or executive organs, nor will the occupant state impose upon them military duties. Consequently they are not to be considered as "citizens" of the occupant state. But they may have political rights with respect to their local governments instituted or permitted to continue by the military government. Hence, they may be considered to be "citizens" of the occupied country, although not citizens of the occupant state. If abroad, they are under the diplomatic protection of the occupant state, since their former state has ceased to exist and consequently has no diplomatic representation abroad. This presupposes that the other states have recognized the fact that the occupant power has placed the occupied territory under its sovereignty. Such recognition is indispensable if the occupation should last any considerable length of time.

III

The sovereignty under which the German territory, together with its population, has been placed is the joined sovereignty of the occupant powers. The Declaration of Berlin stipulates that "in matters affecting Germany as a whole," the supreme authority assumed by the occupant powers with respect to Germany will be exercised "jointly," "on instructions from their governments" by the Soviet, British, United States, and French commanders in chief; in all other matters by each commander in chief in his own zone of occupation. "The four commanders in chief will together constitute the control council. Each commander in chief will be assisted by a political adviser.—The control council, whose decisions shall be unanimous, will ensure appropriate uniformity of action by the commanders in chief in their respective zones of occupation and will reach agreed decisions on the chief questions affecting Germany as a whole. Under the control council there will be a permanent coördinating committee composed of one representative of each of the four commanders in chief and a control staff organized" in several divisions, such as military, naval, air, transport, political, economic, finance, internal affairs, legal affairs, etc.

If two or more states exercise jointly their sovereignty over a certain territory, we speak of a *condominium*. Well-known cases of *condominium* are: the condominium of Austria and Prussia over Schleswig-Holstein and Lauenburg from 1864 to 1866; the condominium of Great Britain and Egypt over

the Sudan since 1898; the condominium of Great Britain and France over the New Hebrides since 1914; the condominium of Austria and Hungary over Bosnia and Hercegovina from 1909 to 1918.

It is important to note that a *condominium* may be established as a provisional measure with the intention of later on settling definitively the status of the territory. This was the case of the territory of Memel which, according to Art. 99 of the Treaty of Versailles, and the territory of Fiume which, according to Arts. 53 and 74 of the Treaty of Trianon, were placed under the joined sovereignty of the Allied and Associated Powers until final settlement regarding these territories have been made.[3] These cases show clearly that a state can place a territory under its sovereignty without "annexing" it, that is to say, without the intention of permanent acquisition.

"The *condominium* may be exercised by agencies which have the character of common organs of the participating states, appointed on the basis of an agreement between these states, or by division of the territory into several districts, each of which is placed under the relatively independent administration of one of these states. But in the latter case, a common organ must also exist to decide certain general questions concerning the whole territory such as disposition of the territory and the final settlement of its legal status, especially the reëstablishment of the territory as an independent state."[4] By the Declaration of Berlin the German territory is "divided into four zones, one to be allotted to each power." The abovementioned "control council," the "permanent coördinating committee" and the "control staff" are the common organs through which the occupant powers exercise their joint sovereignty, that is to say, their *condominium*.

"It is a consequence of the status of *condominium* that none of the several occupying powers is entitled to dispose unilaterally of the territory which is under his occupation and that any essential change is possible only on the basis of a decision adopted by all the powers exercising the *condominium* or by their common organ."[5]

IV

The occupant powers, being the territorial sovereigns, need not, and cannot, conclude a peace treaty with a national German government, since such a government does not exist and since the state of peace has been *de facto* achieved by Germany's disappearance as a sovereign state. But a formal proclamation of peace by a unilateral declaration of the occupant powers is possible and even advisable. It is also possible and advisable to make the

[3] See L. Oppenheim, *International Law*, 1937 (5th ed.), Vol. I, pp. 352 f.

[4] Quoted from writer's article "The International Legal Status of Germany to be Established Immediately upon Termination of the War." this JOURNAL, Vol 38, No. 4 (October 1944), p. 689.

[5] Same, p. 693. The legal status of Germany as established by the Declaration of Berlin is about the same as suggested in the article mentioned above.

recognition of the future national government of Germany dependent upon the latter's assumption by a treaty of certain obligations with respect to boundaries, disarmament, industrial organization, etc. Such a treaty would differ essentially from a peace treaty by which such obligations are usually imposed upon the vanquished state. A peace treaty legally constitutes the new situation of the vanquished state, and consequently charges its government that puts its signature under the peace instrument with the political responsibility for the arrangement. The treaty to be signed by the future German Government as a condition of its recognition would have a merely declaratory character as being only the confirmation of a situation which has been created legally by its predecessor: the military government exercising the *condominium* of the occupant powers.

The occupant powers, being the territorial sovereigns, are in possession of an unrestricted legislative competence within which their military governments may take any measure they deem necessary, including territorial changes. The unrestricted legislative power of the occupants is practically the only possibility of creating an adequate legal basis for the prosecution of German war criminals, which neither international law nor the existing municipal laws of Germany or of any of the United Nations provide.

The Control Council established by the Declaration of Berlin in its capacity as the main agency of the *condominium* over the former German territory is the proper authority to prosecute the German war criminals. General international law obligates any state to punish its own war criminals. In prosecuting the German war criminals by a tribunal established by the Control Council the latter fulfills an obligation imposed upon it in its capacity as successor of the German Government. The situation of such *condominium*-tribunal would be analogous to that of the German *Reichsgericht* upon which, after the first World War, the prosecution of the German war criminals has been conferred. Since a *condominium*-tribunal may be composed of United States, British, Soviet, and French judges, it will certainly be more effective than the German *Reichsgericht* was. The Control Council, being the legitimate legislator of the territory and the population of the *condominium*, may issue the necessary legal rules to be applied by the tribunal. The latter need not necessarily be restricted to the prosecution of war criminals. Its jurisdiction may be extended to any crime for which the former German Government, the Nazi party, or any other organization in their services may be held responsible, even if the crime is not exactly a war crime in the usual sense of the term, such as certain atrocities, committed in no direct connection with war, by the Nazis against their own fellow citizens.

Thanks to the declaration of Berlin, the legal status of the German war criminals is totally different from that of all the other war criminals. Whereas the prosecution of non-German war criminals will probably need an international agreement, at least in certain cases, the prosecution of

the German war criminals may be based on the legislative, judicial and executive powers of the *condominium*. No obstacle on the part of international law stands in the way of this prosecution. It is therefore advisable to separate it from that of the other war criminals.

The exercise of the legislative, judicial, and executive competence which the occupant powers possess in their capacity as territorial sovereigns implies, it is true, that they assume the political responsibility for all these measures. But it is only just that he who has the power should assume also the responsibility. No German puppet government should be allowed to operate under the control of the only true government, that is, the military government of the occupant powers. For any German government operating under the control of the occupant powers might be inclined to resort to sabotage. Hence it seems desirable to permit the establishment of a national government only when the occupant powers are ready to withdraw their armed forces from German territory and thus make possible the restoration of a sovereign German state.

EDITORIAL COMMENT

THE INTER-AMERICAN CONFERENCE ON PROBLEMS OF WAR AND PEACE AT MEXICO CITY AND THE PROBLEM OF THE REORGANIZATION OF THE INTER-AMERICAN SYSTEM

The Inter-American Conference on Problems of War and Peace which took place at Mexico City from February 21 to March 8, 1945, had on its agenda [1] four great topics: coöperative measures for the prosecution of the war effort, social and economic problems, the Dumbarton Oaks Proposals, and the reorganization of the Inter-American System. The latter problem [2] has two aspects: the reorganization as such and the problem of coördination with the proposed universal international organization. This comment will deal only with the first aspect of the reorganization problem.

The Mexico City Conference made far-reaching and sweeping decisions and proposals in this respect.[3] Here arises a first, rather curious, legal problem: Had the Mexico Conference competence to act? In the Fall of 1944 Argentina had requested of the Chairman of the Governing Board of the Pan American Union (PAU) that a Meeting of Foreign Ministers of the American Republics be called "to consider the existing situation between the Argentine Republic and other American Republics." In his letter to the Governing Board of January 6, 1945,[4] the United States Secretary of State "expressed the opinion of the Government of the United States that no action should be taken at this time by the Governing Board," because "the American Republics which are collaborating in the war effort are making arrangements by consultation through ordinary diplomatic channels to meet in the near future to discuss urgent war and post-war problems." Mexico invited to the Conference the governments "collaborating in the war." [5] Argentina [6] was not invited.

This procedure has been strongly attacked [7] and there can be no doubt that, from a juridical point of view, the Mexico City Conference was a

[1] Inter-American Conference on Problems of War and Peace, Mexico City, February, 1945, *Handbook for the use of delegates*. Prepared by the Pan-American Union. 1945 (pp. 207, mimeographed).

[2] This topic was intrusted to the Third Commission (Alb. Lleras Camargo, Foreign Minister of Colombia, Chairman). See *Acta Final*, Pan American Union, 1945, pp. 127, mimeographed; and *Final Act*, P.A.U., Washington, 1945, pp. 121, printed.

[3] Resolution IX, Final Act, pp. 44–48.

[4] *Department of State Bulletin*, Vol. XII, No. 291 (January 21, 1945), p. 91.

[5] The same, No. 290 (January 14, 1945), p. 61.

[6] El Salvador, originally not invited, later joined the Conference, after her *de facto* Government had been recognized.

[7] Sumner Welles, in his article of January 24, 1945, speaks of "violating the Inter-American Agreement on Consultation and gravely weakening the PAU." Walter R. Sharp says that the present procedure of calling Consultative Meetings "may, at the worst, result in maneuvres like the calling of the Mexico City Conference, outside of the jurisdiction of the Pan-American System, in order to exclude one or more American Republics": *Foreign Affairs*, Vol. 23, No. 3 (April, 1945), p. 452.

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to seize those who have committed these acts, it is in accordance with military exigencies, and it has been customary, to impose what are known as repressive reprisals on the whole community where the acts have occurred. As in the case of other military reprisals, this punishes the innocent, but war itself is based upon the principle of collective responsibility.

To quote again Major-General Halleck:

> . . . all members of a town or corporation are held responsible in damages for the neglect or carelessness of their agents; so, in war, a city, an army, or an entire community, is sometimes punished for the illegal acts of its rulers or individual members.

But he adds,

> Retaliation is limited in extent by the same rule which limits punishment in all civilized governments and among all Christian people—it *must never degenerate into savage or barbarous cruelty.*[5]

This is exactly where the Nazis are most blameworthy. They have imposed penalties out of all proportion and reason. Those in command should remember that, if they are victorious, the fruits of victory will be easier to garner if they have not unnecessarily embittered the vanquished by their methods of warfare and by their treatment of occupied territories. For the moment we are powerless to prevent such atrocious acts as the Nazi mass executions in France, The Netherlands, and wherever they control; but President Roosevelt has issued a warning that those responsible for these crimes will be tried and punished after the Axis has been defeated.[6]

After the last war, in accordance with provisions of the Versailles Treaty, a number of Germans accused of violating the laws of war were tried in Leipzig. In principle this was correct, but in practice it is difficult to administer justice in such cases, and the trials stir up bad blood, and this runs counter to the efforts to reëstablish peaceful sentiments between the former enemies. Then, too, the victors generally refrain from trying and punishing those amongst their own forces guilty of violations. The terrible condition of war is made an excuse to try to forget such transgressions. In the present stage of our civilization, this may be about all we can do. But we must try at least to place some restraint upon the outrages that the Nazis are inflicting upon the enslaved lands of Europe. The United Nations are confident that they can make good President Roosevelt's promise to bring to justice those responsible for these cruel, unreasonable, excessive acts of reprisal. Great as must be our sympathy for France, The Netherlands, and other enslaved countries, we have the sad satisfaction of seeing the Nazis digging the grave of their hopes and ambitions as they pile hecatomb upon hecatomb of innocent reprisal victims. For all their science, the Germans are commanded by those who do not understand and they will not be forgiven.

ELLERY C. STOWELL

[5] This JOURNAL, Vol. VI (1912), p. 110.
[6] Statement to the Press, Aug. 22, 1942.

Kuhn

THE EFFECT OF A STATE DEPARTMENT DECLARATION OF FOREIGN POLICY UPON PRIVATE LITIGATION—THE NETHERLANDS VESTING ORDERS

Not often does the State Department find itself called upon to take affirmative action to bring the foreign policy of the United States to the notice of a Federal or State court in matters of private litigation. However, the outstanding rôle which economic warfare plays in the present struggle has made it imperative for local courts to be authoritatively instructed where public policy is pertinent to the issues.

The New York Court of Appeals, on July 29, 1942, handed down a unanimous decision[1] of widespread interest and importance in connection with the freezing of assets in this country belonging to domiciled subjects of one of the United Nations, The Netherlands, whose government is functioning in exile. The significance of the decision lies in the fact that the Department of State has formulated a policy with respect to the effect to be given to freezing or vesting orders of an allied government and has brought such policy to the attention of a State court.

The plaintiff's assignor, a non-resident alien, owned certain securities and monies held in The Netherlands by a Netherlands corporation. It was alleged that the corporation, with the assistance of certain individuals, had converted these assets. Action to recover their value was brought against the corporation and the individual defendants, all of whom were domiciled subjects of The Netherlands, and a warrant of attachment was obtained and levied against bank deposits and other obligations and securities belonging to the defendants within the State of New York. Prior to the attachment, a royal decree of The Netherlands Government (May 24, 1940) declared title to all claims capable of being transferred outside the European territory of The Netherlands and belonging to persons or corporations domiciled there, to be vested in the government temporarily resident in London and exercising its functions there. The decree declared such rights to be vested only for the purpose of conserving the property of the former owners, and restitution was to be made three months after the present emergency. The Netherlands Government intervened in the action for the limited purpose of vacating the levy and thus establishing the effect of the decree. The question certified to the Court of Appeals involved the extraterritorial effect of the decree upon intangible property located in this country belonging to the defendants who were domiciled subjects of The Netherlands.

While the appeal was pending, the United States became a participant in the war and a signatory to the Declaration of the United Nations, of which The Netherlands is a constituent member. A letter was sent by the Department of State to the court, afterwards followed up by a suggestion of the Attorney General upon leave granted, to the effect that the United States "has an interest and concern in the subject matter and outcome of this ac-

[1] Anderson *v.* N. V. Transandine Handelmaatschappij *et al.* The State of The Netherlands, Intervener. Law Report News, July 31, 1942, p. 3; this JOURNAL, *infra*, p. 701.

tion, in so far as there is involved the question of the effect on assets within the United States of the decree of May 24, 1940"; that it is the policy of the United States that effect be given to that decree in so far as it is intended to prevent any person from securing an interest in assets of nationals of The Netherlands located in the United States on account of claims arising outside of the United States in territory now or at any time under the jurisdiction of The Netherlands Government for the benefit of persons not citizens or residents of the United States. The declaration of the State Department filed with the court was limited so as to exclude any question of control which the United States might undertake over any such assets and also excluded any other circumstances not specifically set forth in the declared policy.

The Court of Appeals held that the decree, being the law of a friendly sovereign state of which the defendants are domiciled subjects, had vested their claims against persons or corporations in this country in the State of The Netherlands and therefore the levy was ineffective. Intangible property having a situs in the local state (New York) will be deemed transferred according to the law of the foreign state unless this offends the public policy of the local state. The court adopted the declared policy of the State Department as being in accord with that of New York.

The Netherlands decree was quite unlike the so-called nationalization decrees of the Soviet Union which assumed to confiscate the assets of Russian corporations at home and abroad for the benefit of the state. Thus where the Soviet decrees were set up as a defense to action upon a bank deposit brought by the old officers of a Russian corporation against a New York bank, the Court of Appeals allowed the action and remarked: "the confiscation of its (the corporation's) assets and the repudiations of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity."[2] It is true that after the Soviet Union had received diplomatic recognition, the same court gave effect to the cancellation of life insurance policies held by subjects of the Soviet Union in domestic companies, but the policies were subject to Russian law by their own terms. Judge (now Chief Judge) Lehman correctly pointed out that the basis of the previous decisions was not the lack of diplomatic recognition but the offense against our public policy,[3] and with this view his opinion in the instant case is entirely consistent. The Netherlands decree in effect constitutes the state a trustee for the property of its subjects "which might otherwise be without protection and perhaps subject to seizure by a ruthless enemy for use in prosecuting the war. That enemy is now our enemy. A decree designed for such purposes and having such effect may hardly be said to offend a public policy of the State."[1]

The court quite properly refused to lay down any general principle as to the

[2] Vladikavkazsky Ry. v. New York Trust Co. (1934), 263 N. Y. 371, at p. 378.
[3] See Dougherty v. Equitable Life Assurance Soc. (1934), 266 N. Y. 71, at p. 106.

effect of the declared public policy of the United States upon the public policy of a State. On the other hand, the opinion of the court extended its dictum quite far afield in intimating that the public policy of a State might have to yield if it would render ineffective a transfer of property resulting from the terms of an agreement with a foreign state. It is regrettable that the court cited (seemingly with approval) the recent decision of the Supreme Court in the case of United States v. Pink,[4] which has been subjected to severe criticism. Here there was no agreement. The issue of that case is not pertinent in the slightest degree in respect to the construction and effect of the Netherlands decree.

To limit the extraterritorial effect of foreign laws when against public policy is described by Story as a matter of self-defense; otherwise the local state might be compelled "to desert its own proper interest and duty to its own subjects in favor of strangers, who were regardless of both."[5] The extraordinary exigencies of the present war sometimes result in a reversal of the restrictive character of the rule; for here the public policy of the state is precisely to afford complete recognition to the effect of the foreign executive decree with respect to property over which the local state can exercise jurisdiction. Ordinarily public policy acts in derogation of comity in private international law. Neither comity nor public policy establish standards capable of being predicated in advance, and both principles have been criticized as furnishing only shifting bases for solving conflicts of law. Perhaps their value after all lies in their very fluidity because they afford a margin of discretion whereby to meet changing circumstances which time brings forth. As Judge Cardozo has phrased it: "We live in a world of change. If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow."[6]

In a period when totalitarian states seek to exploit for their own purposes the old forms of law established in the interest of impartial justice, the elastic principle of public policy serves as a necessary protection against acts of spoliation performed abroad affecting property in this country.

ARTHUR K. KUHN

NORWEGIAN MARITIME COURTS IN ENGLAND

On May 22, 1941, the British Parliament passed the Allied Powers (Maritime Courts) Act, 1941.[1] Its main purpose was "to make temporary provision for enabling allied and associated Powers to establish and maintain in the United Kingdom Maritime Courts for the trial and punishment of cer-

[4] (1942) 315 U. S. 203; this JOURNAL, April, 1942, Vol. 36, p. 309. See the dissenting opinion of Chief Justice Stone, *ibid.*, p. 329, and editorial comments by Borchard and Jessup, *ibid.*, pp. 275–288.
[5] Story, Commentaries on the Conflict of Laws, § 32.
[6] B. N. Cardozo, The Paradoxes of Legal Science, p. 10.
[1] 4 and 5 Geo. 6, Ch. 21.

Kuhn, Arthur K.

EDITORIAL COMMENT

FOREIGN FUNDS CONTROL AND FOREIGN OWNED PROPERTY

Secretary of State Hull, speaking before the House Foreign Affairs Committee on January 15, 1941, declared one of the aims of our foreign policy to be "the restoration and cultivation of sound economic methods and relations, based on equality of treatment." It is both a policy and an inducement for the restoration and maintenance of world peace. On the other hand, it may be taken as a corollary that economic weapons will be used against those countries which make use of aggressive warfare and conquest, nations which, to use Mr. Hull's phraseology, are guilty of an "overt breach of world order . . . in direct contravention of solemnly accepted conventions under the Covenant of the League of Nations and of the Kellogg-Briand Pact."

Far-reaching economic steps have now been taken in promotion of this branch of the foreign policy of the United States Government. The Executive Orders dated respectively April 10, 1940, June 14, 1941, and July 26, 1941,[1] prohibit from the "effective date" of the orders a wide category of business and financial transactions with a large number of foreign countries and their nationals. This date is stated to be June 14, 1941, for Albania, Austria, Czechoslovakia, Finland, Germany, Italy, Poland, Portugal, Spain, Sweden, Switzerland, the Soviet Union and some others. Earlier dates apply to Belgium, Denmark, France, Greece, The Netherlands, Norway, Rumania and others; while July 26, 1941, is the effective date for China and Japan. These and like orders, now generally known as "freezing orders," are designed, among other things, to prevent the use of the financial facilities and trade of the United States in ways harmful to national defense, to curb subversive activities within the United States, and to prevent the liquidation in the United States of assets which otherwise would be claimed as booty by the conqueror or constitute the profits of duress and spoliation exercised against oppressed minorities for the benefit of aggressor nations to be used as sinews of further aggression and conquest.

Under the order of June 14, 1941, the term "effective date" becomes especially material because of the definition of "national," which is defined as: "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this order" (Sec. 5, E). "A foreign country" refers to the schedule of particular countries named (Sec. 3). Partnerships, corporations and other group-forms are included in the term "national," provided a substantial part of the shares, bonds, or other securities of such organizations is owned or controlled by the foreign country or its nationals. The draft of the order ascribes to the term

[1] Printed in this JOURNAL, Supp., p. 214.

"national" an artificial and much extended meaning so as to include not only persons domiciled in the respective foreign country but even "any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country"; and also to any other person who there is reasonable cause to believe is a "national" as therein defined (Sec. 5). This is poor legislative drafting.

All transactions mentioned in the order are prohibited, except as specifically authorized by the Secretary of the Treasury, (1) if such transactions are by or on behalf of, or pursuant to the direction of any foreign country designated in the order or any national thereof, or (2) if they involve property in which such foreign country or national has had any interest of any nature whatever since the effective date of the order. The transactions referred to include transfers of credit between any banking institutions within the United States to any banking institutions outside the United States; all foreign-exchange transactions within the United States and all transfers or dealings in any evidences of indebtedness or of the ownership of property by any person within the United States; all dealings in securities containing a stamp or seal of a foreign country designated in the order (Sec. 1); or indeed of any interest in any security or evidence thereof "if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States" (Sec. 2, A(2)).

The wide scope of these regulations may not at first be appreciated. They will undoubtedly reach many transactions of a wholly innocent nature in which foreign nationals, as thus artificially defined, may have only a contingent or tenuous interest. For example, the term "property" and "property interests" include also contingent interests in estates and trusts. It is true that the scope of the regulations has been somewhat modified by general licenses, such as General License No. 30, issued August 14, 1940, which grants authority to any bank or trust company of the United States, or of any State thereof, to make distributive shares of principal or income to persons legally entitled, who are not nationals of the foreign countries designated, or to engage in other transactions arising in the administration of the trust, if no such foreign national is a beneficiary. General License No. 42 issued June 14, 1941, grants a license to individuals who have been domiciled in and residing only in the United States at all times on and since June 17, 1940, or the effective date of the order, if such effective date is subsequent. But the net result is to place a heavy responsibility on trustees and fiduciaries generally.

In addition to these broad provisions of the "freezing" orders, the Secretary of the Treasury has issued regulations further defining certain terms used and requiring reports to be filed under oath, by all persons in the United States directly or indirectly holding or having title to or custody, control, or possession of any property mentioned in the orders, giving information as to

the nature of the property so held; also from every agent or representative in the United States for any foreign country or national thereof having any information with respect to such property. Needless to say the criminal and other penalties for the violation of the provisions of the orders are severe.

It is to be observed that in view of the interrelationship of financial transactions, the control is extended to certain countries not invaded. However, it is intended that through the medium of general licenses, the "freezing" control will be lifted with respect to certain of these countries upon receipt of adequate assurances that the general licenses will not be employed to evade the purposes of the order.

Simultaneously with the issuance of the order of June 14, 1941, the President approved regulations ordering a census of all foreign-owned property in the United States belonging not alone to countries and nationals subject to "freezing" control, but to all other countries as well. The "freezing" control under the order does not apply with the same force to the countries of this hemisphere, but an embargo is accomplished by the Proclaimed List of Certain Blocked Nationals under the order of July 17, 1941,[2] together with General License No. 53, relating to inter-American trade. However, certain obligations still rest upon traders doing business with firms not mentioned in the list.

The orders are based upon the authority vested in the President by Section 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended,[3] as well as by virtue of "the existence of a period of unlimited national emergency" and of all other authority vested in the President. While not issued in time of war, the orders are quite definitely related to national defense and represent an implementation of "measures short of war" doubtless the most extensive in our history. While resting upon territorial jurisdiction and the right of national defense, their justification is partly based upon the violation of the Kellogg-Briand Pact. Attorney General (now Mr. Justice) Jackson, in his address at Havana on March 27, 1941, before the Inter-American Bar Association, said that "one of the most promising directions for legal development is to supply whatever we may of sanction to make renunciation of war a living principle in our society."

The very flexibility of the orders as extended or relaxed from time to time by amendments and by Treasury licenses, general or specific, are designed to carry out the varying vicissitudes of our defense policies and to curb aggression. Thus the order affecting China was made at the specific request of its government and as a "continuance of this government's policy of assisting China."[4] A similar purpose is to be found in the General License of June 24, 1941, exempting the Soviet Union.

The success of these measures may prove an historic milepost in the struggle against wars of aggression. Their effectiveness is greatly enhanced by a

[2] Printed in this JOURNAL, Supp., p. 222. [3] *Ibid.*, p. 213.

[4] Statement issued from the White House, New York Times, July 26, 1941, p. 1.

correlative policy of extending economic *privileges* to those and only to those nations which contribute to the maintenance of peace. Thus the joint declaration of August 14, 1941, made by President Roosevelt and Prime Minister Churchill announced a policy of economic favor as part of the program envisaged by their respective countries. In the fourth point of their declaration it was announced that these countries "will endeavor, with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity." This may be taken to be a corollary to the strong economic measures taken both by the British Commonwealth and by the United States against the Axis nations. Such a peace policy gives force and direction to the measures of non-intercourse and blocking represented by the "freezing" orders and related measures.

ARTHUR K. KUHN

THE SHIFTING BASES OF INTERNATIONAL LAW

Since the object of law is the protection of interests, the constant solicitude of the international jurist should be to note when interests change and how the law must change. Never in all history has there been so profound and so rapid a change in international interests as during the past quarter of a century. It would be beyond the scope of this editorial comment either to summarize the causes of these changes or to attempt their classification. Certain it is that the evolution of international society is swiftly taking the form of a revolution involving cataclysmic changes in social relations. Vast forces of an imponderable nature are at work. We cannot accurately appraise them or calculate their effects. We realize, however, that we poor humans are being swept along by these forces and that we gradually are jettisoning many old accepted political, economic, social, legal, ethical, and spiritual standards of value. About all we can do, as the current carries us along, is to note certain general trends which involve profound changes in the interests of international society, and hence alterations in the principles of law which may be applicable.

First of all, is the amazing political revolution which exalts the state above the individual and announces a new concept of sovereignty, namely, that it does not emanate from the people or from a supreme ruler, but from a political faction which absorbs the state itself. This new form of government might correctly, though paradoxically, be termed a *popular dictatorship*. We are witnessing in many nations a radical change in ideology. Even traditional democracies, such as France, are abandoning cherished ideals of popular sovereignty.

This new political concept completely annihilates systems of law and substitutes arbitrary procedure dictated by motives of expediency. International law, therefore, finds itself almost completely ignored by the devotees

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OFFICIAL ART SEIZURE UNDER THE MILITARY CLOAK

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OFFICIAL ART SEIZURE UNDER THE MILITARY CLOAK

Kenneth Lindsay*

> *"The United States Government is removing from Germany to the continental United States certain perishable German Art Objects not readily identified as looted property, with the sole intention of keeping such treasures safe and in trust for the people of Germany or the other rightful owners."*

So began the White House Press Release of 26th September 1945. Six weeks later, on 6th November, the order came from the Commanding General of the 7th US Army to Collecting Point Wiesbaden, directing that 200 paintings be packed and shipped forthwith to the US. This unprecedented order immediately set off a wave of protest among the Monuments Fine Arts and Archives (MFA&A) officers and enlisted men on active duty that November. To the men safeguarding these national treasures, the directive was seen as nothing less than a betrayal of their purpose.

It is now more than fifty years after the fact, yet there are questions still unresolved regarding this *cause célèbre*. Were the 200 paintings appropriated in good faith or were they being looted? Was the military being exploited by civilian interests? Or was the whole affair only a matter of misjudgement? Two years ago a thorough study on wartime art looting kindled a renewed interest in these questions.[1] To make a fair assessment of what actually happened this paper will recount the evidentiary conditions existing at Collecting Point Wiesbaden in 1945 and reconstruct how the decision to ship the paintings came about.

The White House Press Release of 26th September 1945 continues:

> The United States Government will retain these objects of art in its possession only as long as necessary to insure their physical safety or until such time as it may be possible to return them to their rightful owners. The return of readily identifiable looted art objects to the liberated countries from the American Zone in Germany already is under way.
>
> When the appropriate Allied bodies determine the rightful owners or the return of conditions in Germany whereby the safety of the objects to be stored in the US can be definitely assured, they will be distributed according to the directives of such Allied groups. When objects of art are definitely established as being of *bona fide* German ownership they will be returned to Germany when conditions warrant.
>
> The reason for bringing these perishable art objects to the United States is that personnel is not available within the American Zone to assure their safety. At present these perishable objects are being stored under conditions which would bring about their deterioration. For many of these art objects there are not adequate housing facilities in Germany.

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1 L.H. Nicholas, *The Rape of Europa: The Fate of European Treasures in the Third Reich and the Second World War*, New York: Vintage Books, 1995.

> The National Gallery of Art, through the chairman of its board of trustees, the honourable Harlan Fiske Stone, Chief Justice of the United States, has been requested, on behalf of the government, to arrange for the storage and protection of these works of art which would be kept in the country for the German people until conditions in Europe warrant their return. Among these are masterpieces from the hand of Dutch, Flemish, French, German, and Italian masters. It is not contemplated that any of these works will be exhibited to the public at present.

Six weeks after the Press Release, the direct Order arrived:

> Higher headquarters desiges [*sic*] that immediate preparations be made for prompt shipment to the UNITEK [US] of a selection of a least two zero zero German works of art of greatest importance X Most of these are now in Art Collecting Point Wiesbaden X Selections will be made by personnel from Headquarters CMA US Forces CMA European theatre who will assist in packing and shipment by motor transport to Bremen X... Operation to be completed by two zero November X

Even a cursory reading of these documents raises questions. If the order of 6th November was carrying out the pronouncements of the Press Release, why was September's arch concern about possibly 'looted' works replaced in November by 'German works of art of greatest importance'? Why did the Press Release use the inflammatory word 'perishable' three times? Why would unnamed outsiders be appointed by HQ to make the selections and add two extra paintings to the 200 at the last moment?

The story of the Wiesbaden 202 begins in Berlin. During the early phase of the war, German authorities decided that the treasures of the State museums should be placed for safekeeping in the Friedrichshain Anti-Aircraft Bunker.[2] After the Germans were defeated at Stalingrad and Soviet armies drew ever closer to Berlin, there was serious doubt that the reinforced concrete walls of the Bunker could withstand intensified Allied bombing. Harkening to this grim possibility, advisors urged Hitler to consider secreting museum treasures in a more secure place, and recommended the Kaiserroda salt mine in Merkers, Thuringia. At first Hitler resisted the idea on the grounds that it might appear as a sign of defeat; but finally, on 8th March 1945, he yielded. Between 11th and 30th March, after being packed in whatever material was available, the contents of the fifteen sections of the State Museums of Berlin — including the Islamic Department, the Egyptian Department (with its famous statue of Queen Nofretete), the Painting Gallery, the National Gallery, the Departments of Prints and Drawings, Far Eastern Art, Greek and Roman Art — were dispatched to Merkers. On 6th April, MPs of the American Third Army discovered in the salt mine the hidden hoard of art works, as well as 100 tons of gold, innumerable bags of paper currency, and a thousand sheepskin greatcoats.[3]

Because the Partition Treaty specifying Thuringia as part of the Soviet Zone was soon to go into effect, it was decided that all of the mine's contents should be shipped immediately to the Reichsbank in Frankfurt. The Reichsbank, although a good place for keeping gold and currency, was inadequate for storing art works. Until a new Collecting Point could be set up, the treasures therefore had to remain in Frankfurt.

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2 C. Norris, 'The Disaster at Flakturm Friedrichshain: A Chronicle and List of Paintings', *The Burlington Magazine*, 94 (December, 1952), pp. 337-347. Norris obtained much of his information from Prof. Otto Kümmel, the Director of the Berlin museums at that time.

3 Because German fur coats were a premium item, news about them raised the eyebrows of even the highest placed officers. Lt. General B. Smith and his officers in Frankfurt became interested and by 10 November had wrested them from the Wiesbaden Collecting Point, where the coats had served as excellent packing material. But on close inspection of them Smith must have been disappointed when he saw that the coats were long and ungainly and made of the crudest sheepskin — hardly what his officers would find attractive.

Sometime in June, Lt. Commander Charles Kuhn (a Harvard professor then at SHAEF HQ) and Captain James Rorimer (on leave from the Cloisters and in charge of Monuments work for the Seventh Army), selected the Landesmuseum in Wiesbaden, built in 1920, as a Collecting Point for the Berlin holdings. As this museum had not suffered major bomb damage it required a minimum amount of repair. Its roof was mostly intact and its several hundred rooms were in fair enough condition. In order to quickly put things into shape someone with military experience was needed, and that is why Walter Farmer and I qualified. Neither of us were nominated by art protection groups at home but had obtained our MFA&A assignments on our own initiatives.[4] Captain Farmer, who had done distinguished work in the Corps of Engineers, was keenly interested in art and preservation. With his grasp of how the military functioned and his background in architecture and interior design, he was regarded by Kuhn as eminently qualified to rehabilitate and operate the new collecting point.[5]

I came to Kuhn by way of Paris and the Signal Intelligence Division. When I approached Lt. Rosen in the ETOUSA Personnel Office about the need for trained people on the Monuments team, he telephoned Colonel Geoffrey Webb (Slade Professor of Fine Art at Cambridge and now Monuments Chief for SHAEF). Webb, who knew Oskar Hagen, my mentor in Art History at the University of Wisconsin, recommended me at once as an art historian to serve on the Monuments team. During my trip from Paris to Frankfurt, with the order to transfer in hand, I was beset by non-coms in Replacement Depots who were adamant that only officers could serve in the MFA&A group. But when I finally met Kuhn at SHAEF HQ he overrode the regulations; and I reported for duty on 22nd July.

By the time I arrived, Capt. Farmer had already started to rehabilitate the museum. He installed a wire fence around the entire building and placed flood lamps at each corner to illuminate it at night. Soldiers from the 26th Infantry Anti-Tank Company guarded the perimeter night and day by walking anti-clockwise around the building, one inside the fence and one outside. All Germans tainted by Nazi background were discharged and new guards and specialists hired. But where in ravaged Germany would one find glass to replace the many broken windows, especially those in the skylight structures? Using his accumulated military know-how, Farmer solved the problem by 'borrowing' 26 tons of glass from a US Air Force installation that was being built nearby.

Shortcomings in our museum practices, known only to Farmer, myself, and Farmer's secretary Frau Renata Hobirk, should be acknowledged if a fair assessment of our capability for protecting art treasures is to be made. During our tenure we had one break-in. An MP with his WAC girlfriend used a secret tunnel extension leading from the building across the street to our building, as a trysting place. They pushed out a few bricks and made an opening large enough to squeeze through into our sub-basement, where they took five minor paintings from the vault holding the Wiesbaden Landesmuseum's collection. Flaunting the MP arm band, they bluffed their way past our American guards and then audaciously hung the paintings on the walls of their billet. They were soon apprehended, and the paintings were restored.

Only one serious accident occurred: while our key master and gallery technician, Herr Basenfelder, was fixing the lock of a large glass display case in which the Guelph Cross was installed, the heavy door swung out too far, and the case tipped over. Even though this priceless gold and enamel artifact of the Middle Ages received only minor damage, it needed repair along its rims. A local jeweller who knew the secrets of gold bead decoration was found, and I was sent

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4 Professor Sachs, head of the Sachs Committee, recommended art historians and museum curators for MFA&A assignments. Sachs' committee was part of the Roberts Commission, an organization set up to protect and preserve artistic and historical monuments in the battle zones. Many of these appointees were given Naval commissions and a significant number of them (eight) were graduate students at Princeton.

5 W. Farmer, unpublished essay, February, 1963, pp. 3-5. On 9 February 1997, Farmer was awarded the Commander's Cross of the Federal Order of Merit (Verdienstkreuz) in Berlin. He died 9 August 1997.

there unaccompanied and unarmed — so as not to attract attention — carrying the Cross in a small suitcase. I watched the jeweller as he made the repairs, all the while listening to his remarkable discourse on Etruscan gold work.

There was a strict house rule that no one was allowed in the museum unless the Captain gave his permission in person or in writing. One day, while Farmer was on a field trip, I received a call from the front desk saying that certain high ranking US officers wanted to come in and see the collection. They did not have written permission so I rushed to the gate area, told the officers what the regulations were, and that they would have to come back another day. The Major exploded: "Who the hell do you think you are, soldier? This is a full Colonel who wants to visit." I persisted but finally yielded when he threatened me with court-martial. While they were in the museum I watched their every move. Within the month the officers received official reprimands.

Besides our many other duties such as getting rid of Hitler trees, renaming streets which had previously been named after Nazi officials, verifying the denazification of local art dealers, and taking inventory of thousands of art objects, we spent long hours preparing the museum for the Berlin material.[6] On occasion, unusual problems arose having to do with exiled art or challenged ownership. Here, two special objects stood out: the Holy Crown of Hungary, an eleventh century masterpiece of Byzantine gold and enamel craft; and the bust of Queen Nofretete, the famous spouse of Ikhnaton of Egypt. The Crown had great political significance because without its presence, no government in Hungary could have legitimacy. It was sent without fanfare to Fort Knox for safekeeping and stayed there until 1979, when the political situation in Hungary justified its return to Budapest.

Nofretete did not leave Wiesbaden for a stay in America, but she did become a cause for concern when the Egyptians began to agitate about having her returned to Cairo. They felt their claim to the statue was justified because of the alleged way the Germans had taken it in 1912. The only way to ascertain if the unprepossessing box that arrived at the museum with the label *Die Bunte Königin* contained the statue, was to open it. This ceremony took place before a small gathering of official witnesses from the German Government and the American military. The wooden top came off without trouble, after which I carefully uncovered the wrapping of jet black tar paper. Beneath the tar paper was a sea of pure white spun glass, and within it the beautiful face of the renowned Queen, serenely looking up at us. Because the Egyptian complaint remained unresolved, the statue remained in Wiesbaden until it was sent back to Berlin in 1955.

The deadline for transferring the Kaiserroda mine contents from the Reichsbank to Wiesbaden was 20th August. Right on time, long lines of trucks with armoured vehicles in front and back arrived with their cargo at the Collecting Point's loading dock. By the end of the operation, the Wiesbaden Landesmuseum was transformed into a repository for one of the world's largest collections of art.[7]

Suspicions arose in late October when a portly Colonel appeared at the museum, dropping hints that certain German-owned paintings — which were on a list he had brought with him — would soon be sent to the United States. Sensing that something was wrong but disbelieving such a thing would ever come to pass, Farmer put the thought aside. When the order to ship actually arrived on 6th November, he flew into a rage.[8] At first he contemplated refusing the order,

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6 Yet I had enough time to organise a series of string quartet concerts for the Enlisted Men's club and to commission the artists Alo Altripp and Lore Hengstenberg to make a drawing and a watercolour, respectively, of the prize object in our treasure room, the Holy Crown of Hungary.

7 Besides the Hungarian Crown, we took care of several hundred Polish church treasures, various items of looted art, a large collection of Jewish ceremonial scrolls, collections from museums in Frankfurt, Krefeld, Mainz, Lüneberg, Cologne, Mannheim, and Kassel. The Jewish material was eventually sent to Offenbach.

8 If what T. Howe describes in his book, *Salt Mines and Castles: The Discovery and Restitution of Looted European Art*, Indianapolis, New York: Bobbs-Merrill Co., 1946, is correct, Farmer's superiors close by in Frankfurt knew about a proposed shipment during much of September. Why they never alerted him has never been explained.

even though it meant risking a court-martial. When he regained his composure, he called on the Monuments officers to meet with him the next day for a parliament of concern. The result was the famous Wiesbaden *Manifesto*, the only protest of an official order made by US officers in the European Theatre of Operations during the war. Twenty-five signed. Some did not sign and a few, who could not attend, wrote letters later.

The *Manifesto* argued that the Order established an immoral and untrustworthy precedent, and that contrary to the claim expressed in it, the collecting points were properly staffed and functioning effectively. It concluded with a statement which resonates even today:

> We wish to state that from our knowledge, no historical grievance will rankle so long, or be the cause of so much bitterness, as the removal, for whatever reason, of a part of the heritage of any nation, even if that heritage be interpreted as a prize of war. And although this removal may be done with every intention of altruism, we are none the less convinced, that it is our duty, individually and collectively, to protest against it, and that though our obligations are to the nation to which we owe allegiance, there are yet further obligations to common justice, decency and the establishment of the power of right, not of expediency or might, among civilized nations.

Lt. Commander Bancel La Farge, who had been active in art protection since D-Day and was now the top officer in charge of Monuments, held up the *Manifesto* for a time — it is unclear how long — to protect the signatories until they had safely left military service.[9] But the word got out. Janet Flanner, who visited the Wiesbaden Museum at about this time, promptly published a brief yet informed 'Letter from the Rhineland' in the *New Yorker:*

> This project, casually suggested by American officials at Potsdam, perhaps as a well-meaning attempt to keep the pictures warm this winter in the steam-heated United States, is already regarded in liberated Europe as shockingly similar to the practice of the Einsatzstab Rosenberg.[10]

Shortly after the shipment of the 202 arrived in the United States in December, protests began to be heard in Washington. Among them was one from Charles Kuhn, now back at Harvard, who wrote an article for the January *College Art Journal* in which he publically pointed a finger at the author of the Press Release, Lt. General Lucius Clay.[11]

By targeting Clay, Kuhn centred the anger of MFA&A personnel, who, as they mustered out, had been mostly unaware of the Press Release and its authorship. Now, finally, they had the perpetrator they were looking for. However, there were many political complexities behind the Press Release that remained unknown. It was not until 1974, when Clay's papers were published, that other factors — diplomatic meetings and related correspondence — could be tied in to them.[12] Co-ordinating all of this material with actual events — appointments, discharges, visitations —

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9 Capt. Edith A. Standen, HQ ETOUSA Economic Division, Restitution Control Branch, sent a letter on 1 December 1945 to the signatories of the Manifesto, telling them of La Farge's hesitation about making it public and advising them that they could circulate it privately. Included were the names of the officers who sent separate letters and the three who did not sign.

10 Flanner put this 17 November 1945 article into a larger context in her book, *Men and Monuments*, New York: Harper and Brothers, 1947, pp. 287-290.

11 C. Kuhn, 'German Paintings in the National Gallery: A Protest,' *College Art Journal*, 5, No. 2 (January 1946), pp. 78-82. This issue of the Journal also included G.E. Hamlin's contribution, 'German Paintings in the National Gallery: Official Statement,' pp. 75-77, in which she presented the complete list of the paintings.

12 *The Papers of General Lucius D. Clay*, ed. by J.E. Smith, Bloomington, Indiana: Indiana University Press, 1974., vol. 1 (henceforth to be called *Clay Papers).*

reveals the sputtering way the victors' desire for revenge evolved after war's end into a compromise of reasonable clemency. In addition, the conflict of intentions growing between Fine Arts ideologues in Washington, D.C. and Monuments personnel in the field will be better focused if seen within the time-line scaffolding of Clay's papers. These complexities will become clearer if they are placed within the shifting spectrum of attitudes taking place during 1945.

With the passage of time, it is easy to forget how rapidly moods changed during the early 1940s. The apprehension that Americans felt when German troops overran Europe turned to shock, and then, after Pearl Harbour, to anger. As the war progressed and victory no longer seemed an impossible goal, governmental authorities began to think about post-war planning. Henry Stimson, Secretary of War, recalls how, during August of 1944, President Roosevelt appointed him along with Henry Morgenthau of the Treasury Department and Cordell Hull of the State Department to co-ordinate and outline what had been done by others and present their findings to him. Between Morgenthau's desire for a Cartheginian peace and Stimson's desire for a firm but humane treatment of the Germans, a chasm developed. At the Quebec conference of September, 1944, both FDR and Churchill accepted the Morgenthau plan, even though reducing Germany to a pastoral state would have run counter to the Atlantic Charter, which specified that both victor and vanquished were to have equal access to trade and raw materials for the sake of full economic prosperity. A little later, both Roosevelt at Yalta in February of 1945 and Truman at Potsdam during July softened the excesses of the Morgenthau plan. Still, vestiges of its harshness remained in the conceptions of some lower-level operatives.[13]

Eventually it was political reality — taking care of a conquered nation, seeing to it that people were fed and kept warm, establishing a functioning economy and a sound fiscal situation — that took centre stage. The role Germany would have to play in the great interlocking clockwork of Europe took precedence as the Soviet Union's hegemonical intentions became more apparent. Ultimately these realities found their embodiment in the Marshall Plan.

The people in Monuments, enthusiastically engaged in the cause of protecting great art and rubbing shoulders with decent German people who supported their cause, were sympathetic to this 'softer' attitude. They were perplexed by the order of 6th November because it seemed to reflect the earlier spirit of 'hardness'.

Both Michael J. Kurtz and Lynn H. Nicholas provide documented evidence of the early stages of this shift in attitude.[14] As victory neared, temptation was in the air. One evening, after viewing the newly discovered hoard in the Kaiserroda salt mine, Eisenhower, Patton and Bradley joked that if this were the 'good old' free-booting days 'when a soldier kept his loot', they could have had a fine time with the trove of gold and art. As there is often some truth in a joke, the atmosphere of covetousness was clearly palpable. On a more serious note, the question of what to do with the paintings became involved in the attempts to distinguish between the four 'Rs': reparation, restitution, return, and repair. Gold can be divided and used for reparation but paintings do not lend themselves to such arithmetic.[15] Restitution sounds reasonable until one begins to calculate such payback questions as: "How many German-owned Botticellis equal one French-

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13 H.L. Stimson and M.G. Bundy, *On Active Service in Peace and War*, New York: Harpur and Brothers, 1947, p. 569; and *Morgenthau Diary*, prepared by the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws, of the Committee on the Judiciary, United States Senate, 2 vols, Washington, D.C.: US Government Printing Office, 1967. A. Kubek in the Introduction maintains that Harry Dexter White with the help of "leftish" assistants, devised the Morgenthau Plan.

14 M. Kurtz, *Nazi Contraband: American Policy on the Return of European Cultural Treasures, 1945-1955*, New York and London: Garland Publishing, 1985; and L. Nicholas, *The Rape of Europa: The Fate of European Treasures in the Third Reich and the Second World War*, New York: Vintage Books, 1995.

15 For an analysis of the concepts of restitution and reparation in this context, see W.W. Kowalski, *Art Treasures and War*, 1998, Institute of Art and Law.

owned Michelangelo lost when it was being transported to Berlin?" Once ownership has been established, return can easily be made. Repair for the most part was limited to first aid treatment.

What to do about the four 'Rs' became a ball tossed back and forth by a dozen men, some of them in positions of authority. On the one hand there were the 'bulls' who thought looted art was their due as part of general reparation. Among them was the former oil man Edwin Pauley, a successful fund raiser and the Treasurer of the Democratic National Committee. He had been appointed by the newly seated President Truman to head the Commission for Reparation in Moscow and was impressed by the way the Russians were scooping up as much as they wanted. On the other hand there were the 'bears' — those who wanted to temper the ambition of people like Pauley. For them our obligation to captured art was primarily custodial.

It is the communications of Lt. General Clay, the Deputy Military Governor for Germany, that provide the time-line mentioned above.[16] The main points of the time-line (see Appendix 1) can be summarised as follows:

1) How the rationale for using cultural objects as reparation yielded to a disinclination to use them at all, even for restitution.

2) How a desire to rapidly sequester all German art changed into concern about the ramifications such a move would have among the German people and our Allies.

3) How, prior to the Press Release of 26th September, information had surfaced asserting that the Collecting Points indeed had adequate facilities and personnel.

4) How arguments developed about who would issue the Release.

5) How the insertion of the word 'perishable' into the Press Release text was a last minute addition.

6) How concern grew over the possibility of 'time-delayed' looting.[17]

Having in mind the mood of postwar Germany and a glimpse into how the Press Release came about, we can see how Kuhn's protest article in the *College Art Journal* can be better rationalised.[18]

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16 Lucius DuBignon Clay, a southern gentleman and the son of a US Senator, had graduated 27th in his West Point class of 137. His political and administrative skills earned him the honor of becoming, at 43 years of age, the youngest Brigadier General in the army. They also earned him the directorship of wartime military procurement. While working with Morgenthau at Bretton Woods he was in a position to make important contacts; and in 1945 he was recommended by Stimson for the leadership position in Germany. Even though he knew little about Germany and could speak no German, his many accomplishments during the ensuing three years would assure him a solid place in history. See J.E. Smith, *Lucius D. Clay: An American Life*, New York: Holt, 1990, and Lucius D. Clay, *Decision in Germany*, Westport, Connecticut: Greenwood Press, 1950. The timeline in Appendix 1 profits from Lynn Nicholas' reading of the personal papers of those involved.

17 'Time-delayed looting' takes place when the passage of time freezes into permanency the saying, "possession is nine tenths of ownership". Such transfers can be legalized by ingenious legislative action taken retrospectively. Justification for continuing their retention can be made by calling payments 'questionable,' or claiming they were made to 'questionable' authorities. There are some who regard the Elgin Marbles in this light. Recently the lower house Parliament of Russia overrode Yeltsin's veto of their bill to retain archives and trophies of art, 308 to 15; see M.R. Gordon, 'Art Issues for Russia: Should It Retain Nazi Plunder?', *New York Times International*, 17 April 1997. Even the best of cultural intentions can suffer from insufferable obfuscation by being submitted to discourse by politicians; see for example the *Hearing on H.R. 12543 before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce*, 19 September 1966: 'A Bill to Amend the Trading with the Enemy Act to Provide for the Transfer of Three Paintings to the Federal Republic of Germany in Trust for the Weimar Museum.'

18 See note 11 above.

Though he wrote, "... it is useless to speculate as to the true reason for this act...", he nevertheless does speculate by suggesting two quite different reasons:

> Perhaps it was nothing more than a token shipment — a face-saving device that high authorities are sometimes forced to indulge in, once they find themselves committed to an unwise policy. Perhaps it was only because they are 'damned good pictures'.

For all who know how even 'high authorities' can squirm when they have done something foolish, Kuhn's first reason seems understandable. Yet if accepted, it would exculpate 'high authorities' from doing more than indulging in bureaucratic evasiveness. Kuhn's second reason could scarcely be attributed to Clay because we have no evidence that Clay gave any thought to the history of art and its 'damned good pictures'. To find out who might yearn for estimable paintings we shall have to look elsewhere. But first we should put to rest the keystone argument of the Press Release — that the Wiesbaden museum and its personnel were inadequate — by reviewing the Collecting Point's facilities.

Deterioration of the art works? For humidity control we used the time-honoured way of preventing air from becoming too dry by placing pails of water in the galleries. Though Col. McBride from the National Gallery of Art in Washington was told how the evaporating water kept the moisture level stable, he falsely reported our roof leaked and that the pails were set out to collect dripping water. With reports like these being sent, one can understand why the Press Release stressed the word 'perishable.' But we were not safeguarding fresh vegetables. Metal, stone, ceramic and glass works can endure wide temperature changes over centuries of time; though more sensitive to environment, so can paper and textiles. The fact that many of our old paintings 'lived' on castle and manor walls through centuries of weather without air conditioning, steady heat during winter, or humidity control, proves that up to a point they have considerable resilience.

Lack of fuel? Everyone except the people in Monuments thought this was a valid issue. The large piles of coal briquettes kept outside our museum were more than enough to carry us through the winter and spring. Edith Standon, who took over the direction of the Collecting Point after Capt. Farmer and I left in March, said there was no coal problem during the rest of 1946.[19] Reacting to Kuhn's article, which asserted that there was, in fact, sufficient coal, S. Lane Faison, Jr. of Williams College wrote a letter to the Editor in the *College Art Journal*:

> Sir: I think you covered the recent German fracas admirably. The only thing I missed was the suggestion of one despairing colleague that it would have been easier to ship the needed coal to Europe than the paintings to America. It wouldn't have been necessary to have experts wrap up the coal.[20]

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19 Standon letter to the present author, 12 October 1997. Concerning the coal situation, see the section, 'Interest of the United States in Establishment of Export-Import Machinery for Germany and in German Coal Production and Distribution,' pp. 1521-1558, *Foreign Relations of the United States: Diplomatic Papers*, 1945, vol. 3. European Advisory Commission; Austria; Germany. Government Printing Office; Washington, 1968. See also, G. Stolper, *The German Economy: 1870 to the Present*, New York: Harcourt, Brace, 1967, p. 197, and H. Feis, *Between War and Peace*, Princeton: Princeton University Press, 1960, p. 248 n. 2.

20 Vol. V, No. 4, (May, 1946), p. 381. The Journal incorrectly gave the author's name as J. L. Faisan, Jr. Coal in post-war Germany was indeed an important issue: quality of German coal was discussed at higher levels; coal was bandied about as barter material; it was exported to Russia and other countries; and it was being sent from the United States (see Harriman to the Secretary of State, 13 August 1945, in *Foreign Relations, Diplomatic Papers*, vol. 3, p. 1255). A further note: in Capt. Farmer's 8 December 1945 report to the Commanding General, Western Military District, it was written that "bricketts were delivered but not sufficient to stock pile for colder weather". Farmer did this because he realised that even though he had enough coal for winter, not to request more coal would spoil his chances for future allotments during the next year.

Safety? Not perfect, as we have admitted here: but then the Louvre didn't have a system perfect enough to prevent the *Mona Lisa* from being taken off the wall and out of the building 86 years ago.[21] And several important art works stolen from the Isabella Stewart Gardner Museum in Boston have not yet been found.

Personnel not available? It would be difficult to find someone more capable than Ernst Hollzinger, director of the Städelsches Kunstinstitut in Frankfurt, who worked with us. Our photographic team from Photo Marburg, Eva Marie Czako and Frau Christine Jost, were of first rate quality. Frau Flinch, our restorer (who did only the necessary first aid), was a protégé of Max Doerner, the leading figure in art conservation in Germany. Otto Seeler was our architect in residence and we also enjoyed the expertise of Drs. Frederich Bleibaum, Wilfrid Schoppa, Ferdinand Kutsch, and M. Bruckman.

There is one other Collecting Point circumstance that has never been mentioned. It occurred while the 202 paintings were being selected and packed in accordance with the Order of 6th November. Lamont Moore from the National Gallery in Washington came to supervise the selection and packing. He told Lynn Nicholas that because Wiesbaden held so many German-owned paintings, he did not have to look elsewhere but could use exclusively the list prepared by Walker and Swarzenski at the National Gallery.[22] My duty in this enterprise was to inspect each selected work for its condition and then send it to be photographed on large glass plates. Frau Hobirk recorded my verbal observations and typed up the report. It took us twenty hours a day for nine days to complete this task. When the packing of the 202 paintings into 45 boxes was nearly done, our workmen approached me with a letter they had written, a letter similar in spirit to our Manifesto. If the paintings were never to be returned, they wrote, they hoped they would not be branded as postwar criminals. I gave them permission to include their poignant letter of protest in the shipment, and they tacked it carefully to the inside of one of the boxes. It has never been disclosed whether this letter was ever discovered.

Once the shipment was on its way, justification propaganda rolled off the presses. An American newspaper published for Germans, *Die Neue Zeitung*, reported in its issue of 30th November that we had no heating fuel; *Stars and Stripes* of the same date told its readers that the art we sent had been looted. The *New York Times* of 7th December noted the secrecy with which the shipment arrived in this country and placed its value at $80,000,000. The overseas edition two days later stated that the paintings were Nazi loot. Deploring such misinformation, Edith Standon and Thomas Howe wrote the *Times* a joint letter, published in the edition of 2nd January 1946, avowing that none of the paintings were looted and none had dubious ownership.[23]

Less than two weeks later, Rensselaer Lee, President of the College Art Association, wrote to the Secretary of State that members of the CAA were disturbed by the action because it questioned the integrity of the United States. Declaring that adequate facilities did in fact exist in the American zone in Germany, he asked for a clarification of the action. On 25th January a reply came from Acting Secretary of State James W. Riddleberger, Chief, Division of Central European Affairs, stressing that their decision was based upon the September Press Release: that three separate investigations had proved that personnel and facilities were inadequate; and that because the coal situation was critical, Clay could not be expected to take heat away from hospitals.

Very little resulted from these exchanges. But a *Resolution* prepared by Frederick Mortimer Clapp (director of the Frick Collection) and Mrs. Juliana Force (director of the Whitney Museum) and sent to President Truman on 9th May 1946 caused a stir, undoubtedly because the 95 individuals who had signed were from leading museums and universities. One particularly biting section read:

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21 See above.

22 Nicholas, *op. cit.*, p. 395.

23 The full text of this and the communications to follow can be found in Thomas Howe's book previously cited: *Salt Mines and Castles*, pp. 290-317.

> ... whereas it is apparent that disinterested and intelligent people believe that this action cannot be justified on technical, political or moral grounds and that many, including the Germans themselves, may find it hard to distinguish between the resultant situation and the 'protective custody' used by the Nazis as a camouflage for the sequestration of the artistic treasures of other countries ...

Three answers to the *Resolution* letter from people in Washington added little to the excuses already given. However, the quick response from the Roberts Commission (14th May) ended with a paragraph which reveals more than the writers realised: "The Commission is strongly of the opinion that the resolution sponsored by Dr. Clapp, Mrs. Force and others, is without justification and is to be deplored."

Obviously, there was a growing disharmony between the Roberts Commission and the Monuments Officers in the field. Of those who had been associated with the Commission, only two signed the Clapp/Force Resolution: Daniel C. Rich of the Chicago Art Institute and Sumner M. Crosby of Yale University. Crosby, reportedly, wrote a letter of resignation when he heard about the September Press Release, which he considered to be a slap in the face to the Monuments effort as well as a veiled attempt by museums to appropriate art works.[24]

The rift between the two factions had been widening, partly because those abroad — who each day had to address new sets of concrete problems — and those who were fighting a paper war at home, inevitably saw things from a different perspective. It reached a point where the Roberts Commission finally acknowledged that special trips abroad had to be made because communications with those in the field had deteriorated.[25] As matters escalated, Paul Sachs, a Roberts Commission member, thought the rumored contents of the Wiesbaden *Manifesto* reflected the "silly talk" of the *New Yorker* article. When he learned of the protest letter written on behalf of the College Art Association he resigned in anger from the CAA, then:

> stormed down to Washington and aroused those morally lethargic gentlemen of the RC into cursing maledictions against all signators of the Manifesto and raising the most blood curdling din that all should be courtmartialed.[26]

The violence of this reaction suggests a deep-seated frustration. One cannot but wonder if Sachs was privy to a connection between the list John Walker asked Hans Swarzenski to make of top masterpieces, and to Walker's mark, 'NG' [National Gallery] on a list of important works of art that had been retrieved in Germany. And did he know that Finley, the director of the National Gallery of Art, wanted Walker to interest Clay in the great photographic archive of cultural objects at Marburg?[27]

Even Gen. Clay had his suspicions about the National Gallery. In his top secret letter to General Noce of April 4th, 1948, he concludes with this EYES ONLY statement:

> From the very beginning I have had serious doubts as to the real desires and intent of the directors of the National Art Gallery. Their representatives on an early visit talked about the possibility of obtaining these pictures either in reparations or in payment of occupation costs ...[28]

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24 R.W. Winks, *Cloak and Gown Scholars in the Secret War, 1939-1961*, 2nd edn., New York: Yale University Press, 1987, p.49.

25 *Report of the American Commission, op cit.*, pp. 21-24. It should be noted that the Report of 1946 makes no mention of the Wiesbaden Manifesto.

26 L. Nicholas, *The Rape of Europa, op. cit.* pp. 396-399.

27 *Ibid.*, p. 392, 395, and 401.

28 *Clay Papers*, vol. 2, pp. 615-616. The obituary for Walter Farmer published in *The Economist*, 23 August 1997, states: "The National Gallery of Art in Washington coveted 202 of these treasures ..." Thus the suspicion lingers.

However, Lynn Nicholas in her book discounts the bitterness felt by the Monuments personnel, as well as their suspicion that Francis Henry Taylor of the Metropolitan Museum of Art and John Walker of the National Gallery of Art wanted "to get something out of this war." Without citing her source, she claimed there is "... plenty of evidence that Treasury officials supported such a concept ..."[29] But if she had compared the items sent to those left behind, she would realise that the selection of the 202 disobeyed the November order in two significant ways: the addition of the Manet and Daumier oils from the National Gallery of Berlin, thus making the total 202;[30] and the inclusion of four Adam Elsheimer paintings, which could not be called " of greatest importance," while more than a dozen Rembrandts were passed over. Compared to Rembrandt, Elsheimer was a minor figure. Furthermore, one of the four Elsheimers was suspected not to be from his hand. Is it possible that because there were no paintings by him in our major museums, here was an opportunity to fill in the Elsheimer gap?

In his book, David Finley responded with generalities to the various protests being made about the 202. He avoided defending the position of the National Gallery by not bringing up the critical issues. Instead of facing core questions, he rolled off resounding phrases such as "unwarranted criticism" and "an outcry and extraordinary point of view set forth in the *manifesto signed by a few of these individuals*" (italics mine).[31]

It is doubtful if responsibility for the 202 will be found in a 'smoking gun' — in a paper trail leading to specific people writing down an official agreement. Instead, the scenario could well have been one like Louis Auchincloss describes in his novels about his own upper class, whereby gentlemen's agreements between those of high social station and power are made informally, in posh clubs and mansions. Such understandings have no need for the wordy truth of written contracts.

The issue of the 202 was kept simmering because of a continuing stream of letters written to newspaper editors, senators, and Washington officials. Finally, the Subcommittee of the Committee on Armed Services met to consider Senator Fulbright's bill (S. 2439) to retain the pictures temporarily so they could be sent on an exhibition tour prior to their return to Germany.[32] By 4th May 1949, after being seen by ten million spectators during its tour of the United States, the collection was returned to Wiesbaden.

Just as there were many American soldiers who looted independently during WW2, so did many Austrian, French and Russian soldiers.[33] But when it came to official looting or official reluctance to return looted art, the record chalked up by these countries ranges from poor to scandalous. Their behaviour did not produce an expression of gratitude as was shown to us by

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29 Nicholas, *op. cit.*, p. 400.

30 Cay Friemuth's assertion that after personally selecting the 200 paintings, F. H. Taylor of the Metropolitan Museum added the other two in order to please Eisenhower, is unsubstantiated by any evidence; see Cay Friemuth, *Die geraubte Kunst*, Braunschweig: Westerman, 1989, p. 108. Titles of the two works in question are: Daumier, *Don Quixote and Sancho Panza*, a gift of 1906 from Alfred Beit, London; and Manet, *The Greenhouse*, a gift of 1896 from Edvard Arnhold, E. and R. von Mendelssohn, and H. Oppenheim, Berlin.

31 D.E. Finley, *A Standard of Excellence*, Washington: Smithsonian Institution Press, 1973, pp. 155-169.

32 See Appendix 2: The Return to Germany.

33 Looting of art in the Far East theatre of war has, to my knowledge, been given scant attention. Though the Roberts Commission included a few specialists in Far Eastern art in their roster — as did the English — little seems to have been accomplished by them. A vivid description of the situation during the North Burma Campaign was given to me by Capt. Tom Bogardus, in charge of the Green Combat Team, one of six such teams making up the force known as Merrill's Marauders. Of the 425 men starting, 47 were alive after four months. In their 1,000 mile trek through the jungles they witnessed how each successive wave of soldiers, the British and then the Japanese, trashed villages, took food, looted or destroyed folk art and prayer ceremonies written on banana leaves, and raped. The natives of the area, the Kachins, were pleased that American troops did not act in this way. Bogardus reports, that "At no time before, during or after our training and combat service in Burma was there ever a mention of what to do if we ever found art works or anything pertaining to that aspect of war." Letter to present author from Bogardus, 10 October 1997.

the Dutch Government in 1946.[34] They did not tolerate whistleblowers as we did, nor were they encumbered by our sometimes clumsy democratic processes, within which individuals and organisations often bruise each other, even as they work toward the same goal. Compared to the looting indulged in by some European countries, our taking of the 202 was a mild transgression, one that was rectified early on. As President Truman declared, "There is no piece of territory or anything of monetary nature that we want out of this war."

Those who think legislation will effectively curb wartime looting take comfort in the body of prohibitory laws and codes compiled over the past several centuries. Though such injunctions can inhibit both individual and official looting, they often diminish during the heat of battle. The extent to which restraint eases depends upon many things — the prevailing morality, the enforceability of laws, the socio-economic structure of society, and the degree to which the political complexion of nations allows them to become renegade.[35]

Will there be looting of fine art in future wars? Probably yes. We cannot close our eyes to the world's long history of larceny, a history that transcends time, place, and religion. Andrea Alciati's pious dictum of the early sixteenth century — that because Christians are brothers, war between them would be civil war, in which case looting would have no place — is unrealistic. The looting of art will disappear only in an atomic or biological war, after which everything would be untouchable. In such a catastrophe, Joseph Brodsky's 1994 line becomes prophetic: "Lousy times; nothing to steal and no one to steal from...The legions return empty-handed from their far away expeditions."

APPENDIX 1: Time-Line with Commentary

July 15 1945 - *The Potsdam Conference opens in Berlin*
July 17 - *Evening meeting of Clay, Stimson, and Pauley*
Stimson and Pauley agreed that Clay should get approval for transporting German-owned and privately-owned art works to the United States where they would be held in trust until they "could be returned to proper German ownership."
July 18 (or 19?) - *Clay meets with President Truman*
At Potsdam, Clay obtained from President Truman a verbal agreement to send art works temporarily to the United States. The Roberts Commission's 1946 summary of the Potsdam Conference Agreement on Art Objects listed three classes: Class A consisted of art works taken from public and private collections by seizure and without compensation; works taken from private owners who were presumably given some compensation made up Class B; Class C material consisted of *bona fide* property of Germany. As the US occupation force lacked proper facilities and expert personnel, items from Class A were to be "removed to the United States as rapidly as arrangements can be made and distributed among the museums in the US properly equipped to handle these works of art." Class B remained moot; Class C, which would include the 202 paintings, had the following selfserving attachment: "It is not believed that the US should desire the works of art in Class 'C' to be made available for reparations and to be divided among a number of nations. Even if this is to be done, these works of art might well be returned to the US to be inventoried, identified, and cared for by our leading museums..."[36]

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34 See Appendix 2.
35 See Appendix 3 for a brief historical excursus on looting.
36 *Report of The American Commission for the Protection and Salvage of Artistic and Historical Monuments in War Areas*, Washington, 1946, p. 148. (henceforth referred to as Roberts Commission). Kurtz, *op. cit*, p. 124, gives evidence attributing instigation for this classification of art objects to Lt. Col. Leslie Jefferson. Jefferson,who succeeded Col. Henry J. Newton in the Reparations, Deliveries and Restitution Division, was in charge of the Division which included the MFA&A branch. He was a man who had no interest in art (Nicholas, *op cit.* p. 383).

July 29 - *The Potsdam agreement on art works leaked out*
Monuments headquarters in Frankfurt became aware of Clay's actions and reported them to Murphy and others. They tried to find out who originated the idea.
July 30 - *Memo to Clay from Murphy and Clayton*
Pauley and Clayton added this proviso: "If removed to the US it should be announced that they are being taken there only for care and safekeeping and that their eventual disposition will be subject to future Allied decisions."[37]
August 1 - *Byrnes to Molotov and to Bevin*
In Secretary of State Byrnes' letter to V. M. Molotov, People's Commissar for Foreign Affairs of the Soviet Union, the text of the Potsdam Conference Agreement on Art Objects was included plus a critical paragraph concerning Class C:

> It is contemplated that the third category of works of art will be shipped as rapidly as arrangements can be effected to the United States for care and safekeeping, for which adequate facilities do not exist in Germany. Their eventual disposition will be subject to future decisions.

On the surface this would seem reasonable because at that time Collecting Point Wiesbaden, destined to rescue the Berlin art works from their unhappy stay at the Reichsbank in Frankfurt, was not yet fully prepared to receive such a massive amount of material. There is no indication that those making such bold pronouncements about Class C had any idea of the enormity of the treasure or the purpose of Collecting Points. Molotov could not agree with the Class C disposition. He probably distrusted the notion of urgency for shipment as well as the possible malleability implied by the phrase, "will be subject to future decisions."[38]

Secretary of State for Foreign Affairs Bevin was sent the same memo as Molotov. Although Bevin did not get around to responding until 17th September, his letter contained information that could have dissuaded Clay from sending the Press Release of 26th September. He maintained that moving the art works to the United States would arouse unnecessary ill feeling, thus aggravating the problems faced by the Controlling Authorities; that the Allied countries who might need these works as restitution for works they had lost would feel resentful; and that transport overseas would be fraught with danger. His concluding point showed he was more aware of what the American MFA&A people were actually accomplishing than were the Americans:

> I note that you say there are no adequate facilities in Germany for their safe-keeping. I am bound to say, however, that this does not accord with my information and I suggest that the matter should be very carefully investigated before any action of the kind you mention is taken.[39]

Byrnes did not respond to Bevin's letter until 27th November, a few days after the shipment of the 202 was sent on its way. He excused his delay by saying that in trying to meet Bevin's desires he was obliged to conduct "involved discussions with a number of officials." He then reported that only "one carload" [!] was being sent because military authorities couldn't find adequate storage and that "experts in the field" strongly recommended the selection they had made — an obvious falsehood.[40]

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37 US Department of State, Foreign Relations of the United States, Diplomatic Papers, 1945, *The Conference of Berlin*, vol. 2, Washington, D.C, United States Government Printing Office, 1960, p. 924: 'Memorandum for Gen. Clay (July 30) from Edwin W. Pauley, Representative on the Allied Commisssion on Reparations, and William L. Clayton, Assistant Sec. of State.'
38 'Foreign Relations of the United States: Diplomatic Papers, 1945' Washington, US Printing Office, 1967, vol. 2, p. 946.
39 *Ibid.*, pp. 949f.
40 *Ibid.*, p. 955.

August 1 and 7 - *Angry responses*
John Nicholas Brown — socially prominent, amateur art historian, cultural advisor appointee to the American High Command — was so upset by the recent turn of events, he thought of returning home to dramatise his discontent. Clay wrote to the War Department about Pauley's and Clayton's lack of cognisance of the agreement President Truman made at Potsdam:

> This is of course in conflict with informal approval of President. I am apprehensive that removal of German art without statement of future intent to return would not be acclaimed by public at large.[41]

August 10 - *Brown to Clay and others*
Brown, dismayed that he had not been consulted, informed Clay that personnel was available and that the Collecting Points were now ready to provide safekeeping for the paintings. To express his anger he pointed to the "questionable legal fiction of trusteeship" which seemed to him and the Monuments people "immoral and hypocritical". Two days later he wrote to his wife that he felt like a failure because his consistent advice not to take German-owned art works was being rejected. On 14 August he met once more with Clay to argue his point, but Clay did not budge.
August 14 - *Byrnes to Pauley and Clayton*
During August Byrnes continued to mull over the problem. In his letters to Murphy and Clayton, he reported that State approved of Clay's proposal to transfer the art works. However, he emphasised the need to inform the Germans that we were "not appropriating German art treasures"; that we shouldn't be accused of 'cultural looting'; and that some items may be required for restitution of destroyed or irreparably damaged items.[42]

Lynn Nicholas records several revealing events presumably occurring around this time: John Walker of the National Gallery, who was a Roberts Commission's emissary to Europe, got wind of Clay's proposal on 14th August; Dinsmoor and Taylor of the Roberts Commission felt it proper that Americans could now see the art works; Taylor made a statement, which in no uncertain terms demonstrated the Commission's hard attitude, that he would:

> interpose no objection to whatever decision the Government would make regarding the use of cultural objects for reparation purposes ... the American people had earned the right in this war to such compensation if they chose to take it.[43]

August 20 - 57 trucks brought the art works of the Berlin museums from the Reichsbank in Frankfurt to the Wiesbaden Collecting Point.
August 28 - *Byrnes to Clayton*
Byrnes worried about the claim we had no obligation to tell the Germans they needed to make replacement in kind. We should not, he said, drop our intention "to replace looted art destroyed or not found." For substantiating his position he cited the agreement of 5th June on restitution made by the State-War-Navy Co-ordinating Committee and the Roberts Commission:

> If works of art, books, historic or artistic archives and other artistic or historic property known to have been looted cannot be found within a period of two years after the unconditional surrender or defeat of Germany, there shall be an obligation on Germany to replace such articles by comparable objects from German public or private collections.[44]

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41 *Clay Papers*, 7 August pp. 57f.
42 *Ibid.*, p. 945.
43 Nicholas, *op. cit.*, p. 388.
44 'Foreign Relations', *op. cit.*, p. 948.

August 31 - *Meeting of the Roberts Commission*
It is clear that the Roberts Commission played an important role in establishing the mind-set about art that prevailed in Potsdam. But within their ranks disagreements were beginning to surface. The Commission's secretary, Charles Sawyer, expressed suspicion of Pauley's stern measures: "the physical presence of these objects in the country would lead to strong pressure to retain at least some of them under some pretext or another."[45] He was aware of the possibility of 'time-delayed looting'.
September 4 - *Clay for War Department*
Clay still waited for final word "relative to removal of German owned cultural and art objects to the US to hold in trust for the German people." Murphy of the State Department advised him that these objects should be available for "replacement in kind for articlesremoved from the liberated countries which cannot be found." For Clay, this work could be better done in the US.[46]
September 11 - *Acheson to Murphy*
The State Department had fashioned all but the last sentence of the lead paragraph for the eventual Press Release. The inflammatory word 'perishable', emphasised in the Press Release of 26th September, was still lacking. Additions were expected so as to counter "rumours and anticipated criticism." Four days later Murphy in Berlin notified State that "the US Group Control Council planned to make an announcement concerning the removal of art to the US on 17th September. He wanted to add the following sentence to the version of 11th September: "The return of readily identifiable art objects to the liberated countries is already underway." Having too many cooks was diluting the prudence the project badly needed.[47]
September 14 - *Acheson to Finley, Director of the National Gallery*
This communication officially confirmed the National Gallery as the storage place for the imported art. Acheson reported that Clay wanted to know how much space would be needed because shipments were to begin shortly. Acheson's Department of State was aware of "the marginal propriety of this arrangement." Mason Hammond, Chief of MFA&A in Europe, obtained an interview with Clay, pled his case, citing morality, poor publicity, and great difficulty, as three reasons for not going through with the plan.[48]
September 21 - *Clay to McCloy*
Five days before the Press Release, Clay informed Assist. Sec. of War John J. McCloy — who had become worried about the plan — that conditions for storage in Germany had improved. He bolstered the justification of his planned press release by describing how he caught the Monuments people in double-talk: how could Monuments officers argue for the return of art objects to "liberated areas on the grounds that our facilities were entirely inadequate to protect these pieces" if at the same time they were against removal of art objects to the United States because facilities in the US zone were indeed adequate? Clay claimed the Monument Officers' worry about art objects fueled his own concern.[49]
September 25 - *Dissension in the Roberts Commission*
For their meeting to discuss the imminent shipment of the 202, the Commission invited Crosby, Brown, Walker, Stout and Plaut to attend. After making them wait for ninety minutes, each of the five men was allowed a few minutes to give his view about the transfer. The papers they had prepared were collected for a later reading. The papers emphasised three things: the dangers of transportation; the similarity of our language to phrases used by the Nazis; and the necessity of

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45 Nicholas, *op. cit.*, pp. 388f. See note 17 above for a description of 'time-delayed looting'.
46 *Clay Papers*, 4 September, 45, From Clay for War Department.
47 *Op. cit.*, 'Foreign Relations', pp. 948f; Acheson, Acting Secretary of State to Murphy, US Political Advisor for Germany, 11 September; and Murphy to the Secretary of State, 17 September.
48 Nicholas, *op. cit.*, p. 389.
49 *Clay Papers*, vol 1, p. 83, from Clay for McCloy.

exhibiting the paintings when they arrived in the United States. John Walker of the National Gallery said he thought the moral issue had been taken care of by President Truman's promise at Potsdam. He also said that while the Collecting Points were adequate, there were hundreds [!] more he did not have information about, and thus he would not be able to take a stand for or against. He then exposed his bias and his position on the inside track by saying if we wanted to be wise custodians we should bring at least part of the treasures to this country for safekeeping.[50]

September 26 - *The Press Release is issued*

September 27 - *Clay for War Department*

Clay suggested that a British, French and Russian discussion on German art and cultural objects might yield an agreement for retaining German objects in Germany. This, he wrote, would "reduce our responsibility for storage and safeguarding".[51]

November 14 - *Clay to Gen. Hilldring*

When the packing of the 202 was nearly complete, Clay changed his mind about "replacing unique cultural works with similar or comparable property as restitution." He then made a tardy confession: "I am of view, in any event, that this [German art in the American zone] should be returned to other zones of occupation where it originally came from before it is used for replacement purposes."[52]

This is as close as he came to admitting a mistake. Curiously, if the Berlin Museum contents were sent back to Thuringia they would fall into the hands of the Russians, something that Clay had been fearful of all along.

The September Press Release and November Order are remarkable for their inclusion of error. All the paintings from the Kaiser Friedrich Museum collection could have been readily identifiable as *bona fide* unlooted items simply by looking them up in the museum's catalogue.[53]

APPENDIX 2: The Return to Germany

Attempts were made to get congressmen interested in the problem of the 202, but more often than not questions were defused by evasive excuses. When Senator Robert M. La Follette, Jr. looked into the problem at my request in June of 1946, he reported back to me that Mr. Cairns of the National Gallery said that the paintings were soiled, needed attention, and that "they are now being cleaned." Not knowing that only first aid was given in the National Gallery out of respect for the understanding that no one cleans a museum's paintings except the museum itself, the Senator let the subject drop. The Milwaukee Journal (9th May 1948) characterised those who protested bringing the 202 to this country as a "croaking of a frog's chorus."

It is probable the exhibition of 7th December 1946, 'Paintings Looted From Holland,' was responsible for the decision to exhibit the 202 paintings prior to their return. This Dutch exhibition travelled to fourteen cities before closing on 1st January 1948.[54] It was Holland's way of thanking the United States Army for returning Dutch art looted by the Nazis. Only a few months after these art works went back to Holland, the Subcommittee of the Committee on Armed Services met (4th March, 16th April 1948) to consider Senator Fulbright's bill (S.2439) to temporarily retain the 202 so they could be exhibited in this country.

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50 Nicholas, *op. cit.*, p. 391.

51 *Clay Papers*, vol. 1, pp. 85f. One cannot help but wonder if Clay began to feel guilty about his unilateralism and was establishing, after the fact, a paper trail that would show he desired Allied cooperation.

52 *Clay Papers*, vol. 1, 13 November 1945, Clay, Personal to General Hilldring.

53 *Staatliche Museen Berlin, die Gemäldegalerie*, Berlin: Paul Cassirer Verlag, 1929 (listed by Frl. Dr. Irene Kunze).

54 This well-illustrated catalogue contained lists of patrons and of Monuments, Fine Arts and Archives personnel. A. P.A Vorenkamp, C.G.R. Representative of the Netherlands wrote the introduction. It was published by the Plantin Press, New York.

The meeting of the Subcommittee proceeded with both civility and a touch of sanctimony. Colonel Riggs of the Civil Affairs Division of the Army was quick to point out that the US had acted in good faith from start to finish. The Hague Commission of 1907 and the Army Basic Field Manual were cited to prove the high moral standards of the country.

The printed report of the meeting began with Riggs' use of the Clay press release of 26th September 1945. It closed with a letter from Charles Bohlen, Counsellor for the Acting Secretary of State, who echoed a similar sentiment: "In view of the lack of adequate housing facilities for these priceless paintings, and the lack of adequate personnel for their care, the decision was made to transport them to the United States for safekeeping." No one challenged this assertion. Not one Monuments officer who had experienced the realities of the situation in 1945 was brought in to testify. If they had been invited, the senators could have heard testimony directly from L. Bancel LaFarge, previous head of the MFA & A Section of Military Government for Germany who worked as an architect in New York City. In lieu of participation, LaFarge wrote a letter to the *New York Times* on 22nd April, deriding the notion of 'safeguarding' when only a handful (202) of items were sent, thus "disregarding equally important Berlin sculpture and vastly more numerous illustrious cultural objects from Munich, Frankfurt, or other famed collections ..."

General Clay's Press Release was treated as if it had been written in stone. Ignorance and side-stepping had their day during the Subcommittee meetings. When asked if the conditions in Germany had improved sufficiently to justify returning the paintings, General Draper, Under Secretary of the Army, said, "I cannot answer the question specifically..." John Walker, Chief Curator of the National Gallery said flatly that he did not know.

There was much talk about how embarrassed the occupation authorities would be if the shipment back to Germany was postponed. Warnings were made about the prospect of returning these paintings to Europe if the Russians were indeed planning a take-over, and the old questions about the fragility of images painted on wood was laboured (141 of the 202 were painted on wood). When all the talking stopped, fifty fragile paintings were returned while the others were exhibited around the country to an audience of about ten million people. Fulbright's wish to feed, clothe, and inoculate German children was fulfilled at a cost of $305,964, the sum earned from entrance fees to the exhibitions.[55]

By 4th May 1949 all the paintings were returned intact to Wiesbaden.

APPENDIX 3: Excursus on Looting

Shifting European attitudes about the spoils of war provide a landscape upon which positions prevailing from 1939 to 1946 made their grim march. Hitler and his henchmen inherited the zest of some of the greatest looters of all time, namely the Crusaders who worked in collusion with the city of Venice in the year 1204. Without compunction they carried away over half of the wealth and art of Constantinople. For those who justified unlimited rights of looting as rights of the victor, this was the prime model. Not to exploit fruits of victory must have been considered naive. In this light the Germans and the Soviets in WW2 would appear as exemplars.

55 I. Kühnel-Kunze, *Bergung - Evakuierung - Rückfuhrüng: Die Berliner Museen in den Jahren 1939-1959*, Berlin: *Gebrü.* Mann Verlag, 1984, p. 387.

Fritz Redlich in his pioneering study of the spoils of war in European history, *De Praeda Militari*, describes the marriage between looting and military operations. He explains how restrictions imposed upon the taking of booty evolved as a reflection of the changing nature of military technology and the structure of the society served by that military.[56]

According to Redlich, looting in the Middle Ages was taken for granted. During the Renaissance certain restrictions applied, particularly in the Articles of War which soldiers had read to them when they were mustered. Because these rulings were difficult to enforce, some rulers such as King Gustavus Adolphus of Sweden gave the order in 1621 that any soldier looting independently — without the permission of his CO — would be clubbed to death on the spot. It was commonplace for soldiers to check their loot with their CO so he could extract his part. In the Diet of Augsburg (1500) we are told that the Commander received one third of the loot gathered. There was an effort made to protect the 'innocents' — monks, friars, priests, foreigners, merchants, peasants, women, children and the poor — if it helped the war effort. Commanders worried about the timing of looting: if it began too early the thrust of the operations might be endangered, allowing the enemy to rally. Attempts were made to prohibit wanton destruction, such as destroying houses or chopping down fruit trees. The thought prevailed that one could despoil an enemy if it had been considered honorable to kill him.

Napoleon broke the slowly developing trend of curtailing looting by increasing the use of conscripts and by his casualness in provisioning his troops. The ten volumes of art, *La Galerie Napoléon* published between 1804 and 1815, containing many looted art works, could have served as a model for Nazi art fanatics.[57] Still, as the modern State emerged, so did new concepts of war. The new mercantilism argued that private property should be respected so that the captured country would be worth capturing. American soldiers learned that war and business can be insidiously related when they entered Frankfurt at the end of WW2 and saw the contrast block after block of demolished citizen homes made to the untouched Hoechst Chemical Plant and the I.G. Farben buildings.

The 'Lieber Code', promulgated by President Lincoln (24th April 1863), The Declaration of the Conference of Brussels (27th August 1874), and the Hague Convention of 1907 (Annex , Section 3, Article 47), were symptomatic of modern attempts to tame the excesses of war.[58] Their rules against pillage in general and art works in particular held high promise for decency in warfare. However, such high-flown idealism often withered during the passions of WW2.

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56 *'De Praeda Militari: Looting and Booty 1500-1815' Vierteljahrschrift für Sozial und Wirtschaftsgeschichte*, Beiheft Nr. 39, Wiesbaden: Franz Steiner Verlag, 1956. Redlich, an economic historian, said he did not feel qualified to deal with the looting of cultural objects. He declares, however, that such a subject "cries out for a historical treatment" (viii). Some of the gap is filled by H. Trevor-Roper, *The Plunder of the Arts in the Seventeenth Century*, London, 1970. The probing study made during the immediate aftermath of the First World War, edited by P. Clemen, ('Protection of Art During War: Reports concerning the condition of the monuments of art at the different theatres of war and the German and Austrian measures taken for their presevation' Leipsic: E. A. Seemann, 1919), describes interactions between the opposing sides that make a meaningful contrast to the well-organized brutal looting of totalitarian countries during the Second World War.

57 Filhol, *Galerie du Musée Napoléon*, Paris: l'Imprimerie de Gillé Fils, 1804-1815. Also see, D.M. Quinn, 'The Art Confiscations of the Napoleonic Wars', *American Historical Review*, 50, No. 3 (April, 1945), and more recently, Cecil Gould, *Trophy of Conquest*, London: Faber and Faber, 1965.

58 Listing of many of these attempts and others can be found in Isabel McBride, ed. 'Who Owns the Past', *Papers from the Annual Symposium of the Australian Academy of the Humanities*, Melbourne: Oxford University Press, 1985, pp. 121-124; and extensively in E. Simpson, ed., *The Spoils of War*, New York: H.N. Abrams, 1997, pp. 272-311.

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THE PAYMENT OF AMERICAN CREDITORS FROM VESTED ASSETS

MALCOLM S. MASON AND SAMUEL EFRON*

ON July 25, 1941, all assets of the United States Branch of Assicurazioni Generali di Trieste e Venezia were taken over for administration by the New York Superintendent of Insurance upon a voluntary petition for liquidation. Hartwell Cabell, a New York attorney, filed a claim for reimbursement for legal services which he asserted he had rendered to the New York Branch. The claim was disallowed by the Superintendent on the ground that the services were for the benefit of the Home Office rather than for the Branch and, therefore, was not payable in the liquidation of the United States Branch. In October and December 1942, the Alien Property Custodian issued vesting orders transferring to himself funds and properties in this country of the Italian company. Cabell filed with the Alien Property Custodian a claim and brought suit on his claim under Section 9 of the Trading with the Enemy Act, asserting in substance that he was a person not an enemy or ally of enemy to whom a debt was owing from an enemy whose property had been seized by the Custodian.[1]

The Custodian resisted this claim, pointing out that Section 9 was a World War I provision and in terms permitted debt claims to be filed only on claims owing to and owned by the claimant prior to October 6, 1917.[2] The Government contended that the World War I debt claim provisions accordingly were no longer applicable and that Congress had not intended to revive them. The Government's position was that the World War I debt claim provisions did not make sense in the context of the World War II statute, particularly in the light of the development in World War II of the

* Mr. Mason is Chief of the Legal Branch, Office of Alien Property. Mr. Efron is Chief of the Debt Claims Section, Claims Branch, Office of Alien Property. The views expressed herein are not necessarily the views of the Department of Justice.

[1] Section 9(a) of the Act (50 U.S.C. App., sec. 1 et seq.) in pertinent part provides: "Any person not an enemy or ally of enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require * * *."

[2] Section 9(e) in pertinent part provides: "* * * nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917 * * *."

system of freezing control.[3] The Government urged that since a creditor of a debtor whose property had been seized had no constitutional right to recovery of the seized property,[4] it was appropriate that Congress be afforded an opportunity to re-examine the entire problem of what remedies, if any, should be afforded such creditors and to establish a consistent system for this purpose. In particular, the Government emphasized the undesirability of the race of diligence that would result under the World War I system where the rule of first come first served had been established by case law.[5] The Government's position was sustained in the District Court[6] but reversed by the Circuit Court of Appeals for the Second Circuit[7] and was submitted to the Supreme Court on certiorari.

The Supreme Court concluded that Section 9 had continued vitality and that the time limitation of Section 9(e) must in effect be blue-pencilled from the statute.[8] The court expressly reserved, however, the question whether Section 5(b) of the Trading with the Enemy Act, the provision under which the principal freezing control and vesting powers are exercised in World War II, authorizes action by the Government which would prevent the payment of a judgment obtained under Section 9 or alter the procedure under Section 9. The opinion suggested that the policy questions involved should appropriately be submitted to the Congress.

Accordingly, the Government drafted and submitted to the Congress a new comprehensive bill providing, among other things, for payment of debt claims in appropriate cases.[9] This proposal resulted in the amendment of the Trading with the Enemy Act on August 8, 1946 by the addition of Sections 33 through 38 (Public Law 671, 79th Cong., 2d Sess.). Section 34 provides the new debt claim remedy. Mr. Cabell meanwhile returned to the District Court for further proceedings pursuant to his qualified victory in the Supreme Court and the case was there dismissed on the ground that the new Section 34 procedure was the exclusive remedy for payment of debt claims.[10]

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[3] Executive Order No. 8389 of April 10, 1940, as amended, imposed freezing controls on certain foreign countries and prohibited, generally, financial transactions involving nationals of these countries or their property, except as licensed by the Secretary of the Treasury.

[4] *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491 (1923). *Cummings* v. *Deutsche Bank und Disconto-Gesellschaft*, 300 U. S. 115 (1937).

[5] *U. S.* v. *Securities Corporation General*, 4 F. (2d) 619 (1925) (55 App. D. C. 256), affirmed 269 U. S. 283 (1925).

[6] *Cabell* v. *Markham*, January 3, 1945, U.S.D.C., S.D.N.Y. (1945) (Civ. 26-302).

[7] *Cabell* v. *Markham*, 148 F. (2d) 737 (1945).

[8] *Markham* v. *Cabell*, 326 U. S. 404 (1945).

[9] Earlier bills on this subject had not been reported out of Committee.

[10] *Cabell* v. *Clark*, 69 F. Supp. 640 (1946), affirmed 162 F. (2d) 153 (C.C.A. 2, 1947).

The Act had been amended earlier that year by the addition of Section 32 (Public Law 322, 79th Cong., 2d Sess., effective March 8, 1946) which provides a discretionary administrative procedure authorizing returns of vested property to former owners upon certain findings establishing, among other things, that such owners are citizens of the United States or fall into one of several categories of non-hostile persons, and that the return is in the interest of the United States. There are thus two principal claim systems—one under Section 32 providing for title claims and one under Section 34 providing for debt claims. In addition to these new claim provisions, court recourse for the return of property vested by mistake continues to be provided by Section 9. If, for example, property is vested as enemy but actually belongs to an American citizen, he may elect to proceed under the judicial remedies of Section 9 or under the discretionary administrative remedies of Section 32.

The administration of the claim provisions, originally conferred upon the Alien Property Custodian, has been transferred with other functions by Executive Order to the Attorney General [11] and placed by him in the Office of Alien Property, Department of Justice, which is headed by an Assistant Attorney General who is the Director of the Office.[12] Within the Office of Alien Property there has been established a Claims Branch charged with the administrative handling of both title and debt claims and the development of the record and protection of the interests of the Office in administrative claims proceedings. The function of hearing contested claims has been conferred upon Hearing Examiners in the Hearing Examiners Branch headed by a Chief Hearing Examiner for Title Claims and a Chief Hearing Examiner for Debt Claims. Provision for review of administrative decisions by the Director or Deputy Director is also made. The procedures are set forth in Rules of Procedure for Claims promulgated by the Office on August 14, 1947, and published in the Federal Register.[13]

Some 35,000 debt claims have already been filed, and it is anticipated that in excess of 50,000 debt claims will eventually be asserted. The claims filed include attorneys' claims based on services rendered, unpaid alimony claims, claims for refunds on unused steamship tickets, claims for personal advances and the whole gamut

[11] Executive Order No. 9788, 11 F. R. 11981, October 14, 1946.

[12] §51.81, Title 28, C.F.R., October 15, 1946, 11 F. R. 12045, December 2, 1946, 11 F. R. 14135, May 29, 1947, 12 F. R. 3625; §500.1 (a), Title 8 C.F.R., October 17, 1946, 11 F. R. 12436, December 2, 1946, 11 F. R. 14155, June 1, 1947, 12 F. R. 3602.

[13] 12 F. R. 5565, August 19, 1947.

of commercial transactions. The staff devoted to these claims has been small, and the volume of work is tremendous.[14] A straightforward and intelligible procedure has been established, however, and is getting into motion.

Whose Claims May Be Paid

Claims allowable include only those of United States and Philippine corporations and citizens and of other persons who are and have been since the beginning of the war residents of the United States. The claims of foreign creditors are not allowable unless they have been acquired by the Office of Alien Property. In that event, they may be allowed but they do not have the priority which debts due the United States ordinarily enjoy. A United States resident who is not a citizen of the United States is not eligible if during the war he was interned or paroled pursuant to the Alien Enemy Act, and the claims of persons who since the beginning of the war have been convicted of violation of the Trading with the Enemy Act, as amended, or of certain provisions of law relating generally to wartime offenses are barred.[15] Legal representatives and successors in interest by inheritance, devise, bequest or operation of law [16] are eligible as claimants if their principals or predecessors and they themselves are not disqualified. It will be noted that the statute makes no provision with respect to the eligibility of partnerships and unincorporated associations. In such cases, the Office of Alien Property tests the eligibility of the claimant by the eligibility of the individual members of the partnership or association.

What Property Is Subject to Claims

The property against which claims may be filed is that which before vesting was owned by the individual debtor. There is no attempt to devote the entire mass of vested property generally to the claims of the creditors of all enemy debtors. It may be noted that the statute provides for payment of the debts owed by the person who owned the property immediately prior to vesting or transfer to the Alien Property Custodian (or the Attorney General

[14] In addition to the task of receiving, acknowledging and docketing claims, the Claims Branch of the Office of Alien Property has a correspondence load in excess of 2,000 letters monthly. This is, of course, merely preliminary to the actual analysis, review and determination of claims.

[15] Section 34(a).

[16] The statute provides for successors in interest by operation of law but not successors in interest by *inter vivos* act. The Claims Branch has taken the position that the Assignment of Claims Act (R. S. 3477, 31 U.S.C. 203) is applicable to debt claims, and, accordingly, no claim will be recommended for allowance if it was assigned after vesting.

as his successor). As a result, the enemy character of the debtor is not a jurisdictional fact.[17] It is enough to show that the debtor owned the property prior to vesting.[18] If the debtor is not an enemy he may remove the property from the scope of the debt claim statute by filing claim for return within certain time limitations provided in the statute. Section 34(b) of the Act provides: "nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of * * *" 120 days after publication of a bar order affecting claims in respect of the particular debtor concerned.

Public Law 370, 80th Cong., 1st Sess., makes Italian nationals eligible for return of property vested in or transferred to the Attorney General or his predecessor, the Alien Property Custodian. The Office of Alien Property does consider for allowance debt claims against property which was vested as that of Italian nationals; it does not, of course, consider for allowance debt claims against property which it has determined should be returned to Italian nationals. However, all persons who have asserted debt claims against property which is being returned to Italian nationals will receive adequate notice of the intention of the Office of Alien Property to return such property. Creditors may avail themselves of the remedies provided by Section 32(f) of the Act, which subjects property returned to foreign nationals to attachment by American citizens, residents and corporations.

It is very important to note that creditors' claims may be paid only out of money available after deduction of expenses of the Office of Alien Property and taxes and a cash reserve for future payment of expenses and taxes. The Attorney General as successor in interest to the Custodian is not required to liquidate property held by him in order to make money available for the payment of debt claims, and the statute specifically protects him against court action to require liquidation for that purpose.[19]

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[17] This provision of the statute also has the effect of making it applicable in terms at least to cases where liquidating dividends have been paid to the Custodian as stockholder in a corporation under the mistaken belief that all valid creditors' claims have been discharged.

[18] As a matter of ordinary course, the Office of Alien Property will treat as the pre-vesting owners of the property the persons found to be the owner by the vesting order if the owner is named. The question has not yet been resolved as to whether it will be open to a creditor who desires to file a debt claim to offer proof that some other person was the true owner.

[19] Section 34(d). See the explanatory statement of John Ward Cutler, formerly General Counsel of the Office of Alien Property Custodian, discussing the corresponding provision of an earlier bill (H. R. 4840, 78th Cong., 2d Sess.). House Hearings, p. 121. Cf. also Senate Report 1839, 79th Cong., 2d Sess. on S. 2378. The latter bill is identical with H. R. 6890, which was enacted into law.

What Types of Claims May Be Allowed

The statute does not define the classes of debts that may be allowed. Any class of contract claims may apparently be presented. Tort claims would not appear allowable unless they have been liquidated by judgment.[20] The Claims Branch has not as yet resolved the problem of the effect which will be given to debt claims based upon prior judgment. It would appear, however, that a prior judgment obtained in a contested case (for which appropriate Treasury license had been obtained, if one was required) will be given full effect as the debt. Where the debt claim is founded upon a default judgment or one which was unlicensed, the basic obligation rather than the judgment would appear to be the debt.

The statute specifically provides that debt claims should be allowed if "due and owing" at the time of vesting. Obviously, claims arising after vesting cannot be honored. To do so would be to permit the enemy in effect to recover the benefits of the vested property by creating obligations payable out of it. Certain special problems arise, however, in the application of the "due and owing" test which have not as yet been resolved. Suppose, for example, a note was executed prior to vesting but did not mature until after vesting. In the ordinary sense, it was not due and owing at the time of vesting but all of the policy objections applicable to claims arising later may not be present in such a case. Similar and perhaps more difficult problems are presented in cases involving post-vesting installments of continuing obligations such as lifetime retirement pensions or alimony decrees. The problem may be further complicated where the obligation is conditional. The case of a guarantor of a bond which went into default after vesting was considered in *Sutherland* v. *Kanawha Valley Bank,* 48 F. (2d) 1027 (C.C.A. 4, 1931), under the World War I statute. The court held that such an obligation constituted a debt which was "owed to and owned by" the claimant prior to October 6, 1917, the cut-off date employed in Section 9. It is not clear whether the same result will be reached under the new statute which requires that the debt be "due and owing" rather than "owing to and owned by" the claimant.

The payment of interest on debt claims raises a special and complex problem. Whether interest is payable depends in the first place on whether the debt is to be considered a debt of the United States and secondly, on whether the interest was due and owing at the time of vesting. The statute imposes an obligation on the Gov-

[20] *Stasi* v. *Markham,* 69 F. Supp. 163 (D.C.N.J., 1946).

ernment to pay debts within the limitations set forth, and a claim or suit seeking the payment of a debt claim is clearly a suit against the United States.[21] It does not necessarily follow, however, that the statutory obligation of the Government to pay makes the claim one for payment of a debt of the United States, and the contrary has been held.[22] If this precedent is still applicable, and it appears consistent with the purpose of the legislation that it should be considered applicable, debt claims are not affected by sovereign immunity and interest is not barred. Under the terms of the statute, however, interest would appear payable only if due and owing at the time of vesting and only if, as a matter of the applicable law, the interest is to be deemed part of the debt. The Claims Branch of the Office of Alien Property has adopted this position.[23] The claimant may, of course, waive interest and in many cases, claimants have done so in order to avoid the necessity of proving that interest is part of the debt under local law and thereby secure more expeditious action on their claims for the principal amount owed.

Since only those claims may be paid which were due and owing at the time of vesting, it is important to know when a vesting becomes effective. General Order No. 33 of the Office of Alien Property (10 F. R. 1363, February 2, 1945) provides in general that property "shall be deemed to have vested at the time of filing of the vesting order with the Division of the Federal Register." Vesting orders are published in the Federal Register and the filing date is noted there. In the case of patent, trademark and copyright interests, however, if the vesting order has been filed with the United States Patent Office or Copyright Office prior to filing with the Division of Federal Register (and this is the usual case) the earlier filing makes the vesting effective. In the case of real estate interests, a vesting order is deemed effective as to subsequent purchasers or lienors without actual notice when the vesting order is recorded in the appropriate public recordation office. This is normally after filing with the Division of Federal Register. Accordingly, an unsecured creditor would be bound by the Federal Register filing date.

The statute bars the payment of any debt claim arising from

[21] *Miller* v. *Robertson*, 266 U. S. 243 (1924).

[22] *Miller* v. *Robertson, supra; Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591 (1924), affirming 289 Fed. 924 (App. D.C., 1923).

[23] It is of interest to note that in the case of claims for taxes, no interest is payable from the date of vesting as long as the property is held by the Attorney General. If the property should be returned, the immunity continues for a period of six months after return. Section 36(c) and (d) of the Trading with the Enemy Act and the Bureau of Internal Revenue regulations issued thereunder, sec. 452a.26. It appears unlikely that the Congress intended that private debt claimants should be put in a more favorable position with respect to interest than Government tax agencies.

an action or transaction prohibited by or prohibited pursuant to the Trading with the Enemy Act and not licensed or otherwise authorized pursuant thereto. This provision relates primarily to the necessity of appropriate licensing under the freezing controls. In general, necessary licenses should have been obtained in advance of the transaction. The freezing control contemplates, however, that retroactive licenses may be granted in appropriate cases.[24] As a matter of general policy, neither the Foreign Funds Control of the Treasury Department nor the Office of Alien Property of the Department of Justice grants retroactive licenses after vesting has taken place.[25] If an exceptional case should arise where it can be established that the failure to obtain a license before vesting was inadvertent and innocent and that an injustice would be done by refusing such a license, the case would, of course, be given consideration.

Tax claims, Federal, state and local, need not be filed as debt claims, since special provision is made for the administrative payment of tax claims under Section 36 of the Trading with the Enemy Act. Tax claims enjoy a priority over private debt claims since, as has been noted, only such monies as are available after provision for expenses of the Office and taxes has been made, may be devoted to the payment of debt claims.

Where a debt claimant has a lien, he may assert his lien as a title claim under Section 9 or Section 32 of the Trading with the Enemy Act. Lien interests are recognized by the Office of Alien Property as proprietary interests which may be the subject of a return under those provisions.[26] A secured creditor may, however, elect to seek payment under the debt claim provisions of Section 34 without waiving any rights that he may have as a secured creditor. The practical advantage of such an election is that the administrative procedure for the determination of debt claims is simpler than that required for the return of property. In several cases, secured creditors have in fact made such an election.

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[24] General Ruling No. 12, U. S. Treasury Department, Documents Pertaining to Foreign Funds Control; see Berger and Bittker, *Freezing Controls: The Effects of An Unlicensed Transaction,* 47 Col. L. Rev. 398 (1947).

[25] The position of the Treasury Department has been publicly stated in General Ruling No. 19 and Public Circular No. 31 of the United States Treasury, Documents Pertaining to Foreign Funds Control.

[26] Decision of Michael F. Kresky, Chief Hearing Examiner, in the *Matter of Aaron & Dautch and Kramer & Leavitt,* Docket No. 84, Title Claim No. 1416, September 17, 1947.

Time Limits on Filing Claims

The statute creates periods of limitation which must be observed. Debt claims must in any event be filed within two years from the enactment of Section 34 (August 8, 1946) or within two years from the time of vesting, whichever is later. In the event that property of the same debtor has been vested by several vesting orders, the two-year period runs from the time of the last vesting. The Office of Alien Property may fix earlier bar dates with respect to particular debtors, giving at least 60 days' notice thereof by publication in the Federal Register. A general bar order was originally issued fixing June 1, 1947 as the date after which there could be no consideration of debt claims filed thereafter in respect of debtors whose property was vested prior to January 1, 1947 (12 F. R. 1448, March 1, 1947). This was subsequently extended to September 2, 1947 (12 F. R. 3394, May 24, 1947). At that time only some 6,500 claims were on file. Before September 2nd was reached, however, the influx of debt claims and the interest of the public in the remedies of Section 34 proved so great that it became obvious that the bar order must be extended. Consequently, the general bar order was vacated except for a specified list of debtors (12 F. R. 5798, August 28, 1947). Subsequently, additional debtors were selected for inclusion in other bar orders. Bar Orders 2 and 3 fixed December 17, 1947 and February 25, 1948, respectively, as the dates after which claims against debtors listed therein will be barred from consideration (12 F. R. 6778, October 15, 1947; 12 F. R. 8714, December 20, 1947). Debtor estates have thus far been selected for inclusion in bar orders if they meet a standard of workability which is based upon two tests: (1) degree of liquidity and solvency, since, as has been noted, debt claims may be paid only out of available money; and (2) absence of title claims since, as has been noted, debt claims cannot be paid while title claims are pending. Subject to these tests, claims are taken up as nearly as possible in chronological order of filing.

Distribution and Priorities

The statute provides for a system of equitable distribution of available money of a debtor estate among eligible creditors who have filed valid claims. In this respect, it rejects the World War I procedure which permitted a race of diligence. In the event that the available money in a particular debtor estate does not permit the payment in full of all allowed claims, the statute provides for

a system of priority which is based in general on the bankruptcy priorities. As has already been noted, the expenses of the Office of Alien Property and taxes, including a reserve for future payments of expenses and taxes, must be provided for before any debt claims may be considered. Among debt claims, wage and salary claims not to exceed $600 are entitled to first priority. Claims of the United States are entitled to second priority except that a claim shall not have such priority merely as a result of its acquisition by the Office of Alien Property through vesting. Claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and material delivered to the debtor and for payments made to the debtor for goods and services not received by the claimant form the third class. All other debt claims form the fourth class. Secured creditors, as has been noted, may assert their security interest by a title claim or may elect to proceed under the debt claim statute without prejudice to their rights to file later claims based on a title theory.

Any distribution to a debt claimant operates, to the extent of the distribution, as a satisfaction and discharge of the indebtedness represented by the claim.[27] Any defense to the payment of a debt claim which would have been available to the debtor is available to the Office of Alien Property. For example, partial or complete satisfaction by the original debtor will, of course, to that extent, bar the debt claim.[28] Similarly, defenses such as duress, statutes of limitation, and the like are available to the Office.

Procedures and Review

The analysis review and processing of debt claims are conducted by the Debt Claims Section of the Claims Branch of the Office of Alien Property in accordance with regulations which are designed, in the interest of claimants, to eliminate unnecessary proceedings as far as is consistent with the interests of the Government.[29] When the bar date which is applicable to a particular debtor has been reached, all the claims asserted with respect to that

[27] Section 34(i) provides in pertinent part: "Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim."

[28] It is of interest that Mr. Cabell's claim was voluntarily withdrawn in August 1947. The reason is not stated but it may be speculated that his fee was in fact settled by the debtor, Assicurazioni Generali di Trieste e Venezia.

[29] Rules of Procedure for Claims, 12 F. R. 5565, August 19, 1947. Authority to prescribe rules and regulations relating to claims procedure is expressly conferred by Section 35 of the Trading with the Enemy Act.

debtor's estate are processed with a view to eventual allowance or disallowance, depending upon the eligibility of the claimants and the validity of the obligations upon which the claims are based.

Claims may be classified generally as those requiring hearing and those which do not. If a claim is asserted in respect of a solvent debtor estate and the evidence administratively obtainable clearly warrants allowance and payment, no hearing is necessary. Hearings are required in two classes of cases. If a claim is adequately supported and allowable but it has been asserted against an insolvent debtor estate, a hearing will be required. In such a case, each claimant has the right to examine all other claims involved in the same estate and to object to any allowance, in whole or in part, for the scaling down of other claims will, of course, result in the increase of his own allowance. A hearing is also required, whether the debtor estate is solvent or not, in the event the Chief of the Claims Branch concludes that the claim cannot be allowed on the basis of information administratively available to the Office. In this type of case, the Claims Branch utilizes all the defenses which the debtor would have had and an adversary proceeding before a Hearing Examiner is the result.

Obviously it is to the mutual advantage of the claimant and the Government that a claim be fully developed and supported with all available evidence. The notice of claim itself is filed on Form APC-1C, which contains detailed information and the applicable text of the statute.[30] In preparing the form for submission, claimant or his counsel should check to see that it is timely filed and has not been barred from consideration by the inclusion of the debtor in a previously issued bar order. If the details of the debt are fully developed and accompanied by supporting evidence, more expeditious processing will follow. Further correspondence with the Office of Alien Property may be rendered unnecessary, and the Chief of the Claims Branch may be able to recommend to the Director of the Office that he allow and pay the claim without hearing. As far as possible, therefore, claimant's counsel should furnish, in the first instance, all supporting documents, such as the authorization pursuant to which claimant may have acted in rendering services which

[30] Information concerning the Debt Claims program can be secured upon request from the Office of Alien Property, Department of Justice, Washington 25, D. C. and the field offices at 120 Broadway, New York, N. Y., 813 Market Street, San Francisco, California, and P. O. Box 1200, Honolulu, T. H. There is also available at the office of each United States Attorney copies of appropriate forms, bar orders, and indices to Vesting Orders which contain the names of persons whose property has been vested and who may be debtors.

may form the basis of his claim, or a photostat of the promissory note upon which the claim may be founded, or any statement from the debtor acknowledging the debt.

Numerous claims have been asserted by attorneys for compensation for services rendered the debtor. Such claims should contain, in addition to the Power of Attorney or other authorization for the services, detailed and itemized statements of the services rendered, the fee arrangement with the debtor or any other basis upon which the amount of the fee has been computed. If a claim has been reduced to judgment, copies of the judgment certified by the Clerk of the Court, together with other pertinent documents, should be furnished to the Office with the Notice of Claim form.

Often the validity of a claim may turn solely on a question of law. Where possible, the Claims Branch has joined in stipulations of the facts and a claimant may find it possible to expedite consideration of his claim by proposing such a stipulation, waiving hearing if the stipulation is entered. At the same time, it would be helpful in the consideration of his case if he would submit a brief on the issue of law.

In the event an adversary proceeding is deemed necessary, claimant is notified of this decision and is apprised of his right to a hearing before a Hearing Examiner in accordance with the Rules of Procedure for Claims issued by the Office of Alien Property.[31]

It has been concluded that the Administrative Procedure Act (5 U. S. C. 1001 *et seq.*) does not govern debt claim proceedings. This view is based in part upon the statutory provision for review. Although the review is based upon the records of the proceedings before the Director of the Office of Alien Property, the court may take additional evidence upon a showing that the evidence was offered to the Director and excluded by him or could not reasonably have been adduced before him or was not available to him. The court may be expected to give great weight to the administrative determination, but the statute does not contain provisions such as are frequently found in administrative statutes requiring affirmance if the administrative determination is supported by evidence. The review thus has some aspects of a trial *de novo* which, it is considered, exclude these proceedings from the scope of the provi-

[31] Section 504.202 of the Rules of Procedure provides:

"No claim shall be allowed or disallowed except after hearing, unless hearing has been waived by the parties or unless the claim has been allowed pursuant to section 504.201."

Section 504.201 provides a procedure for allowance and payment without hearing of claims against debtors' solvent estates.

sions of the Administrative Procedure Act relating to adjudication.[32] Nevertheless, the Office of Alien Property, as a matter of policy, conforms to the spirit of the Administrative Procedure Act and has framed its procedures so as to give to claimants the kinds of protection sought by the Administrative Procedure Act. Section 504.12(d) of the Rules of Procedure for Claims provides:

> "Subject to the Rules of the Office, Hearing Examiners presiding at hearings shall have the hearing powers set forth in section 7(b) of the Administrative Procedure Act."

The claimant may elect to withdraw any portion of the claim which may be contested by the Claims Branch or to go to hearing on the issue presented. The case is at issue when the Chief of the Claims Branch has notified the claimant that he cannot recommend the claim for allowance without hearing. Under the Rules, the case is then docketed with the Hearing Examiners Branch for disposition after motion or after hearing on the merits, as the case may be. A Hearing Examiner is designated by the Director or the Chief Hearing Examiner for Debt Claims to hear the case initially. Persons who act as Hearing Examiners do not at any time participate in the prosecution of claims proceedings. Either the claimant or the Chief of the Claims Branch may appeal to the Director within 30 days for a review of the Hearing Examiner's decision.

Where available money is insufficient to pay all timely filed claims against a particular debtor's estate, a schedule of proposed payments is prepared and served on all claimants against the estate. In addition to a statement of the amount of money available for the payment of debt claims, the schedule includes all the claims in each priority category which the Chief of the Claims Branch agrees can be allowed without contest or which have been allowed after hearing by the Hearing Examiner, and the disallowed claims. Each claimant is afforded an opportunity to present evidence and argue not only the strength of his own claim but the weakness of any other claims whose allowance may impair the full satisfaction of his claim.[33] The final Determination accompanying the schedule (made by the Hearing Examiner, or, if review is sought, by the Director) allows valid claims in full, but payment can,

[32] See Section 5 of the Administrative Procedure Act.

[33] A copy of each Notice of Claim filed is maintained in a public file by the Office of Alien Property and may be made available for inspection by any interested party. Likewise, financial information to the extent it may be available concerning the cash picture of a particular debtor's account may be secured from the Office of Alien Property.

of course, be made only to the extent available money in the debtor's estate can be prorated among the allowed claims. If additional money of the debtor becomes available it will be distributed among the creditors whose claims have been allowed but not paid in full.[34]

Any claimant whose claim has been administratively disallowed, in whole or in part, may obtain judicial review of the administrative proceeding by filing, within 60 days of the Director's final action, a complaint for such review in the District Court of the United States for the District of Columbia, naming the Attorney General (as successor to the Alien Property Custodian) as defendant. Where the debtor's estate is insolvent the right of review extends to the entire schedule of payments.

The transcript of the record of the administrative proceeding with respect to a claim must be certified and filed in the District Court within 45 days. The record includes the claim as filed, evidence with respect thereto which was administratively considered and the Determination of the Director. Where the review is taken with respect to an insolvent estate, the record includes all the claims as filed, the evidence presented in the administrative proceeding, the Determination of the Director and the schedule. The centralization of all such review proceedings in the District of Columbia precludes the anomalous result which would follow from the review of the same schedule by several District Courts in which two or more claimants might seek review.

The Court in its discretion may take additional evidence if such evidence was not available to the Office of Alien Property or was offered to the Office and excluded or could not reasonably be presented. Any interested debt claimant who has filed a claim under Section 34 is permitted to intervene in the review proceedings in an insolvent situation.

The Court may enter judgment affirming, modifying or reversing the Director's Determination and directing payment in any amount which it may find to be due, if available money in the estate permits, or affirming or modifying the schedule and directing payment, if any be found due, pursuant to the schedule as affirmed or modified. Pending the decision of the court on such complaint and review and pending final determination of the appeal from such decision, there may be certain claims or certain portions of claims

[34] Section 504.208(a) of the Rules of Procedure for Claims provides:

"If additional moneys become available for the payment of claims after the first payment on allowed claims against a debtor's insolvent estate, the Chief of the Claims Branch shall submit to the Chief Hearing Examiner notice thereof and the suggested payments to be made. Copies thereof shall be served on each claimant whose claim was allowed and has not been discharged in full."

which can be paid without prejudice to the contentions of all claimants for review. In that event, the statute permits such payment.

Fees

Section 20 of the Act imposes a limitation on the fees which an attorney can charge in connection with any claim proceeding. Information must be furnished which will enable the Director to make an administrative determination that the aggregate of fees charged for services in connection with the proceeding does not exceed 10% of the payment and that the fees do not exceed fair compensation for the services rendered. The decision of the Hearing Examiner in such matters is final unless modified by the Director on review. Recourse may be had to any District Court to review the Director's Determination in fee matters. Unlike debt claims, a fee proceeding does not affect the interests of other claimants. Accordingly, it is not necessary to channel all such proceedings into a single court.

* * * * *

Proposals have recently been heard in the Congress for postponement of the consideration of debt claims. These suggestions arise in connection with the problem of the ultimate disposition of vested assets. The Department of Justice has taken the position that legislation providing for such postponement would be undesirable. It is true that payment of debt claims is a matter of grace, not of right. Nevertheless, vesting has deprived American creditors of the opportunity to reach assets which would normally be available in satisfaction of their claims but for the exercise of vesting jurisdiction. In some cases, the obligation may have been created in reliance on the availability of the property. Procedural uncertainties have delayed definitive action on debt claims over a period of many years. This is strikingly illustrated by the long road followed by Mr. Cabell in his vain effort to obtain governmental recognition of his claim. Whatever decision should have been reached on the question as an original matter, the establishing by the Congress in 1946 of a procedure for the payment of debt claims would appear to have created a kind of moral estoppel forbidding further delays except on the strongest grounds.

The Legal Committee of ICAO held its First Meeting at Brussels from September 10 to 25, 1947, at which it approved its rules of procedure, prepared its future work program, and approved a final text of the draft Convention on the international recognition of rights in aircraft which will be submitted to the Second Assembly of ICAO for consideration and adoption and signature if agreement can be reached.*

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AD-J-INR-GAW 42(1948)

AGREEMENT TO RESOLVE CONFLICTING CLAIMS TO GERMAN ENEMY ASSETS OUTSIDE GERMANY

Canada, the Netherlands and the United States signed an Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets in Brussels on December 5, 1947. Belgium signed the Agreement on January 5, 1948. This is the first multilateral agreement to be completed dealing with practically all types of conflicting claims to German enemy assets located in countries members of the Inter-Allied Reparation Agency. The Agreement disposes of conflicts relating to property owned directly by German enemies as well as conflicts relating to property in one Allied[1] country owned by German enemies through enterprises organized under the laws of another Allied country or under the laws of Germany.

The Agreement is open for signature by the other fourteen countries[2] members of the Inter-Allied Reparation Agency. It cannot become binding upon the United States until it is approved by Congress.

When the Allied countries during World War II, or immediately after liberation, seized German enemy assets within their jurisdiction they soon found that more than one of them were laying claim to the same assets. For example, an Allied country would vest on the books of a corporation a German-owned security issued by a corporation organized in its territory even though the certificate was physically located in another Allied country and had been seized or was about to be seized by that other country. In this typical case both countries would claim the same security and, if the pattern of the years following World War I were repeated, the countries would have recourse to long-drawn-out diplomatic representations or rely on the courts to resolve their conflicting claims.

In order that a study might be made of the means to avoid the friction resulting from such conflicting claims and to expedite the liquidation of German enemy assets within the jurisdiction of its Member States, the Inter-Allied Reparation Agency (IARA) appointed the members of the

* See Stephen Latchford, "CITEJA and the Legal Committee of ICAO," in *Department of State Bulletin*, Vol. XVII, No. 428 (September 14, 1947, p. 487).

[1] The word "Allied" is used in this Note to refer in general to countries which are parties to the agreement.

[2] The other fourteen countries are Albania, Australia, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, New Zealand, Norway, the Union of South Africa, the United Kingdom and Yugoslavia.

Committee of Experts on enemy property custodianship which had been provided for under Part I, Article 6F, of the Paris Reparation Agreement of January 24, 1946. This Committee met in June, 1946, and analyzed the various types of conflicting claims facing Member States of IARA. As the result of this analysis further meetings were held in the German External Assets Committee, which consisted of Delegates to IARA from Belgium, Canada, France, the Netherlands, the United Kingdom, the United States, and Yugoslavia. These meetings took place from November to December, 1946, from February to March, 1947 and from September to November, 1947.

The Agreement signed by Belgium, Canada, the Netherlands, and the United States is the outcome of these discussions at IARA and represents a carefully balanced arrangement which gives reasonable consideration to the diverse interests involved.

The Agreement consists of a covering document with eight articles and an Annex in six Parts. Part I of the Annex resolves the problem posed above with respect to securities by providing that the Allied country in whose territory the certificate is located will release the certificate to the country in whose territory it was issued. Similarly, German-owned currency issued by one Allied country, but located in another Allied country goes to the country of issue. Negotiable instruments are released to the country of residence of the principal obligor. A bill of lading or a warehouse receipt is released to the country where the property involved is located. A foreign currency account maintained in one Allied country by a bank located in another Allied country for the benefit of a German customer will be divided equally between the allied countries concerned.

Pursuant to the provisions of Part II of the Annex, in the case of property within one Allied country which forms part of the estate of a non-enemy person who had died domiciled in the territory of another Allied country, when there is a German enemy interest in the estate, the property will be released by the former Allied country to facilitate the normal administration of the estate in the latter Allied country. Similarly, in the case of property in one Allied country held under a trust being administered under the laws of another Allied country, when there is a German enemy interest in the trust, the property will also be released by the former Allied country. It should be noted, however, that real estate forming part of an estate, contrary to the above rule as to estates, is not released by the country where it is located.

The typical case covered by Part III of the Annex relates to property located in one Allied country belonging to a corporation organized under the laws of another Allied country, in which corporation there is a German interest. As an example, suppose there is $100,000 in the United States owned by Corporation X organized in the Netherlands and the shareholders of Corporation X are German citizens to the extent of 60 percent of the shares and Canadian citizens for the remaining 40 percent of the shares. In this situation the following conflicting claims may exist:

1. The U. S. Custodian may claim the whole $100,000 as belonging to a corporation which is German controlled or in which there exists a substantial German interest.

2. The Dutch Custodian may claim that Corporation X is a Dutch national, that the $100,000 is Dutch property, and that the U. S. should release the $100,000 to the corporation. The Dutch Custodian will vest or has already vested the German shares in the corporation, and if the United States should release the $100,000, the Dutch Custodian will benefit from the increased price such shares will bring because of the increment of $100,000 to the assets of the corporation.

3. The Canadian citizens may claim against the United States that they are beneficially entitled to $40,000[3] of the $100,000 and that the seizure of the $100,000 as German assets by the U. S. Custodian would in effect be taking reparations from friendly Allied nationals.

The solution reached under the Agreement with respect to the conflicting claims in this case is based on the general principle that the country where the property is located is entitled to that portion of the property corresponding to the "percentage of direct and indirect German interest" in the corporation, while the portion corresponding to the Allied interest is protected from seizure. However, it is provided further that the country where the property is located should obtain in general no part of the property unless a certain large or important German interest is found in the corporation.[4] This critical interest is set by the Agreement, roughly speaking, at a 50 percent German shareholding or German control. Thus in the example given, since there is a 60 percent German shareholding, the U. S. Custodian would be entitled to $60,000 of the $100,000 and the $40,000 would inure to the benefit of the Canadian interests in the corporation.

Where there is less than a 50 percent German shareholding, and no German control, subject to exceptions,[5] the country in which the property is located gives up any claim to the property or to any German interests therein. Then the Custodian of the country where the corporation is organized will be able to seize the German shares and reap the complete benefit from their liquidation. Any non-enemy interests in the corporations would remain unharmed.

[3] It is assumed that in this hypothetical case there are no creditors.

[4] In an exceptional case the requisite interest may exist not in the corporation but in the property under question, as where the corporation is not German controlled but the property is German controlled.

[5] In the case of dummy and closely held holding companies the country where the property is located is entitled to the portion corresponding to the German interest, however low that interest may be.

Where there is the 50 percent German shareholding or German control, it is provided, in the normal case, not that the country where the property is located itself takes the portion to which it is entitled (the $60,000 in the above case), but that the property ($100,000) is to be released in kind and the releasing country is to receive reimbursement to the extent to which it is entitled from the country [6] where the corporation is organized. The advantage of this mechanism of release and reimbursement is that it results in the economic advantage that comes from reintegrating the corporation property consisting, perhaps, of working capital or sales outlets, with the corporation itself, and so increasing the total value of the corporation as an operating entity. Further, this solution may benefit the economy of the country where the corporation is organized if the corporation is important to it. Also it results incidentally in the automatic protection of non-enemy interests in the corporation.

While the normal mechanism under this Part is that of the release of property in kind and reimbursement certain exceptions to this rule exist based in general on considerations of practicality and national security. When these exceptions are applicable, the country where the property is located may retain the entire property in kind or the portion of the property to which it is entitled, while protection is afforded to non-enemy interests by compensation for the value of their interests or by the release of the portion of the property corresponding to their interests.

These exceptions follow:

1. The property has already been liquidated.
2. The two countries agree that the release of the property would not be practicable or the corporation consents to the liquidation of the property.
3. The property is a production enterprise or a substantial interest therein, the corporation or the property is German controlled, and the country in which the property is located determines that the retention of the property is required for its national security.
4. The two countries agree, because of administrative difficulties or other special circumstances, that the portion of the property may be retained.
5. The corporation is a dummy company or a holding company whose outstanding stock is closely held or is not regularly traded in a recognized financial market.

While no method is set down in the Agreement for the determination of the "percentage of direct and indirect German interest," it is considered that this can only be appropriately determined by a consideration of both creditor and stock interests in the corporation. Before the release of the $100,000 in the example given, the two countries must agree on the general limits of, and the method of calculating the German enemy interest.

[6] The country will make this reimbursement from its liquidation of the shares of the reintegrated corporation.

At this time the countries may agree on a method of calculation which satisfies them, provided reasonable provision is made for avoiding harm to nationals of third countries. In the event that the two countries cannot decide on the limits or method of calculating the German enemy interest, after a reasonable time, the matter may be referred to a conciliator who will render a binding and final solution. It is considered that this conciliator, while having leeway to reconcile the different views of the countries at issue, will in general render a decision which takes into account the creditor and stock interests in the enterprise.

The typical case covered by Part IV is concerned with property located in an Allied country belonging to a corporation organized under the laws of Germany, in which corporation there is an Allied interest. As an example, suppose there is $100,000 in the United States owned by Corporation Y organized under the laws of Germany and the shareholders of this corporation are Dutch citizens to the extent of 40 percent of the shares and German citizens for the remaining 60 percent of the shares. In this situation the following conflicting claims may exist:

1. The American Custodian may claim the entire $100,000 as belonging to a corporation which is legally a German national, or in which there is German control.
2. The Dutch citizens may claim against the United States that they are beneficially entitled to $40,000 [7] of the $100,000 and that the seizure by the Custodian of the entire $100,000 as German enemy assets is in effect taking reparations from friendly Allied nationals.

The solution reached here may be considered an accommodation of administrative practicality with the general principle that the country where the property is located is entitled to that portion of the property corresponding to the German interest in the corporation while that portion corresponding to the Allied interests would be protected from seizure. Thus, for practical reasons, the Agreement, instead of providing for the protection of even a single share, sets a floor below which the mechanism of protection for Allied interests is inapplicable under the Agreement. Specifically, it is provided that property in an Allied country will be released to the extent of the interests in the corporation of all non-enemy nationals of Parties to the Agreement, if non-enemy nationals of Parties own at least 25 percent of the shares in or control the corporation.[8] Thus in the example given, the American Custodian would release $40,000 of the $100,000 and would retain the remaining $60,000.

[7] It is assumed that in this hypothetical case there are no creditors.

[8] It will be noted that there is a 25 percent and control provision in Part IV while there is a 50 percent and control provision in Part III. The provision in Part IV operates to deprive Allied nationals of protection under the Agreement while that in Part III results in a shift as between custodians of different countries of the right to seize and benefit from certain German enemy assets.

Once a corporation is found with the requisite Allied shareholding or control, although the matter is not spelled out specifically in the Agreement, it is considered appropriate for all Allied interest, both of shareholders and of creditors, to be protected.

It is provided in the Agreement that the release of property will be made pursuant to arrangements between the country where the property is situated and the country whose nationals are concerned. If, however, agreement cannot be reached as to such arrangements, recourse may be had to the conciliator who can fix the appropriate procedure of release.

It should be noted that under this Part only non-enemy nationals of signatory Governments may be protected and such nationals must have had their status as nationals on September 1, 1939. Further, the claim of such a national must be sponsored by his Government and be submitted to the Government where the property is located within one year after the coming into force of the Agreement as between these two Governments.

As a normal rule, as in Part III, release is to be made of the property itself, but the release of the money equivalent is permitted where:

1. The property has been liquidated prior to the filing of an eligible sponsored claim with the country where the property is located.
2. The countries concerned agree that the release of the property would not be practicable.
3. The property is a production enterprise or a substantial interest therein, the corporation or the property is German controlled, and the country where the property is located determines that the retention of the property is required for its national security.

Miscellaneous provisions of the Agreement are set forth in Part V, which make it clear that the Agreement does not oblige an Allied country to recognize (1) any transfer of a German enemy interest occurring after the institution of war-time emergency measures by that Allied country or after the invasion of the territory of that country by Germany, or (2) any forced transfers of non-enemy property in Germany to German enemies if the transfers were without adequate consideration. Also, an Allied country, in determining whether any property is owned or controlled by a German enemy, need not take into account any transfer of property to a German enemy which represents looting or a forced transfer within the meaning of the Inter-Allied Declaration of January 5, 1943, against Acts of Dispossession. An Allied country is not obligated to release an enemy interest in property except to the extent that this interest will be treated by the recipient country as German enemy. It is expressly provided that nothing in the Agreement may be construed to confer any right on a person to prosecute a claim in any court or administrative tribunal against his Government or any other country.

Final and binding compulsory conciliation is provided for by Article 4 of the covering document in conjunction with Part VI of the Annex. Provision is first made that if a dispute arises between two or more Allied countries Parties to the Agreement with respect to the interpretation, implementation or application of the Agreement, these countries will endeavor by every means possible to settle the dispute by negotiation, which may include the use of a mutually acceptable conciliator with such powers as the countries in dispute may agree to. If the dispute between the countries is not resolved within a reasonable time by such negotiation, the dispute, on the request of one of the countries must be settled by an impartial conciliator to be appointed from a Panel of Conciliators to be established pursuant to the provisions of Part VI.

The Panel of Conciliators will consist of seven members to be elected by countries which have signed the Agreement within six months of its coming into force. Each of these countries will nominate not more than three candidates for election to the Panel. The seven candidates receiving the highest number of votes will be considered elected, provided that each of them has received the vote of at least two-thirds of the countries voting. Not more than two nationals of the same country may be elected to the Panel. A President of the Panel will be elected by the countries from the seven members of the Panel.

The President of the Panel has the responsibility, on the request of one of the countries in dispute, for making the appointment of a conciliator from the Panel. This conciliator must formulate a solution which is in his opinion the best possible solution, in the spirit of the Agreement. The solution formulated by him is binding upon the countries concerned and final. Two matters are reserved from the jurisdiction of the conciliator. The first is concerned with determining whether the national security of an Allied country warrants the retention of property by it under Part III or IV of the Agreement. The second is concerned with the obligation under Part III to make full payment of reimbursement in the required currency within seven years after the release of property.

In the covering document, Article 1 provides that the countries which are Parties to the Agreement "shall be guided as far as possible, in their relations with each other, by the provisions" of the Agreement.

The Agreement will come into force as soon as it has been signed by countries which, under Part I, Article 1B, of the Paris Reparation Agreement, are collectively entitled to not less than 35 per cent of the aggregate of shares in Category A of German reparations. Belgium, the Netherlands and the United States signed subject to legislative approval.[9] On the basis of the percentage of Category A reparations to which these countries

[9] The Netherlands and Belgium signed the Agreement *sous réserve de ratification* and the United States signed the Agreement "subject to approval" and subject to the reservation of one case from the Agreement.

and Canada are entitled,[10] the Agreement will come into force as soon as the legislatures of the Netherlands and the United States approve the Agreement.

While the Agreement is open for signature by only the other fourteen members of the Inter-Allied Reparation Agency, any other country may signify its desire to become a Party to the Agreement, or to a similar agreement, by notifying Belgium, the depository country within nine months of the coming into force of the Agreement. Upon such notification, countries already Parties to the Agreement would consider in consultation with one another and with the Government filing the notification, its participation in this Agreement or a similar agreement. Under this procedure it is possible that with the consent of the signatories, Latin American countries and countries which were neutrals during World War II, as well as other non-IARA countries, may ultimately participate in this Agreement or a similar agreement.

ELY MAURER *
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THE INTERNATIONAL BAR ASSOCIATION

Another Bar Association is born. The International Bar Association founded in New York on February 17, 1947 is a federated and delegated body representative of the leading Bar Associations and Legal Societies of the principal nations of the world.

In the founding of this new organization the Committee of sponsorship, which was composed of members from 20 countries, was not unmindful of the actual existence of numerous other associations of lawyers on an international scale which are doing excellent work in promoting their various objectives. The International Bar Association is in no way designed as a competitor of these bodies. It hopes to coöperate with and support the activities of all groups of lawyers in all countries.

It is an Association which has no individual memberships. Its members consist of established societies of lawyers, "any national organization of members of the legal profession," as is stated in its Constitution, being eligible.

[10] Belgium 2.7 percent; Canada 3.5 percent; Netherlands 3.9 percent; United States 28.0 percent.

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THE WAR DEPARTMENT IN WORLD WAR II*

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I

Organization is customarily considered a means to an end. The purposes to be realized are of first importance, while administrative structure is a lesser consideration. Thus organization is supposed to describe the division of work already decided upon and the assignment of authority in performing a given task. Only technicians and a few students who find some queer fascination in detail need give particular attention to organizational matters.

However widely held, any such attitude about organization ignores several fundamentals. For one thing, conception of purpose and organization are too closely interrelated to say that one precedes the other. Indeed, in any large enterprise the objectives to be accomplished usually represent the composite views of different component parts. Sometimes conflicting purposes have been fairly well resolved at the center of an agency, and oftentimes they are permitted to flourish without much check, let alone guidance. Frequently you must know the individual elements in order to understand the whole. Finally, organization vitally affects the ambitions, reputations, and fortunes of many individual persons. It is often the battleground which reflects much more far-reaching beliefs than strictly technical concerns about the most efficient method for performing a job.

An account of War Department organization in World War II should have a double interest. Certainly no governmental effort by

* This account is based upon the author's experience and observations, and represents his own opinions. He wishes to acknowledge the assistance of the Council on Research in the Social Sciences of Columbia University, which has made the preparation of the article possible.

any standard has approached the scale of War Department activities during the war. In terms of money spent, of the size of its uniformed personnel, and of its number of civilian employees, the War Department overshadowed all other government agencies. Any large-scale enterprise deserves attention for its own sake. But there is an additional reason for interest. The events of World War II add another chapter in the history of the War Department General Staff. Since its creation in 1903, this staff has been the only legally created instrument of central departmental management in the federal government. It has been the most highly specialized and the most far-reaching device available to the head of any department or agency for directing department-wide activities.

I am not prepared to say how far War Department experience may be transferable to other agencies. The organization problems of the Department were in large part peculiar to its task and to certain Army conditions. Undoubtedly many comparisons will suggest themselves, and some general lessons may be apparent from this record.

The objective, and hence the organizational goal, of the War Department may be stated briefly. It was, in conjunction with the Navy and the forces of allied nations, to defeat the Axis in the shortest period of time with the least cost, particularly in terms of human lives. Obviously, such a simplification gives only the vaguest conception of what the War Department had to accomplish. Its problems ranged from basic strategic conceptions of where to attack the enemy, when, and with what force, to the design of rockets. The tremendous effort which produced the atomic bomb was, after all, only a part, and relatively speaking a small part, of the total effort that went into the enemy's defeat. The many different parts of the Army had to be organized, trained, equipped, and cared for before they could be moved overseas and employed in actual combat. Every stage of the long process of producing a soldier, a combat unit, and their weapons required an amazing amount of initiative and hard work. Sometimes it is inconceivable that so much could have been done in so short a period of time. Certainly it was not all accomplished by organization alone, nor solely by the great organizational segments to which attention will be directed here. The achievement was a product of the entire nation and of its armed forces, together with its allies on every continent and on many islands.

Here we shall have to concentrate primarily upon the top organization of the War Department which was created for directing this great effort. The problems of basic organization at the top illustrate the kind of difficulty which so large an effort entails.

At the outset, a word should be said about the expression "the War Department" as distinguished from "the Army of the United States." In one sense it might be said that the War Department embraces the Army; that it includes the Army, together with all of the work required to maintain the Army as an effective combat force. The Army of the United States, as defined by the National Defense Act, consists of the Regular Army, the National Guard, the Reserve Forces, and all individuals appointed as officers or inducted under the Selective Training and Service Act. The Army consists of various branches of service designated by the National Defense Act, but its internal organization depends upon the action of the Secretary of War. While the Army is made up of commissioned and enlisted personnel, it is difficult to draw a distinction between the Army and the War Department on this basis alone. Uniformed personnel was used in the war to man procurement offices, depots, ports of embarkation, general hospitals, and other fixed installations in the United States. There would be little point in arguing whether a procurement office is a part of the Army or a part of the War Department, or whether a large general hospital should rightly be regarded as one or the other.

As originally provided by the act of August 7, 1789, the War Department is simply an "executive department" and presumably the mechanism by which the Army is directed on behalf of the Commander-in-Chief. When such offices were created as the Quartermaster General, the Adjutant General, and the Militia Bureau, they were established as parts of the War Department. In a sense, the War Department could be termed the connecting link between the President and the Army. But such a definition would assume that the Army could be exactly defined. The point is simply that there is no clear-cut distinction between the War Department and the Army of the United States except to say that, as now organized, the War Department embraces the Army. Speaking technically, then, the Army is simply the uniformed personnel, part of which is organized into combat units and part of which is assigned to the hundreds of jobs required to support the combat units themselves.

During the Civil War, the respective powers of the Secretary of War and the Commanding General of the Army were much debated. Moreover, there was some uncertainty about the rôle of military officers in the War Department. Many bureaus were headed by officers who apparently were not under the authority of the designated Commanding General of the Army. On two occasions between the Civil War and the Spanish-American War, the Commanding General of the Army moved his office out of Washington because of difficulties with bureau chiefs who also were Army officers. The creation of the position of Chief of Staff by the act of February 14, 1903, in part clarified this situation. The position of Commanding General of the Army was abolished and the Chief of Staff became in effect the ranking professional soldier in the Army and at the same time the principal officer directing the entire War Department under the Secretary of War. Yet the problem of command was not entirely settled.

During World War I, the Commanding General of the American Expeditionary Force in France regarded himself as somehow independent of the War Department and subject only to the superior authority of the President as Commander-in-Chief. In practice, this was almost an impossible position to maintain, since it was to the War Department that the Commanding General had to look for his troops and supplies. Yet the personal controversy between General Pershing and General March, the Chief of Staff, was such that the two were not on speaking terms when General Pershing returned to the United States in 1919. General March was retired and General Pershing became Chief of Staff in 1921.

No such problem arose at any time during World War II. The authority of the Chief of Staff as the military head of the War Department and of the Army was never questioned. To be sure, the President was consulted about appointments to command overseas forces. But in every case the commanding general in each overseas command understood that he functioned subject to the superior direction of the War Department. He depended upon the War Department for his manpower and his supplies. Basic strategic directives as determined by the Joint Chiefs of Staff and approved by the Commander-in-Chief were transmitted through the War Department. The Chief of Staff in the War Department was thus the supreme military leader, and the War Department was the organization through which all military operations were conducted by ground and air forces.

It might be argued that the War Department was the Army in the United States. As just indicated, however, such a definition would not truly describe the rôle of either the Chief of Staff or the Secretary of War in World War II. To the officer overseas and to the officer in the United States, the "War Department" meant the Secretary of War, the Chief of Staff, and the War Department General Staff. In other words, it was "the Army High Command" from which came the official instructions to be carried out by all subordinate commands both in the United States and overseas. The organization of the War Department which will be described here, however, was the organization established to carry on the work of the War Department in the United States. Only passing mention will be made of the organization problems faced by commanding generals in overseas commands.

II

Descriptions of War Department organization in wartime ordinarily start with March 9, 1942, as the decisive date. A far-reaching change in the direction of War Department activities in the United States became effective at that time. Yet, like all organizational changes, this one had a background of accumulated experience which produced it.[1]

The reorganization of March 9, 1942, was unquestionably a major event. It established an administrative pattern which was to endure with only slight modification throughout the war and well into the demobilization period. It encountered its difficulties, but it would scarcely have lasted as long as it did if it had been an unsatisfactory arrangement. In essence, the reorganization of March 9 introduced four major elements in the War Department structure. The first was a General Staff on a smaller scale than before and confined largely to planning responsibilities. The other three elements were three great commands—the Army Air Forces, the Army Ground Forces, and the Army Service Forces—directing all

[1] This reorganization was embodied in Executive Order No. 9028, February 28, 1942, which drew upon the authority vested in the President by the First War Powers Act of December 18, 1941. It was further elaborated in War Department Circular No. 59, March 2, 1942. Both the Executive Order and the War Department Circular became effective on March 9, 1942.

of the work of the War Department in the United States. This was a structure greatly simplified from that which existed before March 9. Each part of it embodied a response to different needs and different pressures. Each should be noted in turn.

The General Staff. While the position of Chief of Staff replaced that of Commanding General of the Army, the General Staff authorized by the Act of February 14, 1903, was simply superimposed upon the existing organization of the War Department. In other words, none of the offices and bureaus in the War Department was eliminated at the time of the creation of the General Staff. Subsequent department orders and legislation such as the National Defense Act of June 3, 1916, and the extensive amendments of June 4, 1920, simply added further units to the Department. The result was that by 1941 there were a great number of bureaus and commands subject to the direction of the Chief of Staff.

In explaining the reorganization of March 9, 1942, General McNarney told the Senate Committee on Military Affairs that it had become necessary to relieve the administrative burden carried by the Chief of Staff. Without enumerating them, he mentioned that there were some forty different major commands and some 350 small ones under the direct authority of the Chief of Staff. These units included some twenty bureaus in Washington, such as the Office of the Chief of Infantry, the Office of the Chief of Field Artillery, the Office of the Quartermaster General, the Office of the Chief of Ordnance, the Office of the Chief of Engineers, the Office of the Chief Signal Officer, the Office of the Surgeon General, the Office of the Chief of Air Corps, the Adjutant General's Office, the Judge Advocate General's Office, the National Guard Bureau, the Office of the Executive for Reserve and ROTC Affairs, the Chief of Special Services, the Chief of Chaplains, and the Chief of Finance. In addition, a General Headquarters had been created in Washington in 1940 as a separate command for directing the tactical training of large troop units. Outside of Washington, four defense commands, nine corps areas, six ports of embarkation, half a dozen general depots, separate disciplinary barracks, the Command and General Staff School, the U. S. Military Academy, and a number of other activities reported directly to the Chief of Staff. The General Staff was the instrumentality through which the Chief of Staff was expected to handle the supervision of all these units. General McNarney said that because there was no large

subordinate command to which administrative details could be delegated, the General Staff had found itself handling a larger and larger administrative burden. Many problems eventually came to a Deputy Chief of Staff or to the Chief of Staff for decision. General McNarney added that the War Department General Staff "must be a planning and policy-making staff. Rather, it must not operate and be bothered by minor details."[3]

General McNarney implied that General Marshall as Chief of Staff wished to give more of his attention to the broad strategic questions involved in waging the war. The creation of the Combined Chiefs of Staff and the Joint Chiefs of Staff in January, 1942, meant that much of General Marshall's time would have to go to the work of these two agencies. Apparently he wanted a General Staff which would be confined largely to assisting him in planning military operations overseas. In addition, he wanted some arrangement whereby much of the current administrative detail demanding his and the General Staff's attention could be eliminated. The device of three large commands under which both War Department bureaus and various field agencies could be assigned would meet his need. Within the United States there would be only three commanders with whom the Chief of Staff would have to deal personally. Each commander in turn could assume much of the coördinating burden which the General Staff had previously borne. The commands had an advantage over the General Staff because they were commands. When an operating bureau or field command wished to, it could always carry an appeal from a General Staff order to the Chief of Staff. With bureaus and field commands under three commanding generals, they would be obliged to obey the orders of their commanding general. Thus a simplified operating structure for the War Department was indispensable to the Chief of Staff in fulfilling both his strategic and administrative responsibilities.

The Army Air Forces. The rôle of the air arm in modern combat occasioned acrimonious controversy within the War Department

[3] U. S. Cong. Senate. Committee on Military Affairs, *Hearings before . . . on a Bill to Establish a Department of Defense Coördination and Control*, 76th Cong., 2nd. Sess. (Mar. 6, 1942), pp. 2, 13. General Joseph T. McNarney was chairman of a committee of three which handled the War Department reorganization. Subsequently he was Deputy Chief of Staff, Commanding General of the Mediterranean Theater of Operations, and Commanding General of the American Forces in Europe.

during the 1920's and 1930's. A handful of Air Corps officers in this period constantly maintained that the airplane was a separate weapon which should be organized with its own independent strategic and tactical mission. For the most part, air squadrons during these years were tied to the traditional conception of ground warfare. The airplane was looked upon as simply another weapon for supporting ground troops in their capture and retention of land objectives.

It was the German air forces and the Blitzkrieg of 1939 and 1940 which did more than anything else to free the Air Corps from this limitation. The collapse of the French Army resounded throughout the American Army and shook established conceptions of warfare. This fact was acknowledged by the Secretary of War in his annual report for 1941 when he listed the implications of air power at the forefront of the lessons which the American Army had gained from observing the war in Europe. In his report, Mr. Stimson referred to "certain clearly demonstrated principles" of air power. These were fivefold: (1) freedom through "independent experimentation and research" to develop new forms of aircraft; (2) the power to procure for itself new types of planes; (3) freedom to select and train the special personnel to operate airplanes and to plan air tactics; (4) the power to create an air staff to plan air strategy; and (5) the power to "insure the permanence of the technique" thus created through an adequate permanent force of regular officers.

Secretary Stimson went on to add that of course an air force would have to fight in coöperation with armies on land and navies on the sea. Indeed, he called this its "final and most critical function." He insisted that an air force would have "to submit itself" to a unified command in order to make such coöperation "as perfect as possible." And he argued further that for the Army as a whole, air and ground, there had to be a single head for the final determination of broad policies and for allocating forces to various theaters of combat. Thus, on the one hand Mr. Stimson acknowledged the need for a new conception of the place of the Air Corps in the War Department, and at the same time he insisted that it must remain a part of the Army under the general direction of the Chief of Staff. Finally, the Secretary declared that "the rival views" formerly held in the air and ground forces had now been reconciled.[3]

Thus even before March 9, 1942, a major organizational shift

[3] See *Annual Report of the Secretary of War, 1941*, pp. 8–9.

recognizing a new rôle for the Air Forces was already in process. Previously there had been a Chief of Air Corps as the bureau head in Washington responsible for design and procurement of aircraft, the training of air crews, and the development of tactical doctrine. The organized combat units, however, were attached first to corps areas, later to armies, and then under a single General Headquarters Air Force (Air Force Combat Command). The Army Air Forces as established by the reorganization of March 9 combined the Chief of Air Corps with the Commanding General, GHQ Air Force, under the jurisdiction of the Commanding General, AAF. There was thus created a single command for procuring air supplies, for organizing and training air crews, for directing the air defense of the United States, and for planning air strategy overseas.

The Army Ground Forces. In July, 1940, the War Department created a General Headquarters located in the Army War College in Washington to take charge of tactical training of troops. War Department plans had long contemplated the creation of such a General Headquarters as a forerunner of a headquarters to be set up for the field forces in a theater of operations.[4] Four armies combining the divisions and other tactical units previously assigned to corps areas came under the command of GHQ. But full responsibility for the training of ground units was not lodged in this headquarters. The Chief of Infantry continued to be responsible for training infantry replacements and infantry officers; the Chief of Field Artillery, the Chief of Coast Artillery, and the Chief of Cavalry had comparable responsibilities for their respective branches of service. This training necessarily involved also the development of the doctrine about correct employment of infantry or field artillery units in combat. When General Headquarters took over the training of a division, entailing as it did the successful combination of all four arms as well as a number of service units into a large tactical command, there were many modifications to make in the previous training of most of these units. Under this arrangement, the training responsibility for the Chief of Infantry, for example, ended with an infantry regiment. When the regiment became part of a division, training responsibility passed to GHQ through its field commands. The point of view of GHQ was necessarily one of welding component parts into a harmonious whole.

[4] See "Biennial Report of the Chief of Staff, July 1, 1941," in *Annual Report of the Secretary of War*, 1941, p. 54.

As Commanding General of GHQ, General McNair found frequent occasion to criticize the training doctrine of the four bureau chiefs in the War Department. He submitted numerous memoranda to the Chief of Staff calling attention to conflicting jurisdiction between GHQ as a training command and the Chief of Infantry, the Chief of Field Artillery, the Chief of Coast Artillery, and the Chief of Cavalry. It was this pressure from General McNair, coupled with the drive for an autonomous air force, which probably did more than anything else to bring about the reorganization of March 9.

In any event, the reorganization, in creating a new command, the Army Ground Forces, transferred the functions of the Chiefs of Infantry, Field Artillery, Coast Artillery, and Cavalry to the new command. Although GHQ was officially abolished, the new Commanding General of the Army Ground Forces and the new Headquarters, AGF, was the old GHQ with expanded training responsibilities. The chiefs of these four War Department bureaus did not emerge again during the war. The combatant arms thus became a part of the Army Ground Forces, and the various replacement training centers and schools of the four bureau chiefs passed to the Commanding General, AGF.

The Army Service Forces. The long background of controversy about the direction of supply activities in the War Department has been recounted previously.[5] There were two major difficulties. At the top level of the War Department there were two distinct supervisory staffs on supply problems, one under the Chief of Staff and one under the Under Secretary of War. While both offices had expanded since 1940, the greatest increase had occurred in the Office of the Under Secretary. The line of demarcation between the two staffs was shadowy at best, but particularly difficult to maintain in 1941 and 1942 when the distribution of supplies was essentially a problem of their procurement. In the second place, the full extent of the authority of the Assistant Chief of Staff, G-4, to direct the supply activities of eight different procuring agencies was still somewhat uncertain.

It seems evident that the supply difficulties confronting the War Department were of third importance in producing the reorganization of March 9. The idea of a Services of Supply, as it was first called, was based upon World War I precedent. But the Army Service Forces was more than a supply command. With an apparent mystical faith in the number three, the reorganization planners lumped all the work of the War Department in the United States which did not logically fall under the Air Forces or the Ground Forces in the Army Service Forces. The new command thus embraced a wide variety of activities, from the induction and initial assignment of all enlisted personnel, the maintenance of central personnel records, and the legal work of the War Department to the operation of disciplinary barracks and the payment of all War Department bills.

[5] See John D. Millett, "The Direction of Supply Activities in the War Department; An Administrative Survey," in this REVIEW, Vol. 30, p. 249 and p. 475 (Apr. and June, 1944).

But the new command did settle the issue of divided control at the top of the War Department. The office of the Under Secretary of War was amalgamated with G-4 of the General Staff to make up a considerable part of Headquarters, Army Service Forces. An interesting coincidence probably had great influence in achieving this solution. The Under Secretary of War, Mr. Patterson, in the summer of 1941 had asked the private management consulting firm of Booz, Fry, Allen, and Hamilton to study his office and to make recommendations for the improvement of its organization and procedures. In its final report on December 20, 1941, this firm proposed a number of changes in the organization and operation of the Office of the Under Secretary of War. The most important recommendation called for the Under Secretary to create a military head for his office with the title of Procurement General and with the rank of Lieutenant General. The report declared that the Under Secretary needed an officer of high rank to manage his own staff and to deal with the various procurement agencies. While many of the recommendations of the Booz report had been put into effect before March 9, 1942, this central recommendation had not been carried out. If it had not been for this report from an outside, presumably objective source, the Under Secretary might well have been unwilling to approve an organization plan for the War Department which in part transferred his supervisory staff to the Commanding General, Army Service Forces. As it was, the reorganization could be viewed as bringing about a change which had already been strongly urged upon the Under Secretary.

In his biennial report for the two years ending June 30, 1943, General Marshall summarized the reasons for the reorganization of

March 9. He declared that the tremendous expansion of the Army had required a fundamental change in the War Department's customary organization and procedures. He listed the wartime requirements as (1) a command organization for supply and services, (2) an air arm granted the fullest exercise and initiative in developing aircraft and in creating "the most powerful air force in the world," (3) centralization under one authority of all training and ground forces, and (4) "decentralization of authority within the War Department." He said that more than a year's study had preceded the change and observed that this "complete reorganization of the machinery of the War Department and of the Army at large" was accomplished without confusion and with the "best good will." This was a tribute, the Chief of Staff declared, to "the singleness of purpose" of the senior officers of the Army and also to the way in which the reorganization plans had been prepared and put into effect.[6]

Some officers put the reorganization in a somewhat different light. March 9 was pictured as an event which gave three powerful individuals in the Army what they wanted. General Arnold, in effect, got his independent air forces, with the freedom to plan air strategy; General McNair got his undisputed control of the training of the ground forces; and General Somervell, formerly G-4, gained centralized control over the procurement and supply of the Army. This is not an altogether unreasonable interpretation, but it omits one other aspect: as Chief of Staff, General Marshall achieved a working relationship which enabled the War Department to continue to function with the Air Forces still acknowledgedly a part of the Army; at the same time, he was able to concentrate more fully than before upon the broad strategic problems of waging the war.

III

The organizational pattern of the War Department in the United States was thus made up of a small General Staff and three major commands. In addition, a number of overseas commands were created as the war progressed. The most important of these proved to be the European Theater of Operations, the Southwest Pacific command under General MacArthur (which eventually became a single command embracing all the Pacific except China

[6] *Biennial Report of the Chief of Staff of the U. S. Army, July 1, 1941, to June 30, 1943*, pp. 32–33.

and India-Burma), and the Mediterranean Theater of Operations. There were other commands in the Pacific, Caribbean, South America, China, India-Burma, the Middle East, and the Persian Gulf.

Experience under the organizational structure established in 1942 is the real test of its effectiveness. Since the Axis was defeated in a total elapsed period of forty-four months from our entry into the war, there is a natural tendency to say that this fact alone must attest the success of War Department organization. The subject is not as simple as this reasoning might suggest. No one surely will belittle the accomplishments which the wartime organization helped to achieve. Indeed, one is tempted to say that of all the wars in which the United States has been involved, World War II was the most efficiently directed, with the least amount of bickering and personal jealousies at the top and the greatest accomplishments in training, organizing, and equipping an armed force. In part, the accomplishment surely reflects the great technological and management advances of the last twenty or thirty years.

Yet the organization which the War Department used for the prosecution of the war had its difficulties which eventuated in proposals for a wholly new organization after the war. These difficulties deserve careful attention.

The General Staff. While the reorganization reduced the size of the General Staff, it did not officially affect its organization. Since the Harbord Board Report in 1921, the War Department General Staff had been divided into five parts—G-1 (Personnel), G-2 (Intelligence), G-3 (Organization and Training), G-4 (Supply), and War Plans. The major part of G-1 and G-4 went to the Army Service Forces on March 9. Most of the personnel in G-3 was transferred to the Army Ground Forces. Yet a nucleus continued to function in each of these three offices throughout the war. Each tended to become larger and to assert greater and greater authority. There continued to be certain conflicts in the field of personnel, organization and training, and supply among the three commands which these units had to arbitrate.

In his biennial report of 1943, General Marshall commented that when the War Department was reorganized the General Staff was "divorced from operating activities" with the exception of the War Plans Division. The name of this unit was changed to Opera-

tions Division, and it was, in General Marshall's words, "charged with the preparation of strategic plans and the coördination of operations throughout the world." This division was the center of the war planning that went on within the War Department. It prepared or collected the detailed plans submitted to the Joint and Combined Chiefs of Staff. It was in constant touch with every theater of war, serving as the official link between the War Department at home and the commanding general in each over-seas theater. The members of the division continually traveled back and forth between Washington and the various overseas areas. And an exchange of personnel between this division and overseas commands was almost systematic.

It was the work of the Operations Division more than that of any other part of the General Staff which the Chief of Staff followed with the closest attention. As the war progressed, more and more of the detailed planning of military operations was left to commanders overseas. But the basic strategic decisions on the division of manpower and supply among the various overseas areas continued to be handled within the Operations Division. In a very real sense, Army planning during the war was centered in this unit of the General Staff. To be sure, it drew upon the Army Air Forces, the Army Ground Forces, and the Army Service Forces for much assistance. For example, the details of logistic planning were performed within the ASF, subject to the direction and review of the Operations Division.

G-2 and the Military Intelligence Service made up the other part of the General Staff which was little affected by the reorganization of March 9. Eventually certain counter-intelligence and security work within the United States were delegated to the Army Service Forces, but otherwise the intelligence network of the Army was directed by G-2 with little diminution in scope or personnel after the reorganization. This unit of the General Staff likewise was in close touch with all overseas theaters and with other governments. Its work, like that of the Operations Division, was clothed in the greatest secrecy. Some have estimated that perhaps seventy-five per cent of the important information about enemy plans was gained from the radio interception of messages transmitted in code. Certainly the importance of this method of getting information about Japanese intentions has already been

revealed in the testimony before the Joint Committee on the Investigation of the Pearl Harbor Attack.

The performance of all central personnel functions for the War Department became a responsibility of the ASF after March 9. G-1 Division of the General Staff looked to the ASF staff for central personnel services. Thus, for example, before March 9, G-1 had included a legal branch interpreting statutory provisions affecting personnel policy and drafting new personnel legislation. This branch was transferred to ASF headquarters, but continued to be the central legal unit on personnel matters.

Neither the Army Air Forces nor the Army Ground Forces looked with too much approval upon the close relationships which existed between G-1 and ASF headquarters. Finally, in the spring of 1945 the Deputy Chief of Staff had to issue an official memorandum designating the Army Service Forces as the "operating arm" of G-1 on all personnel questions of military personnel wherever serving in the Army. On another occasion, G-1 voiced considerable dissatisfaction with certain organizational arrangements within the ASF which G-1 considered harmful to central planning and direction of personnel activities. In this instance, an amicable understanding was worked out between the two. Since so much of the central personnel operation was performed within the ASF, that command occasionally doubted the need for a G-1 at all.

Like the Personnel Division, the G-4 or Supply Division continued to function after March 9, even though it was less than a skeleton of its former size. The Army Air Forces retained virtually complete independence over its supply planning and procurement, while the Army Service Forces enjoyed the same authority for all ground equipment and common supplies. An official procurement review board set up in 1943, and a subsequent committee on supply procedures and supply levels, in effect criticized G-4 for not exercising greater supervisory authority over the calculation of supply needs. After January 1, 1944, G-4 nominally did exercise greater authority over supply planning, although it was too small to do much. After V-J Day, a major conflict occurred between G-4 and the Army Service Forces on the determination of postwar reserves. The size of these reserves was the important factor controlling the determination of surpluses to be disposed of. The Army Service Forces favored a small reserve, while G-4 favored a large reserve

in the fear that military appropriations would be negligible, now that the war was won. The Secretary of War had to set up a board to make a final determination of this controversy.

The Chief of Staff looked to the Commanding General of the Army Service Forces as his principal advisor on all logistics questions. Under the circumstances, G-4 was almost a fifth wheel. Since the most qualified personnel had been moved from G-4 to the ASF at the time of the reorganization, it was natural that these individuals should regard themselves as the supply planners of the War Department. The rôle of G-4 was almost negligible.

G-3, the Organization and Training Division of the General Staff, continued to be the central source officially determining the composition of the Army by units. Its primary task was one of balancing the estimated needs coming from the Air Forces, the Ground Forces, the Service Forces, and overseas commands with the total available strength. It was also the final authority on matters of training policy. But here its rôle was a limited one. The real initiative in all training questions was exercised by the three great commands. G-3 was, at best, an approving agency.

From 1903 to 1942, the General Staff was the agency of the Secretary of War and the Chief of Staff for supervising War Department activities as a whole. The various bureau chiefs, such as the Surgeon General and the Chief of Engineers, were oftentimes referred to as the "special staff" having supervisory responsibilities over their particular technical functions as performed by corps areas, overseas departments, and other so-called operating elements of the Army. After March 9, the War Department introduced the concept of a Special Staff to apply to miscellaneous units assigned War Department-wide functions but located outside the General Staff itself. Originally there were only two such units, the Legislative and Liaison Division and the Inspector General. Before World War II had come to an end, five other Special Staff divisions had been added, four of which, in effect, represented the transfer of functions from the Army Service Forces to the War Department Special Staff.

One of the administrative tasks originally assigned the Army Service Forces was to prepare the budget for the War Department. In 1943, the chairman of the House appropriations subcommittee handling the War Department expressed to the Under Secretary the opinion that the budget function should never have been taken

away from the General Staff. As a result, the War Department issued an order on July 7, 1943, establishing the Budget Office of the War Department as a part of the Special Staff. Accounting records continued to be maintained in the ASF, but supervision of budget preparation was henceforth exercised by this new office.

In part, this action was probably the result of some personal maneuvering. On the other hand, it also illustrated a basic difference of opinion about the budget process in wartime. The ASF argued that there was little discretion in preparing budget estimates. The vital factors affecting expenditure requirements were the size of the Army, the plans for the deployment of the Army overseas, and the procurement program of the War Department. These plans all depended upon basic decisions made in the General Staff. The job of preparing budget estimates accordingly was simply the routine task of translating basic plans into fiscal terms. A contrary point of view maintained that budgeting was an essential part of planning and that the two must necessarily go hand in hand. In any event, the budget function was transferred from the ASF to the War Department Special Staff.

During 1943, three other divisions were set up whose origins were in the ASF. A Civil Affairs Division was added to exercise central direction of military government operations. Previously, this work had been done by the Provost Marshal General in the ASF. A high official on relief operations overseas once complained to the Secretary of War that the latter lacked an immediate officer to deal with the State Department, the Board of Economic Warfare (later Foreign Economic Administration), and other agencies on military government matters. The Provost Marshal General was criticized as too subordinate an official. The Civil Affairs Division in the War Department Special Staff was presumably the answer. It was responsible for preparing the basic directives about military government policy, and for directing the training of military government officers and the determination of civilian supply requirements within the ASF. A Special Planning Division was set up in September, 1943, to give attention to all of the many problems which would occur in readjusting the size of the Army after V-E Day and in demobilizing the Army after V-J Day. This work had been started in the ASF four months earlier, but was transferred to the War Department Special Staff as a peculiar planning problem which could best be performed at that level. Then, in

October, 1943, the Chief of Staff ordered the creation of a New Developments Division in the War Department Special Staff to coördinate and direct research efforts. The officer in charge was transferred from the ASF. Actually, the Division gave most of its attention to the problem of introducing new weapons to the combat forces overseas, although it did arbitrate certain disagreements about new equipment between the AGF, the AAF, and the ASF. The other addition to the War Department Special Staff during the war was a War Department Manpower Board for controlling the utilization of manpower by the three Army commands in the United States and later by commands overseas.[7]

In every one of the instances mentioned, the War Department central staff was expanded to meet the needs for new functions to be performed under the immediate supervision of the Secretary of War and the Chief of Staff. The original March 9 conception of the General Staff was maintained, but the central direction of the War Department was expanded through the device of adding new units to the War Department Special Staff. This action revealed a partial breakdown in the original conception of the Army Service Forces.

Although the War Department General and Special Staffs increased in size and scope of authority after March 9, 1942, the volume of administrative work was still less than that exercised before the reorganization. The creation of the three great commands, by introducing a new level of coördinating authority in the War Department structure, had unquestionably reduced the central directing burden. Where before there had been some thirty or forty major commands in the United States alone subject to the central direction of the Chief of Staff and the Secretary of War, after March 9 there were only three large commands. This definitely reduced the burden of the Chief of Staff and the War Department staff.

Indeed, on one occasion during the war General Marshall told a group of officers that as far as supply and procurement activities were concerned, he would not think of going back to the arrangement existing before March 9. It seems a fair verdict to say that as far as one objective in the reorganization was to relieve the central

[7] See George W. Peak, "The War Department Manpower Board," in this REVIEW, Vol. 40, p. 1 (Feb., 1946).

command of the War Department of much of its work, the reorganization substantially achieved that purpose.

The Army Air Forces. Throughout the war, the Army Air Forces consistently maintained a somewhat separate rôle within the nominal framework of the War Department. The Commanding General sat on the Joint Chiefs of Staff in his own right. He was, in a sense, a co-equal member of that body, along with the Chief of Staff of the Army. He had his own air staff planning the strategic operations of the Army Air Forces all over the world. He was, moreover, in direct communication with all Air Force commanders overseas. Official strategic directives about air operations ordinarily went overseas in the name of the Secretary of War and the Chief of Staff. But the Commanding General of the Army Air Forces in Washington had much to say directly about overseas operations. Interestingly enough, the three published reports of the Army Air Forces during the war were addressed by the Commanding General to the Secretary of War rather than to the Chief of Staff.

The basic drive of the Army Air Forces was to demonstrate the separate strategic and tactical rôle which air power could play in military operations. The Army Air Forces was proud of the fact that for nearly two years before the cross-channel invasion, the American Air Forces had been maintaining their own direct attack upon German positions in Europe.

Even in the field of ground-air coöperation, the Army Air Forces conceived of its tactical mission as something more than just "ground support." General Arnold had no use for this word "support," because it made military personnel and others think of air power as long-range artillery directed by ground commanders.[8] The AAF pointed with pride, for example, to the tactical mission it performed during General Patton's breakthrough in August, 1944. The Third Army's right flank was protected almost entirely by air power, and a force of 30,000 Germans surrendered after unremitting air attack and without encountering any large number of ground troops.[9] Indeed, the Army Air Forces at one time issued an order forbidding any of its officers at any time to use the words "air support."

[8] See *Report of the Commanding General of the Army Air Forces to the Secretary of War*, Jan. 4, 1944, p. 42.

[9] See *Second Report of the Commanding General of the Army Air Forces to the Secretary of War*, Feb. 27, 1945, p. 30.

The determination of the Army Air Forces to maintain its own strategic and tactical concept of mission greatly affected its organizational attitude. There was a constant drive to make the Army Air Forces a largely self-contained unit tied into the War Department almost solely by the personal relations of the Commanding General to the Chief of Staff. One evidence of this drive was the attitude of the Air Forces toward the Army Service Forces, which will be discussed in detail below. When the 20th Air Force was created to direct the strategic employment of the B-29 superforts, General Arnold became Commanding General of this Air Force while remaining as Commanding General of the AAF. This organizational desire realized its ultimate goal in the summer of 1945, when the Joint Chiefs of Staff created a separate strategic air command in the Pacific reporting directly to the Joint Chiefs of Staff and not under the command jurisdiction of either General MacArthur or Admiral Nimitz. Undoubtedly the inability of the Army and the Navy to agree on a single commander in the Pacific paved the way for General Arnold to obtain a separate air command on a co-equal basis.

The War Department General Staff, as a matter of policy, appointed AAF officers to many key positions. As a rule, the General Staff tried to insure that at least a third of its officers were drawn from the AAF—roughly the proportion of AAF officers in the Army as a whole.

In his final report to the Secretary of War, General Arnold summarized his conclusions about World War II experience. Air superiority, he declared, had become the "first essential for effective offense as well as defense." This essential demanded a "modern, autonomous, and thoroughly-trained air force." While later he spoke of a team of the Army, the Navy, and the Air Forces "working in close coöperation," he obviously was referring to the Air Forces as a separate arm. In General Arnold's eyes, an air force could no longer "be considered as being local in extent or limited in range." Indeed, he specified air superiority as a prerequisite for any successful ground or naval action. But in the end General Arnold pleaded for an integrated national defense. He argued that unity of command overseas was not sufficient, and he acknowledged a need for unity in military planning, unity in common item procurement, and unity in military doctrine. He advocated ground, naval, and air forces with an equal voice and an equal responsibility for preparing plans and policies for national defense. He wanted these three fighting forces organized in a way which would provide "integrated command of three autonomous services," each with an equal share of the total responsibility.[10]

Certainly the reorganization of March 9 gave the Army Air Forces virtually all that it asked. It acquired additional functions from the Army Service Forces during the war; it retained complete control over its own design and development and over the production of aircraft; and it developed its own strategic and tactical doctrine. At the same time, it remained nominally within the War Department and the Army. This was more General Marshall's achievement than General Arnold's reticence.

The Army Ground Forces. Of the three commands created by the reorganization, the Army Ground Forces seems to have presented the fewest problems for the War Department as a whole. Its function was the most clearly defined because it was the most limited. The AGF trained combat troops for use by combat commands, from the Army group headquarters down through divisions. It provided basic training for enlisted personnel in the infantry, cavalry, artillery, and armored force arms. It received individuals who had had basic training or officer training by the Army Service Forces in such fields as communications, engineering, ordnance maintenance, ammunition supply, and chemical warfare for training in units to function along with the combat arms.

The training responsibility of the Ground Forces necessarily meant that the command had to maintain close relations with the overseas theaters in order to translate combat experience and needs into the training program. The tactical doctrine for the employment of combat units was largely formulated during training in the United States. But once combat units and personnel had passed overseas, the Army Ground Forces had no further control over them. No effort was made to extend the authority of the AGF beyond its training work in the United States.

Few, if any, problems seem to have arisen in defining the rôle of the AGF in the War Department. There were almost no major controversies between this command and the other two. On occasion, the Army Ground Forces may have felt that it received inadequate coöperation in the development of air-ground training

[10] See *Third Report of the Commanding General of the Army Air Forces to the Secretary of War*, Nov. 12, 1945, pp. 59–72.

doctrine and experience. On other occasions, the Army Service Forces felt that the training of supply and service units to function with combat commands should have begun under the ASF, with later assignment to AGF. The Army Ground Forces, however, felt that it should be responsible for all training of supply and service units intended to function with combat commands. The training of the individual in his technical responsibilities remained with the ASF. For the most part, this was a satisfactory dividing line of responsibility. There were occasional differences of opinion between the AGF and the ASF in the development of weapons and the adoption of new types of equipment. These, too, were settled amicably enough. The Army Ground Forces was content to leave the management of the posts where it performed its training work to the Army Service Forces. The coöperative relations between the two commands were close and cordial.

In bringing about a single command of all tactical training in the United States, the Army Ground Forces realized the purpose underlying its creation. Its success was demonstrated by the large number of divisions and special units which it trained and sent overseas. By common agreement, the Army Ground Forces was able to bring about the desired coöperation among all elements of ground warfare. The reconnaissance squadron, the infantry regiment, artillery units, the separate armored units, and armored divisions were all indoctrinated in their own specialty and in the necessary degree of coöperation with each other. Probably for the first time in American Army history, a cohesive ground tactical command was achieved within the division as well as within corps and armies. The AGF had a right to feel that it had succeeded in its mission.

Interestingly enough, the headquarters of the Army Ground Forces in Washington continued throughout the war to be one of the smallest War Department offices in the capital. General McNair always felt that he wanted to know all of the officers in his headquarters. General Lear and General Stilwell continued that tradition. Including all clerical and stenographic assistance, the headquarters of the Army Ground Forces in Washington at no time between 1942 and 1945 greatly exceeded 300 persons.

The Army Service Forces. The Army Service Forces was the most complicated of the three commands created by the reorganization. It had a wide variety of functions. It brought together, among

others, such disparate offices as the Surgeon General, the Chief of Engineers, the Chief of Chaplains, the Chief of Finance, the Judge Advocate General, and the Adjutant General. Its functions ranged from the induction of selectees into the Army and the procurement of military supplies to the transportation of men and supplies by rail and steamship and the protection of vital military facilities and plants from sabotage or other internal menace.

In a sense, the Army Service Forces was a holding company, or it might be described as a reorganized General Staff with command authority. The Army Air Forces was built up out of a single branch of the Army. The Army Ground Forces replaced four bureaus which were abolished. The Army Service Forces was an amalgamation of a considerable part of the General Staff with the Office of the Under Secretary of War, together with certain bureaus such as the Adjutant General's Office, the Judge Advocate General's Office, and the Office of the Chief of Finance into a new command headquarters. Other bureaus such as the Office of the Chief of Ordnance, the Office of the Quartermaster General, and the Office of the Surgeon General retained their previous responsibilities, but functioned under the command of the Commanding General, ASF, rather than under the Chief of Staff. The so-called seven technical services (Ordnance, Quartermaster, Medical, Engineers, Signal, Chemical Warfare, and Transportation) had their own procurement offices scattered throughout the United States, their own depots, and their own training centers. This arrangement was not altered by the creation of the ASF. In addition, the ASF inherited the nine corps areas which had originally been authorized by the amendment to the National Defense Act of June 4, 1920. The designation of these corps areas was changed to service commands in July, 1942, and their rôle became one of handling various field activities for the ASF.

There is no need here to deal with the various internal organization and management problems of the Army Service Forces,[11] but the problems of the organization as a whole in relation to the other commands require comment.

Although the Army Service Forces was often called a co-equal command with the AAF and the AGF, its rôle was different. Army thinking for a great many years has divided all military activities

[11] See *Administrative Management in the Army Service Forces* (Chicago, Public Administration Service, 1945).

into two broad categories—operations and administration. Operations traditionally has meant combat. It refers to the strategic and tactical doctrines which govern the employment of combat forces against the enemy. Administration, on the other hand, has meant all the work required in the performance of combat operations; it is supply, the transportation of men and supplies, communications, medical care, the maintenance of personnel records, the payment of bills, and all the thousands of details that are necessary in supporting a large modern army. In this sense, the ASF was the central War Department admin stration agency for World War II.

The first real issue, then, was how far the ASF should go in preforming these administrative duties on a centralized basis and how far such commands as the AAF and the AGF should perform this work as an inherent part of their own operations. Because of the divergent positions of the AAF and the AGF on the subject, this question was never satisfactorily answered during the war.

The issue had several different aspects. One was the management of Army posts in the United States. The Army post was a fixed installation where large numbers of troops were stationed for training. Each such installation involved so-called "housekeeping" duties arising out of the nature of the installation and the presence of a considerable number of men. For example, there were roads, water and utility systems, a hospital, churches, recreation facilities for off-duty hours, and many other similar activities to be provided. In addition, the military post was an important element in the supply distribution system. It had large warehouses where equipment inventories were maintained for distribution to troops as needed. The Army Ground Forces looked to the Army Service Forces to manage these posts. Thus at a great military installation like Ft. Benning or Camp Hood, the Army Ground Forces directed the training schools and commands, but the Army Service Forces named a post commander who worried about repairs, utilities, the hospital, the churches, the laundry, the warehouses, and other services.

Apparently the Army Ground Forces was at all times satisfied with this arrangement. In any event, no suggestion for its change ever originated with that command during the war. For one thing, the Army Ground Forces desired to move divisions and other units from one post to another as it pleased. Then it wanted to concentrate upon training and not have to trouble itself about the management of fixed installations. Necessarily there were supply and administrative services to be performed within divisions, and even within smaller units. But beyond the division level, the Army Ground Forces was little interested in the supply and service arrangements within the United States.

The Army Air Forces held a diametrically opposed point of view. The airfield where air combat and service troops were trained was regarded as an integral unit. The warehouses, the laundry, the hospital, the post exchanges, the churches—all these came under Air Forces jurisdiction just as much as the hangar, the air strips, and the flight control tower. The reorganization specified that the AAF should retain complete control over all its military installations; and the Army Service Forces at no time seriously suggested that the same method of post management be adopted for air installations as for ground installations.

The real controversy came in deciding how far the ASF should exercise any supervisory control over certain activities at air posts. For example, the Chief of Engineers was a part of the Army Service Forces. In the past, his office had established repair and utility standards for military installations and had inspected to insure that these standards were observed in practice There was no question about the authority of the Chief of Engineers to perform this responsibility at posts utilized by the Army Ground Forces, since there was an ASF officer there responsible for repair and utility activities. But was the Chief of Engineers to inspect repair and utility operations at air posts? The Army Service Forces maintained that he was. And since repair and utility funds were always included in the Appropriation Act under the title "Engineer Service," the ASF allotted the funds for this activity directly to air posts. The same method was followed for a number of other activities such as laundries, recreational work, and fixed communications. The Army Air Forces objected to this arrangement.

In 1944, the Secretary of War created an *ad hoc* committee on fiscal organization and functions of the War Department. The Air Forces argued before this body that service funds should be allotted directly to the Commanding General, AAF, and not to individual air installations through the field structure of the ASF. This point of view was approved by the committee, and the Secretary of War issued an order in September, 1944, requiring the Commanding

General of the ASF to allot directly to the Commanding General, AAF, a portion of the funds appropriated for communications, ordnance maintenance, repairs and utilities, laundries, and recreational activities. The ASF was still given responsibility for setting the standards for the performance of these various jobs.

Immediately after this change, the Army Air Forces voiced objections to ASF inspection of such activities. In the end, the War Department General Staff sustained the authority of the individual technical services and other units of ASF headquarters to inspect performance at air installations, but this was done through the subterfuge of designating the Chief of Engineers, for example, as an instrument of the War Department General Staff when he inspected AAF facilities. This move, of course, raised some doubts about how far the Army Service Forces could function as a single command.

A similar type of difficulty with the Air Forces arose over medical services. In 1943, the Inspector General made a study of all Army hospital facilities in the United States and recommended that these facilities be utilized to treat military personnel wherever they were located, regardless of whether they were AGF, AAF, or ASF personnel. By the end of March, 1944, an agreement had been negotiated between the ASF and the AAF which set up a standard hospital structure on an area basis. Official War Department instructions followed which authorized regional hospitals to be managed by both the ASF and the AGF. The Surgeon General in the Army Service Forces was called also the Surgeon General of the War Department and given authority to inspect the quality of medical treatment throughout the United States. The Surgeon General was thus confirmed as the chief medical officer, but his status within the ASF became somewhat confused.

There were thus two different systems of post management for military installations in the United States. The Army Service Forces managed the training installations which it used and also the great training installations used by the Army Ground Forces. It had a well developed supervisory structure for insuring that all the activities necessary to the operation of these installations were satisfactorily performed. The Army Air Forces managed its own installations as it saw fit with its own supervisory structure pyramiding into the Air Forces headquarters in Washington. There was some duplication of supervisory personnel. There were some inevitable differences in standards under this arrangement. The Air

Forces constantly sought complete freedom from Army Service Forces on the ground that one command should not exercise supervision over another command. Yet the War Department General Staff was not prepared to determine medical policies, engineer policies, or communications policies for the Army as a whole. These responsibilities had been vested in the ASF as the central supply and service agency. The AAF did not approve of this arrangement.

A different kind of organizational relationship between the Army Service Forces and Army Air Forces had to be worked out in the procurement field with the transfer of most of the Under Secretary's staff to ASF headquarters. The Under Secretary of War remained responsible for supervising procurement operations. With the exception of the Army Air Forces, however, all of the procurement agencies after March 9 became operating units of the ASF. In addition, almost the entire staff of the Under Secretary's Office, upon which effective supervision depended, had been transferred to the Commanding General, ASF. Indeed, the Commanding General was, in effect, the Procurement General as advocated by the Booz report of December, 1941.

Personal relationships between the Commanding General, ASF, and the Under Secretary of War were very close. The two occupied adjoining offices. The Under Secretary was consulted on all legal questions affecting procurement, as well as on most policy matters such as pricing and contract termination. The Under Secretary attended all staff conferences of the ASF and dealt directly with many ASF staff officers.

Under these circumstances, a very practical solution was found to the problem of maintaining a common War Department policy on certain procurement operations. Three divisions of ASF headquarters—purchases, renegotiation, and readjustment (contract termination and surplus property disposal)—were also designated as staff units of the Under Secretary's office when dealing with the Army Air Forces. This was an organizational subterfuge, but it worked. Policies on such matters as the award of contracts to small businesses, standard War Department contract forms, and contract renegotiation were issued to the technical services in the ASF in the name of the Commanding General and to the Army Air Forces in the name of the Under Secretary of War. The AAF never made any great objection to this arrangement.

In deciding upon the need for new production facilities, in con-

serving and allotting raw materials, in scheduling production, and in eliminating production bottlenecks, the Army Air Forces and the Army Service Forces went their own separate ways. The Under Secretary actually had very little to say about the production work of the AAF, although he kept in close contact with ASF performance. One reason was the peculiar production arrangements worked out between the Air Forces, the Navy Bureau of Aëronautics, and the War Production Board. A so-called Aircraft Scheduling Unit was a joint operation of these agencies. The Army Air Forces maintained its own separate representatives on various WPB committees and received direct allotments of raw materials through the Aircraft Scheduling Unit. There was thus no single agency in the War Department directing production operations as distinguished from purchasing policies and procedures.

As a major combatant arm, the Army Air Forces injected a new procurement practice into the War Department. The Army Ground Forces purchased none of the equipment for ground troops. Thus the tanks of the armored forces, and the guns and fire control instruments of the artillery units, were purchased by the Ordnance Department. The Quartermaster General bought all personal equipment as well as food and general supplies. It is true that the Ground Forces played an important part in developing all equipment and approved its adoption. It is true that most of the medical equipment and supplies purchased by the Medical Department was used by medical units, and so with transportation equipment, engineer equipment, and much of the communications equipment. Yet the unit training of many of these units remained with the Air Forces and the Ground Forces. The AAF insisted, however, that it should purchase all airplanes and other supplies "peculiar" to its operations.

There was some difficulty, however, in defining just what items were "peculiar" to the Army Air Forces. What about flight clothing, special rations for air crews, high explosive and incendiary bombs, the guns and ammunition used in airplanes, communications equipment, and life rafts? No consistent answer was ever found. The Ordnance Department provided guns for airplanes, the ammunition, and high explosive bombs. Some items were peculiar to the Air Forces, such as the 20 mm. and later the 75 mm. cannon mounted in aircraft. The Chemical Warfare Service provided all the incendiary bombs used by the Air Forces. The AAF

raised some questions about this, but no change was ever made. When it came to items such as life rafts, rescue boats, air crew clothing, and air crew rations, the Army Air Forces did its own purchasing, although it did obtain the assistance of the Quartermaster General in the development of many items.

The most important substantial change in procurement responsibility which took place during the war involved communications equipment for intra-plane as well as for inter-plane and plane-ground communication. Originally all such equipment was purchased for the AAF by the Signal Corps. Early in 1944, the Commanding General of the AAF recommended to the Chief of Staff that the purchase of all communications equipment used in aircraft, including radar equipment for locating bomb targets, should be transferred from the Signal Corps to the AAF. Instructions were so issued in August, 1944. This action was taken in spite of the fact that communications equipment in aircraft was very similar to that developed for use in trucks and tanks and for connecting ground installations. Probably 75 per cent of the component parts in a radar set in an airplane were the same as those in a ground set for the fire control of anti-aircraft and heavy artillery units. Probably the explanation for the transfer was to be found in an organizational mistake of the Signal Corps. The Chief Signal Officer established a central procurement office for all aircraft communications equipment at Wright Field, Dayton, in order to effect close working relations with the AAF. The result was that the Air Forces could argue that since Signal Corps procurement operations were centered at Wright Field, and since all Air Forces procurement was centered at the same point, there was no reason why communications procurement should not be transferred to the AAF.

Review of ASF Position. The various changes which were made in Army Service Forces responsibilities during 1943 and 1944 led the Commanding General in September, 1944, to address a memorandum on this subject to the Chief of Staff. He called attention particularly to the attitude of the Army Air Forces toward the command. As a result, the Chief of Staff, in October, asked the Commanding Generals of the Air Forces, the Ground Forces, and the Service Forces personally to review the whole question of the ASF position in the War Department and to see if they could come to some agreement. Specific points of disagreement were to be referred to the Chief of Staff for decision.

At the end of November, the three Commanding Generals reported that there was fundamental disagreement among them about the relation of supply and service activities to combat forces. The Commanding General of the AAF believed that the development of an effective air combat force went far beyond the training of flight and ground crews and the procurement of aircraft. He maintained that the successful performance of his responsibility required complete control of the bases used by air personnel in the United States. All of the administrative supply and service functions necessary to the operation of these bases had to be under the single control of the Air Forces and integrated with training and combat operations. The AAF did recognize that there were certain supply and service activities which the ASF should perform for the Army as a whole. There was no objection to ASF procurement of foodstuffs and items of common equipment. There was apparently no objection to ASF construction of all War Department facilities or ASF control of surface transportation on land and sea. But the Army Air Forces insisted upon running all services at airfields such as medical and repair and utility activities.

The Commanding General of the Army Ground Forces (at this time Lieutenant General Ben Lear) was content with existing organizational arrangements and sought no change. The Commanding General of the ASF argued that it would be more economical in cost and manpower, and would insure a single standard of service for all individual soldiers, to have one agency procuring common supplies and operating common services. He denied that the ASF had any desire to control the training of air crews or the development of air doctrine.

In December, 1944, the Deputy Chief of Staff acknowledged that the report of the three Commanding Generals did not provide the basis for a solution of their differences. Accordingly, he set forth certain fundamental principles which were to govern relationships among the three commands. In the first place, the War Department General Staff was to be the over-all policy and coördinating staff for the War Department in the Army, while the three commands were to be primarily operating agencies. Secondly, military personnel of the three commands should receive equal consideration and should enjoy equivalent facilities. The General Staff should promulgate appropriate policies and regulations to this end. In the third place, combat commanders should concentrate their attention upon their primary responsibilities and delegate to a common supply service those duties not essential to the command prerogative. Common supply service should emphasize service, not command. The fourth principle was that a common supply and service organization was essential to the War Department. The fifth principle announced that in the "indeterminate zone" where supply and administrative activities might appear to be inseparable from command, or, on the other hand, might be called an inherent part of the common supply operation, the wishes of the combat commander were to govern. As an example, the Deputy Chief of Staff pointed out that the procurement of foodstuffs was appropriately a common supply function to be performed by the ASF. The procurement of high altitude flying clothing, however, was in the "indeterminate zone," and so the wishes of the AAF would govern. In effect, the decision of December, 1944, simply reaffirmed the status quo as of that time. Neither the Army Air Forces nor the Army Service Forces was entirely satisfied. But the problem of a general reorganization of the War Department was postponed for consideration after the defeat of the Axis.

In part, the difficulties of the ASF resulted from the peculiar rôle of its constituent elements such as the Chief of Ordnance, the Surgeon General, or the Chief of Engineers. These officers traditionally had had more than procurement duties or other operating responsibilities, such as the management of general hospitals or the construction of military facilities. They were also the chiefs of their particular professional techniques wherever performed in the Army hierarchy. A combat division had a surgeon, as did an AAF wing. The Surgeon General was responsible for the quality of medical care wherever performed in the Army of the United States. It was this past practice which the AAF challenged. The Commanding General of the AAF had an Air Surgeon on his staff, and he wanted all medical service in the AAF supervised solely by that individual. It was this dual nature of the rôle of the Surgeon General and of the Chief of Engineers, among others, that created peculiar difficulties for War Department organization in the war years.

An immediate practical solution had to be found. War Department orders in 1944 and 1945 specified that the Surgeon General, for example, was the "chief medical officer" of the Army and the "chief medical advisor to the Chief of Staff and the War Depart-

ment." As such, he prepared instructions on general medical policies and procedures which were Army-wide in application. In addition, he was to exercise "technical staff supervision" to insure the best utilization of medical personnel and medical facilities, and he was "to make technical inspections" on health matters. In this particular case, the Surgeon General addressed his recommendations to the Chief of Staff through the Commanding General, ASF, who might only comment about them; the Commanding General could not reject them. Similar orders covered the status of the Chief of Ordnance, the Chief of Engineers, and the Quartermaster General. Thus the concept was introduced that chiefs of technical services were a part of the staff of the War Department as a whole as well as a part of the Army Service Forces. No one could satisfactorily determine the resulting effect upon the Army Service Forces as a command.

In any event, the Army Service Forces was different from the Air Forces and the Ground Forces. Yet it was difficult to get the Air Forces in particular to recognize that the nature of the ASF's job entailed a supervisory responsibility throughout the Army, and particularly over certain phases of AAF operations.

Overseas Commands. The philosophy of the War Department about overseas commands was clearly stated in Secretary Stimson's statement to the Joint Committee on the Investigation of the Pearl Harbor Attack. "One of the basic policies of the Army command," he remarked, "which has been adhered to throughout the entire war, and in most instances with complete success, has been to give the local commander his objective and mission, but not to interfere with him in the performance of it."[11]

Only the broadest conceptions of overseas organization were contained in the two field-service regulations published by the War Department for the guidance of overseas commanders. These two documents, one entitled "Operations" and the other "Administration," simply mentioned that an overseas theater was a territorial area of combat and that it was ordinarily divided into two parts: a combat zone where armies were located and a communications zone containing all the supply and administrative installations necessary for the support of the combat forces. In turn, a communications zone was to be organized on a territorial basis divided into one or more advance, intermediate, and base sections. There was to be a commanding general of the communications zone reporting to the theater commander-in-chief. The regulations did not specify the exact relations between the commanding general of the communciations zone and the various armies in the combat zone, nor the exact rôle that the commanding general of the communications zone would play in the administration of the theater as a whole.

[11] *New York Times*, Mar. 22, 1946.

The same problems appeared overseas that plagued the War Department in the United States. For example, since a large part of the medical activity of a theater of operations was normally located in the communications zone, the chief surgeon in the zone was usually the most important medical officer in the theater. Was he, then, to supervise medical care by armies and smaller tactical units, or was there to be another medical officer on the staff of the theater commander-in-chief supervising medical service both in the communications zone and the combat zone? Different overseas theaters had different answers to this and comparable problems. The arrangement was different in the European Theater from that in the Mediterranean Theater, and both were different from the arrangements in the Pacific.

Various proposals were made from time to time for a detailed organizational structure to be specified for all overseas theaters. It was argued that a standard administrative structure in all overseas theaters, paralleling that of the War Department in the United States, would promote inter-communication and exchange of personnel. It would permit standard procedures and hence more rapid discharge of various functions. But no such recommendations were ever adopted, and theater commanders continued to the end of the war to construct their overseas organization in whatever manner they saw fit.

IV

On August 30, 1945, three days before the official surrender of the Japanese, the Chief of Staff established a board of officers to review War Department organization and to make recommendations for its postwar structure. Under the chairmanship of Lieutenant General A. M. Patch, this board reported in the middle of October; and the report was circulated to the major commands in the United States and in overseas theaters. In turn, another board of officers, with Lieutenant General W. H. Simpson as president, was created by the Chief of Staff at the end of November to review all the comments upon the Patch Board report and to make final recommendations on War Department organization.

Actually there was only one important difference between the reports of the two boards. The second board of officers recommended the creation of Army Areas as subordinate tactical commands of the Army Ground Forces and as separate administrative commands reporting to the Chief of Staff on supply and administrative activities. These Army Areas would be responsible for the operation of ground installations and for such other activities as the induction and initial assignment of military personnel and Reserve and National Guard training. Neither board discussed the defects of wartime organization in any detail. Rather, the recommendations implied obvious criticisms.

The proposed reorganization had four major aspects. In the first place, the War Department General Staff was greatly enlarged and its responsibilities increased. In order to make it clear that this staff had "operating" functions, the head of each staff unit was to be designated as a "director" rather than as an "assistant chief of staff." Thus in place of the old Assistant Chief of Staff, G-1, the position should henceforth be known as "Director of Personnel and Administration." Under the new organization there would be five such General Staff directors—a Director of Personnel and Administration; a Director of Intelligence; a Director of Organization and Training; a Director of Plans; and a Director of Service, Supply, and Procurement. One of the reports criticized the great reduction in size of G-1, G-3, and G-4 on March 9 on the ground that thereafter the Assistant Chiefs of Staff were unable to be of real assistance to the Chief of Staff in advising him on Army-wide problems or in assisting him to exercise supervision of all Army activities. In addition, the War Department Special Staff as it had functioned during the war was continued without change. The reports made it clear that the Chief of Staff was military advisor to the President and to the Secretary of War and commander of all Army forces throughout the world. A Director of Research and Development was eventually added to make six General staff directors.

In the second place, the Army Service Forces as it had existed during the war was abandoned. Its functions were transferred to the War Department General Staff as a part of the plan to strengthen that element of the organization. Henceforth, there would be two major operating commands in the United States—the Army Air Forces and the Army Ground Forces. In addition, there would be area commands, as mentioned above, which would

function partly under the Army Ground Forces and partly under the direct supervision of the General Staff. The technical and administrative services of the ASF would function under the War Department General Staff—the seven technical services primarily under the Director of Service, Supply, and Procurement, and the administrative services (the Adjutant General's Office, the Provost Marshal General's Office, the Chief of Chaplains, and the Special Services Division) under the Director of Personnel and Administration. In effect, this meant that the War Department staff would consist of a General Staff, a Special Staff, technical services, and administrative services.

In the third place, a unified directing staff on procurement and supply was retained. While the Under Secretary of War would continue to supervise procurement matters, he would exercise this supervision through the Director of Service, Supply, and Procurement. The old dual supervisory staff which had existed from 1921 to 1942 would thus be avoided. It was implied, although not so specified, that the procurement policies of the Under Secretary and the Director of Service, Supply, and Procurement would apply also to the Army Air Forces.

Finally, greater autonomy was recommended for the Army Air Forces. The Air Forces would retain complete control over air stations and air installations in the United States and even overseas. It would have complete control within the limits of very broad directives of the research, development, and procurement of Air Forces equipment; it would determine the strength and organization of Air Forces units; it would conduct necessary intelligence activities; it would design Air Forces installations with some assistance from the Chief of Engineers; and it would be virtually separately responsible for determining Air Forces budgetary needs.

At the end of January, 1946, the Chief of Staff (General Eisenhower) announced in principle his acceptance of the recommendations made by the second board of officers which modified only in some details the original proposals. Presidential approval was officially expressed in Executive Order 9722 on May 13, 1946. The new organization for the War Department was then officially set forth in War Department Circular 138, May 14, 1946, to become effective on June 11. Whether the new organization would meet the difficulties experienced in the wartime organization, and whether the new structure would better meet the needs of some possible war, only time could tell.

Die Amerikaner in Deutschland

Eine Studie über die Post im amerikanischen Herrschaftsbereich September 1944 bis Dezember 1945

Von
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Die Rolle von SHAEF

Die Westalliierten hatten ein gemeinsames Oberkommando: **SHAEF** (= Supreme Headquarters, Alliied Expeditionary Force). Oberbefehlshaber war der amerikanische General Eisenhower. Der Stab setzte sich aus amerikanischen und britischen Offizieren zusammen.

Daneben hatten die Amerikaner noch einen nationalen Komandostab: **ETOUSA** (= European Theater of Operations, US-Sector). ETOUSA unterstand den Kommandostellen in den USA und stellte SHAEF die Truppen und den Nachschub zur Verfügung. Oberkommandierender von ETOUSA war gleichfalls General Eisenhower.

SHAEF plante nicht nur die militärischen Operationen, sondern auch die „zivile Seite". General Eisenhower war zugleich vorgesehen als Militärgouverneur für Deutschland und sollte an der Spitze einer Militärregierung stehen.
Es ist sehr wichtig, sich vor Augen zu halten:
die Westalliierten hatten im Kriege und in den ersten Nachkriegswochen **eine einheitliche Führung,** eben SHAEF. Die Aufteilung in gleichberechtigte Besatzungsmächte erfolgte erst mit der **Berliner Deklaration vom 5. 6. 45.**

Die Personalunion von Oberbefehlshaber und Militärgouverneur ist verständlich, wenn man sich in die Situation vom August 1944 hineinversetzt. Den tatsächlichen Ablauf von Herbst 1944 bis Sommer 1945 konnte man nicht voraussehen. Man rechnete mit harten Kämpfen in Deutschland und mit einer NS-Widerstandsbewegung im besetzten Hinterland, die auch über das Ende der Kampfhandlungen heraus aktiv sein würde.

Die Militärregierung war deshalb gedacht:
- während des Krieges:
  zur Sicherung des rückwärtigen Frontgebietes,
  zum sofortigen Unterbinden einer jeden NS-Tätigkeit,
  zum Bereitstellen deutscher Hilfsquellen für die Truppen
- nach dem Kriege:
  zur Abwehr von NS-Unruhen und NS-Guerilla-Tätigkeit („Werwolf"),
  zur Beobachtung der Bevölkerung
  und zur Förderung demokratischer Kräfte.

Im Hinblick auf diese Sicherungsaufgaben wurde die Militärregierung den taktischen Einheiten zugeordnet, genauer gesagt: unterstellt.
Dies begann schon bei SHAEF selbst:
die Angelegenheit der Zivilbevölkerung betreute das **Referat G 5.**

Solche Referate gab es bei allen Stäben bis hinunter zu den Divisionsstäben.
Schon lange vor dem Eindringen in Deutschland arbeitete SHAEF sozusagen „für die Schublade":

- es wurden **Gesetze und Anweisungen** geschaffen, die in Kraft traten, wann und wo immer ein Stück deutschen Landes besetzt werden sollte.

  Es gibt demzufolge kein Datum der Verabschiedung, wie man es bei Gesetzen normalerweise kennt und auch kein einheitliches Datum des Inkrafttretens. Am ehesten könnte man sagen, daß das Paket der vorbereiteten Gesetze und Anweisungen **erstmals** am 18. September 1944 wirksam geworden ist.

  Andere Daten, die bisher in der Literatur häufig genannt werden, sind Daten geänderter Fassungen.
- es gab einen **Plan „Eclipse",** herausgegeben am 10. November 1944, betreffend das Ende der Feindseligkeiten und den Beginn der Besatzung.[1] Hier wurde z. B. anfangs eine Besetzung Berlins auf dem Luftwege durch die 82. US-LL-Division geplant[2].
- es wurde **„die Militärregierung"** vorgeformt,
- es wurde **ein SHAEF-Handbuch** geschaffen, als Hilfsmittel für die Offiziere der Militärregierung.

Zunächst wollte man die Militärregierungs-Einheiten „gemischt" amerikanisch-britisch besetzen. Das wurde jedoch bald aufgegeben, so daß es entweder rein amerikanische oder britische Militärregierungs-Einheiten gab (Militärregierung wird fortan mit MG abgekürzt). Die spätere Auflösung von SHAEF zeichnete sich hier schon ab.

Auch die Ergebnisse der Jalta-Konferenz zeigten, daß SHAEF kein Mandat für die Nachkriegszeit besaß[3]. Aber noch war Krieg.

Wichtig zum Verständnis von SHAEF ist es, zu wissen, daß die Franzosen bei SHAEF keine Rolle spielten. Ihre 1. franz. Armee war vielmehr Bestandteil der 6. US-Heeresgruppe. Es ist deshalb sicher, daß die Franzosen die Weisungen von SHAEF zu befolgen hatten, genauso wie die amerikanischen und britischen Einheiten.

SHAEF hatte mit der Militärregierung die volle Gewalt über jedes Stück deutschen Landes übernommen, das gerade besetzt worden war. Es gab also kein Vakuum, das irgendein Ortskommandant hätte ausfüllen müssen.
Für die Philatelisten ist es nun wichtig, daß SHAEF auch **die Posthoheit** übernommen hatte. Diese Posthoheit galt somit z. B. auch für das von den Franzosen besetzte Gebiet. Die SHAEF-Posthoheit dauerte bis zur Berliner Deklaration vom 5. Juni 1945.

Feldpostbelege mit Bezug auf SHAEF sind sehr selten, weil SHAEF in der Kriegszeit in Reims/Frankreich stationiert war. Erst im Juni kam SHAEF nach Deutschland und wurde bereits am 13. Juli 1945 aufgelöst.

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[1] Ziemke Earl F., The US-Army in the Occupation of Germany 1944–1946. Army Historical Series, Center of Military History, United States Army, Washington, D.C., 1975.
[2] In der Gildeschrift Nr. 103 über die deutschen Militärinternierten in Schleswig-Holstein wurden ebenfalls Einzelheiten zum Plan „Eclipse" gebracht; siehe Vorwort, Anmerkung 5.
[3] Siehe Anmerkung [1] in diesem Abschnitt.

7. Vorkehrungen des Genfer Roten Kreuzes?

Der früheste Hinweis auf das Genfer Rote Kreuz findet sich im ältesten SHAEF-Schriftstück, im SHAEF-Brief vom 15. Mai 1944. Hier wird gesagt, daß im Falle einer bedingungslosen Kapitulation eine Nutzung des IKRK-Nachrichtensystems nicht erforderlich sei[1].
Sollte jedoch Deutschland erobert werden müssen, so sei man verpflichtet, das IKRK einzuschalten. Man müsse dann Vorkehrungen treffen, daß die eigene Zivilzensur-Organisation zwischengeschaltet würde.
In der Praxis kam es anders. Es kam zwar zur Eroberung Deutschlands, aber diese verlief dann so schnell, daß eine dem internationalen Recht gemäße Einschaltung des Roten Kreuzes nicht mehr zum Tragen kommen konnte.

In der Literatur[2] findet sich zwar ein Hinweis auf „erste Vereinbarungen über Nachrichten-Vermittlung zwischen Zivilisten in den befreiten Zonen und Personen . . . in vom Feind noch besetzten Gebieten, neutralen oder alliierten Ländern". Es wird auch eine entsprechende Klappkarte gezeigt. Näheres ist aber nicht bekannt. Es könnte sogar sein, daß man an eine Nachrichtenverbindung zwischen deutschen Zivilisten im besetzten und noch nicht besetzten Gebiet dachte.
In diesem Zusammenhang gehören auch Überlegungen zu einer Verbindung der Fremdarbeiter im noch nicht besetzten Deutschland mit ihren Angehörigen in ihrer Heimat, zu der es ja zunächst keine Postverbindung gab. Zu diesen Fragen ist nichts weiter bekannt. Es ist aber anzunehmen, daß die Ereignisse viel zu schnell abliefen, als daß eine Organisation aufgebaut werden konnte.

Nachkriegszeit – US-Seite

Zunächst wieder ein kurzer Überblick über die zeitliche Entwicklung:

10. 5. 45 US-Kriegsministerium gibt den geplanten Abtransport von 3 Millionen US-Soldaten aus Europa bekannt.

14. 5. 45 Verabschiedung der Directive ICS 1067/6 (mit Zusatz ICS 1067/8 vom 14. 5. 45).

31. 5. 45 Provisorische deutsche Landesregierung für Bayern.

5. 6. 45 Berliner Deklaration der Alliierten zur Machtübernahme in Deutschland, Protokoll über die Aufteilung in vier Besatzungszonen und Groß-Berlins in vier Sektoren, Einsetzung des Alliierten Kontrollrates.

1.–4. 7. 45 Einzug amerikanischer und britischer Truppen in Berlin.

7. 7. 45 USFET-Directive zur Entnazifizierung.

10. 7. 45 Zonengrenzen „zurechtgerückt".

11. 7. 45 Berlin-Kommandantura nimmt die Arbeit auf.

14. 7. 45 SHAEF aufgelöst.

16. 7.–2. 8. 45 Potsdamer Konferenz.

30. 7. 45 Alliierter Kontrollrat konstituiert.

27. 8. 45 US-Zone: deutsche Parteien auf Kreisebene zugelassen.

19. 9. 45 Eisenhowers Proklamation Nr. 2: Gründung der „Staaten" Groß-Hessen, Bayern und Württemberg-Baden.

24. 9. 45 Deutsche Landesregierung für Württemberg-Baden.

26. 9. 45 Westzonen: Beginn der Demontage von Industriebetrieben. US-Zone: Verbot der Beschäftigung von Pg's in der Wirtschaft.

8. 10. 45 Deutsche Landesregierung für Groß-Hessen.

17. 10. 45 US-Zone: Deutscher Länderrat konstituiert.

11. 11. 45 General Eisenhower abgelöst durch General McNarney (ab 26. 11.).

20. 11. 45 Beginn des Nürnberger Prozesses.

23. 11. 45 US-Zone: deutsche Parteien auf Länderebene zugelassen.
Kontrollrat: an den Franzosen scheitern die Versuche, deutsche Zentralverwaltungen zu schaffen.

11. 12. 45 US-Armee übergibt US-Militärregierung die Kontrolle über das Nachrichtenwesen und die Transporteinrichtungen.

1. Die amerikanische Planung für Nachkriegs-Deutschland

Den Beginn dieser Planung kann man auf den 19. November 1943 datieren, als Präsident Roosevelt davon ausging, daß ca. 1 Mill. US-Soldaten für ein Jahr, vielleicht zwei Jahre in Deutschland stationiert sein würden. Diese zeitliche Begrenzung hat Roosevelt in Jalta auch Stalin mitgeteilt: der US-Kongreß würde nie zustimmen, daß eine US-Armee länger als zwei Jahre in Deutschland bliebe.
Diese US-Planung führte dazu, daß auch Frankreich am Alliierten Kontrollrat beteiligt wurde und eine Besatzungszone erhielt. Wahrscheinlich hat die Bekanntgabe an die Sowjets diese ermuntert, die eigenen Ziele für Deutschland höher zu setzen.

[1] Quelle siehe Anmerkung 2 auf Seite 59
[2] Robinson, Norris G: Die kleine UNRRA Studie, Postgeschichte der Hilfs- und Wiederherstellungs-Verwaltung der Vereinigten Nationen, UNOP-Handbuch 82

Die geplante Begrenzung auf zwei Jahre Besatzung hat sicherlich dazu beigetragen, daß die Amerikaner am 18. September 1944 in Quebec mit der Zuteilung Süddeutschlands als Besatzungszone einverstanden waren, einer „schönen Landschaft" gegenüber den Industriegebieten für die Sowjets und Briten. Die Amerikaner setzten auf den Alliierten Kontrollrat als der Zentralregierung für Deutschland, die allmählich durch eine deutsche Zentralregierung ersetzt werden sollte, hervorgehend aus deutschen Zentralverwaltungen in Berlin.

Die Leitlinien der US-Politik für Deutschland legten oberste Behörden in Washington in einer „Directive ICS 1067" detailliert fest. Man plante für Deutschland einen minimalen Lebensstandard, keinesfalls höher als für die befreiten anderen europäischen Länder. Schwerpunkte waren die Entnazifizierung, die Entmilitarisierung, die Demokratisierung und Umerziehung, die Zerschlagung der Wirtschaftskraft als politischem Faktor. Die Directive ICS 1067 war streng geheim, gültig blieb sie bis 1947.

Die Directive ICS 1067 war vom Morgenthau-Plan beeinflußt. Nach diesem Morgenthau-Plan sollte Deutschland in ein Agrarland verwandelt werden. Eine solche radikale Lösung hätte zur Verelendung ganz Europas geführt. Roosevelt und Churchill rückten später eindeutig vom Morgenthau-Plan ab. Die Briten und Franzosen haben übrigens auch die gemäßigtere Directive ICS 1067 abgelehnt. Trotzdem ist das Gedankengut von ICS 1067 in die alliierte Deutschlandpolitik eingeflossen, auch in das Potsdamer Abkommen. Die Amerikaner haben damit den weitaus größten Anteil an der Konzeption der alliierten Deutschland-Politik gehabt.

2. Die Demobilisierung der US-Streitkräfte

Bei Kriegsende befand sich in Europa die größte Truppenansammlung, welche die USA bis dahin außer Landes stehen hatte:
3 077 000 Mann in ganz Europa, davon
1 622 000 Mann in Deutschland.

Es ist verständlich, daß man solche Truppenmasse nach Hause schicken wollte, und das so schnell wie möglich.

Zunächst wollte man aber noch dem pazifischen Kriegsschauplatz helfen. Noch zur Kriegszeit wurde beschlossen, das Hq der 1. US-Armee in den Fernen Osten zu verlegen. Schon am 4. Mai 1945 begann das Hq mit der Übertragung seiner Truppen an andere US-Armeen. Am 8. Mai 1945 waren die letzten Einheiten abgegeben, am 11. Mai 1945 rückte das Hq der 1. US-Armee ab. In den Fernen Osten wurden auch Nachschubeinheiten abtransportiert.[1].

Wie demobilisierten nun die Amerikaner ihre riesige Streitmacht? Man schickte nicht komplette Truppenteile nach Hause, sondern nutzte ein Auswahlverfahren, abgestellt auf den einzelnen Soldaten: a) Dienstzeit in der Armee, Dienstzeit in Übersee; b) Auszeichnungen; c) Anzahl der Kinder unter 18 Jahren (maximal 3 Kinder).

Es wurde nach Punkten bewertet. In die erste Entlassungsaktion kam, wer mehr als 85 Punkte hatte.

Schon im Mai 1945 begann die Verschiffung mit 90 000 Mann. Die Spitze war im September 1945 mit 400 000 Mann erreicht. In Nähe der Häfen Le Havre, Antwerpen und Marseilles gab es riesige Zeltlager für die zur Verschiffung bereitstehenden Soldaten. Bis Oktober 1945 waren alle Soldaten mit 80 und mehr Punkten zuhause.

Im Dezember 1945 standen für Europa noch 223 000 Mann zur Entlassung an: a) Mannschaftsdienstgrade männlich: bis 50 Punkte, weiblich: bis 32 Punkte; b) Offiziere männlich: bis 70 Punkte, weiblich: bis 35 Punkte.

Geplante Truppenstärke für Deutschland: 1. Juli 1946 = 337 000 Mann, 1. September 1946 = 230 000 Mann, 31. Dezember 1946 = 200 000 Mann.

Durch diese schnelle Demobilisierung sank die Kopfstärke der Truppenteile rapide. Die Rest-Truppenteile mußten stets neu zusammengestellt werden, um wenigstens einigermaßen brauchbare Truppen zu behalten, das heißt: die verbliebenen Soldaten mußten oft umziehen, die Offiziere wechselten ständig.

Es dürfte im Herbst 1945 bei den US-Verbänden chaotisch zugegangen sein. Die Kampfkraft in Deutschland und ganz Europa muß beinahe auf Null gesunken sein.

	Gesamt in Deutschland	Davon abgelöst in		Somit verbleiben
		1945	1946	
Inf.Div.	42	36	4	2
Pz.Div.	16	14	2	–
LL-Div.	3	3	–	–
gesamt	61	53	6	2

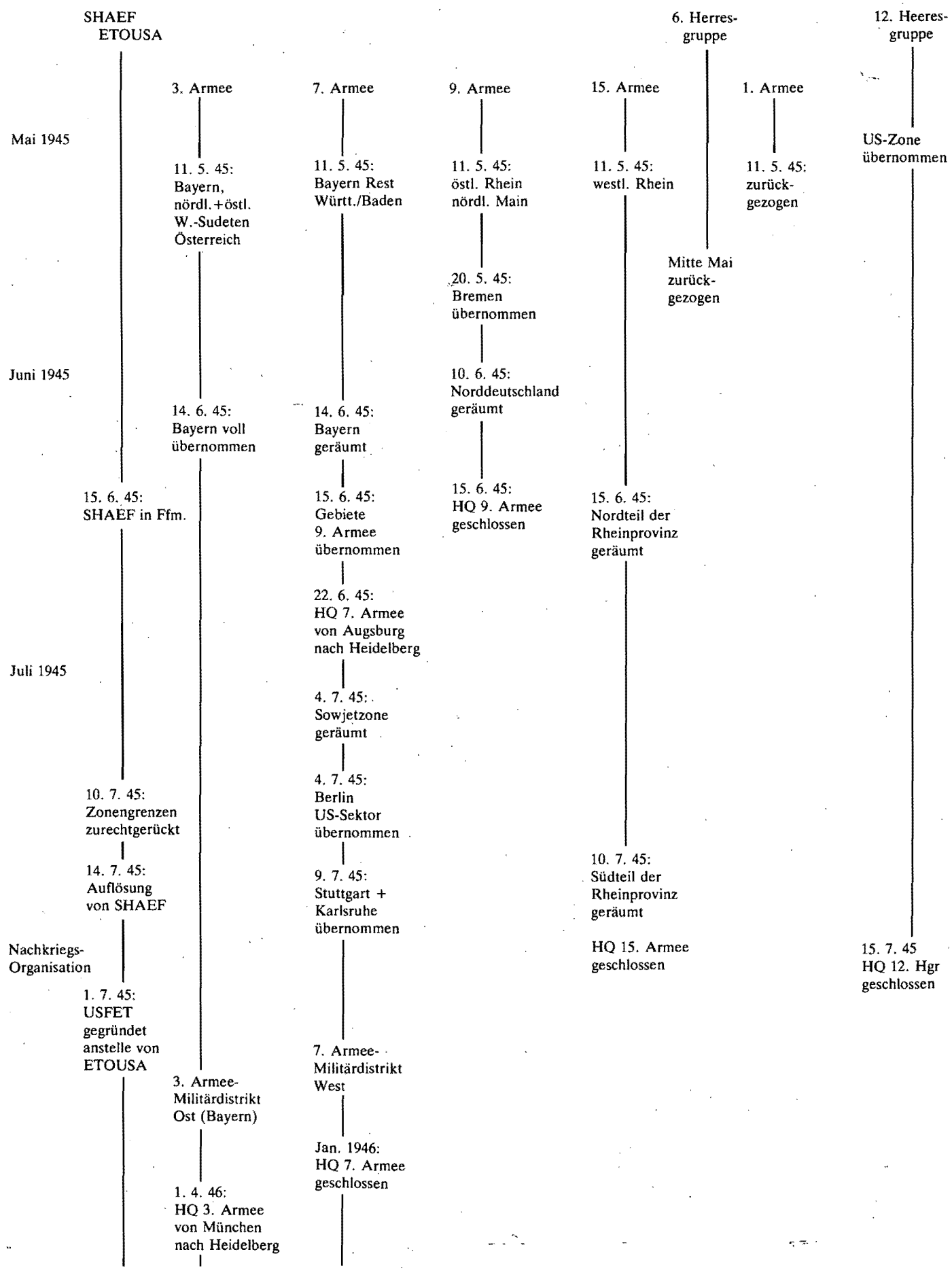
Per Jahresende 1945 waren also von 61 Divisionen nur noch 8 Divisionen übrig und per Jahresende 1946 nur noch zwei (1. und 9. Inf-Div). Sie bestanden aus jungen, unerfahrenen Soldaten.

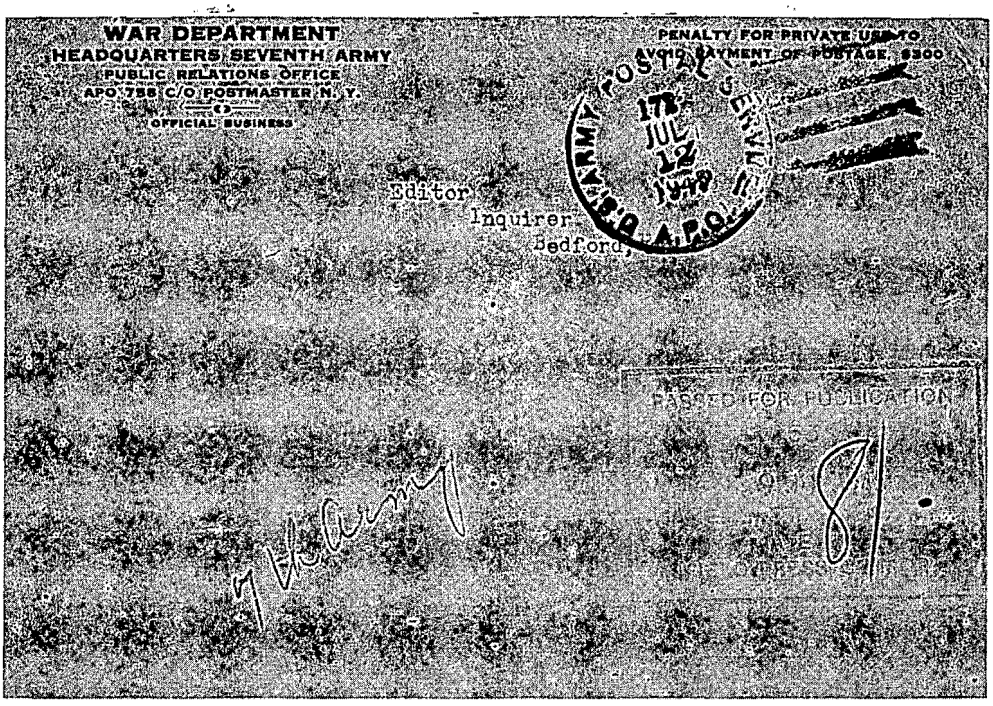
Analog zu den Kampftruppen wurden auch die Stäbe der Armeekorps', Armeen und Heeresgruppen rasch demobilisiert. Dies zeigt das Schaubild: „Entwicklung der US-Hauptquartiere im Nachkriegs-Deutschland".

Man erkennt den Zusammenhang mit dem „Zurechtrütteln" der Zonengrenzen. Im Januar 1946 verblieb nur noch das Hq der 3. US-Armee in Deutschland – genug für die acht Divisionen.

[1] Clay, Lucius D.: Entscheidung in Deutschland. Verlag der Frankfurter Hefte, Frankfurt/Main o. J. (1950).

Entwicklung der US-Hauptquartiere im Nachkriegs-Deutschland





Official-Business-Brief vom 9. 7. 45 an ein Presseinstitut in Bedford. Absender von APO 758 (= HQ der 7. US Armee, stationiert vom 15. 5. 45 bis 21. 7. 45 in Augsburg). Poststempel von APO 172 (stationiert vom 6. 5. 45 bis 31. 7. 45 in Augsburg) und Zensurstempel „Field Press Censor" vom 12. 7. 45.

In gewissem Sinne gehört zur Demobilisierung auch die Auflösung von SHAEP zum 14. Juli 1945. Es wurde schon ausgeführt, daß man nach der Berliner Deklaration vom 5. Juni 1945 das gemeinsame Oberkommando nicht mehr brauchte. Zu einem gemeinsamen Handeln der drei West-Alliierten kam es erst wieder mit dem Zusammenschluß zur Trizone im Jahre 1948.

Aber auch sonst wurden kriegsbedingte Dinge auf Friedensmaß zurückgeführt.

Bei dem oben gezeigten Beleg handelt es sich um den Brief eines Kriegsberichterstatters an eine Zeitung – das war nun nicht mehr notwendig. Die Kriegsberichterstatter, bei den Hauptquartieren der Armeen akkreditiert, in unserem Beispiel beim Public Relation Office der „Seventh Army", konnten die US-Dienstpost benutzen sowie gedruckte Umschläge deutscher Herkunft.

Besonders interessant ist der Pressezensurvermerk. Die Sendung kam zuerst zu dieser Zensurstelle, der Weg zum APO dauerte immerhin auch für eine Presse-Veröffentlichung – oder gerade deshalb? – drei Tage.

Diese Zensur war Aufgabe der PWD = Psychological Welfare Division, die auch für die Propaganda gegenüber den Deutschen zuständig war. Die PWD gab ferner die US-Zeitungen für die deutsche Bevölkerung heraus und kontrollierte die ersten Zeitungen mit deutschen Herausgebern.

PWD gehörte seinerzeit noch nicht zur Militärregierung. Die Kompetenzen aus der Kriegszeit waren, wie sich hier zeigt, in der Nachkriegszeit hinderlich und müssen zu Schwierigkeiten geführt haben.

Das Bild einer radikal betriebenen Demobilisierung wäre unvollständig ohne den Hinweis, daß die Amerikaner ein anderes Konzept für die US-Besatzungs-Streitkräfte entwickelt hatten. Sie fanden, daß für die Besetzung Deutschlands nicht so sehr Kampf-Divisionen (= „tractical troops") benötigt wurden, sondern eher eine Art von Sicherheitstruppen, speziell ausgerüstet und ausgebildet zur Bekämpfung von Unruhen u. ä.

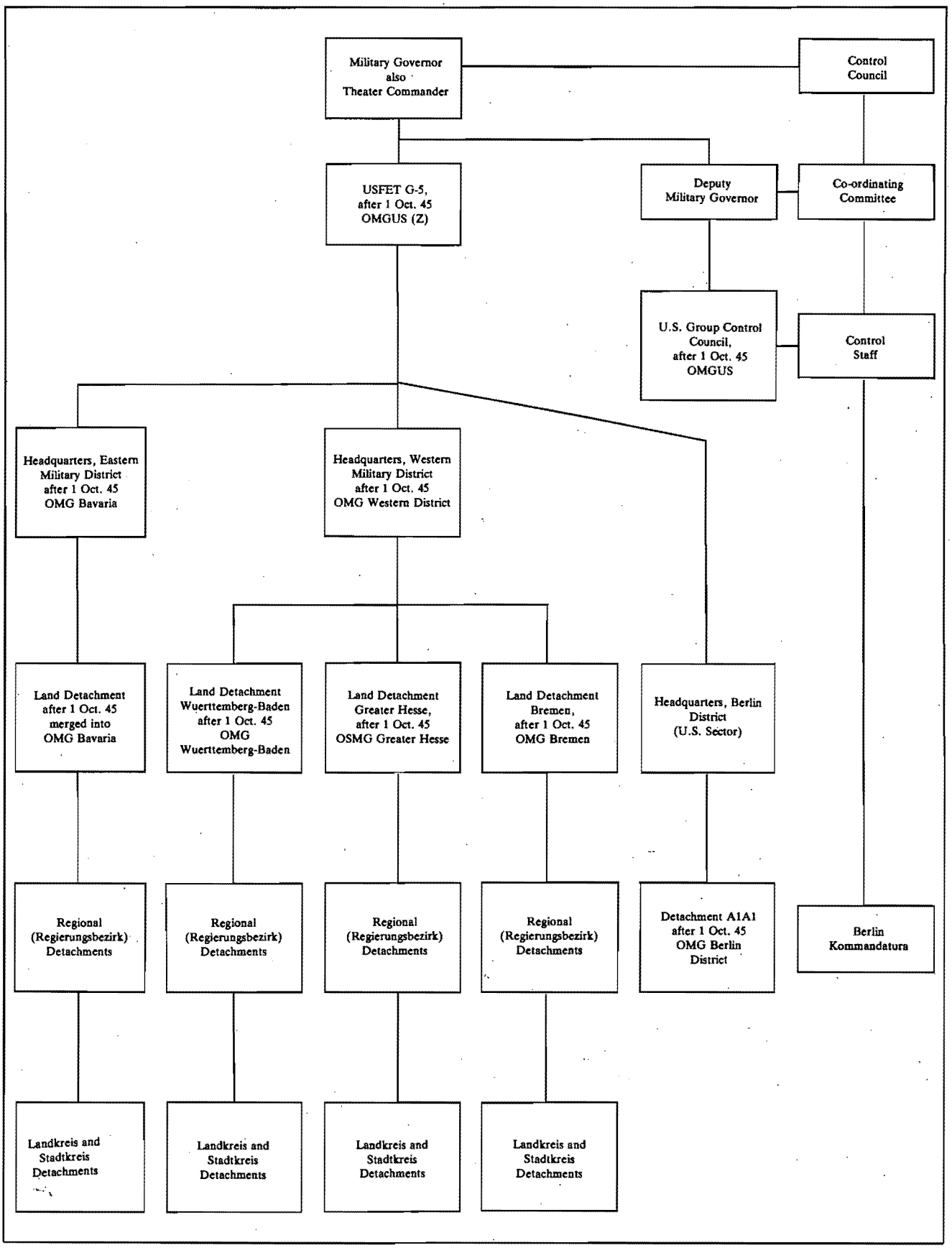
Ab September 1945 wurde diese neue Art von Sicherheitstruppen gebildet, die **Constabulary.** Dies war eine ausgesuchte Elite-Einheit, zusammengestellt aus Militärpolizei, CIC-Detachments, District-Constabularies.

Die Kopfstärke sollte im Endstand 38 000 Mann betragen, Leitung durch ein Corps-Hq, mit je einem Brigade-Hq in den drei Landeshauptstädten, mit Regiments-Hq für jeden der neun Regierungsbezirke, 21 Squadrons für je einen Kreis bzw. mehrere Kreise zusammen. Jede Squadron hatte drei mechanisierte und zwei motorisierte „troops" zu 13 Mann.

Die Constabulary enthielt eine spezielle Ausbildung
- zur Durchführung von Sonderaufgaben und Sicherungsaufgaben,
- in MG-Gesetzen und -Verordnungen,
- als schnelle und bewegliche Sicherungsreserve.

Die Constabulary verfügte über eigene Nachrichten- und Versorgungsverbände, ja sogar über eine eigene Luftaufklärung (air-reconnaissance).

Gliederung der US-Militärregierung in Deutschland
(Stand 1. Oktober 1945)



Abgeleitet von „Cart 2 – US Military Government Relationship (Stadic Phase, August–December 1945)"

FOREIGN AFFAIRS 23 (2) (JAN 1945)

BRETTON WOODS AND INTERNATIONAL COÖPERATION

By Henry Morgenthau, Jr.

THE United Nations won a great if unheralded victory at the Bretton Woods Monetary and Financial Conference. For they took the first, the most vital and the most difficult step toward putting into effect the sort of international economic program which will be necessary for preserving the peace and creating favorable conditions for world prosperity.

International agreements in the monetary and financial field are admittedly hard to reach, since they lie at the very heart of matters affecting the whole complex system of economic relations among nations. It is a familiar fact that in all countries sectional interests are often in conflict with the broader national interests and that these narrow interests are sometimes sufficiently strong to shape international economic policy. It was, therefore, a special source of satisfaction to all the participants in the Conference that agreements were reached covering so wide a range of international monetary and financial problems. This was largely due to long and careful preparation preceding the Conference during which we secured general recognition of the principle of international monetary and financial coöperation.

The Conference of 44 nations prepared Articles of Agreement for establishing the International Monetary Fund and the International Bank for Reconstruction and Development to provide the means for consultation and collaboration on international monetary and investment problems. These agreements demonstrate that the United Nations have the willingness and the ability to unite on the most difficult economic issues, issues on which comprehensive agreement had never before been reached even among countries with essentially similar political and economic institutions. The victory was thus all the greater in that the Bretton Woods Agreements were prepared by countries of differing degrees of economic development, with very far from similar economic systems, and will operate not merely in the immediate postwar years, as will UNRRA, but in the longer period ahead.

The hope that the United Nations will not prove a merely temporary wartime coalition which will disintegrate after military victory has thus received substantial reinforcement. No matter what pattern future organs of international coöperation may as-

sume — and the pattern may be diverse and varied to correspond with the great variety of problems to be met — Bretton Woods proved that if the determination to coöperate for peace as well as for war is present, adequate and suitable instruments can be devised in every sphere where international action is needed. In that sense, Bretton Woods was an unmistakable warning to the Axis that the United Nations cannot be divided either by military force or by the diplomatic intrigues of our enemies. It gave an unequivocal assurance to the soldiers of the United Nations that the sacrifices they are making to stamp out forever the causes of war are not being made in vain. And lastly it was a sign to the civilians on whose labors the war efforts of all the United Nations depend that such labors are bearing fruit in the councils of peace no less than those of war.

I have indicated that at Bretton Woods the United Nations took the first and hardest step toward the adoption of the kind of economic program necessary for world stability and prosperity. It was only the first step because the Articles of Agreement for the establishment of the Fund and the Bank still have to be ratified by each of the participants in accordance with legal and constitutional requirements and procedures. I would be the last to claim that the process is likely to be a simple or an easy one. Yet, so far as the action to be taken by the United States is concerned, I have sufficient faith in the common sense of the American people to believe that they have learned the painful lesson that the best way to guard our national interests is through effective international coöperation. We know that much remains to be done in other fields. But, despite their highly technical nature, the Fund and the Bank are the best starting point for international economic coöperation, because lack of agreement in these spheres would bedevil all other world economic relations.

Highly technical questions have one great advantage from the political point of view — their very intricacy should raise them above merely partisan considerations. My optimism is partly based on the belief that the Bretton Woods proposals will be discussed on an objective basis and that such differences of opinion as may emerge will not follow party lines. The American delegation was non-partisan in composition and was thoroughly united on all major questions. Republicans and Democrats alike had an equal voice in shaping its decisions, and there is good reason to expect that the precedent followed before and during the Conference will be continued and that the next stage of

ratification will be conducted on the same high plane. In the light of my experience as chairman of the American delegation, I believe that men of broad vision in both parties will rise to the challenge and the opportunity to initiate the historical pattern of international economic coöperation that world peace demands. The challenge and opportunity are all the greater because our course of action will largely determine the course of action of many other members of the United Nations. "As America goes, so goes the world" may be an exaggeration. But it is a pardonable exaggeration in a world made one by time and fate, in which America's strength and potentialities are perhaps more clearly realized by the rest of the world than by the American people itself. I should therefore like to emphasize as strongly as possible that a tremendous responsibility rests on our government and people in connection with the ratification of the Bretton Woods Agreements. For our action will be rightly or wrongly interpreted as a sure and infallible index of our intentions with respect to the shape of things to come.

II

The fate of the Treaty of Versailles adds to the significance of the course we adopt on the Bretton Woods proposals. As the President has pointed out, the Allied leaders are acquainted with our constitutional processes as they affect our dealings with foreign powers. If there are any Americans who would utilize the division of powers to defeat the ends sought by the vast majority of Americans, they are not likely to succeed if the issues are clearly and unambiguously presented to the Congress and the people. We must always keep in mind that other nations are anxiously asking whether the United States has the desire and ability to coöperate effectively in establishing world peace. If we fail to ratify the Bretton Woods Agreements, they will be convinced that the American people either do not desire to coöperate or that they do not know how to achieve coöperation. They would then have little alternative but to seek a solution for their pressing political and economic problems on the old familiar lines, lines which will inexorably involve playing the old game of power politics with even greater intensity than before because the problems with which they will be confronted will be so much more acute. And power politics would be as disastrous to prosperity as to peace.

One important reason for the sharp decline in international

trade in the 1930's and the spread of depression from country to country was the growth of the twin evils of international economic aggression and monetary disorder. The decade of the 1930's was almost unique in the multiplicity of ingenious schemes that were devised by some countries, notably Germany, to exploit their creditors, their customers, and their competitors in their international trade and financial relations. It is necessary only to recall the use of exchange controls, competitive currency depreciation, multiple currency practices, blocked balances, bilateral clearing arrangements and the host of other restrictive and discriminatory devices to find the causes for the inadequate recovery in international trade in the decade before the war. These monetary devices were measures of international economic aggression, and they were the logical concomitant of a policy directed toward war and conquest.

The postwar international economic problems may well be more difficult than those of the 1930's, and unless we coöperate to solve these problems, we may be faced with a resumption and intensification of monetary disorder and economic aggression in the postwar period. There is no need to enlarge on the consequences of such a development. It is a bleak prospect, yet it is one we must understand. In some countries it will present itself as the only practical alternative if the rest of the world should be unable to count on effective American participation in a rounded and coherent program covering international political and economic relations. If that should come to pass, we will have to frame our own future to fit a world in which war will never be a remote contingency and in which economic barriers and restrictions will be the rule in a contracting economic universe. On the other hand, if we ratify the Bretton Woods Agreements, we will be showing the rest of the world not only that we can coöperate for winning the war, not only that we are capable of formulating a program for fulfilling our common aspirations, but that we intend to enforce and implement such a program in every relevant sphere of action. Ratification would thus strengthen all the forward-looking elements in every country who wish to translate their craving for peace into deeds and will be a resounding answer to the pessimists who feel that peace is unattainable.

The institution of an international security organization on the lines agreed on at Dumbarton Oaks constitutes a history-making accomplishment of which we may well be proud. Here

is an organization for maintaining peace and political security which for the first time has teeth in it. But it is our duty to keep to a minimum the tensions to which that organization will be subjected and to deal with the economic causes of aggression before the stage is reached where more far-reaching measures would be necessary. International monetary and financial coöperation is indispensable for the maintenance of economic stability; and economic stability, in turn, is indispensable to the maintenance of political stability. Therefore, a program for international economic coöperation of which Bretton Woods is the first step must accompany the program for political and military security toward which the United Nations are moving. Bretton Woods is the model in the economic sphere of what Dumbarton Oaks is in the political. They reinforce and supplement each other. Political and economic security from aggression are indivisible, and a sound program for peace must achieve both.

III

As I have already said, agreement on international monetary and banking policy is only the first step toward the achievement of a constructive economic program through which world stability can be maintained and within which the horizon of prosperity can be expanded. Other measures, both national and international, will be required to round out the program.

Domestic economic stability is, of course, intimately bound up with international stability. But international stability by itself will not ensure domestic stability. It will be incumbent on us to adopt the kind of domestic program which will make possible the attainment and maintenance of high levels of employment with rising standards of living. I have sufficient faith in our economic system and the institutions of free enterprise and individual initiative to hope that this goal will be achieved. Needless to say, its achievement will be greatly facilitated by the promise of international monetary stability held forth by the Bretton Woods Agreements, just as the achievement of international monetary stability will be facilitated by a high level of prosperity in the United States. This is merely another illustration of the thesis that we are an integral part of the world economy and that the relations between the parts and the whole are intimate and mutual. High levels of employment in the United States strengthen economic and political stability throughout the world, which in turn reinforce American domestic prosperity.

In addition, international collaboration in the sphere of commercial policy, control of cartels, and possibly in the supply of primary commodities and labor standards will be needed if the basic causes of economic friction and aggression are to be abolished. The Fund and the Bank are not intended to cover these fields, which will, of course, be subjects for further discussion among the United Nations. The great objective of the Fund and the Bank is to provide the monetary and financial foundation without which agreement in these other important fields would be either impossible to attain or meaningless if attained. For no economic agreements among nations could survive discriminatory exchange practices, severe and repeated competitive currency depreciation, tight permanent exchange controls, and the like. In fact, it is not too much to say that when nations are pursuing competitive exchange policies — whether their purpose is aggressive or merely defensive is immaterial — reciprocal trade agreements cannot be made. Thus no reciprocal trade agreement with Germany in the period from 1933 to 1939, say, would have been worth the paper it was written on for the simple reason that all its purposes and effects would have been completely nullified by the exchange policy which the Germans pursued in those years.

This consideration applies with still greater force to agreements for protecting producers of primary commodities or for raising labor standards. How, for example, can we protect the American farmer in the world markets if a sizable wheat-producing country can resort to monetary action which places the wheat producers in that country in a preferred position with respect to American wheat exporters? If the American farmer is to continue to export wheat and to receive a fair price in dollars for the wheat he sells at home, he must know that the world price of wheat in terms of his own currency will not be seriously disturbed by large exchange fluctuations in the principal wheat exporting and importing countries.

And how can we obtain agreement protecting our own high labor standards if we do not participate in expansion of international long-term investment? For if the economically less advanced countries are to raise their labor standards they must increase their productivity, and to increase their productivity they need capital for modern machinery and processes. Unless adequate provision is made for a resumption and expansion of international investment by private investors on sound lines,

the less developed countries will have no alternative but to meet all their capital requirements themselves. The process of industrialization would then inevitably become more painful both to themselves and to the rest of the world, since they would have little choice but to control their imports rigorously and to compete as intensively as possible for their share of the world market, ruthlessly exploiting their own cheap labor, and undercutting countries with higher labor standards in the process. Instead of tending to raise their labor standards to our high level, this would tend to pull our labor standards down to theirs.

These instances are corollaries of the broader proposition that world stability and prosperity demand the expansion and growth of international trade and investment. In a contracting market each country will fight to maintain its foothold and will not be too fastidious as to the weapons it uses in the fight. An expanding market does not eliminate competition, but while competition assumes cutthroat and destructive forms in a contracting market, it tends to have socially beneficent effects in an expanding one.

IV

The Bretton Woods Agreements are thus the most vital step in the path of realizing effective international economic coöperation. Without monetary coöperation, international economic coöperation in other spheres will at best be short-lived; and it may not be too much to add that without monetary coöperation, international coöperation in non-economic spheres may be short-lived also. The Bretton Woods Agreements are also the most difficult step in international economic coöperation because while we were not exploring entirely uncharted seas, while precedents for monetary and financial collaboration for specific purposes existed, the scope and content of the collaboration proposed at Bretton Woods are so much broader and fuller that problems with infinitely more complications had to be solved. Our own stabilization fund has in the past entered into a number of arrangements with other governments and Central Banks to promote stability in exchange relationships between the United States and other countries. And such arrangements, while *bilateral* in character, undoubtedly made a definite contribution to orderly international monetary relations. An even broader form of *multilateral* coöperation through consultation with respect to contemplated changes in exchange rates was achieved by the

Tripartite Declaration of September 1936 among France, Great Britain and the United States, to which Belgium, Holland and Switzerland subsequently adhered. But without minimizing the significance of such monetary arrangements, and particularly of the Tripartite Accord, it is proper to note that because of their limited and improvised character, and also because of the conditions in which they were made, they could not cope with the range of problems the Fund and Bank are designed to handle.

Take, for example, the question of the relative international economic positions of the United States and England to which so much attention has been devoted in discussions of postwar trade possibilities. England was formerly a creditor nation and has now become a debtor. Previously she was able to turn her unfavorable trade balance into a favorable, or at least a compensated, balance of payments by receipts of interest and dividends on foreign investments and by receipts for current banking, insurance and shipping services. After the war she will have to expand her exports. Otherwise she will have to run down her foreign investment still further or resort to new borrowing, or she will have to curtail her imports which would lower her living standards and sharply restrict world trade. The United States has become a creditor country with the prospect of increasing exports, provided our customers are in a position to find the dollars which they need to pay for the goods and services they want to buy from us. Other countries cannot find the necessary dollars to pay for our exports unless we are willing to increase our own imports, our tourist and other expenditures abroad, or unless we are willing to become a creditor country on a greater scale, or both.

The measures for international coöperation on monetary and investment problems required to meet the needs of the United States and England must obviously be flexible in character and broad in scope. This was one of the outstanding accomplishments of Bretton Woods, an accomplishment which was easier to achieve because of the spirit of mutual understanding with which the American and British delegations faced their problems, and because of the extended British and American technical discussions during the two years prior to the Conference. I believe that the economic interests of the United States and Great Britain are not irreconcilable, that the world is large enough to provide an expanding market for the exports of both, and that, given the good will which has characterized the discussion of our common economic and financial problems in the past, no problem involv-

ing our two countries need remain unsolved. Quite obviously, the solution will be much less difficult in a world in which international trade is expanding and in which an adequate volume of sound and productive international investment is undertaken by private investors. That is precisely how the Fund and the Bank can contribute to the adjustment of international accounts.

V

But that is only part of the picture. At Bretton Woods, countries in very different stages of economic evolution joined in working out common instruments of monetary and investment policy. China and India are predominantly agrarian countries with low levels of industrialization and low standards of living. Naturally, they desire to raise both. The United States and England are countries with high levels of industrialization and high standards of living, which just as naturally desire to maintain and if possible raise both. Unless some framework which will make the desires of both sets of countries mutually compatible is established, economic and monetary conflicts between the less and more developed countries will almost certainly ensue. Nothing would be more menacing to world security than to have the less developed countries, comprising more than half the population of the world, ranged in economic battle against the less populous but industrially more advanced nations of the west.

The Bretton Woods approach is based on the realization that it is to the economic and political advantage of countries such as India and China, and also of countries such as England and the United States, that the industrialization and betterment of living conditions in the former be achieved with the aid and encouragement of the latter. For the process of industrialization, without which improvement of living standards is unattainable, can be most efficiently accomplished by an increasing volume of imports of machinery and equipment. And what could be more natural than for India and China to import such goods from England and the United States with their vastly expanded capacity for producing such goods? The harmony of economic interests in international trade between the more and less developed countries is a doctrine which has long been preached by economists, but it is a doctrine which has often not been honored in observance. The United Nations Monetary and Financial Conference made a big advance toward translating this theoretically sound maxim into practice.

Again, there is a clear line of demarcation between those countries ravaged by war and the countries fortunate enough because of their geographic situation to have escaped invasion, bombing and looting by the enemy. Nowhere was what I should like to call the Bretton Woods spirit more clearly manifest than in the Conference's determinations to give special attention and consideration to the problems of countries in the first category. It was shared no less by the countries whose territories had not been damaged by Axis operations than by the immediate victims of totalitarian aggression. The reconstruction of the devastated countries of Europe and Asia is essential if normal international trade relations are to be resumed promptly. These countries are vitally important to the export and import trade of the western hemisphere. That is why all the American Republics gave wholehearted support to the provision that the Bank is to facilitate economic reconstruction. I should like to single out for special mention Russia's splendid demonstration of the sincerity of her intentions to participate in world economic reconstruction by raising her subscription to the Bank from 9 million dollars to 1.2 billion dollars on the last day of the Conference.

Finally, countries with widely divergent economic systems participated in preparing the Agreements for the Fund and the Bank. The United States is as indubitably a capitalist country as Russia is a socialist one. Yet both agree not only on the desirability of promoting monetary stability and international investment but on the means required to realize these ends. And this for a very simple and satisfactory reason — it is to the advantage of each to do so. As an impenitent adherent of the capitalist system, which in the crucible of war has once again shown its ability to deliver the goods, I am firmly convinced that capitalist and socialist societies can coexist, as long as neither resorts to destructive practices and as long as both abide by the rules of international economic fair play. Perhaps it is not too much to claim for the International Monetary Fund that it prescribes the standards in the field of monetary policy which it is hoped all countries, whatever their political and economic systems, will follow.

Despite these difficulties, the Bretton Woods Conference had to succeed because there is no other method of dealing with international monetary and financial problems than through international coöperation. There is no satisfactory alternative. There has been a suggestion that these were questions that could

be solved by the United States and England, perhaps with the aid in later years of a few so-called key countries. But this approach takes no account of the realities of the postwar situation. The establishment of an exclusive Anglo-American condominium would not be the appropriate means of dealing with international monetary problems. In the absence of effective international action, unstable exchange rates are much more likely to occur in other countries than in Britain. In fact, unless there is a *general* environment of stable and orderly exchange rates with expanding trade and adequate investment, the adjustment of the British balance of payments after the war will be immeasurably more difficult. The problem of exchange stability is a general problem. Our own exporters of agricultural and industrial goods need more assurance than the stability of the dollar-sterling rate of exchange provides. They want to know that the price and quantity of their exports will not be suddenly reduced by depreciation in the countries to which they export or in the countries with whose exports they compete.

I doubt that the 42 other United and Associated Nations, who have been fighting and working with us during the war, would take kindly to what might be regarded as dictatorship of the world's finances by two countries. There is a vague promise in this alternative that other countries might in time be added to the select group whose coöperation was regarded as desirable. But even these countries would be expected to coöperate by attaching themselves to a dollar bloc or a sterling bloc. If we should exclude the greater part of the world from coöperation on these problems and postpone for ten years agreement on stability and order in exchange rates, we should find that the world had become irrevocably committed to fluctuating exchange rates, exchange controls and bilateral clearing arrangements. Once firmly established, it would not be possible to obtain the general abandonment of these restrictive and discriminatory measures. Beyond that, there would seem to be considerable danger — political as well as economic — in setting up a world divided into two blocs. Such a division of the world would not only deprive us of the general advantages of multilateral trade but would inevitably lead to conflict between the two groups. The fact is that the problems considered at Bretton Woods are international problems, common to all countries, that can be dealt with only through broad international coöperation.

The above are only the most striking examples of the range of

issues before the Conference. Each country has its own peculiar position in the world economy which no other country duplicates. Naturally each country wants to safeguard and, if possible, strengthen this position. The representatives of all countries always had this consideration in mind in weighing the merits of the proposals for the Fund and the Bank. Yet the very fact that so broad an agreement was reached is the best proof that the United Nations have all learned that we are one world community in which the prosperity of each is bound up with the prosperity of all. Because this is a point on which I feel so deeply, I should like to quote from my speech to the final session of the Conference on July 22:

> There is a curious notion that the protection of national interest and the development of international coöperation are conflicting philosophies — that somehow or other men of different nations cannot work together without sacrificing the interests of their particular nation. There has been talk of this sort — and from people who ought to know better — concerning the international coöperative nature of the undertaking just completed at Bretton Woods.
>
> I am perfectly certain that no delegation to this Conference has lost sight for a moment of the particular national interest it was sent here to represent. The American delegation, which I have the honor of leading, has been, at all times, conscious of its primary obligation — the protection of American interests. And the other representatives here have been no less loyal or devoted to the welfare of their own people.
>
> Yet none of us has found any incompatibility between devotion to our own country and joint action. Indeed, we have found on the contrary that the only genuine safeguard for our national interests lies in international coöperation.

VI

Attention should also be called to two resolutions of special significance passed by the Conference. The first recommends the earliest possible liquidation of the Bank for International Settlements. Whether rightly or wrongly, this institution has become inextricably identified with appeasement and collaboration. It is fitting that a United Nations Monetary and Financial Conference should record its unqualified stand on an existing financial organization which, to say the least, did not promote the ends we are seeking. Further, the Conference did not wish considerations of power politics to enter into the functioning of the instruments it fashioned. It is specifically stated that the Fund and the Bank should not be affected by political factors in their operations or in their recommendations to member countries. The Conference wanted to avoid linking the Fund and the Bank in any way with the Bank for International Settlements. It might be said

that the best way to deal with the problem was to ignore it. But that was not the feeling of the countries that have suffered from enemy occupation. Such a passive attitude would in itself have constituted appeasement of the Axis, and the root-and-branch recommendation is in much better accord with the determination of the United Nations to tolerate no institution that does not serve in the struggle for freedom and democracy.

The second resolution was designed to ensure the restoration to their rightful owners of property looted by Germany, Japan and their satellites. It supports the steps already taken by the United Nations and calls on the governments of neutral countries to facilitate the process of restoration. It is part of the United Nations program that the Axis and its Allies and agents should not be allowed to get away with any loot this time. This resolution implements that program and contributes to the strengthening of international law concerning international theft and banditry.

If I have dwelt at some length on the significance of the Bretton Woods program for international coöperation, it is because the subject has received less than its due attention and merit in the press, which has confined its discussions to the more purely monetary and financial aspects of the Conference. Its long-run political implications may be no less far-reaching than its economic achievements. For it is in our power to transform the Bretton Woods Agreements into an epoch-making precedent, a beacon of world progress.

state; and, therefore, there was no one with whom Great Britain was at war.[4] The present legal status of Germany was relevant because it is an established rule of English law, which was also followed in the present case, that an alien enemy interned by the Crown was debarred from applying for a writ of *habeas corpus*, and the court had no power to grant a writ.

The Attorney-General, who appeared for the Crown, furnished the court with a certificate from the Foreign Secretary of the United Kingdom which stated:—

(1) Under paragraph 5 of the preamble to the declaration dated June 5, 1945, of the unconditional surrender of Germany, the Governments of the United Kingdom, the United States of America, The Union of Soviet Socialist Republics, and France, assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority. The assumption for the purposes stated of the said authority and powers does not affect the annexation of Germany."

(2) That in consequence of this declaration Germany still exists as a state and German nationality as a nationality, but the Allied Control Commission are the agency through which the government of Germany is carried on.

(3) No treaty of peace or declaration of the allied powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany, although, as provided in the declaration of surrender, all active hostilities have ceased.

The Court held that it had no right to go behind the certificate and that it was bound to take it that "at this present moment" (the case was heard on April 3, 1946) there was a state of Germany, the government of which was being conducted by the allied powers, but that Great Britain was still in a state of war with Germany.

Counsel for the applicant submitted that matters of law arose upon the Foreign Secretary's Certificate and that it was for the court to decide whether or not Germany still existed as a State. The well-known case of *Duff Development Co. Ltd. vs. Government of Kelantan* [5] was, however, authority for the proposition that the statement by the Executive was binding on the court. In that case Lord Finlay had said: [6]

> There is no ground for saying that because the question involves considerations of law these must be determined by the courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.

EGON SCHWELB*

[4] Same, at p. 521. [5] [1924] A.C. 797. [6] Same, p. 815.

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Nadelmann

LOCAL ENEMY ASSETS AND THE PARIS AGREEMENT ON REPARATION

In any agreement between the Allies on the allocation of reparation benefits the value of enemy assets in each Allied country must be taken into account if the assets are retained as reparation. The Paris Agreement on Reparation from Germany,[1] which proceeds on this assumption, provides accordingly. Under the Agreement, signed by eighteen countries, the United States, Great Britain, France, Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Greece, India, Luxembourg, the Netherlands, Norway, New Zealand, South Africa, and Yugoslavia, each Government is to charge against its reparation share the German enemy assets within its jurisdiction.[2] Because of the amount of assets involved, the accounting is of material importance.

The Paris Agreement, in addition to stating the principle, specifies how the charge is to be made. The local assets are to be charged

> net of accrued taxes, liens, expenses of administration, other *in rem* charges against specific items and legitimate contract claims against the German former owners of such assets.[3]

Two kinds of debts may thus be deducted: *in rem* charges and contract claims. Deduction of *in rem* charges would be justified even without express permission. The part of assets absorbed by such charges cannot be called an "asset" for accounting purposes.[4] The delimitation of *in rem* charges will be governed by the law of the situs of the assets, in accordance with well established principles of the law of Conflict of Laws.[5]

With regard to the other deductible item: "legitimate contract claims against the former owners of the assets," the situation is more complicated. It was natural to permit the deduction of claims in the accounting for local enemy assets, as most of the signatory countries permit the payment of such claims. Of these countries there is not one, however, which has limited the privilege to "contract claims," as does the Paris Agreement for the accounting. Claims will therefore be paid which cannot be deducted under the Agreement.

The question arises why the Paris Agreement has singled out "contract claims" and refused deduction of other claims. Tort claims are not less legitimate than contract claims. The explanation for the restrictive rule may perhaps lie in the fact that in the countries of the English Common

[1] Text in *Department of State Bulletin*, Vol. 14, No. 343 (Jan. 27, 1946), p. 114; below, Supplement, p. 117.

[2] Agreement, Part I, Art. 6 A.

[3] Same.

[4] See Feilchenfeld, Elrick, and Judd, "Priority Problems in Public Debt Settlements," in *Columbia Law Review*, Vol. 30 (1930), p. 1115, at p. 1120.

[5] Restatement, Conflict of Laws (1934), Sec. 265; Bustamante Code of Private International Law, Secs. 135, 420. See Nadelmann, "Bankruptcy Treaties," in *University of Pennsylvania Law Review*, Vol. 93 (1944), p. 58, at p. 76.

Law, for historical rather than rational reasons, unliquidated tort claims have long been excluded from consideration in the settlement of estates and in bankruptcy distributions.[6] English bankruptcy law still excludes from admission in bankruptcy "unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust." [7] The American law has freed itself from the old rule. Since 1934 awards under a workman's compensation act are admitted and also tort claims based on negligence when an action has been instituted prior to the filing of the bankruptcy petition.[8] Leading American authors feel that even this does not go far enough.[9] In Civil Law countries tort claims, even when unliquidated, have never been excluded from proof.

Whatever the reason for the limitation of deductible claims to "contract claims," it is now necessary to define "contract claim" for the application of the Paris Agreement. Some of the questions which will arise will lead to substantial difficulties of interpretation. Are quasi-contractual claims "contract claims"? Judgment claims based on an action in tort, are they not deductible? Which is the correct decision when a claim is classified as "contract claim" in one legal system, but not in another? One may think of claims for unjust enrichment, for example. Their classification varies in the different legal systems and even in countries belonging to the same system.[10]

For the purposes of the Agreement, what law determines the meaning of "contract claim"? The law of the situs of the assets does not govern this question. If for "*in rem*" charges the law of the situs is controlling, it is because of the legal relationship between *in rem* charges and assets. No such relationship exists in regard to unsecured claims. For the application of the Agreement, "contract claim" can have but one meaning.

The Agreement is made in two languages, the English and the French. Both texts are equally authentic. The French text uses *droit contractuel* for "contract claim." [11] If one gives "contract claim" the meaning it has in the countries of the common law and *droit contractuel* the meaning prevailing in civil law countries, it will appear that sometimes "contract claim" and sometimes *droit contractuel* has a broader meaning when it comes to the classification of certain types of claims.

[6] Glenn on *Liquidation* (1935), p. 670. [7] English Bankruptcy Act, 1914, Sec. 30.

[8] U. S. Bankruptcy Act of 1898, as amended, Secs. 63 (a) (6) and (7), 52 Stat. 873 (1938), 11 U.S.C.A. Sec. 103 (Supp. 1945). Collier on Bankruptcy, 14th ed., 1941, Vol. III, Sec. 63.25.

[9] So Glenn, at p. 672.

[10] *Batthyany v. Walford*, 36 Ch. D. 269 (1887); Woodward, *Quasi Contracts* (1913), p. 4; Planiol et Ripert, *Droit Civil Français*, Vol. VII, Secs. 752, 767; Gutteridge and David, "The Doctrine of Unjustified Enrichment", in *Cambridge Law Journal*, Vol. V (1934), p. 204; Gutteridge and Lipstein, "Conflicts of Law in Matters of Unjustifiable Enrichment", in *Cambridge Law Journal*, Vol. VII (1939), p. 80.

[11] For the French text, see, *Canada Treaty Series*, 1945, No. 23.

With regard to differences in the meaning of two treaty texts which are both authentic, the Permanent Court of International Justice, in the case of the Mavrommatis Concessions, stated that "where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties." [12] This rule may control when it appears that "contract claim" and *droit contractuel* do not have the same bearing. The issue would be even more involved if it should develop that "contract claim" did not have the same meaning in all English speaking countries and that the law of the other countries differed on the meaning of *droit contractuel* or its equivalent.

The signatories of the Paris Agreement were well aware of possible difficulties in the application of the provisions of the Agreement which deal with external enemy assets. The Agreement itself prescribes the formation of a "Committee of Experts in Matters of Enemy Property Custodianship" with the assigned task to overcome practical difficulties of law and interpretation.[13] Recourse may possibly be had to this Committee for the definition of "contract claim"—*droit contractuel.*

Each Government, under the Agreement, has the obligation to give to the Inter-Allied Reparation Agency created by the Agreement all information for which the Agency asks as to the value of the local assets and the amounts realized by their liquidation.[14] One may expect that the accounting will be required to be made with specification of the deductions, as otherwise no control would be possible.

The formal allocation of German reparation benefits is made by the Assembly of the Inter-Allied Reparation Agency. The Assembly allocates "in conformity with the provisions of the Agreement." [15] Any controversy over the deductibility of a claim would have to be brought before the Assembly, as the deduction of a non-deductible claim would improperly reduce the share of the other countries in reparation benefits. Decisions of the Assembly are taken by majority vote, each Government having one vote.[16]

It is a matter of conjecture whether the accounting for the local enemy assets will lead to differences of consequence. Compared with the amounts involved in the allocation of other reparation items, the question of the deductibility of a claim may appear unimportant. This should not detract, however, from the fact that the rule which limits deductible claims to "contract claims," is an unhappy one. Not founded in any generally recognized

[12] Judgment No. 2 in the Case of the Mavrommatis Palestine Concessions, P.C.I.J., Ser. A, No. 2, p. 19 (1924). See Hyde, *International Law*, Boston, 1945 (2d. ed.), Vol. II, p. 1493.

[13] Agreement, Part I, Art. 6 F. [14] Part I, Art. 6 B. [15] Part II, Art. 5.

[16] Part II, Art. 6.

principle of law, the rule is bound to create difficulties. Therefore an effort should be made to obtain acceptance of a better rule for the agreement on reparation from Japan which is still to be concluded.

The Paris Agreement on Reparation from Germany, in declaring deductible "legitimate contract claims against the German former owners of the assets," has made no distinction with respect to the nationality or place of residence of the holders of such claims. At the time of the Agreement this was in accord with the status of the law in the various countries on the payment of claims out of local enemy assets.[17] In the United States, under the Trading with the Enemy Act of 1917, claims may be filed irrespective of nationality or place of residence of the holder of the claim.[18] This principle has now been abandoned in the United States. The recent amendment to the Trading with the Enemy Act provides that debt claims allowable under the Act shall include only those of citizens of the United States and of residents of the United States.[19]

Strong criticism of the exclusion of claims of non-resident friendly aliens can be anticipated, abroad and in the United States, but particularly in the countries signatories of the Paris Agreement. At the Paris Conference a unanimous resolution was adopted promising equal treatment to the nationals of all signatory countries "in the administration of reconstruction or compensation benefits for war damage to property." [20] Whether or not this covers the admission of claims against local enemy assets, the Conference has gone clearly on record in favor of "equality of treatment" in reparation matters. To exclude claims of non-resident creditors from countries signatories of the Agreement, is not in accordance with the spirit of the Resolution.

It may well be doubted that the new law is in the interest of American creditors in general, as they now face the risk of being excluded in distributions abroad as a measure of retaliation. What may be gained here by the exclusion of claims of non-resident friendly aliens, is insignificant. The amount of such claims is less than two per cent of the total amount of claims.[21] Particularly inopportune is the exclusion of claims of creditors from countries which have signed the Paris Agreement, as these claims are deductible under the Agreement.

[17] Rabel, "Situs Problems in Enemy Property Measures", in *Law and Contemporary Problems*, Vol. 11 (1945), p. 118, at p. 132; also *In re Wiskemann*, 92 L. J. Ch. 349 (1923).

[18] Trading with the Enemy Act of October 6, 1917, No. 9 (a), 40 Stat. 411 (1917), 50 U.S.C.A., App. No. 9.

[19] New Section 34 (a) of the Act, added by An Act to Amend the First War Powers Act, 1941, Public Law No. 671, 79th Congress, 2d session (August 8, 1946). Drafted before the adoption, at the Paris Conference, of the Resolution on "Equal Treatment". First introduced, as H. R. 5089, Dec. 20, 1945, *Congressional Record*, 79th Congress, First Session, Vol. 91, No. 227, p. 12668.

[20] Unanimous Resolution No. 3, *Department of State Bulletin*, Vol. 14, No. 343 (Jan. 27, 1946), p. 122.

[21] Sen. Rep. No. 1839, 79th Congress, 2d Session (1946), p. 4.

The Resolution on "Equal Treatment" adopted by the Paris Conference, already mentioned, provides:

> In view of the fact that there are many special problems of reciprocity related to this principle, it is recognized that in certain cases the actual implementation of the principle cannot be achieved except through special agreements between Signatory Governments.

No guaranty exists, regarding the disposition of local enemy assets, that American creditors will receive their equal share everywhere. Some countries may not permit payment of claims at all, others may give local creditors preferential treatment. Some countries outside the Paris Conference group, as Argentina,[22] still retain in their general law local priority rules.[23] The unconditional admission in the United States of claims of foreign creditors, resident or non-resident, therefore, appears unadvisable. A proper way to deal with the situation, it seems, would be the admission of claims of friendly aliens on a reciprocity basis.

KURT H. NADELMANN *

ARBITRATION BETWEEN THE NETHERLANDS AND UNITED STATES POSTAL ADMINISTRATIONS

A dispute between the Postal Administration of the Netherlands and that of the United States concerning maritime transit rates applicable to mails carried by Dutch steamships in 1920–1923, was recently settled by arbitration.[1] Article 25(1) of the Universal Postal Convention, signed at Madrid on November 30, 1920,[2] provides that "in case of disagreement between two or more members of the Union as to the interpretation of the present Convention, or as to the responsibility imposed upon an Administration by the application of this Convention, the question in dispute is settled by arbitration (*jugement arbitral*). To that end each of the Administrations concerned chooses another member of the Union which is not directly interested in the matter." [3]

The dispute arose out of the application of contracts made in 1904 and

[22] Bankruptcy Law No. 11.719 of 1933, No. 7.

[23] See Nadelmann, "Legal Treatment of Foreign and Domestic Creditors," in *Law and Contemporary Problems*, Vol. 11 (1946), p. 696; same, "Once Again: Local Priorities in Bankruptcy", in this JOURNAL, Vol. 38 (1944), p. 470.

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[1] A dispute between the United States and Norway concerning sea transit charges, claimed by the latter for services rendered in the years 1914 to 1919, was settled by arbitration in 1926; see Manley O. Hudson, "American-Norwegian Postal Arbitration," in this JOURNAL, Vol. 20 (1926), p. 534. That award was applied to similar pending disputes with Sweden and Denmark: Henry Reiff, "Enforcement of Multipartite Administrative Treaties in the United States," in this JOURNAL, Vol. 34 (1940), pp. 661, 673.

[2] Text in G. Fr. de Martens, *Nouveau Recueil General de Traités*, 3d ser., T. XV (1926), pp. 722, 737; see Manley O. Hudson, *International Legislation*, Washington, 1931—, Vol. I, p. 520.

[3] The Convention of 1920 was later revised (at Stockholm in 1924, at London in 1929, and at Buenos Aires in 1939). The last version (54 U. S. Stat. at Large, Part 2, p. 2049) embodies in Art. 11 corresponding provisions for the arbitration of disputes.

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INTERNATIONAL MONETARY AGREEMENTS

By Arthur Nussbaum

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INTRODUCTORY

The international implications of the money phenomenon were to some extent perceived as early as the time of some of the scholastics who found in the universal use of money an instance of the operation of the Law of Nations (*jus gentium*).[1] The latter term, it is true, was employed by the scholastics rather ambiguously, covering also rules observed by all or most nations in domestic relations. A later writer of the seventeenth century, Samuel Rachel, went further. In his Dissertations on the Laws of Nature and of Nations (1676) he advances the idea that the international circulation of many coins—he mentions especially the Turkish Ducats—proves the existence of a Law of Nations in the modern sense of a law governing the relations among independent states.[2]

As a matter of fact the circulation of coins had ever been more or less international in character. Along with the emergence of coins in early antiquity their migration from country to country also sprang up,[3] to come to an end only in the nineteenth century. According to Sombart monetary circulation from the thirteenth to the eighteenth century "bore a definitely international character."[4] Furthermore, on the European Continent an international unit of account appeared in the sixteenth and seventeenth centuries, when, under a common mercantile custom, drafts on the great Fairs were made in terms of the *scutus marcharum*, which really denoted a definite quantity of gold and was payable in diverse gold coin according to current valuation.[5]

Nevertheless Rachel's theory is not tenable. Except for special enactments and customs, the acceptance of foreign coins in the payment of debts,

[1] *Cf.* Francisco Suarez, *De Legibus ac Deo Legislatore* (1612), B.R. I, Ch. 19, Sec. 10.

[2] S. Rachel, *De Jure Naturae et Gentium* (1676), *Dissertatio Altera.* English translation by Bate, E., in *Classics of International Law*, Washington, 1916, p. 216.

[3] See A. R. Burns, Money and Monetary History in Early Times, 1927, p. 43.

[4] *Der Moderne Kapitalismus*, Vol. 1, 1921, p. 409. England was affected comparatively little by the import of foreign coinal, though there was an afflux of Byzantine "besants" after the Conquest, see A. Feavearyear, The Pound Sterling, 1931, p. 22; cf. also W. A. Shaw, The History of Currency, 1896, p. 41. In the American Colonies practically the entire coined curreney was foreign; A. Nussbaum, Money in the Law, 1939, p. 164.

[5] Nussbaum, *op. cit.*, p. 310. According to E. Hoyer *Währungsfragen im Codex juris Canonici* in *Festgabe für Oscar Engländer*, 1936, pp. 101, 110, the Roman Curia in the beginning of this century still reckoned in gold *scuti*. Even in 1939, N. Hilling, Procedure at the Roman Curia, 31 mentioned that the salary of the Cardinals was defined in terms of gold *scuti*. In all probability, this unit of account is related to the *scutus marcharum* of old.

and other modes of their acquisition, were not a matter of legal obligation. The foreign coins were accepted or else acquired on grounds of pure expediency; particularly in the case of the Ducats, Florins, and other coins of renown, because of a common trust in their full weight and fineness. Nor could the enactments or customs mentioned above be linked to international law proper.

Such a connection has, however, been established since early antiquity through international monetary agreements. This type of convention has recently been brought to the fore by the discussion of post-war problems. A historical survey of monetary treaties, which will be attempted in the present article, may shed some light on the paths of the future.

Two groups of international monetary agreements, differing in substance as well as in time, must be distinguished. The earlier group is concerned with coins, that is, with metallic circulating media; in the main, the treaties of this group tend to establish a common standard of coinage (metal, fineness, weight, form, impress, etc.), thus being, in a word, *standardizing* agreements. The more recent group centers on "ideal units" or, to use a more familiar term, on "moneys of account"[6] such as the dollar, franc, pound, and so on, their main purpose being to stabilize the value of the respective unit in the international money market; these may be called *stabilizing* agreements.

STANDARDIZING AND KINDRED AGREEMENTS

Standardizing agreements can be traced back to antiquity.[7] As early as 500 B.C. such treaties were concluded between Greek city-states.[8] Community of minting was rare, each city ordinarily retaining this precious prerogative, but, at least in some cases, the treaties seem to have provided for a compulsion upon creditors within the confederate territories to accept convention money in the payment of debts. Convention money circulated normally side by side with local money, but information on this, as on other points, is incomplete. The most striking features of the ancient treaties are their close connection with military alliances and their termination through military defeats.

During the Middle Ages standardizing conventions are principally found in Germany and Italy, where the decay of imperial power resulted in the acquisition of the coinage prerogative by numerous principalities and cities, the latter being quite naturally in the lead of the movement for a better and

[6] Objections to this use of the term "money of account" are pointed out by Nussbaum, *op. cit.*, p. 7. The expression "ideal unit" was adopted in Bates *v.* United States 108, F (2d) 407, 408 (C.A. 7th, 1939). "Unit of account" is more properly used for such conceptions as *scutus marcharum*, "gold dollar," "gold franc," *cf. supra*, p. 242, *infra.*, p. 255.

[7] On monetary conventions in ancient China and Etruria see Burns, *op. cit.*, p. 95.

[8] Detailed information is to be found in Burns, *op. cit.*, p. 90; and in F. Lenormant, *La Monnoie dans l'Antiquité* Vol. II (1878), p. 53.

homogeneous metallic circulation.[9] As in ancient Greece, community of minting was infrequent, whereas community of legal tender seems to have been considered a corollary of unified standardization and was often safeguarded by outright banishment of foreign coin. The conventions are more elaborate in this period, not only because of the progress in the technique of coining, but because of the incorporation of detailed administrative and punitive regulations designed to secure a strict application of the standard agreed upon. A standardizing convention among cities and principalities of the Upper Rhine area, the Rappenmünzbund,[10] existed through almost two centuries, until 1584. Then, after many struggles and reconstructions, the Bund succumbed to Imperial policies which, though with slight success, tried to establish a unified monetary circulation within the Empire or at least within large parts thereof.[11]

In a few instances the medieval conventions, without creating a common standard of coinage, were merely aimed at establishing a unified area of metallic circulation (*circulatory* agreements).[12]

The conventions so far envisaged are intermunicipal or interprovincial rather than international; the first treaty of a truly international kind was concluded in 1469 between the King of England and the Duke of Burgundy. It was of the "circulatory" and reciprocal type and is remarkable also for the fact that it is concerned with gold coins and silver coins alike, whereas the Inter-German conventions of the period are exclusively concerned with coins of silver and of baser metal.

In the first centuries of modern times the territorial disintegration of the European monetary systems was gradually overcome by the rise and consolidation of the great national states which, under the doctrine of mercantilism, were ill-disposed toward concluding monetary treaties. There are in this period a few late instances of the interprovincial and standardizing

[9] See Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte*, 2nd ed., 1926, p. 288; K. T. von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte des Mittelalters*, Vol. III, Pt. 2, 1901, pp. 372, 396, 416; G. Salvioli, *Il Diritto Monetario della Caduta del Empero Romano ai Nostri Giorni*, 1889, p. 111.

[10] Julius Cahn, *Der Rappenmünzbund*, 1901, a typical product of the then dominant "Historical School" of German economic science, exemplifying both its better and its poorer aspects. An important Italian convention of the standardizing type was concluded in 1254 between Bergamo and other Lombard cities. A monograph by Mazzi, *La Conventione Monetario del 1254 e il Denaro Imperiale di Bergamo*, 1882, cited by Salvioli, p. 112, n. 12, was not available to the present writer. Italian medieval conventions were careful to relate their standards to those of the Empire.

[11] Characteristically, the agony of the Bund was made most painful by a purely political motive: the desire of the member-cities to retain as a matter of prestige their coinage prerogative. Cahn, *op. cit.*, p. 202.

[12] Luschin von Ebengreuth, *op. cit.*, p. 289.

[13] See de A. Witte, "*Les Rélations Monétaires entre la France et l'Angleterre jusqu'au 17-ième siecle*" in *Revue de Droit Int. et de Législation Comparée*, Vol. 26, pp. 75, 86 (*1894*). Unfortunately the information offered in this article is rather vague.

type,[14] but it is only in the nineteenth century that monetary subjects reappear in international legislation.

In Germany the foundation of the Zollverein (1833) was the first important step in establishing, under Prussian hegemony, an economic union among the politically separate German states.[15] In 1838 the Union was strengthened by the conclusion of standardizing treaties among the member states of the Zollverein. Though the treaties left considerable divergencies among the coin types to be used in Northern and Southern Germany respectively, at least a fixed ratio between the North German thaler and the South German florin, the standard silver coins of the respective systems,[16] was secured, and restrictions on minor coins were imposed; a special convention provided for prosecution and extradition of counterfeiters.[17] The urge for national unity made these conventions a complete success; after the foundation of the German Reich, the convention currency was merged into the new Reich currency.

From an international point of view a treaty of 1857 between Austria and the member states of the Zollverein[18] offers greater interest. The treaty had been pushed by Austria, anxious to counteract Prussian hegemony. Her financial power fell short of her political ambition.[19] She had long suffered, and was then still suffering, from serious monetary disturbances called forth by the emission of unredeemable paper money and by an ensuing depreciation of her currency. The treaty therefore obligated the member states not to resort to the emission of such paper money and to withdraw existing issues from circulation until January 1, 1859. This was a unique piece of international legislation indeed; a learned commentator[20] very properly likens it to a person's promise never to fall sick. As a matter of fact, exactly on January 1, 1859, Austria became entangled in new political difficulties which led to the war with France and brought about, in the teeth of the fresh treaty, a new emission of unredeemable paper money. As a result the treaty, though formally ended only by the Austro-Prussian war of 1866, became inoperative, except that the silver convention coins made by Austria emigrated to Germany where, under the treaty, they had to be accepted as legal tender. When, in the early seventies, the depreciation of silver set in,

[14] See Shaw, *op. cit. supra*, p. 199 (Brandenburgian-Saxon treaties of 1667 and 1690); Luschin von Ebengreuth, *op. cit.*, p. 290.

[15] W. O. Henderson, *The Zollverein*, 1939.

[16] Henderson, *op. cit.*, at pp. 249, 251.

[17] The treaties date from August 25 and 26, 1837 (Martens, *Nouveau Recueil des Traités*, Vol. 14, pp. 292, 294), July 30, 1898 (*ibid.*, Vol. 15, p. 670), May 8, 1841 (Martens, *Nouveau Recueil Général des Traités*, Vol. 2, pp. 56, 65), and Oct. 21, 1845 (*ibid.*, Vol. 8, p. 565). French translations in A. Janssen, *Les Conventions Monétaires*, 1911, p. 473; analysis *ibid.*, p. 3. See also Henderson, *supra*, n. 15, p. 139.

[18] Münzverein of Jan. 24, 1857 (Martens, *Nouveau Recueil Général des Traités*, Vol. 16, Pt. II, p. 448).

[19] Information amplifying the account given in the text is found in Janssen, *op. cit.*, p. 38, and B. Nolde *La Monnaie en Droit International* in *Académie de Droit International, Recueil des Cours*, Vol. 27, pp. 247, 369.

[20] Janssen, *op. cit.*, p. 69.

the rapidly growing loss fell on Germany; after lengthy negotiations a small fraction of this loss was assumed by Austria. The treaty illustrates the fact that in monetary conventions the mischief of one partner may easily, and even primarily, affect the others. In fact nobody, it seems, drew a real advantage from this monetary product of political ambition.

Another standardizing treaty is found in the Scandinavian Monetary Conventions of 1873 and 1875 between Denmark, Sweden, and Norway.[22] At variance with the German conventions, the Scandinavian treaty was based on the gold standard. Standardization included subsidiary and minor coins and the principle of common legal-tender was extended to the entire range of convention money. Backed by the racial ties and the propinquity of the member countries, and buttressed by stabilizing agreements,[23] the Convention survived World War I. In 1924, however, the circulatory and legal-tender community was ended in respect to subsidiary and minor coins when these coins were drained from Denmark and Norway by the premium on the Swedish crown; in 1931 the abandonment of the gold standard terminated the intra-Scandinavian circulation of gold coin altogether.

From the viewpoint of universal monetary history the so-called Latin Monetary Union of 1865 [23] constitutes by far the most remarkable instance of a "standardizing" treaty. France, Italy, Belgium, Switzerland, and Greece (1868), were the signatory powers.[24] France was the leader within the Union. Not only were French coins, on the basis of the decimal system long prevailing in France, made the model of the major convention coins in respect to metal, fineness, weight, tolerance, and diameter, but the bimetallistic 1:15½ standard of the French system was embodied in the convention. (Thus history presents us with standardizing treaties of all types—silver, gold, and bimetallistic.) On the other hand, the Latin Monetary convention did not touch upon coins of baser metal or upon paper money. The convention did not even provide for a legal-tender community; instead, the contracting governments only undertook to receive the convention gold coin and five-franc silver pieces, wherever coined, in the payment of debts

[22] A. Nielsen, "Monetary Unions" in Encyclopedia of the Social Sciences, Vol. X, p. 598; Janssen, *op. cit.*, p. 105; Nolde, *op. cit. supra*, n. 20, p. 364; R. Agombart, *Politique Monétaire des Etats Scandinaves*, 1930, p. 119.

[23] *Infra*, p. 248.

[23] Full text of the main treaty of Dec. 23, 1865, with all later supplements and amendments up to 1910 in Janssen, *op. cit.*, p. 514; English translations up to 1900 in Willis, *infra* n. 28, p. 271.

[24] For detailed analyses and appraisals of the Latin Monetary Union see H. P. Willis, A History of the Latin Monetary Union (1901); A. Nielsen "Monetary Unions" in Encyclopedia of the Social Sciences *loc. cit.*, R. H. I. Palgrave, Dictionary of Political Economy sub "Latin Union"; Nolde, *supra*, n. 20, p. 372; R. Gruel, *Die Lateinische Münzunion*, 1926; E. Egner, *Der Lateinische Münzbund seit dem Weltkriege*; W. Stark "*Währungsverträge*" in *Festgabe für Oscar Engländer*, pp. 263, 271. See also K. Neumeyer, *Internationales Verwaltungsrecht*, Vol. III, Pt. 2, Div. III, 1930, pp. 228, 231.

(community of "public receivability").[25] All this hardly amounted to a "union,"[26] but the overstatement of name goes hand in hand with the far-flung expectations underlying the treaty of 1865, which it was hoped would become the corner-stone of a unified world currency. For this reason the treaty explicitly opened the door for the accession of other countries. But only Greece followed in 1868, while Spain, Serbia, Roumania, the Papal state and some South American countries contented themselves with issuing coins of the convention standard; avoiding, however, any international obligation.[27]

Troubles for the Union started very soon, owing to the depreciation of silver, a fact necessarily destructive of the bimetallistic standard. Decay of the Italian monetary system was another source of difficulties. Repeated serious alterations of the treaties, including the transition to a "limping" gold standard, proved necessary to perpetuate the Union, in which also a point of political prestige was at stake for France. Ultimately the Union succumbed to the aftermath of World War I. In 1921 Switzerland felt herself constrained to cancel the public receivability of the foreign five-franc silver coins and to declare them unfit for circulation [28]—a clear violation of the Union treaties which, committed by an eminently law-abiding country, illustrates the utter impracticability of the Union ties. A convention of the same year,[29] confirming the Swiss measures, practically finished the circulation of the Union silver coins outside the state of issue; circulation of Union gold coin outside Switzerland had stopped anyway, owing to currency depreciation, and was afterwards ended by devaluation which finally struck Switzerland herself.

The basic problem of the Union is well reflected by judicial decisions. When in 1894 an Italian appellate court had to enforce a French judgment calling for the payment of French francs, the court held payment in (depreciated) lira notes of the same nominal amount a lawful discharge of the debt.[30] The Court, it is true, reasoned only in terms of the *cours forcé* of the lira notes—a matter of internal law—without mentioning the Union treaty, but the Court was evidently guided by the idea of a unified franc of the Union. The issue reappeared on a larger scale when, after World War I, creditors of international "franc" loans were offered payment in depreciated (French, Belgian) francs or in liras but insisted upon the payment of "inter-

[25] Nussbaum, *op. cit.*, pp. 42, 155.

[26] The preamble of the 1865 treaty, however, employs the term "union monétaire." In fact the term "Latin Monetary Union" has come to be generally accepted.

[27] One-sided adoption of foreign coin types had long been considered good practice. In the Middle Ages the Emperor, in granting a coinage privilege, would condition it on the adoption of the Florentine florin standard. Inama-Sternegg, *supra* n. 9, p. 411. Only deceptive imitations were unlawful; von Ebengreuth, *supra*, n. 9, p. 59.

[28] *Eidgenössische Gesetzsammlung*, 1921, p. 52.

[29] Martens, *Nouveau Recueil*, III *Sér.*, Vol. 14, p. 220.

[30] Appellate Court of Milan, May 1, 1894; *Giurisprudenza Italiana*, 1894, Vol. I, Pt. 2, p. 705.

national" gold francs as defined by the Union treaties subsequent to the abandonment of the bimetallist standard. The creditors' theory was rejected by the courts;[31] the court of one country unrelated to the Union advanced a particularly thorough and convincing argument in support of its decision.[32] Thus the Union, far from having brought about a world currency, had not even succeeded in establishing a unified "ideal unit" (money of account) for the Union countries.

Today it is familiar knowledge that in a modern monetary economy treaties concerned with coinage alone cannot reach the real source of international disturbances as reflected by the fluctuations of the rates of exchange.[33] In fact, no more standardizing treaties have been concluded, it seems, since the consummation of the Latin and the Scandinavian Unions.[34] Dematerialization of money—that is, its severance from the metallic substratum—has called for new forms of international coöperation. Nevertheless there might be still minor international agreements with regard to circulating media as such. Thus the International Convention for the Suppression of Counterfeiting of Currency, prepared in 1924 by the League of Nations,[35] has been ratified by 25 states. The Convention, in organizing international coöperation against counterfeiters, fulfills a task which formerly was performed by standardizing treaties or their auxiliary agreements,[36] and which has become even more urgent since in recent times the counterfeiting gangs have frequently operated from country to country. To this writer's knowledge there are no reports indicating any actual work done in pursuance of the Convention. This may be explained, in addition to the imperfections of the convention, by the circumstances of the post-war period which probably handicapped the migratory habits of the counterfeiters as well as the coöperation among prosecuting governments. In times to come a more effective international agreement along the lines of the Convention might well be attainable.

STABILIZING AND KINDRED AGREEMENTS

Stabilizing agreements originate in certain unilateral transactions of a

[31] French Cour de Cassation, Dec. 21, 1932, *Journal du Droit Int.*, 1933, p. 1201; Swiss Federal Tribunal, June 27, 1918, *Amtliche Sammlung*, Vol. 44. Pt. II, p. 213, and the decision in n. 32. However, the *francs seu libellae* in which the *Codex Juris Canonici* of 1917 expresses money values (Arts. 534, Sec. 1; 1532; 1541, Secs. 2 and 3), seem to mean gold francs of the Union. Hoyer, *op. cit.*, p. 101.

[32] German Kammergericht (appellate court of Berlin) Sept. 25, 1928, *Juristische Wochenschrift*, 1929, p. 446.

[33] See, *e.g.* Stark, *supra*, n. 24, p. 290.

[34] The Austro-Hungarian monetary convention of 1892 (Austrian *Reichsgesetzblatt*, 1892, p. 652) made internationally binding the identical Austrian and Hungarian monetary laws previously enacted. This did not alter the fact that Austria and Hungary had formed, and continued to form, a united territory from a monetary viewpoint.

[35] Nussbaum, *supra*, n. 4, p. 34, with further references. Cf. also L. Dupriez, "*La Répression internationale du faux monnayage*" in *Revue du Droit International et de Législation Comparée*, Vol. 56. (1929), p. 511.

[36] *Supra*, p. 244 and p. 245, n. 17.

coöperative nature, principally in the aid given by a central bank to the central bank of another country in support of the latter's currency. An early, if not the earliest, instance is found in the aid granted in 1839 by the Banque de France to the Bank of England which was then seriously imperiled by a coincidence of bad crops with a bad financial crisis.[37] Such coöperation may develop into stabilizing agreements where aid is reciprocally promised for the future. Thus in 1885 the Scandinavian central banks supplemented the monetary conventions of 1873 and 1875 by the mutual establishment of accounts on which the accredited central bank was allowed to draw at parity and without charge of interest.[38] In 1894 and 1900 the banks even undertook to receive one another's notes at par, an unusual arrangement which—by creating a limited community of "public receivability" in respect to the notes—bore some resemblance to the standardizing conventions of old. The agreements of the Scandinavian banks were terminated[39] when, during World War I, note redemption and gold exportation were suspended.[40]

A more recent and more important type of stabilizing agreement emerged during the monetary crisis which preceded the present war. These agreements were concluded among governments, thereby indicating a shift in emphasis to the political field. Owing to the restlessness and uncertainties of the period, the agreements lack more or less juridical definiteness. In the case of the so-called sterling block formed in 1934 by Great Britain, some Dominions, and the Scandinavian countries,[41] no documentary evidence of any agreement whatsoever exists; the known facts reveal no more than an actual coöperation of central banks and governments[42] aimed at aligning the foreign exchange rates of the "block" currencies to the rate of the pound sterling. The block came to an end as a result of the outbreak of World War II. As for the "gold block," established in 1933 among the countries of the former Latin Monetary Union and Poland and the Netherlands,[43] we have at least a joint declaration[44] expressing the determination of the block countries to uphold the free operation of the gold standard at the then existing parities and within the framework of the then existing laws. As early as 1934, Poland, Italy, and Belgium, unable to abide any longer by the policies

[37] A. Schleidt, *Die Kooperation der Notenbanken*, 1931, p. 12.

[38] Nielsen, *supra*, n. 21; Agombart, *supra*, n. 21, p. 123.

[39] Regarding some insignificant remnants of the agreements, see Nielsen, *loc. cit.*

[40] Still in 1939 meetings and agreements for coöperation among Governors of Balkan central banks as well as among Scandinavian central banks took place. Bank for International Settlements, Annual Report, 1939/40, p. 145.

[41] S. E. Thomas, The Principles and Arithmetic of Foreign Exchange, 6th ed., 1934, p. 483; B. Foster and R. Rogers, Money and Banking, 1936, p. 522; O. Emminger, "*Probleme des Sterlingblocks*," in *Währung und Wirtschaft*, 1934, p. 157; J. B. Condliffe, Reconstruction of World Trade, 1940, p. 316.

[42] Thus the English Government granted the countries of the sterling block certain financial advantages, Foster and Rogers, p. 496.

[43] League of Nations, Monetary Review, 1937, Vol. II, p. 26; F. Gunnicker, *Das Schicksal des Goldblocks*, 1939.

[44] The text may be found, *e.g.* in F. Bradford, Money and Banking, 1937, p. 83.

of the block, withdrew. France, the Netherlands and Switzerland followed suit in 1936.

The "Tripartite" agreement of September, 1936, between the United States, Great Britain, and France [45]—and joined in November, 1936, by Belgium, the Netherlands and Switzerland [46]—is more explicit. Identical declarations by the United States and British Treasuries, mentioning the French Government as assenting, proclaimed the inauguration of a common monetary policy in the interest of peace and of world prosperity. More specifically, a common stand, though in vague and non-legal terms, was taken against quotas and exchange control as well as against further measures of devaluation, except for the then pending 1936 devaluation of the French franc. The pronouncements were supplemented by a statement of the American Secretary of the Treasury on November 24, 1936, to the effect that —subject to revocation on twenty-four hours' notice—the United States would buy from or sell to the British and French Governments gold at a rate "advantageous to the public interest," namely $35 per ounce, the legal standard of the dollar; the handling charge would be one quarter of one per cent. Reciprocally, it was declared, the British and French Governments had arranged for corresponding facilities to be afforded to the United States.[47]

Legally the Secretary's statement of November 24, 1936, amounted to a general license granted to the other Governments under the Gold Reserve Act of 1934,[48] which authorized the Secretary of the Treasury to buy or sell gold "upon such terms as he may deem most advantageous to the public interest." While to this extent the statement constituted a unilateral act, the form of an agreement was preserved by the reciprocal pronouncements of the other Governments which, however, were couched in more indefinite terms.[49] Although, under the given conditions, only the non-American countries were the financial beneficiaries of the agreement, the risk taken by the United States was slight because of the short time of notice and because the gold was available only for dollars.

However, the importance of the agreement can not be gauged by its financial terms. It constituted, in the monetary area, a political declaration of solidarity which was designed for, and led to, monetary coöperation far beyond the buying or selling of gold at $35 an ounce. The preponderance of the political factor was brought home in 1937 when France decreed another devaluation of the franc. Nevertheless, the agreement was continued,[50] to be ended only by the war.

The new international activities of governments have been made possible

[45] Federal Reserve Bulletin, 1936, pp. 759, 980 (American statements); Waight, *infra*, n. 51, pp. 169, 171 (British statements); League of Nations, Monetary Review, *supra*, n. 43, p. 30; Günnicker, *supra*, n. 43, p. 77; Griffith Johnson, The Treasury and Monetary Policy, 1939, p. 115. [46] Federal Reserve Bulletin, 1936, p. 941. [47] *Ibid.*, 940.

[48] 48 Stat. 337, Secs. 8 and 9; U. S. Code, Title 31, Secs. 733 and 734.

[49] See the text of the English pronouncement in Waight, *infra*, 51, p. 171.

[50] Statement by the Secretary of the Treasury, Mr. Morgenthau, of July 1, 1937, Federal Reserve Bulletin, 1937, p. 547.

through the "stabilization funds," a characteristic creature of the recent world crisis. After England had been compelled to abandon the gold standard, she created (in 1932) the Exchange Equalization Account to be controlled by the Treasury, for the defense of the pound.[51] Other countries followed;[52] the United States by establishing under the Gold Reserve Act of 1934 the two-billion-dollar "Stabilization Fund."[53] The stabilization funds —"equalization accounts" differ by name only—are principally designed for the protection of their respective national monetary system in the international money market. Nevertheless intervention in favor of other currencies may be within their scope and purpose, considering the interdependence of currencies which was so strikingly revealed in 1931 when collapse spread with lightning speed from Austria to Germany, from there to England, and from England all over the world.[54] And, inevitably, political considerations will enter the selection of these foreign currencies to be supported by the fund. The American fund, which, from its foundation, was never seriously called upon to defend the dollar, spent its main efforts in supporting currencies of countries politically aligned with the United States.[55] It was the fund which made the Tripartite agreement a live institution and which extended powerful help to the Chinese [56] and later to the Mexican [57] currencies. Assistance to the Chinese currency was granted in the form of another stabilizing agreement in which the British Equalization Account participated.

To the stabilizing agreements proper one may link the *transfer-saving* agreements. The latter include (a) *barter* agreements which envisage the exchange of goods (or services) between two nations, the governments serving as quasi-agents of their producers, with whom they will settle accounts in terms of the respective national currency;[58] (b) *payment* agreements pro-

[51] Hall, The Exchange Equalisation Account (1935); Waight, The History and Mechanism of the Exchange Equalisation Account, 1939. The citation in the text is taken from the Finance Act, 1932, Sec. 24 (3); Waight, p. 166.

[52] "Exchange Stabilization Funds" in League of Nations, Monetary Review (Doc. 1937-II. A. 8), p.52; Ch. Rist, "*Les fonds d'egalization des changes*," in *Revue d'Economie Politique*, 1938, p. 1535; M. A. Heilperin, International Monetary Economics, 1939, p. 245, and the writers in n. 51.

[53] Gold Reserve Act, 48 Stat. 337, Sec. 10; U. S. Code, as cited, Sec. 822*a*; Johnson, *supra*, 45, p. 92.

[54] B. Griziotti, "*L'Evolution Monétaire dans le Monde depuis la Guerre de 1914*" in *Académie de Droit International, Recueil des Cours*, Vol. 49, p. 109.

[55] Regarding the operations of the fund from 1934 to 1938 see the study by Johnson, pp. 8, 115.

[56] Report of the Secretary of the Treasury for 1941, p. 52. In order to meet constitutional objections, the Secretary pledged himself to undertake similar actions only with the agreement of the Congressional committees.

[57] New York Times, June 4, 1943. Regarding a seemingly abortive U. S.-Argentine agreement ("between old and good friends") of December 28, 1940, see Report of the Secretary of the Treasury, *supra*, n. 56, pp. 53, 359.

[58] Barter agreements, however, are not necessarily prompted by monetary considerations. The latter were apparently absent, for instance, in the Anglo-American barter agreement of June 23, 1939 (exchange of cotton for rubber), Department of State Bulletin, 1939, p. 547.

viding that a country under exchange control (country A) make funds available for payments due to country B (or to B citizens), particularly by using for this purpose remittances made from B to A in return for goods bought by B;[59] (c) *clearing* agreements by which two countries under exchange control compel their residents to pay debts due to residents of the other country into their respective national clearing office, whereupon the two offices will settle national balances as far as possible by set-off;[60] and (d) *standstill* agreements, that is, consented moratoria designed to meet difficulties of transfer rather than insolvencies of debtors. Though basically private in character, these belong to the group of transfer-saving conventions where the governments directly or indirectly participate in the agreement, *e.g.*, in the case of American-German standstill agreements of 1931 and the following years.[61]

The transfer-saving agreements, then, are definitely bilateral and legal in character. They by no means indicate the existence of political solidarity; the reverse rather would, in many cases, be true. Consequently, they are *stricto jure* in the sense that they do not imply more than their face value. The preferential treatment which they establish—like that of the barter, payment and clearing agreements—runs counter to the spirit of the stabilising agreements proper, which are aimed at an all-around beneficial effect. In a broad sense transfer-saving agreements may be counted among stabilising instruments but they are very definitely *ersatz* instruments.

STABILIZATION THROUGH INTERNATIONAL BANKS

Through international agreement stabilizing functions may be conferred upon banks or similar institutions. This was done by a treaty concluded on May 11, 1940, between Colombia, the Dominican Republic, Ecuador, Mexico, Nicaragua, Paraguay, and the United States.[62] The treaty provides for the creation of an "Inter-American Bank" with far-reaching powers in the monetary field[63] but the bank has as yet remained a project.[64]

[59] Great Britain Treaty Series, 1934, No. 22, and 1935, No. 26 (Germany); *ibid.*, 1934, n. 2. (Argentina); Nussbaum, *supra*, n. 4, p. 508.

[60] Schneider, *Der Welthandel im Clearingverkehr* (undated; 19387), a detailed and informative study; O. Bourdeaud'huy, *Accords de Compensation et Conventions de Paiement*, 1938, dealing principally with Belgian conditions; Nussbaum, *supra*, pp. 505, n. 1, 508, with further references. [61] Nussbaum, *op. cit.*, p. 507, with references.

[62] Department of State Bulletin, 1940, Vol. I, p. 512.

[63] By-Laws, Art. 5, "Purposes and Powers," where it said that the bank may "encourage general direct exchanges of the currencies of American Republics; encourage the maintenance of adequate monetary resources; promote the use and distribution of gold and silver; *facilitate monetary equilibrium* (italics the writer's); function as a clearing house for the transfer of international payments"; etc.

[64] Many earlier projects have never grown beyond the phase of literary discussion. For references and criticism see P. Mendès-France, *La Banque Internationale*, 1931, p. 23; C. Karamikos, *La Banque des Reglements Internationaux*, 1931, p. 121; H. L. Schlüter, *Die Bank für Internationale Zahlungsausgleich*, 1931, p. 115; W. Trimborn, *Der Weltwährungsgedanke*, 1931, pp. 70, 74, 82, 84.

The Bank for International Settlements (B.I.S.) in Basle,[65] a "bank of central banks," was, as is well known, principally created for the settlement of the Reparation payments under the treaty of Versailles. Nevertheless, the bank was equipped with powers permitting more general activities in the monetary field,[66] and in many quarters it was confidently hoped that the B.I.S. might be able to contribute considerably to a restoration of mutual understanding in international finance and to an improvement of the world's monetary mechanism.[67] Those hopes did not materialize, however.

When, in May, 1931, the Austrian financial crisis broke out, the B.I.S., fully aware of the danger, tried, without delay, to secure an international loan for the Austrian central bank in support of the Austrian shilling, but the consummation of the loan was delayed, because the Banque de France, in this hour of supreme necessity, made its coöperation dependent upon political conditions which the Austrian bank felt unable to accept. The Bank of England, therefore, decided to grant the Austrian bank an intermediary credit of 100,000,000 Austrian shillings (then about $14,000,000). Thereafter, under the lead of the B.I.S., international loans of 150,000,000 and 100,000,000 shillings were procured for the Austrian bank, but the aid could not avert the disaster.[68]

Another, and more technical, phase of the B.I.S. activities likewise bears upon international monetary relations. In connection with the Universal Postal and Telecommunication treaties, under which the Postal Administrations must periodically settle their mutual balances on a gold-franc basis;[69]

[65] Writings on the B.I.S. are abundant. Schlüter's book, *supra*, n. 64, is probably the most thorough study on the subject. Among the publications of earlier date there might be mentioned E. L. Dulles, The Bank for International Settlements, 1932 (prolix and with little analytical discernment, but comprehensive) and Griziotti, "*La Banque des Règlements Internationaux*" in *Académie de Droit International Recueil des Cours*, Vol. 42, p. 359. Ample bibliographies covering the years 1929–1932 are given by these three writers. H. Fehr, "*Die Bank für internationalen Zahlungsausgleich im Lichte des Schweizerischen Rechts*," in Klausing-Nipperdey-Nussbaum, *Beiträge zum Wirtschaftsrecht*, 1931, Vol. 2, p. 1445, might be added. Later publications are: L. Fraser, "The International Bank and Its Future" in Foreign Affairs, Vol. 14, p. 452; E. L. Dulles, "The Bank for International Settlements in Recent Years," American Economic Review, 1938, p. 290, and a valuable Berne thesis by Chambaty, *Die Bank für Internationalen Zahlungsausgleich*, 1939.

[66] *Cf.* the articles of association (Statut) of the Bank Art. 22.

[67] The Young Plan itself (Report of the Committee of Exports on Reparations, Cmd. 3343, p. 11) gave expression to the hope that the Bank might "contribute to the stability of international finance and the growth of world trade." Many utterances of writers are much more sanguine. Expectations rather than facts account for the vastness of literature on the subject.

[68] Particulars on the events of May, 1931, are found in Dulles, *supra*, p. 379; W. Schilling, *Die Abkehr Englands vom Golde*, 1935, p. 79; Chambaty, *supra*, p. 69.

[69] Postal Convention of 1934, Sec. 29, in M. O. Hudson International Legislation, Vol. VI, p. 640; Telecommunication Convention of Dec., 1932, Art. 32, *ibid.*, Vol. VI, p. 109. *Cf.* also African Telecommunication Union Agreement of Oct., 1935, Art. 28, *ibid.*, Vol. VII, p. 108 and generally. Nussbaum, *op. cit.*, p. 399, n. 87.

the B.I.S. in 1934 opened accounts in terms of ounces of fine gold upon actual deposits and holdings of gold.[70] The gold accounts which, like other bank accounts, are handled by crediting and debiting, are held with the B.I.S. by central banks acting on behalf of the respective national Postal Administrations. Pursuant to this arrangement, payments of gold francs are made by way of book transfers from one gold account to another, the gold franc being converted into ounces according to its statutory contents of fine gold. The payee central bank will then presumably credit the Postal Administration in national currency on the basis of the rate agreed upon between the central bank and the said Administration; on the opposite side the debtor Administration will be debited correspondingly. As pointed out by the B.I.S.,[71] the procedure makes it unnecessary for the Postal Administrations to agree among themselves on a currency in which the payments are to be made and on the rate for converting the gold francs into that currency; at the same time any loss in terms of gold is eliminated, with no movements of gold required either for the opening of the accounts or for the effecting of changes in them.

The gold-deposit accounts of the B.I.S. were available to central banks also for purposes other than postal settlements, but the size of the transactions on these accounts was never impressive.[72] Nonetheless, the experiment is interesting from the economic as well as from the legal angle. The Hamburger Girobank of 1770,[73] following an earlier Dutch model, had for a century conducted similar accounts in terms of the famous "mark-banco" which in reality constituted the equivalent of a definite quantity of silver; this was even the main purpose of the bank, which thereby provided the mercantile community with a convenient unit of account. The mark-banco which may be considered as an elaboration, on a silver basis, of the *scutus marcharum*, disappeared when, after the foundation of the German Reich in 1871, a valid and unified monetary system was created for Germany. The precedent of the Hamburg bank seems not to have been thought of in discussion and writing on the B.I.S. Instead, in the negotiations preliminary to the foundation of the B.I.S., the French delegate Quesnay, who became the first General Manager of the Bank, proposed to render the "grammor" (money equivalent of one gram of gold) the accounting unit of the B.I.S.[74] The proposal was rejected, and the gold franc (franc-or) was adopted as the basis of the bank's

[70] *Cf.* on these accounts the Annual Reports of the B.I.S. and the valuable analysis by Chambaty, *supra*, at 88. [71] See especially Annual Report, 1938/1939, p. 129.

[72] The gold deposits amounted to a few million dollars, and only a minority of the Postal Administrations utilized the B.I.S. procedure. See the Annual Reports of the Bank, particularly those for 1938/1939, p. 129, and 1939/1940, p. 150, and the item "sight deposits" in the balance sheets; *cf.* also Chambaty, *supra*, p. 92.

[73] On the *Hamburger Girobank*, see Nussbaum, *supra* at 310, with further references.

[74] Dulles, *supra*, 65, p. 30; Trimborn, *supra*, n. 64, pp. 91, 106. Mr. Quesnay's memorandum seems to have been reproduced by Mendès-France, *supra*, n. 64, p. 283; see Dulles, p. 30, n. 20. The term *grammer* had been previously suggested for the same thing by Grotz, *Geldlehre*, 1865, p. 568 (citation from *Trimborn*, *supra*, p. 48).

accounting. The new gold-deposit accounts constituted, on a limited scale, a revival of Mr. Quesnay's idea except that the ounce replaced the gram. It should be borne in mind, however, that, in this particular application, the gold franc was not a monetary unit either, but exactly like the planned "grammor," was a mere accounting unit, namely, the equivalent in currency (coin or paper) of the gold contained in a golden franc-coin.[75] In the case of gold-deposit accounts as arranged by the B.I.S. the legal situation is probably that the depositor becomes co-owner of the whole gold stock in the ratio of his share to the total weight of the stock. Since the latter weight invariably fluctuates, according to the increases and decreases in deposits, the ratio, too, will fluctuate. The situation may lead to complex and disturbing arithmetical intricacies as shown by German experiences with similarly constructed joint deposits of securities.[76] Moreover, the depositor's fractional *in rem* right in the gold stock no longer offers the same security as in the past when the respect of private property was the almost universally accepted rule; at present gold deposits are likely to be requisitioned by the government as well as by an invader. Under these circumstances, not much can be expected from gold-deposit accounts of the B.I.S. type. The accounting units[77] which have met with wider application are of a different kind. The creditor whose claim is couched in terms of such an accounting unit, is ultimately entitled, as an *in personam* right, to a sum in actual money—coin or paper money—to be computed on the basis of the gold (or silver) equivalent of the units owed.[78] A considerable store of legal experience is available in this respect since in the last decades the well-known devices of gold-franc, gold-dollar, gold-mark, etc., have more and more developed into accounting units. For instance, 1,000 "gold dollars," though originally (under the "gold-coin-clause" interpretation)[79] meaning gold coins of a face amount of $1,000, came to mean (under the "gold-value-clause" interpretation) an amount of American dollars, in coins or paper money of whatever kind, equalling the *value* of the gold contained under the law in gold coins of a face amount of $1,000.[80] Gold value clauses have been used in treaties[81] and may assume new importance in post-war international relations.

[75] Nussbaum, *supra*, n. 4, p. 306.

[76] The *Effecten-Sammel-Depot*. See B. Ascher, *Die Rechtsgrundlagen des stückelosen Effectenverkehrs*, 1927, and H. Schumann, *Zur. Frage vom Miteigentum an Sammeldepot* in Klausing-Nipperdey-Nussbaum, *supra*, n. 65, p. 1174, with references.

[77] Not "moneys of account"; *supra*, n. 6.

[78] This was true even where the parties contracted in terms of mark banco. The legal relationship between the *Hamburger* Girobank and its clients was different, however. Nussbaum, *supra*, n. 4, p. 311, n. 53.

[79] See Nussbaum, *op. cit.*, p. 306. [80] *Ibid.*, p. 353.

[81] Gold value clauses are to be found in the Convention for the Unification of certain Rules relating to the Bills of Lading, 1924. (Treaty Series, No. 931, Art. 9, and in the International Wheat Convention, 1933 (Great Britain, *Treaty Series*, 1933, No. 38 (Cmd. 4449) Appendix V. In some other treaties (Nussbaum, *op. cit.*, p. 199, n. 2) the gold clauses are rather in the nature of gold coin clauses.

POST-WAR PLANS

The post-war plans for international monetary coöperation, published by the Governments of Great Britain ("Keynes Plan"),[82] of the United States ("White-Plan")[83] and Canada [84] have met with ample comment of an economic or political nature.[85] A few observations of a more administrative and juridical kind may be added here.

The draft agreements are all planned as multilateral. Conditions for a successful operation of multilateral treaties have been very little investigated as yet. There are a number of multilateral treaties, such as the Universal Postal Union, which have been a success, but the absence of major political factors is conspicuous in these cases. Not infrequently even a relatively slight admixture of political elements has proved fatal in multilateral treaties.[86] In monetary matters, the critical significance of their political bearings appears from our historical account. The more complicated the texture of the treaty, the more the political factor will make itself felt. And the new plans are of a complication entirely unprecedented in the history of international law. Moreover, at variance with the examples of the past, say the Latin Monetary Union, they allow a leeway novel in treaty practice. The confines of the planned organizations are but dimly drawn. It will be the task of the respective Boards which are equipped with tremendous powers, to develop and to define the functions of the new international bodies, and to do this in an ever-flexible fashion as required by the changeability of monetary and international conditions. In this connection the Boards will have to apply such vague conceptions as, for instance, "expansionist conditions impending in the world economy" (Keynes Plan II 7) or the "point of view of the general international economic situation" (White Plan V 3 and 7).

Moreover the decisions of the Board are in most cases designed as discretionary rather than as mandatory which will further invite political dissension. The heavily qualified majorities required under the White Plan for major decisions give point to this apprehension. Under these circumstances it is to be feared that the deliberations of the Board will be slow and ridden with delays. However, monetary developments do not wait and frequently proceed with lightning speed. In the race between events and Board deliberations the chances are not too good for the Board. Paradoxically, the existence of the treaty may even immobilize a signatory Government

[82] *Federal Reserve Bulletin*, 1943, p. 827.

[83] *Ibid.*, 1943, p. 501; revised; *ibid.*, p. 827. The citations of the White Plan in the above text refer to the revised version.

[84] *Ibid.*, 1943, p. 718.

[85] A careful bibliography of "Post-War Currency Plans" has been published, under the date of Jan. 1, 1944, by The Princeton University, Department of Economics, International Financial Section (mimeographed).

[86] Instances are given by the writer in "Rise and Decline of the Law-of-Nations Doctrine of Private International Law," Columbia Law Review, Vol. XLII (1942), pp. 195, 203.

which otherwise would be willing to remedy a situation by independent action. A significant neglect of the time element appears in a provision of the White Plan (V 4) according to which, if the Fund's holdings of the currency of a particular country drop below a certain limit, then the Fund will have to render to that country "a report embodying an analysis of the causes of the depletion of the Fund's holdings of that currency, a forecast of the prospective balance of payments in the absence of special measures" and appropriate recommendations designed to increase the Fund's holdings of that currency, to which the addressed Government will have to pay "immediate and careful attention." Considering alone the time needed for the drafting, deliberation and passing of the report, one may doubt if such arrangements will work satisfactorily.

From a juristic point of view, exception must be taken to the denomination, in the Keynes Plan, of "bancor" as a "currency" and, in the White Plan of "unitas" as a "monetary unit." In reality both units are conceived by their sponsors as mere accounting units not represented by coins or paper. The inexact denomination is apt to veil legal difficulties inherent in the use of accounting units—difficulties which have clearly appeared in the case of national accounting units such as the gold mark,[87] but might emerge in a different way with the new supranational or rather "multi-national" devices. Attention must also be paid to the fact that agreements in terms of "bancor" or "unitas" would imply gold clauses in the invalidation of which courts have developed an almost incredible ingenuity as soon as the clauses seemed to impair the national interest.[88]

The writer whole-heartedly agrees with the opinion that the necessary post-war reconstruction in monetary matters cannot be achieved except by international coöperation. Still the question is whether for this purpose the strait-jacket of a treaty, and of a long-term treaty with a multitude of reliable and unreliable partners, is the commendable solution for a beginning. Modern experience rather suggests informal or easily dissoluble agreements among a limited number of participants united on the solid ground of common interests and inspired by international good-will. Such tentative agreements under which much of the official plans might be used as statements of policy, may then gradually solidify by experience and eventually crystallize into more rigidly defined and more comprehensive conventions.

[87] Nussbaum, *op. cit.*, Sec. 27, p. 326.

[88] *Ibid.*, pp. 335, 351, 355.

Rule 17. A member of the State Bar shall not intentionally misquote to a judge, judicial officer or jury the testimony of a witness, the argument of opposing counsel or the contents of a document; nor shall he intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional.

Rule 18. A member of the State Bar shall not advise inquirers or render opinions to them through or in connection with a newspaper, radio or other publicity medium of any kind in respect to their specific legal problems, whether or not such attorney shall be compensated for his services. (Adopted February 20, 1937.)

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ANNUAL COMMITTEE REPORTS

THE FOLLOWING STATE BAR COMMITTEES filed annual reports with the Board of Governors in 1942:

Committee on Administration of Justice.
Committee on Administrative Agencies and Tribunals.
Committee on American Citizenship.
Committee to Organize and Supervise the General Work of Annotating the Restatement of the Law as Prepared by the American Law Institute.
Bankruptcy Committee.
Bank Conference Committee and Title Association Conference Committee.
Committee of Bar Examiners.
Committee for Cooperation Between the Law Schools in California and The State Bar (report of Chairman).
Southern Section of Committee to Investigate the Administration of Criminal Justice.
Committee on Facilities of the Law Library of Congress.
Juvenile Crime Prevention Committee.
Legal Publications Committee.
Committee on National Defense and Public Relations.

Arrangements are being made to make available mimeographed copies of these reports. Any member of the State Bar who desires a copy of the report of any of these committees should apply to either the San Francisco or Los Angeles office of the State Bar. It is suggested that such application be made promptly in order that it may be determined how many mimeographed copies of each report should be prepared.

 1943

FUNCTIONS OF THE ESTATE AND TRUST SECTION OF THE ALIEN PROPERTY CUSTODIAN'S OFFICE

By **Edwin J. Owens,** *Chief of the Estate and Trust Section, Western States Area*

THE ESTATES AND TRUSTS SECTION stems from the President's Executive Order No. 9193, particularly paragraph 2(f) and paragraph 5. Paragraph 2(f) of the Order is as follows:

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.

Paragraph 5 of the Order is as follows:

5. The Alien Property Custodian is authorized to issue appropriate regulations governing the service of process or notice upon any person within any designated enemy country or any enemy-occupied territory in connection with any court or administrative action or proceeding within the United States. The Alien Property Custodian also is authorized to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States. If, as a result of any such action or proceeding, any such person obtains, or is determined to have, an interest in any property (including money judgments), such property, less an amount equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding, shall be subject to the provisions of Executive Order No. 8389, as amended, *provided, however,* that this shall not be deemed to limit the powers of the Alien Property Custodian under section 2 of this Order; and *provided further,* that the Alien Property Custodian may vest an amount of such property equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding.

Interpreted briefly, these two sections authorize the Alien Property Custodian to represent the interests of persons within enemy countries and enemy-occupied territory in any court or administrative actions or proceedings pending within the United States and to vest in himself any property involved in such actions or proceedings which he determines is payable or deliverable to or claimed by a designated enemy country or national thereof.

In furtherance of the authority vested in the Custodian by these two sections, he has issued two general orders, known as General Order No. 5 and General Order No. 6. Both of these orders have been published in the San Francisco "Recorder," "Intercity Express," Oakland, and Los Angeles "Daily Journal." In addition, a copy of

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each order has been sent to the county clerk of each county in California where they are available to members of the bar.

General Order No. 5 is entitled "Report by Designated Persons of Property or Interest of a Designated Enemy Country or a Designated National." The term "designated enemy country" is defined as meaning "any foreign country against which the United States has declared the existence of a state of war." While the term "designated national" is defined as meaning "any person in any place under the control of a designated enemy country or in any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication," it appears that this definition is broad enough to include even an American citizen, provided he is now in a place which is under the control of a designated enemy country or with which for any reason the United States does not maintain postal communication. "Designated persons" is defined as meaning "any person or officer acting under judicial supervision, or in any court or administrative action or proceeding." Such "designated person" is required by this general order to forward to the Alien Property Custodian at Washington, a report on Form APC-3. This report should be filed within thirty days from the date upon which the "designated person" qualifies. These forms are readily obtainable from the San Francisco Field Office and requests for them, together with any other inquiries should be addressed to the Estates and Trusts Section, Office of Alien Property Custodian, 417 Montgomery Street, San Francisco.

General Order No. 6 is intended to provide a method of service of process upon any person presently within any designated enemy country or enemy-occupied territory. The essence of this order is contained in the following paragraph:

1. In any court or administrative action or proceeding within the United States in which service of process or notice is to be made upon any person in any designated enemy country or enemy-occupied territory, the receipt by the Alien Property Custodian of a copy of such process or notice sent by registered mail to the Alien Property Custodian at Washington, D. C., shall be service of such process or notice upon any such person, if, and not otherwise, the Alien Property Custodian within sixty days from the receipt thereof shall file with the court or administrative body issuing such process or notice, a written acceptance thereof.

Under present regulations it is not permissible to send mail addressed to persons within either enemy countries or enemy-occupied territory. This order is intended to provide a medium of substitute service for the benefit of those who, in particular instances, may be charged with the duty of serving notice in a court or administrative action upon anyone within either an enemy country or enemy-occupied territory. It will be noted that under the general order such

service upon the Custodian, however, is not effective unless the Custodian chooses within sixty days from receipt of the notice to file with the court or administrative body a written acceptance of it. The purpose of the sixty-day interval is to enable the Custodian to make his determination as to whether or not he chooses to accept the notice in behalf of the person to whom the notice of citation is directed. It is the present policy of the Custodian to accept service of notice in behalf of an alien within either enemy country or enemy-occupied territory only when it appears that some property interest of such person is involved. To facilitate determination by the Custodian as to whether or not he desires to accept the service, it would be desirable if attorneys would send with the notice either a copy of the particular petition to which the notice refers, or at least a letter giving essential details. Attorneys are urged to set the date for hearings on petitions for which citations have been sent to the Custodian far enough in advance to permit compliance with General Order No. 6 which allows the Custodian sixty days in order to make his decision as to whether he will file a notice of acceptance. Although the Custodian has recently established a field office in San Francisco, it is still necessary for the present that notices sent under General Order No. 6 be sent directly by registered mail to the Office of the Alien Property Custodian, Washington, D. C. The field office referred to in San Francisco has been established only within the past few weeks. Its purpose is to enable the Custodian to deal more readily and effectively with matters pending on the west coast.

It is our desire to cooperate fully with the members of the bar to the end that the handling of matters in which the Custodian has an interest may be facilitated. It is to be anticipated that at the outset we may encounter some problems which in turn may result in occasional delays. However, I assure the members of The State Bar that we shall expend our sincerest efforts to cooperate with them in every conceivable way, and I feel equally assured of the cooperation of the bar.

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The Future of Frozen Foreign Funds

Judd Polk

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THE FUTURE OF FROZEN FOREIGN FUNDS

By JUDD POLK

Over 7 billion dollars in foreign-owned assets are now subject to regulation by the United States Treasury Department. (See Table on p. 266.) The presence of extensive exchange controls in a country long distinguished as the foremost champion of free exchange raises questions of the most far-reaching significance for the future course of international finance. It will be the concern of this paper to examine the circumstances under which the American controls operate with a view to determining what conditions may be necessary or desirable before the United States can safely reopen its money markets to foreigners.

The immediate objective of any exchange control is to bring foreign transactions under the scrutiny of a governmental agency in order that the particular purposes of the government may be enforced. While these purposes differ widely among the various countries,[1] they ordinarily are concerned with (1) the rationing of foreign exchange rendered scarce by continued strains, arising from the balance of payments, on cash resources,[2] and/or (2) the supervision of imports with a view to influencing the terms of trade or in support of internal economic policies of the government. In general it may be said that government intervention in the foreign exchange markets has been provoked in most cases either as a necessary feature of governmental regulation of trade, or as a sort of temporary receivership for deranged national accounts, where the alternatives—uncontrolled currency depreciations or formal devaluations—were thought to be more onerous methods of securing the needed correction in the balance of payments.

I. The United States Version of Exchange Control

The United States had two grounds for opposing the world-wide trend toward exchange control, which in the years 1931-39 put every important exchange market save our own on a controlled basis.[3] The

[1] Professor Ellis distinguishes functionally seven types of exchange control, ranging from the prevention of capital export to the bolstering of totalitarian economic and political control. (H. S. Ellis, "Exchange Control in Germany," *Quart. Jour. of Econ.*, Aug., 1940, 159-68.) United States' wartime controls are comparable with the latter class, with the important distinction that they are *wartime* (*i.e.*, temporary) controls.

[2] Rationing exchange by some means other than currency depreciation is here meant.

[3] The British and French markets were not strictly controlled until the war made it necessary. However, the development of British bilateralism was sufficiently rapid throughout the thirties to prevent the classification of sterling as strictly free. See H. J. Tasca, *World Trading Systems* (Paris, 1939), pp. 141-57. The French market was subject to frequent—though perhaps not sufficiently frequent—rate revisions. See P. Einzig, *World Finance, 1939-1940* (New York, 1940).

first was a matter of economic faith—that increased governmental interference with international finance would impose an incubus on international trade.[4] The many facets of this faith are hard to define, but perhaps the Hull program may be considered an application of it in modern circumstances. It does not insist that exchange markets shall be absolutely free of all government regulation. Rather it contemplates that, though regulation may be undertaken in the interests of protecting international currency relations against speculative derangement and "downward spirals" initiated by depression, such regulation shall none the less be confined within limits consistent with the conception of exchange markets as mechanisms facilitating the adjustment of the international balance of payments.[5]

Whether this faith suited the circumstances of other countries or not, it was clearly more appropriate to our own international economic position than acceptance of the trend toward exchange controls would have been, and this was the United States second ground for opposing the exchange control. Throughout the difficult thirties the United States never experienced any really awkward shortage of exchange. A chronically active balance of trade (4 billion dollars, 1935-40), coupled with a torrential flow of both long- and short-term capital to this country (7.4 billion dollars, 1935-40),[6] produced not an exchange shortage but an *embarras des richesses*. The manifestation of these circumstances was the unprecedented 12 billion-dollar influx of gold in these years.[7] But even in the event of an exchange shortage, our relatively small ratio of foreign to domestic trade would have kept the problem less than crucial in our national economic policy. As it was, we were more concerned with the fact that our credit balance in commercial and capital transactions with the rest of the world was frozen by the controls adopted by countries in circumstances precisely the reverse of our own.

[4] However, W. Diebold (*New Directions in Our Trade Policy*, New York, 1941, chap. 2) finds that available evidence on the effect of the Hull anti-control program on trade does not support the proposition that a removal of controls stimulates imports. But this may have been merely the failure of the import-stimulating aspect of the policy to overcome the effects of the devaluation of the dollar as a stimulus to exports. *Cf.* Imre de Vegh, "Imports and Income in the United States and Canada," *Rev. of Econ. Stat.*, Aug., 1941, p. 137. De Vegh found that during the period of pronounced increase in exchange controls, the League of Nations figures show a drop in the marginal import ratio (*i.e.*, the slope of the regression of world imports on world industrial production) from .95 in the period 1925-29 to .49 in the period 1932-38. (*Ibid.*, pp. 138-39.) Ellis also believes that exchange controls reduce the volume of trade and discusses the evidence. (*Op. cit.*, pp. 184-91.)

[5] *Cf.* Tasca, *op. cit.*, pp. 158-60; J. Donaldson, *The Dollar* (New York, 1937), pp. 193 *ff.*

[6] This figure was derived from *Federal Reserve Bulletin* figures on capital movements and earmarked gold. The dates are inclusive.

[7] *Ibid.*

Despite the opposition of the United States to the trend,[8] foreign exchange markets outside of this country had become alarmingly "unfree" by the summer of 1939. The imminence of war gave added impetus to the world-wide flight to the dollar. Repatriation of American foreign investments (804 million dollars, 1935-40),[9] the United States Treasury's gold purchases,[10] the transfer of foreign-owned funds to the uncontrolled American market in the interest of liquidity and security —all these factors in the general movement were intensified by the threat of war, and later by the war itself. This one-way movement of international funds, which foreign controls originally encouraged, came to be in itself a major cause for the continuation and extension of such controls, and developed into the main problem of international finance in the pre-war period. No solution was in sight when the war itself, bringing rigid new controls in its wake, indefinitely postponed the search. Before the war brought us a completely different order of financial concerns, the main problem for the United States was how to foster international financial institutions which would dispense with the competing, arbitrary, and discriminatory controls imposed by various nations for various purposes, without merely returning to the magnificent disorder which originally prompted those controls. It is to this problem that the United States will have to return after the war.

However, when the United States returns to the problems of peace finance, it will do so not as the world's leading advocate of "free finance," but as the world's most powerful practitioner of exchange control. The present controls were adopted in response to a dilemma occasioned by Germany's military seizures. In April, 1940, when the first controls were imposed, there was no problem of capital flight or exchange shortage to be met. The United States had simply to choose between sacrificing its free exchange policy and allowing Germany, less reluctant in controls, to take over the American holdings of invaded countries. It chose the former.

[8] To a large extent the opposition of the United States was merely verbal. We did not liberalize our trade policy significantly. The Hull program apparently favored exports more than imports. (Diebold, *op. cit.*, pp. 9, 22.) The devaluation of the dollar and the high tariff policy played some part in driving other nations to adopt exchange controls. *Cf.* M. A. Gordon, *Barriers to World Trade* (New York, 1941), p. 30. On the other hand, the United States did continue to buy gold despite the proportions of its flow here, and that was a definite step supporting a "free finance" policy, whether that was the actual motive of our gold purchases or not.

[9] *Federal Reserve Bulletin* figures on international capital movements.

[10] The bulk of the gold sales were, of course, merely the means of effectuating the flow of capital to the United States. None the less, for new gold the United States was the only practical buyer in the world. Similarly, large amounts of gold ordinarily held in reserve abroad were shipped here. Accordingly, it is proper to include transfers of gold to this country as an independent manifestation of the "flight to the dollar," and the existence of a steady gold market here as one of the reasons for that flight.

By subjecting to Treasury licensing all transactions involving a property interest of any national of an occupied country, the United States hoped to accomplish several objectives.[11] Most immediately, the Treasury's scrutiny of such transactions was intended to be a protection to owners in invaded countries. In addition, however, it was designed to afford some measure of protection to the American custodians—mostly banks—of the property of these owners.[12] In lieu of government intervention, the custodians had no legal basis for refusing to honor legitimate drafts; and they had no factual basis on which to determine whether a given draft was drawn under German duress or not. A further, though much more remote, prompting of the American controls was the thought that American creditors and investors might eventually be benefited by the government's efforts to keep the assets of invaded countries intact.

For these purposes it was thought sufficient to require licenses only for those transactions which involved the property of the invaded nations. However, experience with enforcement readily showed, and policy belatedly recognized, that effective prevention of any specified class of transactions meant rigorous supervision of *all* transactions involving a foreign interest.[13] Moreover, as the United States increasingly undertook economic measures against the Axis, a new motive for exchange control appeared: the bolstering of our anti-Axis economic policy by means of a financial blockade. Hence, from a limited control intended primarily to protect invaded countries, the United States exchange control grew in a year to a thoroughgoing Treasury supervision of any foreign financial transaction which might redound to the benefit of the Axis.

[11] The motives of the freezing are available in the press accounts of interviews with government officials. See, for example, "Treasury Studies Legality of Policy of Foreign Assets," *Jour. of Comm.*, July 19, 1940, and editorial in the *New York Herald Tribune*, April 12, 1940. See also Treasury Department Appropriation Bill for 1942, Hearings before the Subcommittee of the House Committee on Appropriations, February, 1941, 77th Cong., 1st sess., pp. 78, 82-83, 84, 85; *Banking*, Aug., 1941, pp. 24-25; A. M. Strong, "The Freezing of Foreign Assets," *Am. Banker*, July 22, 1941. Later motives of economic warfare were specified in the official Press Release accompanying the Executive Order freezing Japanese and Chinese assets, July 26, 1941. J. W. Pehle, Assistant to the Secretary of the Treasury, in charge of the Division of Foreign Funds Controls, reviewed the purposes of the control and its development in a luncheon address before the Foreign Credit Interchange Bureau in March, 1941 (mimeographed). For an inferential summary of purposes, see "Foreign Funds Control through Presidential Freezing Orders," *Columbia Law Rev.*, June, 1941, pp. 1042-44.

[12] However, the issuance of a license does not necessarily determine the licensee's right to the funds involved, except in the case of foreign public funds where the State Department has been authorized by statute to certify the right of the claimant. Pub. Doc. No. 31, 77th Cong., 1st sess., chap. 43, S. Doc. 390.

[13] " 'Freezing' of Assets May Be Broadened," *Jour. of Comm.*, February 11, 1941; "Millions in U. S. Money Withdrawn by Italians," *New York Herald Tribune*, May 3, 1941; "Reich Liquidating Its Credits Here," *New York Times*, April 17, 1941; and editorial in *The* (London) *Economist*, Feb. 1, 1941.

In form the control is simply a supervisory power over financial transactions with foreigners,[14] delegated by the President under statutory authority[15] to the Secretary of the Treasury. Under the President's orders[16] any transaction with, or for, or in behalf of, a foreign national of 35 specified countries[17] requires a Treasury license. To obtain such a license the parties to a proposed transaction must submit to the Federal Reserve Banks notarized forms setting forth all relevant details.[18] The banks forward these applications[19] to the Treasury's Division of Foreign Funds Control, where the facts are examined in the light of policies determined by an Inter-Departmental Committee. A licensee must keep a record of the transaction and may be required to report.[20] In addition, all holders of foreign property are required to report the nature of the holding to the Treasury.[21] Failure to conform to the orders is punishable by 10 years' imprisonment, or $10,000 fine, or both.[22]

The immediate problems of the control are those which concern its wartime effectiveness in preventing economic benefits to the Axis and economic detriments to victims of the Axis.[23] These problems are largely short-run problems of administration and, as such, do not raise sig-

[14] A fuller description of the control can be found in Hearings on the Treasury Department Appropriation Bill, *op. cit.*, pp. 76-105; Amos E. Taylor, "Frozen Funds and National Defense," *For. Comm. Weekly*, Aug. 9, 1941, pp. 6-7; "Property Census—An Element in Foreign Funds Control," *ibid.*, Aug. 16, 1941, p. 6.

[15] The President's authority derives from the Trading with the Enemy act of October 6, 1917, sec. 5 (b) (40 *Stat.* 415), as amended by the Emergency Banking act of 1933 (48 *Stat.* 1), and the Joint Resolution of May 7, 1940, which last see for the final version of the power. Pub. Res. No. 69, 76th Cong.

[16] The "freezing orders" issued under this authority date from April 10, 1940 (Executive Order No. 8389, amending Order No. 6560 of January 15, 1934) to December 26, 1941 (Executive Order No. 8998, amending earlier orders so as to extend freezing automatically to all territory occupied by the enemy). The basic control documents, namely the Executive Orders, General Rulings, General Licenses, Public Circulars, Proclaimed List of Certain Blocked Nationals, and the Presidential Proclamation authorizing the list, are all available from the Treasury or the Federal Reserve Banks.

[17] Norway, Denmark, The Netherlands, Belgium, Luxembourg, France (including Monaco), Latvia, Estonia, Lithuania, Rumania, Bulgaria, Hungary, Yugoslavia, Greece, Albania, Andorra, Austria, Czechoslovakia, Danzig, Finland, Germany, Italy, Liechtenstein, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, U.S.S.R., China, Japan, Thailand, Hong Kong, and the Philippines. "Nationals" include many persons besides actual citizens or subjects. See Executive Order No. 8785, as amended, sec. 5. The transactions of unoccupied neutrals and anti-Axis belligerents are subject to liberal license provisions.

[18] Executive Order No. 8785, as amended, sec. 4(A), and Regulations thereunder, sec. 130.3.

[19] Except a small proportion which are decided at the Federal Reserve Bank on the basis of General Authorizations from the Treasury.

[20] Executive Order No. 8785, as amended, sec. 4(A and B); Regulations, sec. 130.3.

[21] Regulations, sec. 130.4.

[22] Executive Order No. 8785, as amended, sec. 8.

[23] See the present writer's "Freezing Dollars Against the Axis," *Foreign Affairs*, Oct., 1941, p. 113.

nificant issues in international finance.[24] The problem of what is to be done after the war, however, raises really vital questions of financial policy. And the consideration of these questions cannot be postponed until the return of peace.

The absence of government exchange controls has been habitually described—it may be wondered why—as a state of "free exchange." Any country's regard for free institutions may well command respect in these times, but a willingness to justify chronic disorder by labeling it "free" is merely an invitation to authoritarian controls. From this point of view, the striking characteristic of international finance from 1919 to 1939 is not that it was converted from a free to a controlled basis in most nations, but that, whether controlled or free, it moved in a more or less unbroken crescendo of disorder, punctuated at the beginning and end of the period by the complete rupture which world war entails.[25] Thus after the war the question will scarcely be one of deciding whether or not to return to pre-war financial institutions. There is literally nothing to return to. The question will be how to induce some degree of order in a field carrying a long tradition of disorder.

II. An Approach to Policy

In the remaining paragraphs of this paper it will be argued that: (1) The circumstances attending the return of peace will not be auspicious for an unqualified removal of United States controls, because such a removal would likely result in an arbitary allocation of United States goods not on the basis of international needs but on the basis of accrued claims, and because the unrestrained expenditure of such claims would embarrass the rebuilding of an adequate mechanism for international finance. (2) The possibilities in an international clearance of claims are not promising, either as a means of disposing of frozen claims here and abroad, or as a step in the reconstruction of international finance. (3) Only a comprehensive and carefully planned pattern of economic reconstruction will make possible a satisfactory handling of the frozen funds. In such a pattern of reconstruction, the frozen funds could, with considerable freedom, play a useful rôle.

Unqualified removal of controls. At the close of the last war, the wartime controls, which were very similar to the present ones, were

[24] The problem of securing Latin American coöperation in the control may be thought of as an exception to these statements. The international control techniques now (February, 1942) being worked out in the hemisphere will unquestionably have some influence on the development of post-war finance.

[25] For brief accounts, see P. Einzig, *op. cit.*, chap. 3; M. A. Gordon, *op. cit.*, pp. 7-46; J. B. Condliffe, *The Reconstruction of World Trade* (New York, 1940), chaps. 2, 3.

removed almost immediately.[26] It might be supposed in the first instance that a similar procedure would be appropriate after this war. After all, are not the frozen claims legitimate obligations of the United States? Short of a desire or willingness to repudiate these debts, what basis would the United States have for refusing to release the funds for whatever use their owners should elect to make of them?

This line of thought, however, oversimplifies the complications which may embarrass the free use of foreign funds after the war. Obviously the mere fact of a debt's existence is not a sufficient reason to support the unqualified freedom of international funds. The very existence of wartime restrictions shows that circumstances may arise under which obligations other than those of a simple debt nature may be regarded as determining the status of foreign funds. The question then is whether the circumstances of the immediate post-war period may, like the war itself, point toward the maintenance of some restrictions on the use of foreign claims.

The first objection to an unqualified release of the funds is that such a step would inevitably lead to an arbitrary international allocation of the available American goods. That such goods will be in intense demand after the war seems clear, in view of the industrial demoralization of war areas. If the goods are to be allocated through ordinary market processes, the owners of the frozen funds would gain an arbitrary advantage. How arbitrary is clear when it is recalled that the frozen claims have no necessary relation to a given nation's war sacrifices or post-war needs. For example, France presumably will have intact most of its current frozen holdings; China, Britain and Russia will have no substantial holdings at all (except their current gold production). Conceivably the problem of these arbitrary purchasing-power disparities might be approached in terms of new loans or post-war lease-lend arrangements. Since, however, the effectiveness of foreign purchasing power is limited by the export potentialities of our economy,[27] any leveling of arbitrary advantages via increasing the funds available to foreigners would force the United States (1) to permit an inflation of export prices, with the attendant depreciation of the dollar at the expense of domestic consumers, or (2) to adopt export controls, in which

[26] A presidential order of July 26, 1919, freed foreign accounts except for certain restrictions on Central European exchange, which were retained to facilitate the work of the American Relief Administration, and restrictions on transfers to Bolshevik sections of Russia, which were retained as part of the general United States policy vis-à-vis Russia. By December, 1920, even these restrictions were removed. Federal Reserve Board, *Annual Report*, 1919, pp. 48-49; *ibid.*, 1920, p. 34.

[27] These potentialities will probably be relatively low in the immediate post-war period when our economy is still geared to the production of war goods.

case we are in effect controlling foreign exchange.

In a period of post-war unemployment there might be considerable pressure on the government to adopt just such a policy of stimulating exports in order to increase domestic employment. The merits of this suggestion cannot conveniently be explored here, but we may note three strong objections: (1) the conscious inflation of export prices is itself a form of debt repudiation, a result utterly inconsistent with the motives here assumed to base its adoption; (2) it is doubtful that it would lead to any desired allocation of United States goods; and (3) as far as the (good) effect on employment in the United States is concerned, similar stimulation could be obtained by domestic-market projects, without any loss of product via exports.

The second objection to an unqualified release of the claims is that their complete liquidation might be a considerable blow to the reconstruction of international finance. As is well known, the 7.5 billion dollars in frozen claims[28] were originally acquired directly or indirectly through the shipment of gold, securities, and merchandise for sale in the United States. The movement of long- and short-term capital in the years 1935-40 itself built up a large part of these claims: 3.2 billion dollars in bank balances, 1.25 billions in earmarked gold, 803 millions in foreign securities, and 101 millions in brokerage balances.[29] The very fact that such funds could be transferred from other countries to the United States illustrates that some sort of system of international finance was *operating*, whether well or badly. Instruments of international monetary significance (*e.g.*, gold and securities) did exist. In effect the capital movement meant that balances which were formerly maintained in various markets came to be shifted to the United States market. The gold which the United States acquired in consequence remains available to secure their convertibility. For all practical purposes the United States became the international bank of the world, with substantially all international funds maintained here, and substantially

[28] Estimated as of the end of 1941. D. W. Bell, Under Secretary of the Treasury, listed the holdings of Denmark, Norway, The Netherlands, Belgium, Luxembourg, France, Latvia, Estonia, Lithuania and Rumania at 4.4 billion dollars based on a Treasury census of frozen holdings. (Hearings, *op. cit.*, p. 80.) My estimate for other countries is based on Federal Reserve and Commerce Department figures, corrected for estimated capital movements and checked against estimates made informally by various interested government agencies. For the country-by-country breakdown, see the Table, p. 266. It is to be borne in mind that, for the purposes of the freezing orders, many holdings which would not ordinarily be defined as "foreign" are included. (See footnote 17, *supra.*) Such inclusion might make the figure some 25 per cent larger than estimates of foreign holdings made for other purposes. To serve as an estimate of frozen funds at the end of the war, the figure would have to be qualified further by reductions or increases through licensed transactions during the war. The volume of these transactions is not available, but scattered evidence in the press on licensing policy and the *Federal Reserve Bulletin's* figures on current capital movements to and from certain of the frozen countries suggest that the frozen funds are being kept substantially intact.

[29] Derived from statistics on international capital movements in the *Federal Reserve Bulletin.*

all the international reserves (gold) here too.[30] No one can question the technical soundness of the reserve position of the United States. International claims could be completely liquidated in gold without disturbing the larger portion of these reserves. In the light of this unprecedentedly strong reserve position, why would the system of international finance be endangered by removing restrictions on foreign funds?

The danger is paradoxical only on first glance. United States gold reserves are not inadequate in the usual sense. They are merely irrelevant. There are good reasons to believe that a lifting of restrictions would not start a movement from dollar claims to gold, but rather from gold to dollars, just as before the war. These reasons are, firstly, that the post-war needs of nations owning dollar resources or gold are such as to urge their expenditure on goods; and, secondly, it seems unlikely that they will be in a position to remove their own controls after the war.[31] The United States, alone being capable of selling goods and amenable to buying gold, will become the place where international claims are cashed—not in gold, but in goods. The position of the United States is roughly comparable to that of a bank whose depositors all want to cash their deposits, but refuse to accept cash. This upside-down result is only another facet of the financial inversion which, as other writers have noted, has put gold on a dollar standard.

If this sort of encashment of international claims should be allowed to take place, as well it might, it would amount superficially to an honoring of international claims, but in reality to a winding-up of the system of finance to which they are relevant. The United States in effect would have "cashed" all the world's gold in a procedure through which the gold loses any further international monetary significance. The gold standard would paradoxically be lost through the very steps taken to save it. This paradox, though, is only another reminder that an international standard, gold or other, depends on international policy, not on unilateral action by a single nation.

Thus we may conclude that an unqualified removal of restrictions on foreign funds would be undesirable because (1) it would amount to an arbitrary allocation of limited United States production among the needy nations in the post-war reconstruction, and (2) it would tend to dissolve the available mechanism of international finance by permitting

[30] An accurate estimate of funds capable of conversion into dollars but not now in this country is not really possible. Of some interest is the Federal Reserve estimate that at the end of 1939 the potential dollar purchasing power of foreigners, including gold reserves not actually in this country, was 17.4 billion dollars. *Federal Reserve Bulletin*, Dec., 1939, p. 1042. This estimate does not, of course, take into account lease-lend balances or other war credits.

[31] The problem of maintaining a balance of payments without further depreciation of war-weakened currencies, and of expending the available foreign exchange resources on the imports thought to be most necessary in a reconstruction period, may be expected to prompt a continuation of controls, unless the nations can be persuaded by an offer of alternative advantages to relax their controls. This possibility is treated below in the text.

the complete liquidation of instruments formerly possessing international significance.

Before turning from the desirability of removing our exchange controls without any further understanding as to the use to which the freed funds can be put, two other aspects of the problem should be mentioned, though they cannot be discussed in any detail here. The first is to note that the legal consequence of removing the controls would be to turn over to the courts the innumerable complex problems of ownership and public policy which are bound to arise. The courts, in determining which of several foreign claims to various funds should be honored, would have no well-developed definition of public policy on which to rely.[32] The problem would be especially formidable in the event that the United Nations should fail to bring about the restoration of France, Belgium, and The Netherlands, the largest owners of frozen funds. (Together, these three countries own over half of the frozen funds.) The second is the political importance of the defeat of Germany. If Germany is not defeated, the likelihood that the United States would permit Europe's American funds to be used, under German direction, for the purchase of American goods seems most remote, quite apart from the economic considerations discussed above.

An international clearance of debts. The United States might well feel that the disposition of foreign claims in this country does not represent a problem suitable for unilateral action by this country, but rather represents one aspect of the larger problem: What is to be the post-war fate of international claims everywhere? Recognizing this larger problem, some observers, including Secretary of the Treasury Morgenthau, felt, even in the early weeks of our control, that the frozen foreign funds might afford a means of securing for American investors and creditors at least a partial payment on their outstanding claims against foreigners.[33] This concern about foreign debts was not new. Discussions of the defaulted European war debts, the defaulted South American loans, the German-blocked dividends and interest payments, and the Mexican expropriations provide much evidence of its place in American foreign policy.[34] But the United States had never before been in a position to undertake directly retaliatory action; there were no foreign balances in this country to be blocked abroad. The war-prompted flight

[32] For a discussion of the state of the law relevant to the settlement of foreign claims, see *Columbia Law Rev., op. cit.*, pp. 1048 *ff.*, and an extended note on "Protective Expropriatory Decrees of Governments in Exile—Their Application to the United States," in the same issue, p. 1072. See also Arthur Nussbaum, *Money in the Law* (Chicago, 1939), chap. 8.

[33] See, for example, "U. S. May Use Funds of France on Debt," *New York Times*, Aug. 9, 1940; *PM*, Oct. 10, 1940.

[34] See J. W. Gantenbein, *Financial Questions in United States Foreign Policy* (New York, 1939), chap. 1 and *passim*.

to the dollar changed this situation by radically changing our balance of payments.[35] The influx of foreign capital resulted in the piling up of European balances here, despite our favorable balance on current account. At the end of May, 1941, for instance, the *Federal Reserve Bulletin* reported foreign banking funds in this country at 3.9 billion dollars, in contrast to a mere 364 millions reported by United States banks as their foreign holdings. So the United States had the power, if it wished to exercise it, to do what England had frequently done during the past decade—insist that, before foreign balances would be released, some agreement should be made designating a portion of the funds to be used in satisfaction of foreign debts.

The figures for total foreign investments of Americans abroad and of foreigners here appear to suggest that such a payments agreement might provide for extensive compensation to American investors and creditors. Our assets abroad at the end of 1940 were estimated by the Department of Commerce to be slightly over 11 billion dollars, or 23 billion dollars if obligations arising out of World War I are included. If only the countries whose American assets have been frozen by the President's orders are counted, our foreign investments are as follows:[36]

Direct investments	$1,051	million
Portfolio investments (dollar bonds)	613	"
Short-term ("Banking") funds	80	"
World War I debts	8,069	"
	$9,813	"

The frozen assets, we have seen, are estimated at 7.5 billion dollars.

However, the possibilities of offsetting American claims against frozen foreign claims is less promising than these totals might suggest. If the clearance is undertaken on a country-by-country basis,[37] a lump

[35] After 1935 the United States might have blocked foreign balances to force a settlement of debts to Americans, but strong political considerations operated increasingly against the step. We hesitated to demoralize further the already demoralized European markets, and we were still hopeful that our efforts in behalf of free finance would be successful. *Cf.* Secretary Morgenthau's defense of the government's gold-buying policy. Letter to Senator Wagner (Mar. 22, 1939), Treasury Department, Press Release, March 23, 1939.

[36] See table, p. 266, and footnote 28 for sources.

[37] If the occupied countries owning frozen assets here are restored after the war, clearance on a country-by-country basis would be the only possible method. A lumping together of European funds would, of course, be to some extent an appropriation of the assets of one country to pay the debts of another. If the European countries are not restored, or if Germany remains in control of Europe, then there would be somewhat more justification for treating the assets as "European." In this event, however, the procedure would be less a reciprocal clearance than a unilateral action by the United States, recognizing the loss of its European investments, and appropriating European assets here as an offset.

figure of foreign investments is not an appropriate indicator of clearance possibilities. From the table below it can be computed that the frozen assets of eight countries exceed our placements there, also frozen,

A PARTIAL BALANCE SHEET OF AMERICAN AND FOREIGN CLAIMS[a]
(In millions of dollars)

Country	Foreign claims against United States	United States claims against foreigners		
		World War I	Other	Total
Austria	$ 9	$ 26	$ 6	$ 32
Belgium	760	401	53	454
China	275	0	140	140
Czechoslovakia	5	165	7	172
Denmark	92	0	111	111
Finland	17	8	10	18
France	1,593	3,864	167	4,031
Germany	107	1,225	382	1,607
Greece	122	32	24	56
Hungary	24	2	33	35
Italy	72	2,005	155	2,156
Japan	131	0	197	197
Latvia, Lithuania, Estonia	29	29	53	82
Luxembourg	48	0	—	—
Netherlands	1,619	0	96	96
Norway	175	0	91	91
Poland	7	206	81	287
Portugal	157	0	17	17
Rumania, Bulgaria	55	64	56	120
Spain	30	0	86	86
Sweden	516	0	28	28
Switzerland	1,484	0	12	12
U.S.S.R.	39	192	10	202
Yugoslavia	71	62	33	95
Total	$7,437	$8,281	$1,844	$10,125

[a] Not listed here are Thai assets, frozen on December 9, 1941. Furthermore an amending order of December 26, 1941 froze Hong Kong and provided for the automatic freezing of all further territories occupied by the enemy. Executive Order No. 8988.

Sources: For foreign holdings in the United States, see footnote 28. The United States claims arising from World War I are taken from the United States Treasury's *Annual Report*, 1940. Other United States investments are estimated by correcting the Commerce Department's figures for 1936 (the last year for which the figures are available by country) on the basis of the increase shown in Commerce Department's estimates for our investments in all countries in 1939 (United States Department of Commerce, Release of July 15, 1940). Figures for our investments in Luxembourg are not available.

by 4.3 billion dollars, indicating that this amount of the frozen funds would not be available for offsetting purposes.

If a further distinction is drawn between government and private debts, and private assets are excluded from clearance against public debts, a further reduction must be made in the amount of frozen foreign

funds which might be disposed of by clearance. The amount of reduction on this score can be estimated only roughly, since available statistics do not distinguish between private and public funds. But there is reason to believe that, by-and-large, the frozen funds are about two-thirds private, and one-third government and central bank.[38] If this estimate is correct, clearance would take care of only 1.5 billion dollars.

In addition, certain reductions must be made in the American claims which might appropriately be allowed. The clearing estimates given above have lumped all American claims together—war debts, private claims, dollar bonds. It is at least doubtful, however, whether the United States should or would insist that the old war debts be included in clearance. An obvious element of inequity would arise from the circumstance that the major debtors of World War I are, with the exception of France, the countries with small American holdings. Of the 8 billion dollars in war debts owed by the countries with frozen American holdings, three-fourths are owed by three countries: Germany (1.25 billion dollars), Italy (2 billion dollars), and France (3.9 billion dollars). England, with an old war debt of 4.4 billion dollars, would escape the clearance altogether. Moreover, the United States might decide as a matter of policy that a portion at least of the public funds of The Netherlands, Belgium, Poland, Czechoslovakia, Greece and Yugoslavia should be turned over to Britain in accordance with understandings, already reached or to be reached by the end of the war, between Britain and the governments-in-exile of these countries. If for these or other reasons it should be felt inappropriate to include the old war debts in the clearance, then the only American claims against the public funds of the frozen countries would be 500 million dollars in dollar bonds.[39] A clearance of 347 million dollars is the greatest possible on this basis.

In making these clearance calculations, private claims have been excluded on the grounds that responsibility for private obligations is not properly imputable to governments, except where there is a specific government guarantee. Certain circumstances might arise, however,

[38] The proportion differs considerably for different countries, according to the scattered information which can be derived from evidence on gold holdings and central bank holdings. In the case of some countries, the writer has been able to get no information at all. However, since gold is mostly owned by governments and central banks, and securities by private owners, with banking funds split between the two, and since fairly accurate estimates of these types of holdings are available, the proportion here would seem at least not unreasonable. Central bank funds were here arbitrarily counted as public in nature, although there is considerable question whether for other purposes central banks are to be regarded as public or private institutions.

[39] This figure includes loans guaranteed by foreign governments and obligations of municipal and provincial governments, as well as the direct debts of national governments. The inclusion of municipal and provincial obligations, which total 82 million dollars, is admittedly arbitrary. See P. D. Dickens, "Status of United States Investments in Foreign Dollar Bonds, End of 1940," *For. Comm. Weekly*, July 19, 1941, p. 3.

which would render government responsibility for private commitments more reasonable. This would be the case if governments adopted (or continued) exchange controls which in effect appropriate the foreign assets of their private citizens. Under such circumstances, governments might be considered to be assuming responsibility for the debts of their private citizens, even though the privately-owned assets which the governments appropriate do not belong to that group of private citizens against whom Americans have claims. The controlling governments would then be chargeable with preventing private debtors from making payments. If such circumstances should apply to all the countries whose funds are now frozen in the United States, the possible clearance, country by country, would be 1.2 billion dollars, approximately the figure (1.5 billions) obtained above by excluding frozen private assets, but including the old war debts. Inclusion of both war debts and private claims of the United States does not materially increase clearance possibilities since either one exhausts the major portion of the available funds in this country.

It is not possible to make a defensible estimate of assets of private foreign debtors in this country which might be available for satisfaction of their obligations to us. It seems unlikely that the amount represents any substantial portion of the frozen funds, however. For instance, foreign exporters would typically own funds here, whereas foreign importers would owe debts. Only governments may be expected to be debtors and creditors of the United States at the same time.

We may conclude, then, that (1) in the unlikely case Germany should succeed in dominating Europe, and we should counter with a seizure of the frozen assets of that entire area, making these assets available for the satisfaction of American claims of all types, the clearing process would operate at maximum efficiency. It would dispose of 4.6 billion dollars of the frozen funds. (2) If, however, European countries are restored to their former national status at the end of the war, the maximum clearance (country by country) would be 3.2 billions; but this amount would probably be reduced to practically nothing by weeding out both the American claims and the foreign funds thought to be inappropriately included in the clearing.

In general the clearance of claims is unattractive, even apart from the limitations the figures indicate, because it arbitrarily singles out a limited area of the world for a forced settlement of claims, while neglecting such important areas as the British Empire and Latin America. Moreover, it is at best a procedure that would contribute greatly to the further economic segmentation of the world. As such, it would complicate, or even be utterly incompatible with, plans for the reconstruction of war-blighted countries.

The frozen funds in planned reconstruction. The perplexing problem in the post-war handling of foreign funds concerns not so much their equitable liquidation as their effective re-utilization in the processes of international finance. For the reasons expressed above, there is at least a strong possibility that unqualified removal of the controls, or removal conditioned on a reciprocal clearance of claims, would result in the extinction of all international balances—a process roughly amounting to the winding-up of the mechanism of international finance. Consequently, either of these alternatives would deal a severe blow to hopes that an adequate pattern of world finance might be constructed out of the remains of the inadequate pre-war system. The problem, then, is how to qualify the post-war release of funds so as to avoid these objections.

Basically the function of international finance, of which the foreign claims in every nation are an important aspect, is to provide international economic development with what we may describe as flexibility in time and space. Time flexibility in a system of finance permits the development of any given area of the world at a rate faster than the savings of that area would allow. Space flexibility gives facility for transferring savings from one area to any other. During the present world war, pressing needs for the greatest possible expansion of armaments plus the strategic advisability of isolating enemies and unfriendly powers reduce flexibility to a very low degree. But, what is more relevant to our purposes, even before the war the financial system had an intolerably low degree of flexibility, owing to factors too familiar to justify recital here.

At this distance from the circumstances attending the return of peace, it is difficult to speak concretely of the precise rôle which the now frozen foreign funds may be suited to play in a program of remedying the inflexibility of world finance. It is obvious that controls which operate as virtual embargoes on the movement of funds reduce flexibility. Similarly, the existence of a huge volume of defaulted international debts reduces it, as do unstable currencies. But it would be a serious error to suppose that all exchange controls, other than limited governmental operations to smooth out currency fluctuations, must be inimical to flexibility. For, despite the abstruse and extensive political manipulation of exchange controls in the last decade, there seems to be little hope of preventing defaulted debts, capital embargoes, or currency instabilities without a very appreciable degree of government control.[40]

[40] Probably few economists would care to defend the abuses of exchange controls, just as few would care to defend the financial abuses which inaugurated the era of exchange controls. Ellis apparently fears that the discriminatory possibilities in exchange control practice cannot be avoided. (*Op. cit.*, p. 217.) The danger cannot be glossed over. It

The vast movement of international funds to the United States after 1934 was unquestionably a manifestation of chronic disorder in international finance. Even so, the movement may prove to have been not entirely unhappy for the eventual reconstruction of finance. By unprecedented pooling of financial reserves in a single center, the movement may prove to have facilitated opportunely the development of a nucleus for world banking. Moreover, the movement has given to the United States increased influence in the use of international funds in the reconstruction of finance along liberal lines.[41] Thus, for example, the United States might advantageously release funds for expenditures on American goods on the condition that the beneficiary countries agree to maintain minimum gold balances in New York, or subscribe to an agreed amount of capital stock in a bank specially created to facilitate short- and long-term capital movements among the member countries.

Without a planned reconstruction, any attempt to release the frozen foreign funds will worsen the condition of international finance, proving at the same time to be very costly to the United States. But in a planned reconstruction, the problem of the frozen funds largely disappears. For example, once a means of international banking is reconstituted, there would no longer be any reason to fear the effect of allowing the owners of frozen funds substantial freedom within the agreed rules. There still might be a considerable movement to convert dollars into goods, but this movement would proceed from the actual post-war need for goods, and not from the need to dispose of international funds that have lost their significance outside of this country. Nor would it any longer be unlikely that a good portion of the funds would be withdrawn in the form of gold (assuming, of course, that the new agreements retain gold as an international money). For gold could again have a useful function in defining currency relations, securing legitimate adjustments in balances of payments, and even as a familiar basis for the control of domestic currencies.

It would be pointless to understate the difficulties which beset such a program. It involves the articulation of currencies weakened not only by unproductive foreign debts and depressed world agricultural prices, but even more by the strains of war itself, both by distortions in the

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seems scarcely realistic to entertain the possibility of government controls aimed at international monetary stabilization without also recognizing the same opportunities for discriminatory practice. *Cf.* Tasca's account of the development of British bilateralism. (*Op. cit.*, pp. 145-57.) At the same time, there is no reason why international controls should not prove capable of avoiding both discrimination and instability. *Cf.* Virgil Salera's account of Argentine exchange control experience. (*Exchange Control and the Argentine Market* [New York, 1941], chap. XI.)

[41] By "liberal lines" is meant a system of finance which avoids the arbitrary groupings of regions on political rather than economic bases.

balance of payments and by inflationary methods of armaments finance. It further involves conceptions of international responsibility and co-operation which are quite at odds with the nationalistic developments of the past decade. It may provoke opposition among private bankers, who, though not in a position to provide the necessary institutions for a flexible world finance, none the less feel that they must resist the advent of government in their field. They contend that such a program would put finance at the mercy of politics, or more concretely and frankly, that it would deprive them of an established source of revenue.

In conclusion, then, we may say that, in deciding what policy to follow with respect to the frozen foreign funds, when the return of peace removes the reasons for their freezing, the United States must recognize its relation to the whole problem of financial reconstruction. The release of the funds is vastly more complicated than was commonly supposed at the time of their freezing. At the same time, the size of frozen holdings in the United States provides a real opportunity to influence world finance in the direction of an inclusive and flexible system, and away from unrelated arrangements between pairs of nations or among small groups of nations. Just as the war called a halt to the chronic disorders of pre-war finance, so the end of the war will provide an occasion, not soon to come again, for the long-overdue revisions in international finance. The unusual position of the United States at the end of the war, both as the trustee of a very large portion of international funds and as the only large nation in a position to finance reconstruction, could provide the means of taking advantage of that occasion in the interest of more flexible and stable world finance.

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TRANSFER OF PROPERTY IN ENEMY OCCUPIED TERRITORY

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A. Nature of the Problem

International law was no more prepared for the dynamics of the present war than was the Maginot school of military strategy. International lawyers had given little serious thought to the legal problems which total war would bring. Consequently, while international arrangements were concluded on special questions (e.g. on aerial warfare), the main body of the 1907 Hague Convention, including the section dealing with military occupation, remained unchanged. Military occupation was still conceived of as a temporary phenomenon with limited objectives. But totalitarian warfare as waged by the Axis powers has had unlimited objectives, aimed at nothing less than the complete political and economic subjugation of the occupied territory. In practice the enemy has recognized no restraints of either law or custom save the threat of immediate retaliation. Far from "respecting, unless absolutely prevented, the laws in force in the country," as the Hague regulations require, the Axis has systematically destroyed the political and legal order in the occupied territories. It has substituted quislings in the place of duly constituted local authorities, and has employed them for economic as well as political ends.

An inkling of the changes wrought in the entire property structure of occupied territories may be found in the report issued by the United States Board of Economic Warfare on April 27, 1943, which disclosed that by the end of 1941 the German plunder of Europe had already amounted to $36,000,000,000. This figure covers only direct acts of confiscation. Furthermore, according to a recent report by the British Ministry of Economic Warfare, up to August 31, 1944, Germany extorted from France, Belgium, Netherlands, Denmark, Norway, Bohemia-Moravia, and Serbia at least 26.4 billion dollars in the form of "occupation costs" and "unpaid for goods."[1] Beyond such acts, the Axis has undermined the whole notion of contractual free will with regard to private business dealings under enemy occupation. For behind the appearance of free will there stood, and still stand, the occupants and quisling officials who recognize no inviolate domain of private property, and who dictate the terms of private commercial transactions.

In the light of these new factors, a reëxamination of the whole subject of property transactions under enemy occupation seems imperative. For practical reasons this analysis must confine itself to transactions in territories under German occupation. For one thing, there is little reliable data con-

[1] *New York Times*, October 11, 1944.

cerning the acts of the other Axis powers. For another, it is German occupation which has most seriously disturbed the commercial and financial structure of Europe and the world.

Recognizing some of the new problems arising out of totalitarian methods of warfare and the wholesale re-shuffling of public and private property under Axis occupation, a number of governments-in-exile have tried since 1939 to safeguard legitimate interests by decrees aimed against certain acts committed during occupation. The first attempt toward the formulation of a general policy with regard to property transfers came in the Inter-Allied warning of January 5, 1943, regarding property transfers and dealings in areas under enemy occupation or control.

B. The Hague Convention

Practically all the governments concerned with the present problem are signatories of the Hague Convention.[2] Neither Germany nor the other Axis powers have thus far formally denounced the Convention or repudiated contractual international law. Consequently the 1907 Hague Convention[3] remains the recognized basis for international order in wartime property relationships.

Articles 42–56 of the Hague regulations deal with both private and state property. According to Article 56, "the property of communes, that of institutions dedicated to religious worship, charity, education, art and science, even when belonging to the state, shall be treated as private property."[4] Article 46 lays down the general principle that private property must be respected by the occupant. Provisions of two types amplify this general doctrine. On the one hand, there is an absolute prohibition on confiscation (Article 46, paragraph 2), on pillage (Article 47), and on general penalties against the local population (Article 50). On the other hand, the following exactions are conditionally permitted: (a) taxes to cover the expenses of administration (Article 48); (b) contributions for military necessities or the administration of the territory under the written order of the commander-in-chief and against receipt to the payer (Articles 49 and 51);

[2] For adherence to the Hague Convention, see: L. Oppenheim, *International Law*, ed. by H. Lauterpacht, London, 1940 (6th ed.), Vol. II, p. 739; G. G. Wilson, *International Law*, Boston, 1935 (9th ed.), App. 3, p. xxxvii. Yugoslavia neither signed nor ratified the Convention of 1907, but she and Italy did sign and ratify that of 1899 (*Proceedings of the Hague Peace Conference, 1899*, p. 268) which remains in force, according to Article IV of the 1907 Convention.

[3] Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Washington, 1942, gives a comprehensive summary of the problem as it stood at the beginning of the second World War. Cf. also Ernst Fraenkel, *Military Occupation and the Rule of Law*, London, 1944.

[4] This could be defined as "private property by destination" analogous to the "immovable property by destination" of the French *Code Civil* (Articles 517, 524). On this subject see William M. Franklin, "Municipal Property under Belligerent Occupation," this Journal, Vol. 38 (1944), p. 383.

and (c) requisitions in proportion to the resources of the country and not in excess of the needs of the occupying army, against cash payment or receipt (Article 52). Certain types of strategic appliances, even if privately owned, may be seized under certain conditions. In every case the legal rights of the occupant with regard to private property are narrowly defined and compensation is always required.

With regard to public property, the rights of the occupant include administration, but here too the legal limitations are quite explicit. The occupant is only the administrator (Article 55). He may take possession of movable property which is "strictly the property of the state" (Article 53, paragraph 1), but the seizure of appliances and war material is permitted only on condition of ultimate restoration and compensation (Article 53, paragraph 2).

The occupation of large areas of Soviet territory has raised a novel problem not foreseen under the Hague Convention. Although the Soviet Union, which repudiated all treaties concluded by the Czarist regime, has not formally adhered to the Hague Convention, it is generally accepted that it considers itself bound by its provisions. Moreover, in his famous note on German atrocities of April 27, 1942, Molotov declared that the "Soviet Government . . . continues as hitherto to observe the obligations undertaken by the Soviet Union with regard to the regime for war prisoners according to the Hague Convention of 1907." [4a] In the Soviet Union there is no private property in the traditional sense. Instead there is "socialized," [5] "cooperative," [6] and "personal" property.[7] The private property clauses of the Hague Convention would cover the Soviet category of personal property, but the heavy concentration of national wealth in state or socialized enterprises perhaps subjected to enemy administration much that would otherwise have been protected by the "private property" clause. This raises a problem analogous to the conflict of qualifications in international private law.[8] While such Soviet agricultural units as the *kolkhoz* and the machine tractor stations could, by analogy, have been protected by Article 53, paragraph 2, which requires restoration and indemnity, the business and industrial enterprises of the Soviet Union would be protected along with other state properties. It should be noted that the same problem arises with regard to other European states which own considerable business property. Thus the shift from private to public ownership presents another of the problems which will harass those who continue to think within the Hague framework.

[4a] *Isvestiya*, April 28, 1942.

[5] Article V of the Constitution of the U.S.S.R., literally reproduced in the Constitutions of the Union Republics. Cf. Article 52 of the Civil Code of the R.S.F.S.R.

[6] Such is the so-called property of the *kolkhoz* (collective farm).

[7] Articles IX and X of the Constitution of the U.S.S.R., reproduced in the Constitutions of the Union Republics. There are various types of "personal" property (Articles 54, 71 ff. of Civil Code) including "areas neighboring the house of the farmer."

[8] E. A. Bartin, *Droit International Prive*, Paris, 1938.

C. Forms of Property Transfer Under German Occupation

It would be going far afield to describe Germany's methods of conquest of the banking, insurance, industry, and trade of the occupied countries.[9] For present purposes it is sufficient to define, in legal terms only, the devices whereby Germany has become master of a great part of Europe's wealth. The German occupants have not merely committed all the acts expressly forbidden by the 1907 Convention, but they have devised new and more suitable encroachments on property rights, which have had far-reaching effects. They may be presented in schematized outline as follows:

I—*As to the occupied countries as a whole:*

a. Contributions far in excess of the amount necessary to defray the expenses of occupation, contrary to Article 49. These contributions, which the Germans call "occupation costs," are in reality wholly disproportionate to the actual cost of occupation. Thus in France, for example, of the 72.3 billion francs paid by the French as "occupation costs" up to December 31, 1940, no less than 41.4 billions remained unused at that date, deposited to the account of the *Reichskreditkasse* in the Bank of France. By the end of 1941 the unused credit balance rose to 62 billion francs.

b. Requisitions without compensation and beyond the purview of Article 52, i.e., not for the needs of the army of occupation and wholly out of proportion to the resources of the occupied country.

II—*Direct seizure of private property:*

a. Confiscation without compensation of the property of special categories of persons, such as (1) those who left the country, (2) those belonging to the ruling family, (3) those who were regarded as promoting the Allied cause, (4) Jews, and (5) citizens of annexed territories.[10]

[9] The strategy behind German penetration of European industry is to establish links too strong to be broken even in the event of military failure. The methods are threefold: (a) the amalgamation of foreign and German industry through financial arrangements and the fiction of legal acquisition; (b) the reorganization of continental industry by directing the flow of raw materials, dismantling plants that may compete in the future and centralizing others to make control easier; (c) modification of production processes by "persuading" controlled industries to use ersatz materials, thus making them dependent on Germany for raw materials and technical direction. (*The Statist*, London, Vol. 138, No. 3314, pp. 150–151; see also: "The Penetration of German Capital Into Europe," *Inter-Allied Bulletin* No. 5, Inter-Allied Information Committee, London, 1942), and *Occupied Europe: German Exploitation and its Post-War Consequences*, London, 1944.

For the German technique of occupation, see: Raphael Lemkin, *Axis Rule in Occupied Europe*, Washington, Carnegie Endowment, 1944.

[10] The houses and possessions of 1,500,000 Poles who were forcibly deported from the occupied territories during the first year of German occupation were turned over to Germans, mostly new settlers coming from various regions of the Soviet sphere of influence; in Alsace and Lorraine all property of enemies of Germany was confiscated; in Serbia, of Jews, and Gypsies; in Ostland, of Jews.

b. Seizure of foreign holdings in the banks and private safety deposit vaults.

c. So-called "aryanization" of property: the transfer of property defined as Jewish to German corporations and individuals, and in some cases, to the local "Aryan" population. This practice clearly violates Article 43 of the Hague Convention because it conflicts with the constitutional safeguards of equality of all citizens irrespective of race or creed. These guarantees are present in the constitutions of all the occupied countries.[11]

d. Trusteeship: certain enterprises, both individual and corporate, are assigned to so-called trustees of various German concerns instead of being confiscated outright. This practice was particularly widespread in Alsace-Lorraine where the entire iron and steel industry was turned over to the *Hermann Goering Werke* and other German concerns as of March 1, 1941.

e. Coercion against owners to sell their domestic and foreign holdings and the auctioning of private art collections and securities in a quasi-legal manner.

III—*Indirect confiscation:*

a. The creation of an arbitrary rate of exchange [12] in favor of the mark over the currency of the occupied country, thereby enabling German purchasers to obtain goods far below their actual cost.

b. With regard to foreign trade, a manipulated clearing system under which Germany sends neither commodities nor exchange to the occupied countries in return for their "exports" to Germany. Consequently Germany's indebtedness to these countries has already reached astronomical figures.[13]

c. With regard to the Netherlands, the establishment of a customs union which facilitates the purchase of Dutch securities and enterprises with German marks.

[11] The *avis officiel* of the Belgian government-in-exile to the law mentioned below and of the Luxembourg decree cited below define these acts as constituting an attack against the sovereignty of the Belgian state and Luxembourg, and especially against the constitutional principle of equality of all Belgians and Luxembourgers, without distinction of creed, race, and language.

[12] The rate of exchange of the French franc was set at 20 fr. to the mark after the collapse of France, while the rate existing previously was only 17.6. The real rate, if the purchasing power of the two countries were to be compared, would have been no more than 10 francs to the mark. In other countries, imposed rates were raised or lowered in accordance with German requirements. For the exchange rates, see: Lemkin, p. 52.

[13] The credit balance of Belgium at the end of August 1944 was $1,440,000,000; of France $2,300,000,000. Before the occupation, Denmark owed Germany 7.6 million Kroner; in 1944, Germany owed Denmark 39 million dollars (*Free World*, Vol. III, No. 1, p. 70; *New York Times*, October 11, 1944).

During 1941, the Netherlands Bank's holdings of bills payable in Germany, resulting from the accumulation of large amounts of German marks, increased from 15.4 million guilders to 929.9 million guilders (*Knickerbocker Weekly*, 1942, No. 5).

It will be extremely difficult after the war to track down all these illegal property transactions. In many cases assets seized by Germany and transferred to neutral countries will have been sold to investors abroad. In the last war, assets looted by Germany and sold to persons in neutral countries were later purchased by investors in allied countries. Given the far more intricate system of plunder now employed by the Reich, the complexities implicit in such transfers have increased many times in comparison to World War I.

The Hague Convention covers explicitly only part of the ground, specifically outlawing improper levies and requisitions against occupied countries as a whole and certain direct confiscatory measures against private property. The illegality of indirect and camouflaged acts of confiscation must be implied from the general protection afforded to private property. The difficulty is that the maze of indirect and masked spoliation will be exceedingly hard to follow.

D. Allied Decrees Against Property Transfers Under Enemy Occupation [14]

During the uneasy lull between the subjugation of Poland and the assault on Denmark and Norway (October 1939–April 1940), a number of threatened countries enacted laws prohibiting business organizations from disposing of assets abroad in the event of enemy occupation. On February 2, 1940, the Belgian government enacted a decree relating to the wartime administration of commercial enterprises. This law was later amended and extended by the Belgian government-in-exile through decrees on June 8, 1940 and October 31, 1940.[15] Under these decrees the powers of all officers and directors of Belgian companies residing in Belgium were suspended with respect to the affairs and property of such companies located outside of Belgium. All orders and instructions emanating from such persons were to be null and void abroad. At the same time the rights of directors or managers of Belgian companies residing outside of occupied or controlled territory were extended to permit them to exercise their normal functions even in the absence of the quorum required by the by-laws.

Measures of almost identical nature were enacted by the Luxembourg government on the eve of occupation and since that time (Decree of February 28, 1940, amended on February 5, 1941).[16] An analogous step was

[14] The present paper is concerned with developments before liberation. It should, however, be stressed that, to the best of our knowledge, no new development of any importance in the field have so far been enacted by the governments in liberated countries, except in France.

[15] *Moniteur Belge*, February 7, 1940; June 8, 1940; November 22, 1940. English translation in *Commerce Clearing House, War Law Service, Foreign Supplement*. New York.

[16] Original text in the *Mémorial du Grand-Duché de Luxembourg*, March 2, 1940, English version in the Federal Reserve Bank of New York *Circular* No. 2211 of May 12, 1941; *Mémorial*, February 15, 1941.

taken by the government of the Netherlands shortly before invasion (April 26, 1940) [17] to facilitate the transfer of the legal domicile of business concerns to Dutch possessions not occupied by the enemy. A decree issued immediately after occupation, on May 24, 1940,[18] vested the Royal Netherlands Government with the property rights of persons, business associations, and public bodies, "for the conservation of the rights of former owners." In response to confiscatory measures of the German forces of occupation, the Polish government-in-exile enacted a decree on February 26, 1940 regarding Polish property abroad.[19]

Thus far seven Allied governments have promulgated laws regarding transfer of property under enemy occupation: the Polish decree of December 2, 1939;[20] the Netherlands decree of June 7, 1940 aimed at safeguarding the kingdom's interests in wartime;[21] the Belgian decrees of January 10, 1941 [22] relating to property transactions effected by the enemy; the Luxembourg decree of April 22, 1941;[23] the Yugoslav decree of May 28, 1942 regarding all property transfers since the date of German invasion;[24] the Greek decree of

[17] *Netherlands State Law Record* No. 200; English translation by the Netherlands Chamber of Commerce, New York.

[18] *Netherlands State Law Record*, May 24, 1940, as amended March 6, 1942, and May 7, 1942; English version in the Federal Reserve Bank of New York *Circular* No. 2091, July 2, 1940 and Circular No. 2633 of June 4, 1943.

[19] Polish text in *Dziennik Ustaw Rzeczypospolitej Polskiej*, 1940, Nr. 4, Poz. 10. In this connection the legislation of the Protectorate is of interest, and is cited below:

July 15, 1941: Ordinance of the Ministerial Council for the Defense of the Reich regarding the registration of foreign property and German property abroad (*Verordnungsblatt, Reichsprotektor* 1941, S. 424 — *Reichsgesetzblatt* I, S. 439).

August 15, 1941: Ordinance of the Trustee for the Four Year Plan for the Liquidation of the Claims and Debts of Polish Property (*Verordnungsblatt, Reichsprotektor* 1941, S. 500–513 — *Reichsgesetzblatt* I, S. 516).

November 19, 1941: Ordinance of the Reich Protector of Bohemia-Moravia for the execution of the Debt Liquidation Ordinance of August 15, 1941 (*Verordnungsblatt, Reichsprotektor* 1941, S. 649).

[20] *Dziennik Ustaw Rzeczypospolitej Polskiej*, No. 102, poz. 1006.

[21] Original text in the *Netherlands State Law Record* No. A6, 1940, English version issued by the Netherlands Shipping and Trading Committee, N. Y. After the occupation of Netherlands East Indies by the Japanese, a special Royal Decree was enacted on March 6, 1942 to safeguard the property in this colony (English translation as in footnote 17).

[22] *Moniteur Belge* 1941, No. 6, February 25, pp. 44–49. On the same date a second Belgian decree was promulgated to determine the effect of measures taken by the occupant and the provisions taken by the Government, both decrees accompanied by an *avis officiel* (the same, p. 44). It may be interesting to note that these two decrees are practically a literal reproduction of decrees of the Belgian Government-in-exile (Bordeaux) during World War I, decrees of May 31, 1917 (*Moniteur*, May 26–31, 1917) and of April 8, 1917 (the same, April 5–8).

[23] The Luxembourg decrees are a reproduction, with minor changes, of the corresponding Belgian decrees (See: *Mémorial du Grand-Duché de Luxembourg*, April 2, 1941, No. 2). English version in the Federal Reserve Bank of New York *Circular* No. 2268, August 29, 1941).

[24] *Sluzebne Novine*, No. 7, 1942.

October 22, 1941;[25] the Norwegian decree of December 18, 1942.[26] In addition, the Czechoslovak Government on December 19, 1941 made public a declaration concerning transfers and dispositions of property,[27] and the French Provisional Government on November 12, 1943 issued a decree embodying the warning of January 5, 1943.[28]

Some governments enacted supplementary provisions. For example, the Polish government on January 26, 1940, and on February 3, 1940, issued two decrees concerning a moratorium on public and private debts.[29] On January 8, 1941, the Norwegian Government-in-exile served notice that it would regard all measures of confiscation of private property as well as transactions deriving from these acts, as illegal. On July 29, 1941, it provided for the reopening and revision of judicial and administrative decisions promulgated under German occupation.[30] Later decrees (October 3, 1941 and October 9, 1942) [31] suspended the statute of limitations for legal proceedings and established the machinery for invalidating property transfers.

For present purposes the constitutionality of the decrees enacted by the governments-in-exile is assumed, subject to subsequent developments.[32] Their practical effect was very slight. They did not serve as a deterrent upon the occupant, nor did they restrain "collaborationist" elements in the local population from engaging in prohibited property deals under enemy occupation. Nevertheless, these decrees may loom large when the enemy is expelled and legitimate authority is reëstablished. For this reason a comparative analysis of such legislation projected against the background of the Hague Convention is imperative. The main features are as follows:

(1) Article I of the Polish decree proclaims that all legal acts and regulations of the occupant which go beyond the limits of the Hague Convention are null and void. This provision is of importance for the illegality of those

[25] *Greek Official Gazette*, No. 172, October 28, 1941.

[26] *Norsk Lovtidend*, December 31, 1942, p. 182.

[27] *Inter-Allied Review*, 1941, No. 11.

[28] *Official Journal*, November 18, 1943, pp. 277–278, amended by the Ordinance of November 14, 1944 (*Official Journal*, November 15, 1944, p. 1310).

[29] *Polish Law Gazette*, 1940, Nos. 2 and 3.

[30] Provisional Ordinance on the Reopening and Revision of Legislative and Administrative Decisions and Administrative Decrees in Norway Under German Occupation. *Norsk Lovtidend*, No. 2, 1941, p. 119.

[31] Same, pp. 120–121, 179–180.

[32] See: Oppenheimer in this JOURNAL, Vol. 36 (1942), p. 578; Alfred Drucker, "The Legislation of the Allied Powers in the United Kingdom," *Czechoslovak Yearbook of International Law*, 1942, pp. 45–59, 172–178, 190–195, 218–221; Dr. Manfred Lachs, "Polish Legislation in Exile," same, pp. 57–60; Dr. Egon Schwell, "Legislation in Exile: Czechoslovakia," in *Journal of Comparative Legislation and International Law*, 1942, pp. 120–124; "Legislation in Exile: Norway," same, 125–130; Mortin Domke, *Trading with the Enemy in World War II*, New York, 1943, Chap. 21: "Administration of National Assets Abroad by Governments-in-Exile"; S. A. Lowrie and M. Meyer, "Governments-in-Exile and the Effect of their Expropriation Decrees," in *University of Chicago Law Review*, Vol. XI (1943), p. 26.

acts according to domestic law which is not *ipso jure* affected by the international illegality of an act of the belligerent.

(2) All the decrees which were published after occupation are retroactive. The Polish decree operates with regard to the legal acts of the occupant performed at any time (Article IX). The Belgian, Luxembourg, Norwegian, and Yugoslav decrees apply to transactions since the first day of invasion. The same may be inferred from the language of the Dutch law.

(3) The decrees do not always differentiate between state and private property. The Belgian and Luxembourg edicts, which annul the "disposal and pledging" of state properties beyond the limits of normal administration, follow the Hague Convention's distinction between the two types of property. The Yugoslav decree, which assimilates to state property all property of regional administrative units and public bodies controlled by the state, voids all acts of disposal and all transfers without the qualifications of the Belgain and Luxembourg decrees. Furthermore the Yugoslav decree annuls all transfers and disposals of such property after April 6, 1941, regardless of whether the occupants had a hand in the transaction. The second paragraph of Article I, voiding seizures of property by authorities illegally constituted on Yugoslav territory, is meant to remove the cloak of legality from the acts of the puppet Serb and Croat governments. The wording of Article I, however, makes necessary a saving clause in Article VI which exempts the actions on Yugoslav territory by General Draja Mihailovich from the blanket prohibition.

With regard to public property, the Norwegian decree invalidates all transactions under enemy occupation except those specifically authorized by the government-in-exile.

As to private property, the Belgian and Luxembourg decrees differ from the Yugoslav in that they declare null and void all the measures of the occupants affecting private property while the Yugoslav edict only establishes a presumption that transfers of property since occupation are unlawful. The Greek decree differentiates between transfers in favor of the enemy, his subjects, or persons acting under his orders on the one hand, and all other persons on the other.

The Polish decree does not distinguish between public and private property. It voids all transfers or restrictions of property rights where the beneficiary is a foreign government, foreign citizen, or foreign corporation. This would seem to imply that such transactions are valid when in favor of Polish corporations or Polish citizens.

The Netherlands law, on the other hand, lays down no criteria for the validity of wartime property transfers. Instead all such acts must be scrutinized by a commission created for that purpose. Acts may be validated only with the approval of the commission. The law does not specify how approval may be secured by persons residing inside occupied Holland. The

sence is, however, that in the absence of such approval all acts mentioned Article VI of the decree are invalid *ex nunc*.

A similar provision is contained in a Norwegian decree of October 3, 1941, garding the acquisition of rights in Norwegian companies. These are reserved to Norwegian citizens who possessed such rights before April 9, 1940, the date of the German invasion of Norway, provided that permission was granted by the king or persons authorized by him. Here again it seems obvious that no such permission can be secured by persons living under enemy occupation, and that all such transfers are illegal and invalid.

(4) The Belgian, Luxembourg, and Yugoslav decrees do not specify whether they refer to property within the country or abroad,[33] whereas the Greek decree contains provisions for both cases and the Norwegian decree of December 18, 1942, explicitly refers to transactions concluded in Norway and in countries held by the enemy or his allies, or occupied or controlled by them. The Polish decree contains an unconditional ban on all regulations by the occupants affecting the property abroad of Polish citizens and of Polish legal persons (Article IV). The obvious difficulty is that this provision, which is more properly within the domain of international rather than municipal law, is valid only in so far as the courts of the country where such property is situated choose to recognize it.

(5) All measures for the sequestration, administration, and change in the utilization or administrative personnel of the property or interests of private persons and Polish corporations are proclaimed null and void by Article III, paragraph 1.

(6) "Voluntary" acts of utilization, administration, and change of personnel, if effected at the request and in the interest of Polish citizens, are not legal *per se*, but are subject to examination after the war. The same holds for acts of temporary administration (Article VI) in accordance with actual necessities. The procedural details for the recognition of such acts remain to be worked out at some later date. The Belgian, Luxembourg, and Yugoslav decrees do not provide this procedure for cases not affected by the general nullity. The Belgian and Luxembourg edicts explicitly recognize acts of normal administration whereas the Yugoslav decree is entirely silent on the subject.

(7) The Belgian, Luxembourg, Dutch, Norwegian, and Yugoslav decrees refer to movable and immovable property irrespective of the owner's nationality or status, whether individual or corporate. The Polish and Greek decrees are somewhat different. As to individual owners, the question of nationality seems to be irrelevant from the viewpoint of the Polish decree, alien and stateless persons as well as Polish citizens being protected, except in regard to property abroad and the safeguards against losses in consequence

[33] On the problem of the validity of acts of the occupant in foreign countries, see: *London International Law Conference, 1943*, London, 1944, pp. 1, 75.

of legal acts (Article VII). With regard to corporations, however, only those of Polish law are covered. This may be because under Polish law foreign corporations must be registered in Poland in order to do business there. As worded, this provision may have important consequences. The Greek decree differentiates between Greek subjects and subjects of Allied nations, and all other residents or owners.

(8) While the invalidity of titles acquired through illegal acts seems self-evident, Article V of the Polish decree expressly restates this principle, probably to exclude *bona fides*. The same article also nullifies private contracts referring to all titles and property covered by Articles I–IV as well as any property advantages acquired as a result of the illegal regulations of the occupant.

(9) Private contracts where at least one of the parties is a Polish citizen, are presumed null and void if effected under direct or indirect pressure of the occupant. This would cover the "voluntary" transfer of the property of Polish citizens to Germans (Germanization), or to German and Polish citizens in the process of so-called aryanization. Under the Polish decrees private transfers may only be recognized if registered with the Polish authorities. Provision is made whereby persons whose interests are prejudiced (here again only Polish nationals) may register their objections and institute proceedings to nullify such transactions (Article VII).

(10) While the Belgian and Luxembourg decrees (and, except for Article VII, the Polish as well) start, as mentioned, with the presumption that transactions based on enemy acts are illegal, the Yugoslav decree places the burden of proving that the contract was not freely made upon the prejudiced party. The Norwegian legislation opens the way for the invalidation of all private contracts resulting from, or influenced by, illegal pressure and abnormal conditions created by the German occupants or the Quisling regime. It is interesting to note that both the Norwegian decrees are based on a Norwegian law of 1918 concerning defects of contractual free will. The Greek decree provides for court decision in cases of forced transfers of property belonging to subjects of allied nations, even if made in payment of debts, if there is a suspicion that the transfer was made to the enemy, his subjects, or persons acting under his orders.

(11) Whereas the Polish decree leaves open the problem of the possessor's offset against the legal owner, the Belgian and Luxembourg decrees expressly discharge the latter of the duty to refund the price. The possessor must seek recourse, if any, against the person from whom he obtained the property. It should be noted, however, that the Belgian and Luxembourg decrees do not rule on the validity of contracts executed without any participation on the part of the occupant.

The above-mentioned Norwegian decree also expressly provides that persons who obtain rights in Norwegian companies in violation of paragraph 1, cannot claim reimbursement for the amount paid. The decree of December 18, 1942, goes even further, ruling that the owner of confiscated property may demand reinstatement in possession of his estate or rights without compensation, irrespective of the possessor's good faith. The same decree also provides that mortgages, leases, and other encumbrances upon the owner's title assumed by the possessor shall impose no legal obligations upon the real owner. The problem of good faith is specifically stressed in the Greek decree. The Norwegian decree, as seen above, excludes *bona fides* explicitly in certain cases. The Belgian and Luxembourg decrees seem to follow the same line.

(12) Penal sanctions are imposed by the various decrees for rendering assistance to the enemy in acts against national property. Under the Polish decree the penalty may reach up to ten years imprisonment; in other cases punishment ranges from three months to five years. Fines are also provided, and under the Polish law the entire property of convicted Polish citizens may be forfeited. Under the Belgian law those convicted may also lose certain political and civil rights. Under the provision of the Norwegian statute, the person who illegally uses property which has been the object of seizure is required to compensate the lawful owner for all his losses.

The Belgian and Luxembourg laws provide that even when such offenses are committed by persons abroad, they are to be tried by Luxembourg or Belgian courts. This unusual provision, unless confirmed by international agreement, raises a very troublesome problem of jurisdiction.

Although the Belgian and Luxembourg decrees fix penal responsibility only for acts committed after promulgation of the said laws, there is no such provision in either the Polish or the Norwegian decree. The Yugoslav edict, on the other hand, provides that penal responsibility is to be established by a special law. Under the Polish decree of 1939 only Polish citizens are subject to criminal prosecution, whereas the other decrees do not contain this limitation. However, a Polish decree of October 17, 1942,[34] provides that "All acts committed in violation of international law and harmful to the Polish State, to Polish institutions, firms, or citizens, will be punished by imprisonment." This decree applies to all persons committing such acts irrespective of their nationality.

(13) The Polish law contains no statute of limitations presumably on the theory that general rules of prescription will apply; but the Belgian and Luxembourg decrees provide that no claim may be asserted more than three years after the conclusion of peace. The Norwegian decree of December 18, 1942, contains the shortest statute of limitations: six months from the date of a general armistice. Under the Yugoslav law, the prescriptive period remains to be established under a future decree.

(14) The provision in the Polish decree aimed against the large scale settlement by the Reich of German colonists on Polish territory, declares null and

[34] *War and Peace Aims*, Special Supplement to United Nations Review, No. 1 (January 1943), p. 36. Cf. also the amendment of December 17, 1942 of the Belgian Penal Code.

void "the settlement of foreign citizens on real estate under any legal title." The wording of this clause is such as to cause considerable confusion, for it is difficult to see how the fact of settlement can be declared null and void.

(15) It is also difficult to grasp the purpose of the second paragraph of Article II of the Polish decree annulling acts which "result from the application of a policy of national extermination." The first paragraph of the same article may seem to cover the same acts whatever their motivation, unless the reference is here to Polish nationals.

E. The Inter-Allied Warning

A new element was introduced into the situation by the United Nations warning issued January 5, 1943, regarding property transfers in enemy occupied or controlled territories. The signatories represent all the countries occupied in whole or in part by the Axis with the exception of Denmark and the Philippine Islands, as well as the United States, the United Kingdom, and the British Dominions. The Baltic States do not appear in this Statement. None of the Latin American countries is a party. On April 17, 1943, however, Viscount Simon declared that inasmuch as the Nazis were transferring part of their loot to Latin America, the United Nations were concerned that these countries should be cognizant of the Inter-Allied policy. He added that the United Nations which were not original parties to the warning, as well as the Latin American countries which had severed relations with the Axis, had "responded most readily" to the suggestion that they associate themselves with its principles and had "made pronouncements of their own to that effect."[35] He also disclosed that the United Nations had agreed on a plan for the recovery of Nazi looted property without indicating the nature of the said plan.

An Explanatory Memorandum-Note on the meaning, scope, and application of the Inter-Allied Declaration against acts of dispossession committed in territories under enemy occupation or control[35a] stated that the parties to the Declaration have set up an inter-Allied committee of experts which is at work on the task of considering the scope and efficiency of existing legislation in the allied countries, for the purpose of invalidating the transactions referred to in the Declaration. It is not known what, if any, recommendations were made.

The warning is addressed "to all concerned, and in particular to persons in neutral countries." This emphasis is justified in view of the probable flight of Axis-seized goods to neutral countries. It covers transfers or dealings with property rights in occupied or controlled territories but does not

[35] *New York Times*, April 9, 1943.

[35a] Cmd. 6418. See also: Final Act of the United Nations Monetary and Financial Conference (Bretton Woods) VI. Enemy Assets and Looted Property (Department of State *Conference Series* 55, p. 22), and L. H. Woolsey "The Forced Transfer of Property in Enemy Occupied Territories", this Journal, Vol. 37 (1943), p. 282.

refer to the Hague Convention or to the decrees of the governments-in-exile discussed above. This may introduce considerable confusion, since the warning may perhaps unwittingly lend itself to interpretation as a retreat from the policy laid down in the decrees. For, whereas the latter generally declare property transactions in enemy controlled territory to be illegal, the warning merely reserves all the rights of the signatories to declare such transactions invalid. Although nothing is said explicitly on the subject, it may be presumed, like the decrees, as applying *ex tunc*.

The warning is useful in that it protects both nationals and aliens resident in affected countries as well as the affected investments of foreigners who do not reside in enemy controlled territories. On the whole it does not eliminate or significantly clarify the vast array of problems which will arise in attempting to enforce the decrees of the governments-in-exile. Moreover, it does not attempt to fill out the existing gaps in international law. The warning is perhaps most important as an expression that the United States, Great Britain, Russia, and China now stand behind the smaller states which were the first to act with a view toward disentangling the mesh of German control over non-German property.

F. Conclusions

Viewing the decrees of the governments-in-exile as well as the Inter-Allied warning against the background of the Hague Convention and past experience of international law, it seems fairly certain that if steps are not taken soon to clarify the whole picture, a period of interminable litigation and legal wrangling may be expected after the war. Law suits of this type may well impede international business relations for many years to come. Because the job of disentangling the tentacles of Nazi control will be so tremendous, there may well arise a school of thought favoring the cancellation at one stroke of all claims and counter-claims in order to start with a "clean" slate.[36] But such a move would be highly prejudicial to legitimate interests, public as well as private, and would leave Axis accomplices in substantial control of their loot. Cancellation provides no short-cut to a solution of the problem.

The possible postwar ramifications arising from the present muddle may be gauged by two well-known examples: The Soviet nationalization decrees and the Belgian nullification legislation of 1917. From *The Rogdaj*[37] to

[36] See, for instance: Hiram Motherwell, *The Peace We Are Fighting For*, New York and London, 1943, pp. 32–33:

"It is easy to say, from a distance, that all Nazi financial operations put into effect during the war ought to be declared null and void and all property should be restored as of the *status quo ante*. But these operations were often accepted as legal at the time. ... Shall someone distinguish between voluntary deals and deals concluded under duress? Scores of millions of individuals will simply have to take their losses and start anew."

[37] 273 Fed. 294.

U. S. v. *Pink*[38] there were hundreds of cases in many countries which dominated the field of international private law for nearly a generation. It is therefore only too easy to foresee the plethora of cases which will come before courts after the war in connection with the scrambled property situation, unless adequate legal measures are taken to introduce some certainty into the picture.

The following is, therefore, suggested as a point of departure:

I—A formal reaffirmation of the Hague Convention by the United Nations to serve as the legal foundation for fixing civil and penal responsibility in a multilateral treaty which will be part of the general postwar settlement.

II—A United Nations declaration covering the type of indirect property violations discussed in this paper, and especially such acts which are not specifically covered by the Hague Convention or the decrees of the governments-in-exile.

III—A uniform law for all occupied countries and areas, laying down at least the following legal guides: (a) the scope of the property transactions covered; (b) the statute of limitations; (c) the presumptions of validity or invalidity; (d) the method for validation or invalidation; (e) the rights of *bona fide* third persons; (f) the penal sanctions for willful connivance with the occupants; and (g) a code of summary procedure to permit the speedy clearing of claims.

IV—A general convention signed by victorious, defeated, and neutral states alike should lay down general rules of jurisdiction and procedure for the purpose of expediting the effective settlement of all property claims arising from the direct or indirect violation of public and private property rights under Axis occupation. This convention should include the following:

(a) The removal, with respect to such claims, of the immunity of states from suits in courts abroad in order to permit the persons affected to obtain redress wherever assets of the states exist. A natural concomitant of this is that such assets should be subject to execution wherever they may be found.

(b) International judicial assistance in trial commissions, the authentication of documents and similar acts.

(c) Recognition and execution in the respective countries of the judicial decisions duly reached.

(d) The establishment of rules of priority in the execution of claims arising out of illegal transfers of property.

(e) The international pooling of Axis assets located abroad for the purpose of assuring a just priority in the satisfaction of public and private property claims arising from the illegal practices of the Axis.

[38] 62 Sup. Ct. 552 (reprinted in this JOURNAL, Vol. 36 (1942), p. 309).

ON THE FOUNDATIONS OF INTERNATIONAL LAW

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Since the collapse of the European system of the Middle Ages and the birth of modern international law most jurists have worked on the assumption that the principles underlying the international legal order are radically different from those that lie at the base of national law. With the disintegration of the authority of the Pope and the Emperor there had come into being a number of independent states that recognized no political superior and hence considered themselves as equals. In their relations with each other, at least, these states acted like the sovereign bodies which in fact they were. In so far as international relations were concerned the world had returned to a condition of complete anarchy. The states of the world lived in that condition of natural equality described by Hobbes where each was the potential enemy of every other. In the formulation of their policies and in their acts each state took into account its own interests only and when these interests came into conflict, as they inevitably did, the only arbiter was brute force.

If the world were to be saved from complete chaos it was necessary to find some system of rules that could govern the relations which, despite the break-down of the old order, were bound to persist between the new states. Such a system was discovered in the new science of international law. In the conditions of the time it would have been wasted effort to urge the kings and princes who had only just thrown off the supremacy of the Pope and the Emperor to submit to the authority of some new political superior. The classical writers did not, therefore, posit the necessity of a political authority over the new states. They found a substitute in an international law based on the principles of natural law and the consent of the states.

The classical writers fall into three groups according to the place which they gave to the two factors that served as the basis of the new system. The positivist school, which was foreshadowed by Gentilis, and which had its first exponent in Zouche, gave first place to the consent of states. The Grotian or eclectic school based its system on the twin pillars of consent and natural law, Grotius having made a distinction between the natural and the voluntary law of nations. The naturalist school, on the other hand, of which the chief exponent was Pufendorf, completely identified international law with natural law.

Natural law was an element in the theories of all these writers—even the positivists. For while in positivist doctrine agreement and custom were the sources of international law, its rules had nevertheless to be in harmony with