THE BELLIGERENT OCCUPANT AND THE RETURNING SOVEREIGN: ASPECTS OF THE PHILIPPINE LAW OF BELLIGERENT OCCUPATION

FLORENTINO P. FELICIANO *

To those who have had to live under an enemy occupation regime during the last war, the "law of belligerent occupation" carries with it a strong sense of unreality. To them, nothing more profound than bayonets lies behind the occupant's decrees and proclamations; indeed, the inhabitants will often feel a moral compulsion to disregard and violate those decrees. One finds in this branch of the law of war the Austinian emphasis on the coercive element in law pushed to its logical extreme. As McNair put it, with classic British restraint, "that the power of the occupant affords unique opportunities for the abuse of the law is patent." [1] The occupied area and its inhabitants are entirely though temporarily at the physically unlimited discretion of the occupant. International law appeals to the occupant's "conscience" and "sense of humanity," and sometimes, under conditions of total war, those are luxuries belligerents can ill afford. The law of belligerent occupation is, as it were, a veil of authority, thin and tenuous it must be admitted, with which to cover the nakedness of the occupant's power.

People who have undergone severe deprivations at the hands of an occupant are not likely to be very dispassionate in appraising the practices and policies of the occupant. In the Philippines which saw much of its resources, physical and human, destroyed with apparently utter wantonness, there were strong feelings and intemperate language for a long time after the return of the sovereign. Eight years after the termination of the occupation, it is perhaps now feasible to look back and apply the yardstick of familiar international law doctrines to what the occupant did. This paper will be limited to two aspects of the occupation regime: patterns of government and administration of the occupied territories and the currency manipulations by the occupant, matters which in the experience of the Philippines, appear as the more significant. Those patterns and manipulations will be surveyed, and the policy considerations underlying them indicated. Further, the treatment by the returning sovereign of those practices will be dealt with and its decisions on the matter examined. The extent to which the returning sovereign must consider rules of international law in dealing with the problems raised

* A.B. (U.P.), LL.B. (U.P.), LL.M. (Yale); Yale Fellow 1952-1953.

[1] Municipal Effects of Belligerent Occupation, (1941) 57 *Law Q. Rev.* 33 at 36.

by acts of the erstwhile occupant will be inquired into. Particular emphasis will be laid on the case of the Philippines, and more generally, on the experience of the other countries occupied by the Axis Powers, for the most part the other Southeast Asian countries under Japan. Analogous situations and parallel or contrasting actions of occupant and returning sovereign in other countries will be indicated. Some of the decisions of the Supreme Court of the Philippines, especially those concerning certain problems engendered by the occupant's currency practices, have been subjected to severe criticism. In one instance, the critic went to the extreme of subtle insinuations of asininity.[2] It will be interesting to find out how far the criticism has been merited in the light of how the other returning sovereigns met the same and similar problems in their respective jurisdictions.

1. *Participants*

The participants in the situations to be considered are, for the most part, two: the belligerent occupant generally acting through the Commander-in-Chief of the occupying forces, and the returning sovereign mainly through its courts and in some cases its legislative and executive officials. It will be noticed that the participants do not interact simultaneously; they are separated by an interval of time. During the period of occupation, the occupant acts alone, unilaterally affecting the conditions of the occupied territory and its inhabitants. The sovereign is absent, in exile as in the case of the Philippines or pushed to a remote corner of the country as in Burma. When the sovereign has returned and is in a position to exercise its power, the occupant has been expelled. The relationship is thus successive, governed by what Feilchenfeld calls *jus intertemporale,* as distinguished from *jus interlocale* which regulates the relationship between the occupant and the absent sovereign.[3] In litigations before the courts of the restored sovereign, the former occupant may be considered as represented by the party interested in enforcing a right acquired under the occupant's legislation or in upholding a transaction effected during the period of the occupant's possession.

A third participant may be indicated, the occupation government or "puppet" regime or state established by the occupant. The Supreme Court of the Philippines has labelled the Philippine Executive

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[2] Fraleigh, C. A., The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights, (1949) 35 *Corn. L. Q.* 89. More sympathetic was Lockwood, L. D., in the Philippine Supreme Court and Postwar Problems of International Law (1950) 3 *Stanford L. Rev.* 3 who adverted to the destruction of judicial records and law libraries compounding the difficulties faced by the Court.

[3] FEILCHENFELD, E. H., THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION, (1942) at 130 and n. 1.

Commission and the Republic of the Philippines created by the Japanese occupant as "de facto governments of the third type," i.e. governments of paramount force.[4] The label should not be allowed to obscure the fact that the Commission and the Republic had no distinct status apart from the belligerent occupant. These governments were based on the sufferance and military power of the occupant from whose will they derived their existence and power. What power they had could be exercised only within the limits of the military interests and political objects of the occupant. It is more accurate factually to consider them as mere organs of the occupant, as extensions of his military authority. They have no greater authority in the occupied area than the occupant himself. The legality of their acts should be determined by the same rules applied to acts of the occupant.[5] The term "puppet" is accurate descriptively. Occupation governments established by the occupant are therefore properly subsumable under the category occupant.

A fourth participant may sometimes be involved in the situation. The validity and effects of acts of the occupant may be invoked or questioned before the courts of a third state by its own nationals or by foreigners. In this case, what the returning sovereign did with respect to the occupant's acts becomes irrelevant. The public policy of the forum will have to be consulted in conformity with the appropriate rules on conflicts of laws which, rather than principles of international law, are sometimes deemed controlling.[6] *Aboitiz and Co. v. Price*[7] is an example. There the Federal court held that an alleged Japanese regulation imposing severe penalties upon those undertaking to aid the interned enemy nationals (American) could not be invoked by the defendant as rendering illegal the plaintiff's act of lending him money for his use during his internment. The alleged

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[4] *Co Kim Cham v. Valdez Tan Keh* (1945) 75 Phil. 113.

[5] One court in Greece has so refused to consider the German occupation government as a "de facto government;" *In re G.*, Criminal Court of Heraklon (Crete), ANNUAL DIGEST, 1943-1945, Case no. 151. Lauterpacht's note to this case says (at p. 440), "this judgment contains a precise analysis of the character and juridical nature of the 'occupation government' "; but adds (at p. 442) "the part of the decision dealing with de facto governments, although strictly correct, does not appear to be supported by Greek precedents * * *." Cf. Zepos, P. J., Enemy Legislation and Judgments in Liberated Greece, 30 *J. Comp. Leg. and Int. L.* (3rd Series—1948) 27 at 29. Also LEMKIN R., AXIS RULE IN OCCUPIED EUROPE, 1944) at 11, and *Jecker v. Montgomery* 13 How. 498 at 515.

[6] 3 HYDE, INTERNATIONAL LAW, (2d ed., 1945) p. 1886.

[7] (1951) 99 F. Supp. 602; noted in 65 *Harv. L. Rev.* 527. Actually, it should be noted that the United States was the returning sovereign in the case of the Philippines; for it was not until July 4, 1946 that the final and complete transfer of sovereignty to the Republic of the Philippines was effected.

regulation was held invalid as repugnant to the forum's public policy because it was "directed by the enemy against this nation or its citizens, is obnoxious to our ideas and intended primarily to aid his efforts to put us down." [8] A third state may become involved in the situation in another way. Its nationals may be affected by the policy of the restored sovereign in recognizing or refusing to recognize acts of the former occupant. The third state's nationals may consider themselves wronged by the recognition or recission and may conceivably invoke its diplomatic protection for redress of an "international delinquency." In this situation it becomes important to determine to what exent international legal obligations are incumbent on the returning sovereign in the matter of recognizing, revising, or rescinding the acts of the occupant, or whether the matter is or should be governed by international law at all.

2. *Institutional Patterns of Government of Occupied Regions: Power Practices*

On January 2, 1942, the City of Manila was occupied by the Japanese forces, defending troops having fallen back towards the Bataan peninsula. It was not until May, 1942 that organized resistance by the regular armed forces ceased. However, at no time during the period of the occupation was the entire land area of the Philippines under the effective control of the occupant. Large islands of the Visayas group remained in the hands of the Commonwealth authorities which set up some form of local administration, levied taxes, and issued currency. The courts established under the Commonwealth government continued functioning in those areas. In Mindanao, with the exception of Davao province, the area under the occupant's control was limited generally to the coastal regions. Nonetheless, by a proclamation dated January 3, 1942, the Commander-in-Chief of the Japanese forces announced that "the Japanese Army has occupied the Commonwealth of the Philippines and established the Military Administration in the islands." [9]

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[8] *Ibid*, at 622. The court added (at 623) " * * * we are free under international law to choose our own theories of conflicts of laws, and that is particularly true, where the acts to which we refuse recognition are the acts of an enemy."

But see Shanker, M. G., the Law of Belligerent Occupation in the American Courts, (1952) 50 *Mich. L. Rev.* 1066, commenting on the Aboitiz case, where the point is made (at 1068) that "the status of the belligerent occupant is peculiarly distinctive in both international and American law;" that (at 1071) "to it is attached a body of law peculiar to it alone. Attempts by some courts to deal with the acts of the belligerent occupant by application of principles of law designed to govern the acts of a de jure or sovereign government overlook this fundamental fact and result in much confusion."

[9] 1 *Official Journal of the Japanese Military Administration* p. 2.

A similar situation prevailed in Burma. A not inconsiderable portion of Burma, i.e., the Chin Hills, parts of North Arakan and North Burma, remained in British hands for the duration of the war. Thus two governments functioned simultaneously, one set up by the occupant and the other by the British Military Administration. The civil government had retired across the border to Simla, India, and parliamentary legislation being no longer possible, the Governor, in the exercise of his powers under the Government of Burma Act, assumed all legislative powers.[10] In the Netherlands East Indies [11] and in Malaya,[12] the Japanese arms were more successful; there the legitimate sovereigns were completely expelled from their territory.

The spatial and temporal extent of the authority of the occupant is of course limited by the requirement of effective control.[13] The occupation extends only to territory where such authority has been established and can be exercised.[14] Such extent is a matter of fact; the legal test of occupation is its actual effectiveness.[15] Whatever proclamations may say, in international law, occupation depends solely upon the fact of possession and rule. No proclamation is at all necessary, though occupying powers seem to be in the habit of issuing

[10] Gledhill, A., Some Aspects of the Operation of International and Military Law in Burma, 1941-1945., (1949) 12 *Modern L. Rev.* 191 at 200 et seq.

[11] See generally WOLF, C. JR., THE INDONESIAN STORY, (1948), Am. Institute of Pacific Relations, p. 6 et seq.

[12] See generally Barnett, P. G., Malaya, Part II in THE DEVELOPMENT OF SELF RULE AND INDEPENDENCE IN BURMA, MALAYA, AND THE PHILIPPINES, (1948), Am. Institute of Pacific Relations, p. 68 et seq.

[13] Thus a pardon granted either by the Japanese Commander-in-Chief or by the President of the occupation Republic after the Japanese forces had lost effective control of the area where the prisoner was confined is null and ineffective, and is not recognized after return of the sovereign; see *Sameth v. Director of Prisons* (1946) 76 Phil. 613, *Camasura v. Provost Marshal* 44 *Official Gazette* 2237, *Botuyan v. Director of Prisons* 46 *Official Gazette* 65.

[14] Art. 42 of the Regulations Annexed to the Hague Convention IV. Downey, W. G. Jr., in Revision of Rules of Warfare, (1949) *Proc. Am. Soc. Intl. L.*, at 106, mentions additions to art. 42 proposed by Dr. Otto Reik: "(1) A territory is no longer considered occupied after actual authority, previously established, ceases to be exercised. (2) All general and individual orders derived from an alleged occupation, but not backed by the exercise of actual authority (through means as enumerated in art. 43) are void. Such orders become void when actual authority previously established, ceases to be exercised." Such additions requiring a continuous exercise of authority rather than mere capacity for its exercise would render doubtful the status of the territory where, as in the Philippines, the occupant's forces contented themselves with occasional incursions for purposes of requisitions and primitive action against guerrillas. In cases like North Burma, where both Japanese and British forces periodically visited the same villages and town, the question of effective control becomes more difficult.

[15] FENWICK, INTERNATIONAL LAW, 3d ed., 1948, p. 569.

them. When one is issued, as Colby puts it, "expectation should not outrun accomplishment. * * * It records but does not create occupation."[16]

For about three weeks after the proclamation mentioned above, the Japanese occupant ruled Manila and other occupied areas directly through his Military Administration. On January 24, 1942, Mr. Jorge B. Vargas was designated by the Japanese Commander as "head of the central administrative organization" and as "Chairman of the Executive Commission." [17] Six executive departments were reconstituted: Interior; Finance; Justice; Agriculture and Commerce; Education, Health and Public Welfare; and Public Works and Communications. A Commissioner for each department was appointed by the Commander-in-Chief upon the recommendation of the Chairman. Men who had been prominent in government and politics under the Commonwealth were designated as Commissioners. The appointment of "other important officials" and chiefs of local administrative organs was vested in the "Chairman subject to the approval of the Japanese Commander." Jurisdiction over courts was retained by the Japanese Commander. The internal organization of the departments and of the local administrative organs was in the general "based upon what have existed hitherto." The Chairman of the Executive Commission created a "Philippine Council of State" as an "advisory body" for the administration of the occupied territory the members being appointed by the Commander.[18] It should be noted that in the pre-occupation government, a Council of State, composed of ranking officials of the Executive and Legislative departments, existed and served as an extra-constitutional link between the two departments. Membership in the Council meant membership in the national political elite, and carried with it great prestige.

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> "based on the existing statutes, orders, ordinances and customs until further orders, provided that they are not inconsistent with the present circumstances under the Japanese Military Administration."

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[16] Colby, E., Occupation Under the Laws of War, (1925) 25 *Col. L. Rev.* 904 at 908.

[17] Order no. 1, 1 *Official Journal of the Japanese Military Administration*, p. 7; 1 *Official Gazette* (1942) p. 6.

[18] Executive Order no. 2, January 29, 1942, 1 *Official Gazette* (1942) p. 13-14.

Chief." [19] Certain constitutional and statutory provisions were deemed suspended, those

> "which are to disturb the peace and order in the occupied areas, to endanger the safety and maintenance of the Japanese forces, e.g., laws or regulations concerning freedom of conscription, assembly and press, suffrage, carrying firearms, travel, etc.; and laws or regulations especially provided with some political purposes, e.g., those prohibiting certain aliens, including the Japanese, from enjoying the right or privilege to exploit natural resources or to carry on or engage in certain business or professions." [20]

The grant of legislative power to the Executive Commission was intended to enable it to replace the laws suspended with other presumably more appropriate under the "new order of things." The Commander in Chief retained the power to legislate directly or to order the Commission to enact any particular law or regulation.

The Executive Commission then proceeded to reorganize the administrative framework of the government by comprehensive legislation.[21] In the main, the basic outlines under the Commonwealth were retained, the reorganization consisting mainly of discarding the department of Labor and some Bureaus and Offices not deemed indispensable, the merging of several departments and the creation of a Bureau of Religious Affairs.[22] This Bureau was the official medium through which religion was attempted to be utilized as a deliberate instrument of propaganda, a practice which seems to have been limited to the Japanese. On the level of local government, the reorganization effected one important change. The local legislative bodies, i.e., provincial boards and the boards or councils of cities and municipalities, were shorn of all power to enact ordinances, and reduced to the position of an advisory body to the provincial gover-

[19] Order no. 3, Concerning Basic Principles in Exercising Legislative, Executive, and Judicial Powers, Feb. 20, 1942, 1 *Official Journal of the Japanese Military Administration* p. 34.

[20] Explanatory note to Order No. 3, *ibid*, at 35. It is not clear whether the enumeration was intended to be exhaustive, for the note contains a preceding statement sweeping in scope: "All the laws and regulations of the Philippines have been suspended since the Japanese occupation."

[21] Executive Order No. 4, Defining the Duties, Functions, and Activities of the Central Administrative Organs and Judicial Courts, as Reconstituted, February 27, 1942, *ibid*, at 68, et, seq.

[22] Sec. 11, *id*. This last Bureau was given the "power of supervision over all religious organizations or orders in the Philippines, and after due investigation shall give authorization for the organization and establishment hereafter of other religious corporations or orders. It shall require religious organizations or orders to submit reports from time to time concerning their membership, properties, facilities, and other matters * * *."

nors and city or municipal mayors. Since the governors and mayors were appointed by the Chairman of the Executive Commission, the net effect of the formal structure was an extreme centralization of governmental authority and a concentration of executive and legislative functions in the Commission. Superimposed on the structure was the Military Administration which functioned continuously throughout the occupation. At the apex of course, stood the Commander-in-Chief.

The court system was in general left intact as it existed prior to the occupation. However the courts' criminal jurisdiction was modified to exclude:

> (a) crimes against the military laws, regulations, ordinances, proclamations, or other orders issued by the Japanese occupant;
> (b) crimes having any relation with the strategic interest of the Japanese forces or those which, in the opinion of the military authorities, seriously affect peace and order in the occupied areas;
> (c) crimes committed by Japanese subjects.[23]

Cases involving these categories of crimes were tried before military tribunals, the third including offenses committed by occupation army personnel. Civil cases to which enemy aliens, i.e., Americans, British, Dutch etc., were parties, and which were pending before the courts of the Commonwealth at the outbreak of the war were suspended. No new cases could be filed by enemy aliens without the approval of the Director General of the Military Administration.[24] The lifting of the suspension and permission to file new cases were made contingent on the "military authorities deeming it necessary and proper to do so after careful investigation of the nature of each case."[25]

Even before the changes described above were fully worked out, a wider pattern began to emerge. Scarcely three weeks after the occupation of Manila, and while the battle for Bataan was still raging, Prime Minister Tojo, appearing before the Imperial Diet at Tokyo on January 21, 1942 indicated that "Japan will gladly grant the Philippines its independence so long as it cooperates and recognizes Japan's program of establishing a Greater East Asia Co-prosperity Sphere."[26] On June 19, 1943, upon the "recommendation" of the Commander-in-Chief, a Special National Convention of the Kali-

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[23] Instruction No. 10 to the Commissioner of the Department of Justice, March 18, 1942, 1 *Official Gazette* (1942) p. 72.

[24] Instruction No. 28 to the Commissioner of the Department of Justice and the Chief Justice of the Supreme Court, May 16, 1942, 1 *Official Gazette* (1942) p. 216.

[25] Notification Nos. 2 and 5, May 16, and June 30, 1942, 1 *Official Gazette* (1942) p. 326-327.

[26] The text of the speech appears in 1 *Official Gazette* (1942) p. 21-22.

bapi (*Kapisanan sa Paglilingkod sa Bagong Pilipinas*—Association for Service to the New Philippines) chose twenty persons to form the "Preparatory Commission for Philippine Independence." This Commission took less than three months to draft a constitution, which document was promptly ratified by a Special General Assembly of the Kalibapi. The members of the Kalibapi then proceeded to elect from among themselves the representatives to the National Assembly provided for in the new constitution. The Assembly convened and elected as its Speaker Mr. Benigno S. Aquino, hitherto the Director General of the Kalibapi and Dr. Jose P. Laurel as President of the Republic. On October 14, 1943, the Republic was inaugurated. The next day, a Pact of Alliance was concluded between Japan and the Republic, pledging a "close cooperation on matters political, economic, and military for the successful prosecution of the war of Greater East Asia." [27] The ultimate form that this cooperation took was a proclamation, issued on September 22, 1944 after the first attack on Manila by the American airforce, "that a state of war exists between the Republic of the Philippines and the United States of America and Great Britain." [28] Conscription of Philippine citizens was however never imposed.

Soon after the inauguration of the Republic, the President formally notified twenty seven nations of the existence of the new "independent state." These nations included Germany, Italy, Bulgaria, Rumania, Denmark, Hungary, Croatia, Slovakia, Nanking China, Manchukuo, Thailand, Burma, and the Provisional Government of India. Almost all of these countries responded and accorded recognition to the Republic. On the other hand, the neutral countries notified, including Turkey, Eire, Argentina, Sweden, Portugal, and Switzerland, all withheld recognition. Spain sent a congratulatory message, which, upon protest of the American ambassador to Spain, was officially declared as not amounting to recognition. The Vatican acknowledged receipt of the notification, which was interpreted by the Republic as recognition, an interpretation scarcely warranted by the terms of the acknowledgment.[29]

The formal authority structure under the Republic remained essentially the same as under the Executive Commission. The same centralization of authority and concentration of functions on the executive head was evident. Thus, for instance, the constitution provided

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[27] The text of the treaty is found in 1 *Official Gazette* (Rep. of the Phil., 1943) p. 105-106.

[28] The text of the proclamation by Dr. Laurel may be found in GALANG, R. SECRET MISSION TO THE PHILIPPINES, (1948), 182-183.

[29] See CIVIL AFFAIRS HANDBOOK—JAPAN, JAPANESE ADMINISTRATION OF OCCUPIED AREAS—PHILIPPINE ISLANDS (1944) p. 8 *et seq.*

for a National Assembly composed of provincial governors and city mayors acting *ex officio* and one representative from each province.[30] The governors and the mayors were appointed by the President,[31] and were the heads of the local units of the Kalibapi in their respective provinces and municipalities. Suffrage was limited to the members of the Kalibapi. The judicial system underwent considerable reorganization. In place of one Court of Appeals, five district Courts of Appeals were created, the various provinces being grouped into five districts. The Judicial Districts for Courts of First Instance were reduced from sixteen prior to the occupation to five.[32] These changes were effected by the President pursuant to an act of the National Assembly empowering him to change or create or abolish any government instrumentality.[33] At all times, it goes without saying, the superstructure of the Military Administration remained behind the facade of the Republic.

So far only the level of formal authority has been touched. It need hardly be said that effective control lay in the hands of the occupant. The label of "puppet" was factually correct, but it would have been extreme naivete to expect otherwise. A belligerent occupant, in possession of hostile territory,[34] simply cannot afford to relinquish actual control. The devices used universally, it seems, throughout Southeast Asia including Siam and Indo-China, by the Japanese occupant to conceal the fact of control behind a veil of authority were not very subtle: Japanese advisers were integral parts of each department, bureau and office. The occupant simply relieved himself of the day to day burdens of ordinary civil administration, thereby releasing the personnel necessary for military operations. It is probably true that the set up tended to benefit the inhabitants of the

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[30] Sec. 2, Art. III of the Constitution. A detailed comparison of the provisions of this constitution and that of the Constitution of the Commonwealth may be found in CIVIL AFFAIRS HANDBOOK—JAPAN, JAPANESE ADMINISTRATION OF OCCUPIED AREAS —PHIL. ISLANDS (1944) p. 8 *et seq.*

[31] Sec. 10, Art. II of the Constitution.

[32] Executive Order No. 27, Reorganizing the Court of Appeals and the Courts of First Instance, Jan. 7, 1944, 1 *Official Gazette* (Rep. of the Phil., 1944) 345.

[33] Act No. 10, December 22, 1943, 1 *Official Gazette* (Rep. of the Phil. 1943) 230.

[34] The degree of hostility to the Japanese occupant varied in the different Southeast Asian countries; and the intensity of control and frequency of interference by the occupant was directly proportional to the degree of hostility. Resistance to the occupant seems to have been highest in the Philippines, while peculiar historical and social conditions in the Netherlands East Indies, in Burma and Malaya inclined the inhabitants to a more positive cooperation with the occupant at least during the earlier stages of the occupation. On this point, see WOLF, *op. cit. supra* note 11 at 12; THOMPSON, V., POST MORTEM ON MALAYA, (1943), Institute of Pacific Relations, p. 301 et seq.; and Gledhill, *loc. cit., supra* note 10 at 193.

occupied areas by minimizing direct contact with the occupying forces. The Japanese army did not have a reputation for patient handling of conquered peoples.

Another technique of occupation, also used throughout Southeast Asia, was the formation of "national service associations," closely analogous to the "Imperial Rule Assistance Association" in Japan.[35] Thus, there was the *Kalibapi* in the *Philippines*, the *Concordia* of Manchukuo, the *Java Hoko Kwai* and the *Tiga A* in Indonesia, the *Hain Min Hui* of North China, and the *Do bama* in Burma.[36] These associations were instruments of "enlightenment," i.e. propaganda, the media for the dissemination of information as to the professed aims and ideology of the occupant. Access to power for the inhabitants of the occupied areas required membership as a condition precedent. Whatever political functions were conceded to the inhabitants of the occupied territories were exclusively reserved for the members of the associations; to this extent they could be considered as a sort of political party. The occupant attempted to create a value position (in terms of ostensible power and wealth through preference in the rationing of prime commodities) for the associations so as to induce as large a membership as possible. In the Philippines at least, whatever success was achieved by the Kalibapi was not too impressive.

The pattern of occupation government in the Philippines was substantially repeated in Burma.[37] The Japanese forces brought with them the Burma Independence Army, an organization mainly officered by young Burmese Nationalists. To this organization, the Japanese Commander in Chief initially entrusted the task of setting up a civil administration. The *modus operandi* of the Independence Army was to create "Peace Committees" to conduct a rudimentary administration and to administer justice of a kind. In the latter part of 1942, when the military situation had been relatively stabilized and the great part of the country in Japanese control, the Commander in Chief established a government closely resembling the preexisting British administration. Dr. Ba Maw, an ex-Premier, who at the time of the invasion of Burma was detained by the British for political reasons, was made the head of the administration. The personnel consisted generally of Burmese politicians and former civil servants; Japanese advisers were of course provided for.

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[35] See CIVIL AFFAIRS HANDBOOK—JAPAN, GOVERNMENT AND ADMINISTRATION: LOCAL GOVERNMENT, (1944) p. 4 *et seq.*

[36] See RECTO, C. M., THREE YEARS OF ENEMY OCCUPATION, (1946) p. 14.

[37] See Gledhill, *loc. cit., supra* note 10 at 195.

Early during the occupation of Burma, an "Independence Preparatory Commission" was created, the members being chosen by Dr. Ba Maw and his advisers. The Commission drafted a "Constitution Act," which was ratified by a "State Assembly Board" composed of the same members as the Commission. On August 1, 1943, the independence of Burma and the abolition of the Japanese Military Administration was proclaimed. Dr. Ba Maw, as head of state, assumed the title of *Adipadi*. A treaty of alliance, recognition by the Axis powers, and a declaration of war on Great Britain and the United States followed as a matter of course.

The patterns set in the Philippines and Burma are also visible in the case of the Netherlands East Indies. But important conditioning factors must be noticed. Here, independence was not so much promised gratuitously by the occupant as in the Philippines and Burma, as demanded by the Indonesian nationalists.[38] The *Poesat Terraga Rajat* (Central People's Power) or *Poetera* as it was called, was established on March, 1943, by the nationalists. This was a centralized organization of all political parties, labor organizations and youth and religious societies, led by Soekarno and Hatta. The *Poetera* carried on a continual tug of war with the Japanese military authorities for concessions to the nationalist cause, for higher positions in the government for Indonesians, and for a withdrawal of the military administration. In exchange for these concessions, the nationalists promised support of the Japanese war effort. Finally on April, 1944, a "Commission for the Preparation of Independence" was created, headed by Soekarno and Hatta. The Commission adopted a national flag and a national anthem and drafted statutes providing for the increased participation of Indonesians in the occupation government. On September 1944, Prime Minister Koiso made the first formal Japanese promise of independence. On July 1945, the Japanese Commander in Chief opened formal discussions with the nationalist leaders concerning independence, apparently with the intention of bargaining for the support of the Indonesian Auxiliary Army. A constitution modelled in part after that of the United States was drafted and adopted. On August 17, 1945, two days after the capitulation of Japan, the Republic of Indonesia was proclaimed, not in the name of the Japanese Emperor, but in that of the people.[39]

This practice of going through the motions granting independence to the countries occupied by Japan had started before the outbreak of the Pacifc War. Wang Ching Wei had been installed as Pre-

[38] WOLF, *op. cit., supra* note 11 at 6 et. seq.

[39] Collins, J. F., The United Nations and Indonesia, *International Conciliation*, March, 1950, p. 115.

sident of the occupied areas of China on November 28, 1940; the standard procedure of a pact of alliance and later a declaration of war against the Allied Powers seems to have been first developed here.[40] An even earlier instance is perhaps that of Manchukuo, under the Emperor Henry Pu Yi.[41] A Provisional Government of India was formed, with Subhas Chandra Bose as Head, without any Indian territory having been occupied by Japanese forces. Only in the case of the Settlement of Singapore was there any formal attempt at outright annexation.[42] The whole pattern culminated with the convocation of a "Greater East Asia Conference" at Tokyo, on November, 1943. At that conference were represented the occupied countries which had been raised by the occupant to the dignity of "independent states": the Philippines, Burma, Free India, Manchukuo, China, and Thailand. The completed pattern of regional hegemony, political and economic, by Japan was quite clear, despite the continued verbal emphasis on sovereignty and independence.[43] The Japanese insistence on outward forms and their preoccupation with establishing "independent states" may be contrasted with the German techniques of occupation government. Germany established only two "puppet states"—Slovakia and Croatia. Germany either directly annexed the occupied territory and absorbed it as part of the "Greater Reich" in which case it was administered by "Gauleiters," [44] or simply left the territory to be administered by Reich Commissioners ers and Governors or by military commanders depending on the strategic value of the territory.[45]

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[40] GAYN, M. J., THE FIGHT FOR THE PACIFIC (1941) p. 211 et seq. contains an account of the events leading to the establishment of the Wang Ching Wei regime. See also RECTO, *op. cit., supra* note 32 at 28-29.

[41] See generally TAKEUCHI, WAR AND DIPLOMACY IN THE JAPANESE EMPIRE, (1935) p. 385 et seq., and HISHIDA, JAPAN AMONG THE GREAT POWERS, (1940) p. 339 et seq.

[42] See opinion by Murray-Aynsley, C. J., in *Sultan of Johore v. Tungku Abubakar* (1950) 16 *Malayan L. J.* 3. The internal administration of the Malay states seem to have been but slightly altered by the occupant. The Japanese Commander merely substituted his own officers as advisers to the Malay sultans, in place of the British Residents and outwardly respected the authority of the native sultans, much as the British advisers used to do prior to the occupation. See BRITANNICA YEARBOOK, (1945) p. 282.

[43] See the Joint Declaration of the Greater East Asia Congress, November 6, 1943, setting forth five "basic priciples" governing the relations of the participants among themselves. 1 *Official Gazette* (Rep. of the Phil.—1943) p. 156.

[44] As in the case of the Polish provinces, the Sudeten, Austria, Luxemburg, Alsace-Lorraine, Eupen, Malmedy, Moresnet, and Northern Yugoslavia; see LEMKIN, *op. cit., supra* note 5 at 9.

[45] Norway and the Netherlands were administered by Reich Commissioners, while Belgium, Occupied France and Greece by Military commanders directly responsible to the Fuhrer; *ibid*, at 10.

3. Currency Manipulations by the Occupant: Wealth Practices

On January 3, 1942, the Commander-in-Chief of the occupying forces in the Philippines issued a proclamation to the effect that "war-notes (military peso money) have been issued by the Imperial Japanese Government, and said Government takes full responsibility for their usage having the correct amount to back them up." [46] The war notes followed the peso monetary units used by the Commonwealth government previous to the occupation. The war notes and the peso currency were to circulate side by side at par valuation. The circulation of Yen paper money, i.e. the currency issued by the Japanese government at Tokyo, and yen notes issued by the Banks of Japan, of Chosen (Korea), and of Taiwan (Formosa), and of piastre currency issued by the Bank of Indo China and all foreign currencies was prohibited.[47] But the American dollar was allowed to circulate at its previous legal rate of exchange of two pesos (₱2) for one dollar; very soon thereafter, however, its circulation in the occupied areas was stopped and prohibited.[48] Philippine National Bank Emergency Circulation Notes which were issued just before the occupation, and by the Commonwealth authorities in the unoccupied portions of the Philippines, were also banned from circulation.[49] And so only the occupation fiat money and the Philippine peso issued prior to the Pacific War could freely circulate in the occupied territory; refusal to accept the fiat money was threatened with severe penalties. Very soon afterwards, the Philippine peso disappeared from circulation.

The war notes had no known coverage, whether in bullion or otherwise. In such a situation, depression of the fiat currency was almost inevitable. The occupant attempted to prevent the inflation of the war notes by several devices. One such device was the system of forced savings for all employees of government offices, banks, and business firms. The employer was required to deduct from the salaries paid by him, where such salaries were not less than 200 pesos per month, a certain percentage based on a specified scale.[50] The sums required to be deducted were to be deposited by the em-

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[46] 1 *Official Gazette* (1942) p. 9.

[47] Proclamation Prohibiting Circulation of Yen Paper Money and Foreign Currencies, January 10, 1942; *ibid*, p. 9-10.

[48] Proclamation of February 6, 1942,, 1 *Official Journal of the Japanese Military Administration*, p. 43.

[49] Proclamation of May 7, 1942, 1 *Official Gazette* (1942) p. 211.

[50] See Proclamation on System of Forced Savings for all Employees, January 23, 1942, *ibid*, at 10. Indicative of the subsequent inflation was the later reduction of the amount of compulsory savings; Executive Order No. 42, March 30, 1944, 1 *Official Gazette* (Rep. of the Phil.—1944) p. 615.

ployer in banks for the benefit of the employee. Another device was the limitation of withdrawals from bank deposits to ₱500 per person, including corporations, per month. Withdrawals for purposes of paying taxes, bills for water, gas, electricity, and telephone charges, and other payments having the approval of the Commander-in-Chief were exempted from the restriction.[51] The permitted withdrawals from deposits with the Philippine Postal Savings Bank were even smaller: Fifty pesos per month in case of a married depositor, and thirty pesos for the unmarried.[52] These were later further reduced to thirty and twenty pesos respectively.[53] It is significant, however, that the restrictions on withdrawals did not apply to deposits created after the reopening of the Bank; such subsequent deposits were naturally of war notes. A third device was fixing ceiling prices for prime commodities and the imposition of heavy penalties on vendors charging higher prices.[54] None of these measures succeeded; the fiat money continued to be issued and continued to depreciate in value until finally, just before reoccupation by the American forces, it reached complete worthlessness. The inflationary trend was accelerated by the considerably diminished production of consumer goods and services.

The enormous volume of money in circulation, coupled with a sharp shrinking of the quantity of goods and services available, pushed prices far above the stationary wage levels. The occupant's price control measures failed conspicuously. By 1944, all attempts to check inflation were given up; the occupant continued to issue war notes in ever vaster quantities and larger denominations. The original proclamation in 1942 specified only ten, five, and one peso war notes. Later, twenty, fifty, hundred, five hundred, and thousand peso war notes were issued. No proclamation was ever issued declaring these higher denomination notes as legal tender.[55] However, it should be noted that the original proclamation did not itself specifically declare the small denomination notes as legal tender; there was only the threat of punishment for refusal to accept them. If we consider the quality of being legal tender as a function of the issuing authority's power to compel their acceptance, the lack of an explicit declaration may not be as significant as Professor Hyde seems to think it is.[56]

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[51] Proclamation on the Reopening of Banking Institutions and Financial Organizations, January 23, 1942, *ibid*, at 11.

[52] Executive Order No. 8, February 20, 1942, *ibid*, at 48.

[53] Executive Order No. 48, June 5, 1942, *ibid*, at 331.

[54] Proclamation, February 1, 1942, 1 *Official Journal of the Japanese Military Administration* p. 50.

[55] Hyde, Concerning the Haw Pia Case, (1949) 24 *Phil. L. J.* 141 at 143 n. 3.

[56] *Ibid.*, at 157.

Closely connected with the occupant's currency practices was the control exercised over banking and other financial institutions. The first banks allowed to reopen were Japanese banks which had been operating in Manila prior to the commencement of the war: The Yokohama Specie Bank, The Bank of Taiwan, and the Mutual Credit Association of Japanese in Manila.[57] They were, strange to say, subjected to tight control regulations. Subsequently, four domestic banks were ordered to reopen business: The Philippine National Bank, Banco Hipotecario de Filipinas, Bank of the Philippine Islands, Philippine Bank of Commerce.[58] They were quite naturally subject to the same regulations and restrictions as were the Japanese Banks. They were however required to pay fees and taxes from which the Japanese banks were exempted.[59] Other local banks were allowed to reopen for the sole purpose of collecting loans, advances, receivables and other credits. The cash collected had to be reported to the Military Administration.[60] The domestic banks were not allowed to engage in foreign exchange transactions. This as will be pointed out later, was part of the total monetary and financial scheme followed by the occupant throughout the entire occupied regions of Southeast Asia. The occupation government was financed by means of a "loan agreement" executed between the Yokohama Specie Bank and the Philippine National Bank. The Commander-in-Chief would order the Japanese bank to credit the account of the Philippine bank, and the occupation government drew its funds from the latter bank.[61] The total amount of the loans are not known, though presumably they were heavy since taxes were not efficiently collected.

With respect to intangible property of enemy nationals, i.e. of the Allied Powers, the occupant took certain control measures and regulations which do not appear in themselves to be unduly harsh. Payments to enemy nationals of dividends, surplus, interest, and principal of bonds and debentures by public and private corporations and partnerships were required to be deposited in designated banks in the name of the agent of the paying institution.[62] Where the enemy nationals desired to take advantage of the deposits, they were

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[57] Special Order and Notification, January 23, 1942, 1 *Official Journal of the Japanese Military Administration* p. 41, 45.

[58] Notification, February 3, 1942, *ibid*, p. 46; and 3 *id.*, p. 11.

[59] Instruction No. 39, June 25, 1942, 1 *Official Gazette* (1942) 325.

[60] Executive Order No. 44, May 28, 1942, *ibid*, p. 226.

[61] Order No. 10, March 30, 1942, *ibid*, p. 68.

[62] Military Ordinance No. 1, February 25, 1942, *ibid*, p. 31. The definition of "nationals of hostile countries" included any "partnership, association, corporation, or other commercial organization which has been organized under the laws of the following countries or a substantial part of the capital of which is owned or controlled by hostile nationals or organizations."

required to apply to the Commander-in-Chief for a license authorizing them to do so. Where the enemy national had his own deposit account with any other bank, the payments pertaining to him could be transferred to such bank, no prior permission being required. The custodian banks appointed by the Commander-in-Chief were the Bank of Taiwan, and the Yokohama Specie Bank. In the same way, payment of the proceeds of insurance policies owned by enemy nationals were to be deposited in a bank in the name of the insurance company.[63] Withdrawal of such deposits also required a prior license from the Military Administration authorities. Whether or not the requisite license for withdrawal was ever granted is not known.

Another control measure enforced by the occupant was the compulsory liquidation and winding up of enemy corporations and companies.[64] The same custodian banks were appointed liquidators to assemble their assets and collect the outstanding receivables and other debts owing to them. On October 4, 1943, the Military Administration ordered all banks in the Philippines to transfer to the Bank of Taiwan, as the depository of the Office of Enemy Property Custody, the deposit accounts of individuals, irrespective of nationality, residing in Allied held territory.[65] The Office of Enemy Property Custody had previously undertaken to collect debts owing to such residents of Allied territory,[66] whether such debts had matured prior to or during the occupation. In some cases, the occupant apparently undertook to accelerate the maturity of debts.[67] These measures were extensions to occupied territory of the Japanese national legislation on enemy property located within the boundaries of Japan.[68] In all these cases of "blocking" or "sequestration" of enemy property, it should be borne in mind that the payments made to the custodian or liquidator banks were in the fiat occupation currency or war notes, which, as has been pointed out above, were in a continuous process of depreciation. The legal consequences of this state of facts will be discussed later.

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[63] Approvation, March 9, 1942, 2 *Official Journal of the Japanese Military Administration*, p. 6. This order also authorized the reopening of three domestic life insurance companies; it prohibited the payment of life policies where death of the insured was caused "by direct or indirect hostile action of the deceased to the Japanese forces."

[64] *Haw Pia v. China Banking Corporation*, 45 *Official Gazette, Supp. no.* 9. p. 229; see 6 *Official Journal of the Japanese Military Administration*, p. 38.

[65] *Everett Steamship Corp. v. Bank of the Philippine Islands*, 47 *Official Gazette*, p. 165.

[66] *Hodges v. Lacson*, July 12, 1948, 13, *Lawyers Journal* 603.

[67] Fraleigh, *loc. cit., supra* note 2, at 99.

[68] See DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943) p. 5.

In all the other Southeast Asian countries occupied by the Japanese, the occupant also issued fiat currency. In no case was the yen of Japan properly used. Thus, in Hongkong, military yen were issued; in Singapore and Malaya, military dollars.[69] In Burma, military rupees were utilized. As in the Philippines, the military rupee was at first circulated side by side with the pre-occupation money. A "collateral currency" system was thus erected.[70] The pre-occupation currency theoretically remained legal tender; but as the user of that currency was invariably suspected and treated as a spy, it again as in the Philippines, dropped completely from circulation.[71] In Hongkong, the Japanese Governor General prohibited outright the circulation of the Hongkong dollar, regarding it as a vestige of British sovereignty.[72] In the Netherlands East Indies, the occupant issued military guilders. These guilders circulated together with those issued previous to the occupation by the Bank of Java, the central bank of the Indies.[73] Thus, within each occupied country, a particular occupation currency was used for strictly internal circulation. This "decentralization policy" was one of the monetary policies formally announced by the occupant.[74]

The other monetary policies formally enunciated had reference to foreign exchange and "international trade," that is, trade between and among the countries occupied by the Japanese. For the purposes of trade, the occupied regions were divided into three groups: (a) the yen block area, comprising Formosa, Manchuria, Korea, North China, and Siam. (b) the military yen area, including the Philippines, Central and Southern China, Netherlands East Indies, Hongkong, Malaya, and Burma. It will be noticed that this group consisted of the countries occupied after the outbreak of the Pacific War, where military occupation currencies were issued. (c) a semi-autonomous area consisting of French Indo-China. Trade within each group, except the last, and between the blocs was to be carried on, not in the local fiat currency, but in Bank of Japan yen.[75] A common currency was to be used for external trade throughout the Co-prosperity Sphere. Japan was the central clearing house. For clearing purposes, the local occupation currencies were evaluated in terms of the Bank of Japan yen. Each currency unit was pegged to an

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[69] Fraleigh, *loc. cit., supra* note 2 at 108.

[70] *U Hoke Wan and U Pe Tin v. Maung Ba San,* Rangoon Law Reports (1947) p. 398 at 400.

[71] *Ko Maung Tin v. U Gon Man,* Rangoon Law Reports (1947) p. 149 at 157.

[72] Ward, R. S., ASIA FOR THE ASIATICS? THE TECHNIQUES OF JAPANESE OCCUPATION, (1945) p. 124-127.

[73] BRITANNICA YEARBOOK, 1943, p. 244.

[74] See 6 *Official Journal of the Japanese Military Administration,* p. 111.

[75] See *ibid.* p. 114. WARD, *op. cit., supra* note 72 at 121-123.

arbitrary ratio of one to one,[76] a measure feasible because none of the fiat currencies had any coverage, metal or otherwise. The currency control scheme, on the international level was supplemented by detailed regulations on the exportation and importation of goods within the occupied region. Both exportation and importation was carried on exclusively by the Military Administration. Goods were supplied to the Military Administration by the Purchasing Agencies established by it and by designated private Japanese enterprises. In turn, the Military Administration imported Japanese industrial products and sold them to designated distributors. Control over the suppliers and distributors was exercised through the medium of a "Import and Export Control Association" created by the occupant within each occupied country.[77]

On the national level, the net effect of the occupant's financial practices was the complete economic utilization of the occupied country.[78] That this entailed at the same time the complete collapse of the economic structure of the occupied country did not serve as a deterrent to the occupant. Further, it enabled the occupant to dispense with formal contributions and requisitions. When the occupant needed money, he simply printed more. Thus he paid for the goods and services exacted from the occupied country. Paying with the fiat occupation currency was more convenient than issuing receipts for requisitions; requisitions ceased to appear as requisitions. There was no need to impose occupation costs; indeed, the occupant lent money to the governmental organizations he established.[79] On the international level, the financial systems of the various occupied countries were tied to and rendered dependent upon Japanese financial institutions. Since the flow of goods was from the occupied regions to Japan, Japan would normally have been heavily indebted to the occupied countries. The Military Administration and Purchasing Agencies paid for these importations in the local fiat currency. It is very difficult to determine whether the clearing arrangements were fictitious or prospective; in any case, the yen of the Bank of Japan could not be imported into the occupied countries, nor could the occupation currency be exported.[80]

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[76] See *ibid*, p. 113, and 10 *id.*, p. 11.

[77] See U.S. Board of Economic Warfare, JAPANESE TECHNIQUES OF OCCUPATION, KEY LAWS AND OFFICIAL DOCUMENTS (1943) vol. 1, p. ix.

[78] For a summary of the practices of the German occupant in Europe, see LEMKIN, *op. cit., supra*, note 5 at 51 et. seq.

[79] The situation in German-occupied Europe was very different; see Klopstock, F. H., Monetary Reform in Liberated Europe, (1946) 36 *Am. Eco. Rev.* 578 at 581.

[80] The totality of the patterns of government and financial techniques employed by the Japanese occupant must be located in the context of his war aims. A handy summary of those war aims is found in the concept of the "Greater East Asia Co-

4. Community Intervention

(a) *On the State to State Level.* The methods of community intervention that may be involved in the attempt of the returning sovereign to meet the problems raised by the occupant's techniques may perhaps be usefully classified into those on the state to state and those on the municipal level. On the interstate plane, the problems engendered by the enemy occupation are, as a rule, to be threshed out and solutions provided for in the peace treaty between the victors and the vanquished. Assuming that the occupant was defeated, the damages suffered by the restored sovereign will ordinarily form part of the war indemnity and reparations to be borne by the loser.[81] With special reference to damage inflicted and suffered through the currency practices of the occupant, this mode of settlement was used after the first World War. Belgium demanded more than five billion francs or 420.4 millions reichmarks from Germany as damages arising from the entire depreciation of the mark currency which the Germans had introduced and circulated in Belgium during the occupation. Germany submitted to this claim in a treaty concluded on July 13, 1929.[82] This particular claim, or at least the amount thereof, does not seem to have been completely justified on an international legal basis, and Germany was subjected to strong political pressure.[83] However, the case serves as an illustration, if not as precedent, of a solution of occupation currency problems reached on the international level.

This was the method suggested in 1948 by the Supreme Court of the Philippines by which nationals of the Allied powers could recover whatever losses they might suffer through the returning sovereign's decision to recognize the occupant's currency measures.[84]

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prosperity Sphere in the "New World Order." See WHYTE, F., JAPAN'S PURPOSE IN ASIA, (1944) Royal Institute of International Affairs, p. 30 et seq.; BISSON, T. A., SHADOW OVER ASIA: THE RISE OF MILITANT JAPAN (1941) Foreign Policy Assn., Inc., p. 93 et seq.; Vinacke, H. M., Implications of Japanese Foreign Policy for the Philippines and Southeast Asia (1943) *Annals, Am. Acad. Pol. Soc. Sc.*, Vol. 226 p. 50; Watkins, F. M., Military Occupation Policy of the Axis Powers, in FRIEDRICH AND ASSOCIATES, AMERICAN EXPERIENCES IN MILITARY GOVERNMENT IN WORLD WAR II (1948) p. 86 et seq. For a Japanese view, see Miyaoka, The Foreign Policy of Japan, *International Conciliation* (1935) no. 307 p. 31.

[81] See 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943), 232- 233.

[82] 104 *League of Nations Treaty Series* 202, Agreement Regarding the Marks.

[83] NUSSBAUM, A., MONEY IN THE LAW, NATIONAL AND INTERNATIONAL, (1950) at 591-592.

[84] *Haw Pia v. China Banking Corporation, supra,* note 64: "Now that the outcome of the war has turned against Japan, the enemy (Allied) banks have the right to demand from Japan, through their states or governments, payments or compensation in Philippine pesos or U. S. dollars as the case may be, for the loss or damage inflicted on their property by the emergency war measure taken by the enemy. If Japan

Presumably such nationals were in a position to exert pressure on their respective governments to include in the peace treaty provisions on war indemnity and reparations so as to shift the burden of the loss on the defeated occupant where it should normally rest.[85] Actually, conditions of bipolarization of world power politics and the Western Powers' present need for the Japanese military potential as a bulwark against Communism in the Far East intervened decisively. The Japanese peace treaty as finally signed, contains an article on reparations postponing their payment for a conveniently indefinite period, i.e., until such time as the Japanese economy is able to absorb the burden.[86] The treaty, however, gave each of the Allied Powers the right to seize, retain, and dispose of property and interests of Japan and Japanese nationals, of persons acting for or on behalf of Japan and Japanese nationals, and of entities owned or controlled by Japan or Japanese nationals, where such property and interests were, on the date of the effectivity of the treaty, subject to the respective Allied Power's jurisdiction. Such property and interests included those vested in or under the control of the enemy property custodians of the Allied Powers. Thus a measure of indemnity and compensation was given to the countries which suffered losses arising during the Pacific War. As far as the Asiatic countries occupied by Japan during the war were concerned, such provision could make up for only a fraction of the actual losses inflicted by the occupant by his power and wealth techniques. Hence the insistence of Indonesia, Burma, and the Philippines on more positive provisions on reparations,[87] an insistence that was finally

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had won the war * * * the property or money of said banks sequestrated or impounded by her might be retained by Japan and credited to the respective state of which the owners of said banks were nationals, as a payment on account of the sums payable by them as indemnity under the treaties, and the said owners were to look for compensation * * * to their respective states."

[85] Cf. Stetler, C. J., Congressional Appropriations for War Loss, (1951) 16 *Law and Contemporary Problems* 469: "It is true that there is no definite legal obligation under recognized concepts of international law, which requires a government to secure indemnification for the war losses of its nationals. Further, it cannot be flatly asserted that the settlement of such losses is more compelling than the many social and economic considerations incident to the negotiation of peace treaties and other international agreements. Still the claims to be considered are based on violations of well established principles of international law, and as victims of such violations, claimants have the right to expect their government to press their claims for adequate compensation."

[86] Article 14 (a): "It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless, it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations. * * *" 46 *Am. J. Int. L.* (1952) Off. Docs. Sec. 71 at 77.

[87] See the interesting and unusually naive article of Sparkman, J. J., Notes on

subordinated to pressing power considerations. From their viewpoint, the peace treaty method of meeting post occupation problems proved conspicuously inadequate, and a frustration of expectations.[88] The matter has been overshadowed by the exigencies of bipolar world politics which have resulted in the peculiar situation of the victors having to woo the defeated with a "soft peace treaty," and actually having to rehabilitate the latter.[89]

Another method on the state to state level is exemplified by the Inter Allied Declaration of January 5, 1943 concerning acts of dispossession committed in enemy-occupied territories. The Declaration provided that the parties to it

> "* * * reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under

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the Japanese Peace Treaty, (1952) I *J. Pub. Law* 109 at 110. Also Brown, R. J., A Reply to General Romulo, (1949) 26 *Foreign Notes* No. 15. For the Philippines' viewpoint, see Sinco, V. G., The Japanese Peace Treaty, (1952) 27 *Phil. L. J.* 367. Recto, C. M., For the Senate Resolution Terminating State of War with Japan, (1952) 27 *Phil. L. J.* 374 at 377 mentions that the Philippines had received ₱4,500,000 from the sale of enemy assets in the Philippines from the U.S. Alien Property Administration and ₱20,000,000 in reparations in kind. The estimate of the damage caused in the Philippines during the war reached ₱16,000,000,000. A breakdown of this figure follows:

1. Physical damage	₱ 1,674,822,000
2. Loss of human life: 1,111,938 civilians killed during the occupation and battle of reoccupation	3,335,784,000
3. Commandered goods and services	11,148,624,000
	₱16,159,230,000

The above figures are derived from *Report of the Committee on Reparations*, published in the *Philippines Herald*, July 15, 1951. The figure for loss of human life was probably based on art. 2206, Civil Code, which fixes a minimum of ₱3000 for death caused by a delict or quasi-delict. And see note 171, *infra*.

[88] It is interesting to note that the expectations frustrated included expectations of the United States. Mason, M. S., in Relationship of Vested Assets to War Claims, (1951) 16 *Law and Contemporary Problems* 395 at 399-400, mentions that the statute creating the Philippine War Damage Commission (60 stat. 128, 50 U.S.C.A. §§ 1751-1806) expressly contemplated that reparations would be received from Japan. The statute authorized compensation for certain categories of property damaged caused by the Japanese in the Philippines, the source of compensation being a fund of $400,000,000 appropriated out of the U. S. Treasury. It provided that reparations received from Japan on account of Philippine war losses were to be used first to reimburse the Treasury for this fund.

[89] Schein, E., The Philippine War Damage Commission, (1951) 16 *Law and Contemporary Problems*, 519 at 538: "* * *with the kind of war which is waged in the modern era, the enemy at the time of victory becomes reduced to a position where it is actually the charge of a victorious opponent, and in the name of humanity and sound business, if you please, demands its own rehabilitation at the expense of the rest of the world."

> the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected." [90]

This "expression of solidarity" was, however, intended to be "without derogation to their national sovereignty and having regard to the differences prevailing in the various (occupied) countries." [91] This was an enunciation of a collective policy that returning sovereigns could pursue in meeting problems posed by the occupant's wealth practices. It will be noticed however that the Declaration went no farther than to "reserve the right" to render these practices invalid. Nothing was said about reparation for wrongs which cannot thus be undone.[92] It is doubtful, to say the least, whether the governments parties to it assumed any specific obligation to nullify the acts of the occupant even where the harm could be corrected.[93] The final decision as to validation or nullification or revision seems to have been left to the returning sovereign who will have to consider the varying consequences of any of the alternatives. A rigid, uniform policy of invalidation might have been deemed undesirable in view of varying fact-situations in the different countries which the declarants could not then foresee. In any case the Declaration had to be implemented on the municipal level by the returning sovereign, and probably, on the international level by means of the peace treaty, as was suggested by Woolsey.[94]

Possibly another mode on this level is the direct intervention of a third state, in the form of diplomatic protests and demands for damages against the returning sovereign. The third state's nationals may have suffered losses, or more precisely, denied recovery of losses caused by acts of the occupant, in consequence of the returning sovereign's policy of recognition or repudiation of those acts. The third state could conceivably see the acts of the returning sovereign as an

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[90] *U.S. Dept. of State Bull.*, January 9, 1943, p. 21.

[91] A Note on the Meaning, Scope and Application of the Inter Allied Declaration, *Great Britain Command Papers*, Cmd. 6418, Misc. No. 1, 1943, p. 3. at 4, "Insofar as transfers or dealings are confined in their scope to the territory of a particular country, * * * the decision reached regarding their invalidation will have to be undertaken by the legitimate government of the country concerned in its return * * *."

[92] Woolsey, L. H., Forced Transfers of Property in Enemy Occupied Territories, (1943) 37 *Am. J. Int. L.* 282.

[93] Fraleigh, *loc. cit., supra* note 2 at 97.

[94] *Loc. cit., supra,* note 81 at 282: "The declaration reserves rights which are impliedly retroactive, and which may therefore need to find lodgment in the terms of peace in order to be effective."

international delinquency. It becomes important then to inquire whether international law imposes any obligation on the restored sovereign to recognize or to invalidate any particular act of the former occupant. This will be discussed later. For our present purpose, it suffices to point out that the Inter Allied Declaration of 1943 could plausibly be viewed as an attempt to deal on the nation to nation plane with a matter that would otherwise be considered as within each nation's discretion. The question of how far the returning sovereign is to give effect to the acts of the occupant, during the occupation and after its termination, is to be determined by the municipal law of the state concerned, acting in accordance with its own conceptions of policy. Thus, for example, whether criminal sentences imposed during the occupation by the enemy should be set aside is regarded as a domestic question.[95] Of this there seems to be no doubt so long as only the restored sovereign and its subjects are concerned. Where a national of a third state is involved, it has been suggested that the question becomes an "international one." [96] This probably means only that the third state acquires a right to exercise its function of diplomatic protection of its citizens abroad. For, as will be seen later, whether citizens or foreigners are involved, courts of restored sovereigns have generally used the criterion of international legality in passing upon acts of the former occupant, utilizing rules of international law as incorporated into and made a part of the *lex fori*. From this viewpoint, the question of whether the matter is "municipal" or "international" is largely on the verbal level.

(b) *On the Intra State Level.* For the most part then, world community intervention would assert itself on the municipal plane through the application by the courts of the restored sovereign of relevant doctrines of the law of belligerent occupation. Courts of third states may also find occasion to invoke those same doctrines as has been previously indicated. It behooves us therefore to essay a brief survey of those rules and doctrines, which survey has to be in terms of high level abstractions, before discussing their actual applications by the restored sovereigns' courts.

The law on belligerent occupation, in so far as it has been authoritatively codified, is found in the Regulations on Land Warfare, Section III, annexed to the Hague Convention IV of 1907.[97] The Hague

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[95] 2 OPPENHEIM, INTERNATIONAL LAW, (LAUTERPACHT, 7 ed. 1952) p. 617; FENWICK, INTERNATIONAL LAW, 2 ed., p. 582 n. 4.

[96] LAW OF BELLIGERENT OCCUPATION, U. S. Judge Advocate General's School, Text No. 11 (1944) p. 263.

[97] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, covering both enemy aliens in the territory of a belli-

Regulations, however, suffer from serious limitations on their utility as a measure of the international legality of acts of the belligerent occupant. They were a late codification of a body of law adopted in an atmosphere of nineteenth century liberalism, shaped by the basic socio-political philosophy and "humanitarian ideals" of that era, and drafted for the conditions of a nineteenth century world.[98] The age of liberalism took a restricted view of the permissible or desirable functions of a state and considered war mainly as a trial of strength between opposing professional teams in which civilians were interested though anxious onlookers. The law attempted to confine the players strictly within the agreed lines on the field, and to prevent as far as possible inconvenience to the spectators.[99] Now they have to be applied in a world in which radically different techniques of war and economics and government are prominent, in a context of total war. War has become a war of peoples, no longer an affair of princes.[100] The Regulations have been characterized as archaic,[101] and as very scant in extent and very superficial in character,[102] charges it would be idle to refute. They are phrased in vague generalities which can be rendered almost meaningless by an elastic doctrine of military necessity. Indeed, their legal nature has been denied,[103] apparently in desperation over their wholesale viola-

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gerent and inhabitants of territory under belligerent occupation, is declared to be "supplementary" to the Hague Regulations (art. 154). The inference is that the latter remain the main body of law on belligerent occupation. Neither the Philippines nor the United States has ratified the Civilians Convention.

[98] FEILCHENFELD, *op. cit., supra* note 3 at 17; GRABER, D. A., THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION, 1863-1914, (1949) p. 35.

[99] Smith, H. A., The Government of Occupied Territory, (1944), 21 *Brit. Y. Int. L.* 151 at 151; Jamieson, H. M., Some Aspects of the Law of Belligerent Occupation, (1945), 57 *Juridical Rev.* 6 at 8.

[100] See In Re Flick and Others, Nuremberg, U. S. Military Tribunal, ANNUAL DIGEST 1947, Case no. 122 p. 266 at 271; also Carroll, M. B., Legislation on Treatment of Enemy Property, (1943), 37 *Am. J. Int. L.* 611 at 629. Husserl, G., Global War and the Law of Nations, (1944), 30 *Va. L. Rev.* 543 at 601 went so far as to say that "this war * * * can no longer be conceived as a proceeding under traditional International Law;" but hastened to add (*loc. cit.*, n. 99) that "from this it does not follow that the Axis Powers be freed from the obligation to observe the rules of warfare (The Hague Regulation)." See also 1 Wright, A Study of War (1942) 304-310, and Morganthan Politics among Nations (1950) 287 et seq.

[101] Smith, *loc. cit., supra* note 99.

[102] Colby, *loc. cit., supra* note 15 at 916.

[103] *Ibid.*: "Obviously what governs is not law at all, but merely expedient regulations designed to accomplish military ends that are deemed necessary. In some respects, the Hague Conventions restrict action, but even they can be avoided on a just plea of military necessity, of reprisals or of * * * national policy (sic) * * *. As far as municipal law is concerned, the supreme power is the arbitrary will of the com-

tion by the Axis occupants in the last war. It may be useful to point out that the lag of law behind fact tends to be diminished by the very broadness of the phraseology of the Regulations. Judges are thus enabled to pour new content into them, allowing the Regulations to adjust themselves to the contours of new specific occupation situations. In any case, however inadequate the Regulations appear in the light of modern warfare and the organization of modern society, they were nonetheless deemed the law applicable to World War II.[104] Belligerent occupants have not formally denounced the Regulations nor contended for exemption on the grounds of changed conditions; their actual observance is of course quite another matter.

The law of belligerent occupation is anchored in the concept that occupation differs in its nature and legal consequences from conquest or subjugation.[105] Belligerent occupation is a phase of military operations, an incident and method of warfare, founded on military might *flagrante bello*. The factual assumption is that the war continues to be fought. The authority of the belligerent occupant, resting simply on actual physical possession and control, is in essence provisional and precarious, and remains so until the war has ended in his victory and the occupied territory is finally annexed. It is not sufficient that the invaded sovereign is reduced to the extremest straits. So long as he is on the field, no matter how poor his prospects of ever expelling the invader, the precarious character of the occupation subsists. The occupation by one of the belligerents of the entire territory of another does not necessarily involve subjugation or conquest if the armed contest continues. The occupied state may have allies who carry on the hostilities against the occu-

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mander exercised without reference to any principle and subject to no limitation, or as said by Sir Matthew Hale, something indulged rather than allowed as law."

Cf. Fenwick in (1949) *Proc. Am. Soc. Int. L.* 110: "the laws of war belong to a past age and except for a few minor matters of no consequence, it is futile to attempt to revive them. * * * Let's face the facts. War has got beyond the control of law, other than the elementary law of humanity, if that can be discovered among the ruins of devastated cities."

On the other hand, SCHWARZENBERGER, G., MANUAL OF INTERNATIONAL LAW, 2 ed. (1950) at 84, affirms that "yet in this field too (belligerent occupation), military objects may be pursued only within the bounds of international customary and conventional law." Robinson, J., Transfer of Property in Enemy Occupied Territory, (1945) 39 *Am. J. Int. L.* 216 at 230 suggested "a formal reaffirmation of the Hague Convention by the United Nations to serve as the legal foundations for fixing civil and penal responsibility."

[104] Freeman, A. V., War Crimes by Enemy Nationals Administering Justice in Occupied Territory, (1947) 41 *Am. J. Int. L.* 579 at 606; Wolsey, *loc. cit., supra* note 92 at 284.

[105] GRABER, *op. cit., supra* note 102 at 11.

pying power elsewhere. This conclusion presupposes that no separate peace has been concluded between the occupant and the occupied power.[106]

The belligerent occupant has succeeded in driving out the public forces of the invaded sovereign. From sheer necessity of preventing anarchy, international law recognizes in the occupant a right of government and a power of administration, temporary it is true, but which comes so near to sovereignty as to have been denominated "quasi-sovereignty."[107] Courts and publicists of different nations have quarreled over the exact delimitation of the occupant's authority, but none dispute the rule that belligerent occupation does not effect a transfer of sovereignty over the occupied territory in favor of the occupant.[108] It is impossible because of the fact of occupation for that sovereignty to be publicly manifested and exerted within the occupied state, but it does not disappear on that account. Though paralyzed in fact, at least within the limits of the necessities of war, in law it persists.[109] No annexation or incorporation of occupied territory by the precarious occupant is legally permissible for that will mean assumption of sovereignty over the territory, and "there is not an atom of sovereignty in his authority." [110] However intense may be the desire to retain the occupied territory, with whatever certainty the occupant may count on forcing his vanquished enemy to agree to the cession by a treaty of peace, he has, up to the conclusion of peace or the annihilation of his adversary, no rights save those which flow from his possession.[111] It is quite clear then that Japan was acting *ultra vires* and in violation of rules of international law when she purported to act as sovereign of the occupied territories in granting them independence. Germany likewise was guilty of a similar breach of international law when she established

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[106] LAW OF BELLIGERENT OCCUPATION, *supra*, note 96 at 29.

[107] Baty, T., The Relations of Invaders to Insurgents, (1927) 36 *Yale L. J.* 966 at 973.

[108] 2 OPPENHEIM, *op, cit., supra* note 95 at 433; 3 HYDE, *op cit., supra* note 6 at 1878; SPAIGHT, J. M., WAR RIGHTS ON LAND, (1911) 321; FENWICK, C. G., INTERNATIONAL LAW, 3 ed., (1948) 568; War Department, BASIC FIELD MANUAL, FM 27-10, (1940), par. 273 McNAIR, LEGAL EFFECTS OF WAR, 3 ed., p. 320; Oppenheimer, F. E., Governments and Authorities in Exile, (1942) 36 *Am. J. Int. L.* 568 at 571.

[109] ROBIN, DES OCCUPATIONS MILITARES EN DEHORS DES OCCUPATIONS DE GUERRE, Translated and reproduced by the Carnegie Endowment for International Peace (1942), p. 5. On January 3, 1942, Commander-in-Chief of the Japanese forces in the Philippines issued a proclamation to the effect that "as a result of the Japanese military operations, the sovereignty of the U.S.A. over the Philippines has completely disappeared * * *." 1 *Official Journal of the Japanese Military Administration*, p. 1.

[110] Oppenheim, The Legal Relations Between an Occupying Power and the Inhabitants, (1917), 33 *Law Q. Rev.* 363.

[111] SPRAIGHT, *op. cit., supra* note 108 at 329 quoting Bonfils and Loening.

the puppet states of Slovakia and Croatia,[112] and incorporated portions of other occupied countries. The Supreme Court of the Philippines in the *Co Kim Cham* case, made no mention of the international illegality committed in the establishment of the Republic of the Philippine, treating the Republic as *in pari materia* with the Executive Commission when no legal objection can be raised to the establishment of the latter.[113]

This form of usurpation of sovereignty seems to be a violation of international law against which it has been especially difficult to find a sanction. If the occupant who has been guilty of such a misfeasance wins the war, the other belligerents will not be in a position to raise any objection. Nor will his allies be likely to object. On the other hand, if the occupant losses, the annexation or incorporation will be reversed by the peace treaty or the usurpation simply disregarded. More pressing questions will push aside any consideration of penalties for action now purely academic. The main objections to the practice of annexing occupied territories in the course of a war seem to be that it usually involved treating the occupied area as loot and the enlistment of the active population in the occupants military forces.[114] Actually the Axis Powers treated the occupied countries as loot whether they were "puppet" or "independent" or incorporated or otherwise, with fine impartiality. In Southeast Asia at least, there is no recorded instance of the Japanese occupant resorting to compulsory enlistment of the inhabitants. From this viewpoint, the matter seems to be a case of *damnum absque injuria*. It has been pointed out how the grants of independence were an integral part of the total war perspectives of the Japanese occupant, how busily he labored to lend them an air of reality. It would perhaps be unrealistic to require him to refrain from a formalism when, in actual practice, he has treated and stripped the occupied country as if it were his private property.

The test of international legality has been mentioned. The question of the legality or illegality of the acts of the occupant will depend on the courts' conception of the scope of the occupant's authority, which in turn varies in accordance with the status which he is

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[112] See Sereni, A. P., The Status of Croatia Under International Law, (1941) 35 *Am. Pol. Sci. Rev.* 1144 at 1146.

[113] The High Court of Judicature of Burma, on the other hand, held that "the so-called Independent Government of Burma (Dr. Ba Maw's regime) had of course no legal status whatever and the statutes passed by that government are of no legal effect." *The King v. Maung Hmin and three*, Rangoon Law Reports (1946) 1 at 15. No similar statement was made with reference to the civil administration that had preceded the Ba Maw government.

[114] Gledhill, *loc. cit.*, *supra* note 10 at 199; Baty, *loc. cit.*, *supra* note 107 at 984.

deemed possessed of. The significance of status then lies in the powers conceived as flowing therefrom and the effects arising from the exercise of those powers. To the returning sovereign that is important. After having been forcibly expelled, the sovereign returns, to find that in his absence his powers have been exercised and a mass of acts executed. How should he treat those acts? How far must or should he give effect to the acts of the very power responsible for his expulsion? Different countries with different views on the status and powers if the belligerent occupant, have given different answers. It is not suggested that the actual treatment meted out by the restored sovereign can be explained solely in terms of *a priori* legal concepts. It is quite possible that theory is a *post hoc* rationalization of policy.

In the main, there appears to be three relatively distinct views on the matter. The Anglo-American view is that through military occupation, the authority over the territory and its inhabitants only *de facto* and not by right, only temporarily and not permanently, passes into the hands of the occupant. Since the occupant is *de facto* in authority, he has a right of administration over the territory. The asserted consequence is that all acts which he carries out in accordance with international law and the existing local law must be recognized by the legitimate government after its restoration.[115]

In the view of a school of German writers, the belligerent occupant's power, *strictu sensu*, is a legal and not merely a factual power. Section III of the Hague Relations could not possibly lay down limitations on such power without thereby simultaneously recognizing its legal character." "The authority of the legitimate power," contemplated in article 43, is put entirely out of operation by the occupation; the factual elimination of the legitimate government of the occupied territory removes it legally too. While the expelled power retains the sovereignty, the occupant exercises in the occupied area all the rights emanating from sovereignty.[116] From this it follows that acts of the expelled power, despite its retention of sovereignty, are of no legal consequence for the occupied region; in particular, such acts have no binding force on the subjects living therein.[117]

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[115] OPPENHEIM, *loc. cit., supra* note 110 at 363-364; see also *supra* note 108, and Mcnair, *loc. cit., supra* note 1 at 35.

[116] Stein, E., Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre, (1948) 46 *Mich. L. Rev.* 341 at 355 n. 37-38, citing Meurer, Huber, Heyland, Stauffenberg and Anholt.

[117] VON KOHLER, L.,THE ADMINISTRATION OF THE OCCUPIED TERRITORIES, Vol. 1-Belgium (1927); translated by Dittmar, W. R., from DIE STAATSVERWALTUNG DER BESETZTEN GEBIETE, (1942) p. 4-5.

The German view is in direct conflict with the doctrines enunciated by Belgian courts. The weight of Belgian jurisprudence holds that the only basis for the powers of the occupant is a temporary factual situation.[118] The Hague Regulations, by establishing rules circumscribing those powers, do not bestow any legal status whatever upon the occupant.[119] The whole relationship is only a precarious fact. Article 43 does not suspend the legal authority of the absent sovereign nor its exercise. Sovereignty is absolute and indivisible; a "mixed" regime under which the occupant would at least have some legal powers is inconceivable. The orders of the occupying powers are not "laws," are no more than "commands of the military authority of the occupant." They are not "incorporated in the legislation or institution of the country."[120] Hence the legal power of the absent sovereign to enact laws and regulations for the inhabitants of the occupied country remains unimpaired. This Belgian doctrine appears to have been followed by some Dutch,[121] Polish,[122] and Latvian [123] courts. At least one English writer, McNair, seems to have accepted it.[124] In practical effect, the Belgian courts have recognized in the restored sovereign full discretion in the recognition, revision, or recission of acts of the former occupant.

The Anglo-American, German, and Belgian doctrines were in all probability influenced by the historical experience of the respective countries.[125] Belgium, who twice in the present century has had to suffer belligerent occupation, manifests a tendency to reduce to a minimum the occupant's powers while construing broadly that of the absent and returning sovereign. Germany has insisted on a legal status for the occupant and a wide interpretation of his powers. She has several times engaged in the "catastrophic game" of invasion and occupation. The United States and the United Kingdom have generally followed a middle path. They have never exper-

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[118] *Re C.*, Belgium, Court of Appeals of Brussels, July 9, 1942, ANNUAL DIGEST 1943-1945, Case no. 159; decision of Court of Cassation, May 1, 1916, INTERNATIONAL LAW NOTES, Sept.-Dec. 1917, p. 170.

[119] *Mathot v. Longue*, Belgium, Court of Appeals of Liege, February 19, 1921, ANNUAL DIGEST 1919-1922, Case no. 329.

[120] *Cambier v. Lebrun*, Belgium, Court of Cassation, December 4, 1919, ANNUAL DIGEST 1919-1922, Case no. 325.

[121] *In Re Van Huis*, Holland, Special Criminal Court, The Hague, November 15, 1946, ANNUAL DIGEST, 1946, Case no. 143.

[122] *Stansiuk v. Klewek*, Poland, Supreme Court, May 11, 1927, ANNUAL DIGEST 1927-1928, Case no. 380.

[123] *Kulturas Balss Cooperative Society v. Latvian Ministry*, Latvia, The Senate, ANNUAL DIGEST 1919-1922, Case no. 321.

[124] *Loc. cit., supra* note 1 at 72-73.

[125] FEILCHENFELD, *op. cit., supra* note 3 at 15; Stein, *loc. cit., supra* note 116 at 360.

ienced an enemy occupation of their own territory and had themselves acted as occupants; on the other hand, they have been allied to past victims of enemy occupation. In the Philippines, it might perhaps have been expected, if there is any logic in sharp experience, that she would tend to follow the Belgian courts. On the whole however, the Supreme Court of the Philippines has followed rigorously the views of Anglo-American textwriters, no doubt influenced by half a century of American sovereignty. In much the same way, the High Court of Judicature of Burma has relied on the same publicists.

The principal immediate object of occupation is military, that is, to provide for the security of the occupant's army and to contribute to the success of his belligerent operations. On the other hand, the occupant's principal duty, under article 43 of the Hague Regulations is to "take all measures in his power to restore and ensure, as far as possible, public order and safety." Those are the two considerations which are the legal bases upon which the occupant's authority rests.[126] In concrete terms, the occupant has to establish some form of government for the occupied territory. Necessarily, some right or power of legislation must be recognized in the occupant. The more difficult question is the extent of such legislative power. It is clear that such legislative power extends to what is necessary "to restore and ensure public order and safety." The word "safety" used in the English translation of the Hague Regulations does not adequately convey the meaning of the original "vie publique" which would comprehend the entire social and economic life of the country.[127] For, as Kohler put it,

> "the life of the occupied country is not to cease or stand still, but is to find continued fulfillment even under the changed conditions resulting from occupation."[128]

The range of the occupant's authority is therefore broad and comprehensive and not limited to the mere suppression of physical violence and anarchy. It is consequently impossible to exclude formally any of the subjects of legislative or administrative action from the sphere of control which is exercised in virtue of his authority. Where the occupation is prolonged, and where owing to the war, the economic

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[126] In the words of SPAIGHT, *op. cit., supra* note 108 at 322: "The occupant's rights are double-based, resting on the necessity for providing some established government in a country which is shut off from its ordinary fountain of justice and spring of administration, and secondly, on the military interests of the occupant himself."

[127] Schwenk, E. H., Legislative Power of the Military Occupant Under Article 43 of the Hague Regulations, (1945) 54 *Yale L. J.* 393 at 393; 2 WESTLAKE, INTERNATIONAL LAW, (2nd ed., 1913) p. 95.

[128] *Op. cit., supra* note 117 at 6.

and social conditions of the occupied area undergo profound changes, it is quite evident that new legislative measures are essential sooner or later.

That authority however finds a limitation in the requirement that he must respect, unless absolutely prevented, the laws in force in the occupied area; he must refrain from fundamental alterations. The phrase "unless absolutely prevented" seems to refer both to military necessity and restoration of the "vie publique." It is obvious that the line which article 43 draws between the permissible and the proscribed is extremely vague and unsatisfactory, and will shift depending on the decision maker's concept of military necessity and "vie publique." Freeman writes that "genuine military necessity," not "mere expediency" is required.[129] Colby takes a much more candid view. Thus he wrote that "in war, things are necessary or not, purely from military standards; anything that aids the military is necessary."[130] We have indicated the practically unlimited character of the war objects of the Japanese occupant. He carried with him a new concept of "vie publique," of the social and economic life of a country within the Southeast Asian region, which concept he tried hard to realize during his brief administration. Naturally, the Japanese occupant's idea of military necessity and of occupation techniques had to expand correlatively with his fundamental perspectives. What becomes then of the test of international legality in terms of military necessity? Should there be a carefully considered revival of the ancient doctrine of *raison de guerre?* Could military occupation still be conceived as a temporary phenomenon with limited objectives when total war as waged by the Axis occupants has had unbounded aims, nothing less than the complete political and economic subjugation of the occupied regions, and the reorganization of social and legal relations?[131] On the other hand, will not justification of particular occupation measures solely because they serve "ends of war" or on the basis of "kriegrason," logically conduce to the abrogation of all legal restraints upon the occupant's activity?[132]

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[129] *Loc. cit., supra* note 104 at 581.

[130] *Loc. cit., supra* note 15 at 26 *Col. L. Rev.* 146, 169: "Amidst such a turmoil of nationalistic, chauvinistic, or jingoistic thought and speech, the military commander can depend upon but one thing: military necessity.—This is the final rule of belligerent occupation. It is the theory underlying each word of the Hague Convention concerning occupied territory (*sic*) * * * It is the theory by which the commander's work will be judged by his own superiors in the Army; and eventually, when the fumes of bitterness have cleared away, by the 'general opinion of the civilized world.' Yet to be just, that opinion must consider the nature of modern war."

[131] See Watkins, *loc. cit., supra* note 80 at 86-87.

[132] See the valiant efforts of Downey Jr. to reconcile the law of war and military necessity, in (1953) 47 *Am. J. Int. L.* 251. His conclusion was that (at 262): "mili-

What guide can courts of restored sovereigns follow in passing upon the occupant's acts in view of the self-negating nature of the test of international legality?

It is necessary to notice two more points before dealing with the practices of restored sovereigns. The issuance of currency by the occupant for circulation within the occupied area is generally regarded as within his competence; the power seems to be based on military necessity and on the occupant's general power to maintain law and order.[133] "Vie publique" obviously includes the economic and financial relations of the inhabitants. It means the restoration or establishment of a currency system that functions in the orderly way necessary for a normal economic life in the occupied region. Only in Burma was the power denied, the military rupee being considered as never having been "lawful currency." [134] The ground for this decision does not appear. The Burmese High Court however recognized that they had a certain purchasing value during the occupation, and that they could be, and were, used as a medium of exchange. The Japanese occupation notes were treated as documents with a value in exchange for goods, but a loan of them was not a loan of money, and consequently, a note containing a promise to pay a certain sum in fiat notes was not a valid promissory note at all. This decision is distinctly unrealistic. The military rupees were legal tender in any significant sense, for they were accepted by the inhabitants in the creation and payment of debts, such acceptance being compelled by the occupant in *de facto* authority. Withholding

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tary necessity cannot justify an act by a military commander which disregards a positive rule of law or which goes beyond the express limitations of a qualified rule of law." This followed from his definition of military necessity as (at 254): "an urgent need, admitting of no delay, for the taking by a commander of measures, which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of *regulated violence, and which are not forbidden by the laws and customs of war.*" (Italics supplied).

[133] FEILCHENFELD, *op. cit., supra* note 3 at 70. See the well documented *Opinion on the Legality of the Issuance of AMG Currency in Sicily*, published in Occupation currency Transactions, Hearings before the Committees on Appropriations, Armed Service, and Banking and Currency, U. S. Senate, 80th Congress, 1st Session (1947), p. 73 *et seq.* Also Wilson, A., The Laws of War in Occupied Territory, (1932) 18 *Grotius Society* 17 at 22.

[134] *Ko Maung Tin v. U Gon Man*, Rangoon Law Reports (1947), p. 149 at 150; Mr. Justice E. Maung in *Maung Sein Kho v. Maung Hla Din* (quoted in *Chan Taik v. Ariff Moosaje Doophy* Burma Law Reports [1948] 454) said: "The Japanese Military Forces which occupied Burma and the administration set up by them in the name of the Burmese Independent State never had, under International Law, any authority to set up a currency system of their own. The legislation * * * equating the Japanese military notes to the legal currency of the country is not within the competence of the occupying power. In law therefore, the Japanese military notes * * * could not be considered as legal currency."

the label of "lawful currency" becomes meaningless on the one hand, and on the other, may work undue harshness on the inhabitants. Assuming that the issuance of the fiat currency was unlawful under international law so as to render the occupant liable for its redemption and for indemnity, yet in the realm of private domestic law, such illegality should be deemed irrelevant.

The occupant may pursue any of three courses.[135] First, he may leave the old currency of the occupied area in circulation. Where the coverage of such currency has become inadequate, he may create new types and supplies of coverage. Second, he may use his own currency in the occupied region. This may be found inconvenient if the coverage of his national currency will not stand additional strain on it through new issues. Third, where both the original currency and the occupant's own currency have become inadequate, new types of currency may be created. The last was adopted by the Japanese occupant throughout Southeast Asia, as has been mentioned. In the Philippines, this choice of method is partly explained by the fact that the metal coverage of the Philippine peso had been removed to the United States or dumped into the sea to prevent capture by the occupant. All three methods may be used simultaneously. The actual decision as to which mode or modes are to be employed is not so much determined "by any principle of the law of money, but by the terms and spirit of the Hague Regulations."[136] The Hague Regulations prohibit "fundamental alterations" in the institutions of the occupied country save where a just plea of military necessity is made out. Under this rule, the occupant who introduces a new or his own currency may do so only to the extent required to satisfy military needs or to supplement the old currency where it is inadequate for the reasonable needs of the territory. In other words, the second and the third methods should be followed only when and insofar as the first is not feasible.

The last point in this brief survey is that since the occupant's authority rests on the fact of occupation and the laws of war, and not through the expelled sovereign, constitutional and statutory limiations on the power of the sovereign do not affect the occupant. In the pursuance of his belligerent aims and in the administration of the occupied territory, the occupant is independent of the constitution and laws of the occupied country,[137] at least those which are incompatible with the factual situation created by the occupation. Included

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[135] FEILCHENFELD, *op. cit., supra* note 3 at 71, 76, 80.

[136] Mann, F. A., Money in Public International Law, (1949) 26 *Brit. Y. Int. L.* 259 at 272.

[137] OPPENHEIM, *op. cit., supra* note 95 at 437; also LAW OF BELLIGERENT OCCUPATION, *supra*, note 96 at 57.

in this category are laws of a political character and those providing for political privileges, which are deemed altered or suspended. Thus, it would be absurd to expect the legislative power of the occupant to be exercised in accordance with the constitutional procedure required of the absent sovereign.[138] The constitution itself, being political in nature, must be deemed suspended. This was the rule announced by the Supreme Court of the Philippines in *Cabauatan v. Uy Hoo*,[139] a proposition legally correct if properly limited but whose doctrinaire application and uninspired repetition led to an unsatisfactory result. The constitutional provision there involved prohibited the sale or transfer of private agricultural land to aliens. The plaintiff sold a piece of agricultural land to the defendant Chinese during the occupation, and after the return of the sovereign, sued for its recovery alleging the transaction to be repugnant to the Constitution. The court denied recovery because the Constitution, being of a political character, was inoperative during the occupation. The court failed to distinguish three entirely different relationships. As between the occupant and the inhabitants of the occupied area, clearly the Constitution of the sovereign could not be invoked to limit the occupant's power. As between the absent sovereign and the inhabitants of the occupied territory, the Constitution is deemed as subsisting and in force, just as inhabitant's allegiance to the absent sovereign subsists. And as between the inhabitants themselves, there is no reason why the Constitution should be deemed suspended. The case before the court fell in the third category. Because the court failed to notice the three levels of relationships, the rule that is properly confined to the first level, was made to cover all three.

5. *Trend of Decisions*

(a) *On Enemy Legislation and Judgments in General.* At this stage, we are in a position to study the actual treatment meted out by the returning sovereigns to acts of the occupants and the occupation governments set up by them. A cursory survey of the various countries occupied in the last war discloses an interesting fact. Practically all the restored sovereigns embodied their policies on this matter in comprehensive statutes. It is only in the Philippines where no comprehensive statute came into force dealing with the effect to be given to governmental and financial acts of the occupant. On January 18, 1945, the Congress of the Philippines did enact a statute, Commonwealth Act No. 727, providing for validation of payments

[138] *Suller v. Perez*, G. R. No. L-4630, prom. October 30, 1952, held that election laws are political in character and hence suspended during the occupation.

[139] G. R. No. L-2207, prom. January 23, 1951; see note in (1951) 26 *Phil. L. J.* 129.

effected during the occupation, the revaluation of unpaid debts in accordance with the real value of the fiat currency at the time the debt was incurred, the validation of preoccupation bank balances and the non-collectibility of deposits made during the occupation. The statute was disapproved by the President of the United States upon the recommendation of the American High Commissioner to the Philippines.[140] It was not reenacted after July 4, 1946 when the present Republic of the Philippines was established. The matter therefore was left to piece-meal solutions by the courts. The Supreme Court had had to make over broad statements and rules not warranted by the narrow facts before it, in the effort to establish a general guide for the disposition of other cases. Policy premises of legal conclusions were obscured and suppressed, confined in the minds of the justices, instead of being subjected to the public debate and scrutiny that would have accompanied a legislative enactment. Syntactic consistency, which, while not the supreme value, is still highly desirable, was accordingly more difficult of achievement.

On October 23, 1944, a few days after the landing at Leyte, General MacArthur issued a proclamation, which *inter alia* provided:

> 2. That the laws now existing on the statute books of the Philippines and the regulations promulgated pursuant thereto are in full force and effect and legally binding upon the people or areas of the Philippines free of enemy occupation and control; and
>
> 3. That all laws, regulations, and processes of any other government in the Philippines than that of the said Commonwealth are null and void and without legal effect in areas of the Philippines free of enemy occupation and control.[141]

The proclamation was not wholly free from ambiguity. Its precise meaning was passed upon by the Supreme Court in the *Co Kim Cham* case. There, the Court relying heavily on Anglo-American textwriters, made the broad assertion that it was a "well known principle in international law" that

> "the fact that a territory which has been occupied by an enemy comes again into the power of its legitimate government or sovereignty does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another, it is within his competence to do. Thus

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[140] In vetoing the bill, President Truman said, "I do not know what motives actuated the Philippine Congress in taking this step, but I cannot properly discharge my responsibilities to the people of the Philippines (*sic*) without disapproving this act." 163 *Com. and Financial Chronicle* 1092 (February 28, 1946). Hyde (*loc. cit., supra* note 55) was more candid when he pointed out that the Haw Pia decision, which produced the very result designed by the vetoed bill, was injurious to "American interests in the Philippines."

[141] 41 *Official Gazette* (1945) 784.

> judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good." [142]

The case involved a petition for mandamus to compel the respondent judge to continue the proceedings in a civil case which had been initiated in the court existing during the regime of the Republic established by the Japanese occupant. The judge had refused to take cognizance of the case on the ground that the MacArthur proclamation had invalidated and nullified all judicial proceedings and judgments of the occupation courts and that the post liberation courts had no jurisdiction to continue such proceedings in the absence of enabling law granting such authority. The question then before the Court was narrow, that is, whether the Commonwealth courts reconstituted after the return of the sovereign had jurisdiction to continue proceedings which had been pending before the court existing during the occupation. The issue referred only to judicial processes. Nonetheless, the rule announced was made to cover all non-political acts, legislative, executive or administrative, of the occupant. MacArthur's invalidating proclamation was construed to affect those acts only from the moment of reoccupation, and not *ab initio*. The laws and executive orders and regulations themselves, of whatever character, ceased to have effect from the time effective control by the occupant was terminated in the sense that they could no longer be invoked in the assertion of any right or privilege.[143] But transactions executed during the occupation under and pursuant to such

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[142] 75 Phil. at 131, quoting HALL, INTERNATIONAL LAW, 7 ed., p. 518.

[143] There is a suggestion by Lauterpacht in ANNUAL DIGEST, 1943-1945, note to Case No. 151 at 440 that not all laws enacted by occupation governments automatically cease to have force and effect upon re-occupation: "It is perhaps necessary to distinguish between acts which are of a kind contemplated by article 43 of the Hague Regulations and acts which go beyond that category. The former (insofar as they tend to benefit the population and not merely to forward the military objects of the occupant) will, it is submitted, be applied by national courts even after the liberation of the territory. The state restored to its full sovereignty, will naturally be free to proceed to the modification or repeal of such laws. But meanwhile, the courts are bound to apply them." None of the liberated countries in World War II appear to have followed this suggestion. On the contrary, special legislative acts were deemed necessary to continue in effect such acts of the occupation governments as were beneficial to the inhabitants. In France, for example, the sovereign by ordinance of Oct. 9, 1945 expressly recognized as having continuing effect a Vichy law of September 22, 1942 regarding marriage and the rights and duties of spouses. (See Delaume, *loc. cit., infra* note 161 at 33) Likewise, in Greece Constitutional Act No. 58 of 1945 of the restored sovereign empowered the Greek Cabinet to declare laws of the occupation period to have been promulgated in the interests of the Greek State, in which case, such laws were to be enforceable after liberation. (Zepos, *loc. cit., supra* note 5 at 31).

laws and regulations were not to be overturned after the return of the sovereign.

For example, during the occupation, the Chairman of the Executive Commission by executive order promulgated a "New Divorce Law" adding new grounds to the two specified in Act No. 2710, the preoccupation statute on divorce. In *Baptista v. Hernandez,*[144] the plaintiff attempted to continue divorce proceedings commenced during the occupation relying on the "New Divorce Law." The case was thrown out of court, since said law ceased to have any force and effect, although it was clearly not of a political nature. But divorces that had become final before the return of the sovereign remained undisturbed. It will be noticed that it is very doubtful whether enactment of the "New Divorce Law" was within the competence of the occupation government in the first place. Divorce could hardly be related to military necessity however wide that concept may be expanded. True it related to the "vie publique," but there was nothing to prevent the occupation government from respecting the old law in force. Moreover, the Chairman and members of the Commission, being Filipinos, were well aware that all attempts previous to the occupation, to "liberalize" Act No. 2710 had been killed by the opposition of the Catholics who formed the overwhelming majority of the population. Hence if the returning sovereign had chosen to disregard the "New Divorce Law" completely, together with all its divorces obtained under it, he would have had some grounds to support him.

Where the transaction or act of the occupation government was of a continuing nature, it cannot be continued after reoccupation. Only completed acts fall within the rule above mentioned. In *Banaag v. Encarnacion,*[145] a lease of fisheries was executed by the Director of Forestry and Fishery in favor of the plaintiff in 1943 for a period of five years. After the return of the sovereign, the lessee claimed that the contract should be declared valid for the entire period of five years, i.e. 1943-1948. The Supreme Court rejected this claim, holding that the term "real estate" in article 55 of the Hague Regulations included fisheries. Accordingly, the Japanese occupant in whose representation the Executive Commission and its agencies executed the lease, had ceased after reoccupation to be administrator and usufructuary of the fisheries involved. The lease was therefore regarded as terminated as of the date of the liberation of the province where the fisheries were located.

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[144] 42 *Official Gazette,* (1946) 3186.

[145] G. R. No. L-493, April 19, 1949, 14 *Lawyers Journal,* 436.

Going back to the *Co Kim Cham* ruling, it will be seen that two important propositions were set forth. First, that for completed acts (as distinguished from laws) of the occupant and his occupation governments to be immune from reversal and disturbance by the restored sovereign, the laws under which they were executed must have been non-political in character. Secondly, such acts must have been within the competence of the occupant, under international law, to undertake. With respect to the first, the Supreme Court's definition or description of a "political" law or regulation had specific reference to penal enactments. Thus, in *Alcantara v. Director of Prisons*,[146] it said:

> "A punitive or penal (law) is said to be of a political complexion when it penalizes either a new act not defined in the municipal laws, or acts already penalized by the latter as a crime against the legitimate government, but taken out of the territorial law and penalized as new offenses committed against the belligerent occupant, incident to a state of war and necessary for the control of the occupied territory and the protection of the army of the occupier. * * *"

Penal occupation laws of a "political" character were thus limited to those defining acts of "war treason." Hence, illegal discharge of firearms, directed against a Filipino, was held as not of a "political complexion." And neither was adultery.[147]

As to the test of competence under international law, with particular reference to the occupant's power to reorganize the judicial system of the occupied country and to establish new tribunals, the Philippine Supreme Court has taken wide view of the powers of the occupant. The abolition of the Court of Appeals with nation-wide jurisdiction existing prior to the occupation and the creation of five Courts of Appeals with regional territorial jurisdiction by the occupation Republic, and the reduction of the number of judicial districts of the Courts of First Instance have been previously mentioned. These changes were impliedly held within the power of the occupant to make when the Court in the *Co Kim Cham* case held that the occupation Courts of Appeals were the same as the pre-occupation Court of Appeals and the Court of Appeals reconstituted by the restored sovereign, the changes not having affected the nature and identity of the latter.[148] This holding, which apparently flies in the face of

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[146] (1945) 75 Phil. 494 at 497. But see *Ministere Public v. Lisein*, Belgium, ANNUAL DIGEST, 1946, Case No. 149.

[147] *Herrero and Crisostomo v. Diaz* (1945), 75 Phil. 489.

[148] See *Sameth v. Director of Prisons* (1946), 76 Phil. 613 at 616 where a sentence for estafa promulgated by the occupation Court of First Instance for Manila was held "legal and valid, having been rendered and pronounced by a competent court

facts, was rendered logically necessary by the Supreme Court's insistence on the "continuity of the law."

In *Peralta v. Director of Prisons*,[149] the power of the occupant to establish new criminal courts with a special summary procedure and with jurisdiction over crimes newly defined by the occupant was recognized. The occupation Republic had set up a "Court of Special and Exclusive Criminal Jurisdiction," principally to try violations of the regulations against the profiteering in and hoarding of essential commodities, which offenses had been given very heavy penalties. The summary procedure was objectionable chiefly because the refusal of the accused to answer the court's interrogations could be considered unfavorable to him, and because if from the facts established at a preliminary investigation the guilt of the accused appeared, he could be convicted at once without any further trial. It should be remembered that preliminary investigations were conducted by the Japanese Military Police accustomed to employ violent torture for extracting confessions of guilt. The Supreme Court relied on its "acts-of-a-political-complexion" doctrine, holding that the mere creation of the court was not a political act, although particular decisions thereof might bear such a political complexion. The law under which Peralta had been convicted was a new penal act of the occupation Republic, hence political under the *Alcantara* ruling. Peralta's sentence, though initially valid, was held unenforceable after reoccupation. On the other hand, in *Indac v. Director of Prisons*,[150] a sentence for theft under Revised Penal Code of the Commonwealth was held enforceable even after reoccupation. In both the *Peralta* and the *Indac* cases, the offenses had been directed against the occupant. The diverse results reached are difficult to explain.[151]

On this matter, the attitude of the returning British sovereign in Singapore furnishes a useful contrast to that adopted by the Philippine Supreme Court. On November 8, 1945, the British Military Administration of Malaya (Singapore division) issued a proclama-

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duly organized under the *de facto* government established in this country, under the Japanese army of occupation."

[149] (1945) 75 Phil. 285; This rule was reiterated in *People v. Benedicto Jose*, (1945) 75 Phil. 612.

[150] 44 *Official Gazette* 56 (1946).

[151] In *Asican v. Quirino*, 75 Phil. 791 at 794, a dictum appears to the effect that the *Co Kim Cham* ruling that judicial proceedings during the enemy occupation are valid "does not necessarily exclude an exception on judicial proceedings held actually under duress or intimidation." This case, however, was a civil one, where the plaintiff sued to recover a piece of land which he had transferred to the defendant during the occupation by means of a judicial compromise. The plaintiff claimed the judicial compromise had been effected through the defendant's threats to have him jailed, the defendant having been a "Japanese protegee." The court did not pass on this assertion.

tion "to provide for setting aside convictions by tribunals exercising jurisdiction during the Japanese occupation of the Settlement of Singapore." The proclamation was in addition to the Order issued on November 3, 1945, under the Military Courts' Proclamation which quashed the convictions and sentences of persons convicted by military tribunals during the occupation of Singapore. The joint effect of the Order and the Proclamation was to set aside all convictions rendered by the criminal courts during Singapore's occupation by the Japanese. This total rescinding action was explained in terms of the changes introduced by the occupant in the criminal procedure of Singapore, which, as in the Philippines, included the violent interrogatory methods of the occupant's Military Police. Since it was too inconvenient to go over the convictions one by one to determine who had been given a fair trial, the restored sovereign gave the convicted the benefit of the doubt and set aside all convictions.[152]

The High Court of Judicature of Burma has been as liberal as the Supreme Court of the Philippines in construing the powers of the occupant respecting the judicial organization of the occupied country. The Japanese Commander in Burma had established a new court, the City Court of Rangoon, and vested in it jurisdiction that used to be exercised prior to the war by two courts, the Rangoon Small Causes Court and the High Court on the Original Side. The decisions of the Rangoon City Court in both criminal and civil cases were recognized as valid and binding, and enforceable after reoccupation by the court which would have been seized of the case but for the creation of said new court. Further, if a case was pending before the new court at the time of the return of the sovereign, it was automatically transferred to the proper court.[153] The occupant was held not to have exceeded his powers under the Hague Regulations in establishing the new court.[154] In the same way, the Supreme Court established by the occupant in the place of the original High Court of Judicature was held to have been duly constituted, and its decisions valid and binding after reoccupation. The High Court of Judicature reestablished after reoccupation went so far as to say that it was the successor of the occupation Supreme Court.[155]

In Indonesia, a similar broad view of the powers of the occupant was taken by the Court of Appeals in Batavia. The occupant had introduced "very substantial" changes in the judicial organization of

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[152] See Powers and Duties of Enemy Occupant, note in (1946) 12 *Malayan Law Journal* 1.

[153] *Abdul Aziz v. Sooratea Bara Bazaar Co. Ltd.* (1947), Rangoon Law Reports, p. 18.

[154] *Maung Hla Maung v. Ko Maung Maung,* (1947) Rangoon Law Reports, p. 1.

[155] *U San Wa v. U Ba Thin,* (1947) Rangoon Law Reports, p. 78 at 80.

the country. Among the alterations made was the fusion of the *Raad von Justitie* which had jurisdiction over Europeans, Chinese, and other "foreign Easterners," and the *Land raad* which had jurisdiction over native Indonesians, into the *Tihoo Hooin* empowered to deal with persons of all nationalities, except Japanese subjects. The judicial acts of the Japanese occupant were generally held valid, provided they were not of "a pronounced political character," notwithstanding the alterations which were considered as relating only to "matters of judicial procedure." [156]

In both Burma and the Philippines then, the judgments rendered by the courts during the occupation were in general recognized as valid and binding and were left undisturbed after the return of the sovereign, the rule being qualified, in the Philippines, where the judgment was "of a political complexion." A different treatment to enemy judgments was accorded by the restored sovereign in Singapore. We have mentioned the setting aside of all criminal convictions. With respect to civil cases, a Japanese Judgments and Civil Proceedings Ordinance was enacted in 1946 giving the right to any person aggrieved by a Japanese decree to apply to the courts, under certain conditions, for an order setting aside such decree, or that he be given the right to appeal from such decree which had long become final. The grounds for the setting aside of an occupation judgment were:

> (a) that it was obtained as a result of such force, injury or detriment to any party to the proceedings or other person, or such threat thereof, as in the opinion of the appropriate court was sufficient to render the action of the party in relation to the proceedings involuntary;
>
> (b) that any necessary party did not appear personally but was represented by any person appointed by any Japanese authority;
>
> (c) that it was based on principles unknown to the existing laws.
>
> (d) on any other ground which the appropriate court considers to be sufficient.[157]

Far from adopting the enemy judgments en masse, the Singapore courts were thus given wide discretion in recognizing or upsetting such judgments. In practice, the discretion seems to have been sparingly exercised being utilized only in circumstances of unusual injustice or oppressiion entering into individual cases or transactions. In other words, where individuals have suffered from circumstances

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[156] *Mr. P. v. Mrs. S.*, Netherlands East Indies, Court of Appeals, Batavia, ANNUAL DIGEST 1947, Case No. 118. Lauterpacht in his note on this case doubts whether the alterations, which "in fact amounted to the overthrow of the entire judicial system of Indonesia," could stand the test of international legality.

[157] Section 3(4), Japanese Judgments and Civil Proceedings Ordinance, 1946, as quoted in *Sultan of Johore v. Tungku Abubakar,* (1950) 16 *Malayan Law Journal,* p. 3 at 7 *et seq.*

of injustice or oppression which were common to all members of the population, or to a considerable part of it, the loss was left to lie where it first fell. Where, however, an individual was able to show that he had suffered injustice or oppression which was peculiar to him and beyond the general lot of his fellows, then he was granted relief.[158] Thus the returning sovereign was able to achieve an optimum balance between the desideratum of stability of judicial decisions and rights and expectations founded thereon and that of flexibility of revision or recission where special circumstances required it.

This method of treating the judgments of occupation courts was not confined to Singapore. In Norway we find substantially the same treatment. On November 15, 1946, the restored Norwegian parliament erected a statute giving persons convicted by occupation tribunals a right to have their cases reopened under certain conditions. Criminal judgments could be reopened in the following instances:

> (a) If the decision was made directly pursuant to an unlawful enactment issued during the occupation or pursuant to enactments which had as their predominant object to serve the interests of the occupant, except cases where it is apparent that the decision was unaffected thereby.
>
> (b) If a member of the *Nasjonal Samling* (Quisling Party) or a person guilty of treason took part in the decision as a judge and there is reason to believe that the decision was affected thereby.
>
> (c) If the offense was committed as part of the opposition against the enemy and for that reason must be considered lawful.
>
> (d) If the convicted person was prevented by reason of war from appearing or from producing evidence and there is reason to believe that the decision was affected thereby.
>
> (e) If there is reason to believe that the decision was influenced by political considerations.[159]

Under (a), the criterion of legality to be applied was Section III of the Hague Regulations. It will be noticed that (c) achieves the same result that the Philippines Supreme Court reached in the *Alcantara* case. Judgments in civil cases could also be reopened under the same grounds, except (c). In civil cases, however, it is necessary to consider the interests of a second party who may have in good faith settled his affairs in the expectation that the judgment was final and irrevocable. The court reopening the case will have to assess the values represented in the conflicting interests.

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[158] See *In Re Sethuramaswany*, (1950) 16 *Malayan Law Journal*, p. 300 at 304; also *Chang Fong Shen v. Chan Phooi Hoong* (1947) 13 *Malayan Law Journal*, p. 104. That not all judgments in civil cases were to set aside and declared of no effect is made clear by Thorogood, J., in *Cheang Sunny v. Ramanathan Chettiar*, (1948) Singapore Law Reports, p. 12.

[159] Stabell, P. P., Enemy Legislation and Judgment in Norway, (1949) 31 *J. Comp. Leg. Int. L. (3d series, parts III & IV)*, p. 3 at 5.

In Greece too, a similar right to have judgments of occupation courts amended or annulled was granted by the restored sovereign, upon application of the interested party within a limited time. The restored sovereign even went farther and assumed the power to declare any particular law or regulation enacted by the occupation government as void *ex tunc*, i.e. from the moment of their promulgation, and not only from the moment of reoccupation. As a consequence of the annulment of any such law or regulation, all acts and transactions executed thereunder were likewise invalidated *ex tunc*.[160] Again, in France, the same right to have decisions of the courts existing not only in the territory of Alsace-Lorraine, which had been incorporated into Germany, but also in Vichy France reopened and annulled or revised under certain conditions was given by the returned sovereign. In France as in Greece, the sovereign assumed and exercised the power to invalidate any particular law or regulation passed either by the German administration in Alsace-Lorraine or by the Vichy government *ex tunc*. There was a distinction between retroactive annulment and prospective abrogation, a distinction that the sovereign drew at his discretion.[161] In the Netherlands, this same discretionary power was exercised by the sovereign, even before its return. On September 17, 1944, the Netherlands Government in London enacted a Decree on Occupation Measures (Decree No. E 93). This Decree classified the occupation laws and ordinances into 4 groups:

> (a) Those which must be held never to have had any validity;
> (b) Those which became inoperative as from liberation;
> (c) Those which for purely practical reasons were temporarily maintained in force;
> (d) All others, the operation of these being suspended provisionally pending a final decision.[162]

Laws and ordinances falling within class (b) and (c) were treated as though they had been valid during the occupation, although they were contrary to rules of international law as in excess of the powers of the occupant to enact. The factor of international illegality was apparently outweighed by the desire to render the transition from war to post war conditions as smoothly as possible.[163] Thus the sovereign assumed the power not only to invalidate acts of the occu-

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[160] Zepos, *loc. cit., supra* note 5 at 31.

[161] Delaume, G., Enemy Legislation and Judgments in France, (1948) 30 *J. Comp. Leg. Int. L.*, p. 32 (*3d series, parts III & IV*).

[162] *Bedrijfsgroep Bouw en Aardewerkambachten The Hague v. Vonck*, Holland, ANNUAL DIGEST 1947, Case No. 114. Similar decrees were issued by the exiled governments of Belgium and Luxemburg and France; *id.* at 251 n. 1.

[163] *Kloet v. Klok*, Holland, Supreme Court, ANNUAL DIGEST 1947, Case No. 115.

pant within his power under international law to perform, but also to attach *post hoc* binding force to acts of the occupant illegal under international law. Special judicial machinery was established for the settlement *ex aequo et bono* of rights adversely affected by the occupation.

The above brief survey of the practices of the sovereigns restored after World War II shows that many of them felt completely free to annul or validate any or some of the acts of the occupant either from the moment of reoccupation or from their promulgation. Some textwriters [164] and some courts, notably the Supreme Court of the Philippines and the High Court of Judicature of Burma, speak as if the restored sovereign were under a positive obligation imposed by international law to give effect to non-political acts of the occupant within his legal competence to perform. The two courts seem to rely on the argument that where international law authorizes or even requires the belligerent occupant to do something, for example, to establish courts in the occupied territory, that law cannot at the same time leave the restored sovereign free to undo what the occupant did by, for example, setting aside decisions of occupation courts.[165] This argument assumes that the treatment by the restored sovereign of the acts of the expelled occupant is governed by international law. This assumption has been doubted by several writers. Thus Feilchenfeld said:

> "It (the restored sovereign) may certainly go as far as it pleases in refusing recognition to acts of its enemies. As sovereign of its own

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[164] Thus 2 OPPENHEIM, *op. cit., supra* note 95 at 618, "Postliminium has no effect upon such acts of a former military occupant connected with the occupied territory and with the individuals and property thereon, as he was, according to international law, competent to perform; these acts are legitimate acts. Indeed, *the state into whose possession such territory has reverted must recognize these legitimate acts, and the former occupant has by international law, a right to demand this.*" (Italics supplied). Also HALL, INTERNATIONAL LAW, 8 ed., p. 163; MCNAIR, *loc. cit., supra* note 1 at 35, is less categorical, and says that "it is customary for the legitimate government—to recognize (the occupant's) measures and give effect to rights (and equally to penalties) acquired thereunder." Hyde was making a clearly preferential statement when he said (3 *op. cit., supra* note 6 at 1885). "If by any process, the occupant is ousted from a possession and control which is resumed by the territorial sovereign, it is highly undesirable to permit the latter to ignore the consequences of what the occupant lawfully did while it remained in power." He called the theory that no legal duty rests upon the restored sovereign to be bound by what the occupant enacted if respect for the latter's action produces results regarded as contrary to public policy as "a dangerous doctrine which if consistently and broadly applied must be defiant of legal principle." See also, Ireland, G. The Jus Postliminii and the Coming Peace, (1944) 18 *Tulane L. Rev.* 584 at 591-592.

[165] *Co Kim Cham v. Valdez Tan Keh* (1945), 75 Phil. 113 at 137; *The King v. Maung Hmin and three* (1946) Rangoon Law Reports, p. 1 at 7.

> people, it should see to it that no undue hardship is created by conflicting instructions and sudden rescissions of legal acts; but the degree of benevolence exercised by a sovereign towards its own people, is according to present rules of international law, a domestic and not an international matter." [166]

And according to Lauterpacht,

> "the view (that the restored sovereign remains bound by acts of the occupant within the limits of his powers) seems open to objection, as the question of how far the occupied state must respect the acts and regulations of the occupant lies only partly within the domain of international law. The municipal law of the occupied state may attribute *ex post facto* legal force to ordinances which were contrary to international law. It can, equally, deny legal force to ordinances which were in accordance with it, at least in relation to its own nationals." [167]

Further, the international law rules on belligerent occupation were evolved as limitations on the otherwise unrestrained powers of the occupant, rather than as restrictions on the restored sovereign. There was need to circumscribe what the occupant could legally do to the inhabitants and property in the occupied regions, for he was hostile to them, and they were completely at his whim and caprice. On the other hand, it could safely be presumed that the restored sovereign would have the interests of his subjects at the forefront. Hence, it is submitted, from the international legality of the occupant's acts does not arise any necessary inference of an international obligation of the restored sovereign to respect those acts.

It should also not escape notice that the test of international legality relied upon by the Philippine and Burmese courts, as well as by Oppenheim, McNair, Hall and Hyde, is a very imprecise one. Under the Hague Regulations, the measure of licitness is at least reducible to the question of military necessity. And the concept of military necessity continues to expand under the impact of new techniques of total war, of total utilization of occupied areas, and of unlimited belligerent objectives. If the stamp of legality is conceded to the new techniques (and it may be futile to withhold it from a belligerent at war with another who employs them), the restrictions on the restored sovereign would be logically extended. The resulting

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[166] *Op. cit., supra* note 3 at 134, parentheses supplied.

[167] ANNUAL DIGEST 1947, editorial note to Case No. 114 at 253, parentheses supplied. Also 2 WHEATON, INTERNATIONAL LAW, 7 ed., (1944) p. 245:

"Moreover, when it is said that on occupier's acts are valid, it must be remembered that no crucial instances exist to show that, if his acts should all be reversed, any international wrong would be committed. What does happen, is that most matters are allowed to stand by the restored government, but the matter can hardly be put further than this."

spacious liberty of the occupant would be an anomalous contrast to the resulting severe limitations on the sovereign. Should not rather, as Feilchenfeld suggests,[168] total warfare be followed by total postliminy? Should a hostile occupant be permitted to engage in fundamental and detrimental changes without at the same time permitting the sovereign to rechange his own country according to his own policies?

(b) *On Currency Manipulations by the Occupant.* The Supreme Court of the Philippines, in the celebrated case of *Haw Pia v. China Banking Corporation*,[169] passed upon the question of the efficacy of payments made during the occupation with the occupation fiat currency in satisfaction of debts incurred prior to the occupation. Obviously there were three main possible courses open to the Court: total invalidation, or total validation, or revaluation of the sum given or tendered in payment. The Court chose total validation. If Mr. A. owed Mr. B. a thousand pesos in lawful Philippine currency prior to the occupation, and paid Mr. B. a thousand military pesos (known by the cynical label of "Mickey Mouse" money) during the occupation, Mr. A, was deemed by the Court to have fully discharged his obligation. The Court chose to ignore the element of time, when the payment was effected, and disregarded the question of the "intrinsic" value of the military peso in terms of the Philippine peso which had been driven out of circulation. We have previously pointed out the progressive depreciation of the military peso until, just before reoccupation, the point of utter worthlessness was reached. The Court stood squarely on its premise that it was within the competence of the occupant to issue occupation currency as legal tender. If the military peso had the quality of legal tender, payment therewith necessarily discharged in obligation, whether the obligation was created before or during the occupation. Thus ran Mr. Justice Feria's familiar syllogistic judicial reasoning. All other considerations were pushed aside as legally irrelevant. This peso-for-peso validation rule was applied regardless of the non-acceptance of the creditor. The judicial consignation and deposit of fiat occupation currency, following the creditor's refusal to accept such money was held sufficient to discharge the entire debt.[170] The creditor who had refused to avail himself of the judicial deposit simply suffered a total loss.

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[168] *Op. cit., supra* note 3 at 25.

[169] 45 *Official Gazette, Supp. No. 9*, p. 229.

[170] *Cunanan v. Amparo*, G. R. No. L-1313, prom. Feb. 16, 1948; *Mata v. Pichay*, G. R. No. 156-R, prom. June 14, 1947; *Haw Pia v. San Jose* (1947), 44 Official Gazette, 2704. Cf. *Arcache v. Lizares and Co., Inc.*, G. R. No. L-4333, prom. May 23, 1952, noted in (1952), 27 *Phil. L. J.* 788. See also *Sia v. Court of Appeals*, G. R. No. L-3472, prom. December 23, 1952.

In this situation of war time payment of a pre-occupation debt, the respective claims competing for judicial recognition are easily indicated. On the one hand was the debtor's expectation of release having parted with a certain number of military pesos. Presumably he had ordered his affairs on the basis of this expectation and did not want to go through the task of raising a certain number of Philippine pesos with which to pay again. This is essentially the claim of stability for consummated transactions. On the other hand, the creditor insisted on mutuality or equality of consideration. He had parted with a certain number of Philippine pesos, and had gotten in return military pesos whose value, in terms of purchasing power, had decreased to a greater or lesser degree. This was the claim of "justice and equity," of the sanctity of property rights. It will be noticed that the debtor's expectation could be reasonable only where the creditor had accepted the offer of payment; yet the rule as applied disregarded the creditor's non-acceptance. The Court chose to uphold the debtor's claim. What the policy motivations of the Court were, if any, beyond the reluctance to disturb settled transactions, have never been made explicit in any of its decisions on the matter; one can only speculate. The extensive physical destruction that accompanied reoccupation, coupled with the deprivations resulting from the occupant's wealth practices, had impoverished the great mass of the people. This situation had called forth an Executive Proclamation providing for a debt moratorium. Perhaps the Court felt that it would have been too much of a hardship on the debtors to compel them to pay again, in whole or in part. Perhaps the Court considered that creditors, although presumably they had suffered too, were in a better position, especially banks and other corporations, to absorb the economic shock of the occupant's currency practices. Perhaps it feared a great wave of litigation if it were to fix any more complex course than total validation. In any case, the Court let the loss fall on the creditors.

In the situation of presently pending obligations incurred during the occupation, the Court adopted a different course. Here the debtor had received military pesos and had now to pay in Philippine pesos. Payment in military pesos was out of the question, since by Executive Order No. 25 they had been declared as no longer legal tender in the territories reoccupied and freed from Japanese control.[171] In this

[171] 41 *Official Gazette* (1945), p. 56; The Supreme Court in *Hilado v. De la Costa*, 46 *Official Gazette*, p. 5472 indicated that this Executive Order No. 25 (Nov. 18, 1944) was unnecessary. The original Japanese proclamation (*supra* note 46) requiring acceptance of the fiat currency in payment of any kind of debt "being of a political character, fell through as of course upon the cessation of the Japanese military occupation."

case, the Court generally followed the rule of revaluation. If Mr. A borrowed a thousand military pesos from Mr. B during the occupation, Mr. A was not compelled to pay after the occupation a thousand Philippine pesos. The debt was revalued, in terms of the relative values of the fiat and the Philippine peso at the time of the creation of the obligation.[172] The Ballantyne Scale setting forth the value of the military peso during the course of the occupation has been used for purposes of revaluation, although the same has never been enacted into a statute.[173] The above rule was applied in the absence of any stipulation to the contrary by the contracting parties. Where the parties had explicitly agreed that the debt was to be paid in Philippine pesos, or in currency that would be legal tender after reoccupation, or that the debt was to be payable after a certain period had elapsed, not earlier, and that period elapsed after reoccupation, the Court reverted to its peso-for-peso rule. In such cases, the debtor was required to pay in Philippine pesos the face value of the military pesos he had received.[174] The Supreme Court considered such stipulations as converting a simple loan into an aleatory contract, a sort of legalized gambling on the possible date of reoccupation. For the supporting legalisms the Court fell back on the ordinary contract rules in the Civil Code, a step whose wisdom may well be doubtful. For the Spanish Civil Code of 1889 hardly contemplated extraordinary war conditions of extreme currency inflation.[175] In the situation now under consideration, the respective claims of debtor and creditor were reversed. Now it was the debtor who pressed for mutuality or equality of consideration, for "justice and equity;" while the creditor insisted on the fulfillment of his expectations of profit, expectation

[172] *Hilado v. De la Costa, supra; Soriano v. Abalos*, 47 *Official Gazette*, p. 168; *De Asis v. Agdamag*, G. R. No. L-3709, prom. October 25, 1951; *Wilson v. Berkentotter*, G. R. No. L-4476, prom. April 20, 1953. The phrase "presently pending obligations" used above may be legalistically refined to mean "obligations payable within a certain period of time which coincides wholly or partly with the Japanese occupation." Such obligations are revalued in terms of the Ballantyne scale; see *Cornejo v. Calupitan*, 48 *Official Gazette* 61; *Arevalo v. Barredo*, G. R. No. L-3519, prom. July 31, 1951; *Litton v. Luzon Surety Co.*, G. R. No. L-2603, prom. Feb. 11, 1952. Such obligations could have been paid during the Japanese occupation in Japanese fiat currency, but were not actually paid, and hence were still pending after reoccupation. Justice Feria in *Gomez v. Tabia*, 47 *Official Gazette* at 645 points out that in such situations, to compel the debtor to pay in Philippine currency the face value of the war notes would be punishing him for delay in making the payment; the inference seems to be that that is too heavy a penalty for *mora*.

[173] The Ballantyne Scale may be found in (1952 27 *Phil. L. J.* at 790 n. 10.

[174] *Gomez v. Tabia*, 47 *Official Gazette* 641; *Rono v. Gomez*, 46 *Official Gazette*, Supp. No. 11, p. 339.

[175] The Court relied on art. 1255 and 1091 of the Spanish Civil Code. The new Civil Code of the Philippines attempts to meet this situation in art. 1250.

which more often than not he had cleverly made explicit by the kind of stipulations mentioned above. Where the stipulations had not been provided for, the Court upheld the debtor's claims as it did in the first situation. Where the creditor had the shrewd foresight to insert the stipulations, the Court, apparently concerned over the "sanctity of contracts" and "freedoms of contract," could not bring itself to disregard the stipulations. It simply overlooked the fact that during the occupation, the debtor and creditor did not stand on equal grounds. The debtor was necessitous to the point of extreme urgency, else he would not have borrowed money which all knew was rapidly falling in value. On the other hand, the creditor had probably engaged in dubious "buy and sell" transactions with the occupant's agencies, for that was practically the only way one could have made enough money to lend some. The stipulations should not have proved insuperable obstacles to a consistent policy of revaluation.

We come now to the question of the effects of the liquidation of enemy banks which the occupant ordered during his brief tenure. This matter was dealt with at length in the *Haw Pia* case.[176] There the plaintiff was a pre-occupation debtor of the defendant China Banking Corporation. The bank was one of those ordered liquidated by the occupant, with the Bank of Taiwan as liquidator. The liquidator proceeded to assemble the assets of the enemy bank by collecting debts owing to it. Haw Pia paid her debt to the bank some time in August, 1944, with the fiat occupation currency. The debt having been secured by mortgage, and the liquidator having failed to release the mortgage, Haw Pia sued after reoccupation for the cancellation of the mortgage. The Supreme Court of the Philippines granted the plaintiff's prayer. The Court conceded as within the competence of the occupant the issuance of occupation currency legal tender. Further, the occupant was held empowered to sequestrate the assets of enemy banks to prevent their being used against himself. Given these two premises, the Court held that the payment of the plaintiff's pre-occupation debt to the liquidator in occupation currency was effective to discharge the debt in its entirety. The Court thus arrived at the peso-for-peso validation rule discussed previously, setting aside the question of the "intrinsic" value of the fiat money as irrelevant, the issue being, in its view of the case, simply one of power.[177]

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[176] *Supra*, note 169.

[177] The Haw Pia ruling was subsequently reaffirmed in a long line of cases; e.g., *Hongkong and Shanghai Bank v. Perez Samanillo, Inc.*, G. R. L-1345, prom. Novem-10, 1948, 14 *Lawyers Journal* 74; *Philippine Trust Co. v. Araneta*, G. R. No. L-2734, prom. March 17, 1949, 14 *Lawyers Journal* 318; *Gibbs v. Rodriguez and Luzon Surety Co.*, G. R. No. L-1444, prom. Aug. 3, 1949; 47 *Official Gazette*, p. 186; *Hilado v. de la Costa, supra* note 171; *La Orden de Padres Benedictinos v. Phil. Trust Co.*, 47

Hyde has vigorously attacked the Haw Pia ruling as

> "internationally illegal conduct on the part of the Philippine Government which is productive of a solid claim for compensation in behalf of alien nationals or creditors who suffered loss as a direct consequence of such decision." [178]

With respect to the first premise of the Court, its correctness, in view of the cumulative examples furnished by the practices of belligerents in the last and previous wars, was not seriously questioned. But, it was added, no belligerent occupant has been permitted through the exercise of the legal-tender-making power to cause the creditor to accept something that was very greatly depreciated in payment of a debt due him by a local debtor; this was a "prohibitive rule of international law," and the Japanese decrees which permitted this were "in violation of international law". This appears to have been substantially the same qualification attached to the second premise respecting the occupant's authority to sequestrate enemy intangible property. The sequestration effected by the Japanese occupant in the Philippines, Hyde deemed as unlawful destruction of the debtor-creditor relationship because payments to the liquidator were made in the greatly depressed occupation currency. It will be remembered that the occupant's decrees providing for liquidation of enemy corporations and the sequestration of their assets were issued in 1942, early in the occupation, when the military peso had the same purchasing value as the Philippine peso.[179] Presumably if the plaintiff had made full payment then, little objection could be raised to the release of the mortgage, since the debtor would have had surrendered value equal to that she had received. Of course the notes given in payment would have depreciated later anyway in the hands of the liquidator, so that from the enemy bank's viewpoint, the ultimate effect would have been the same. Hyde therefore apparently makes the legality or illegality of the occupant's acts contingent on events subsequent to the original exertion of power.[180] "The scope of the occupant's

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Official Gazette, p. 2894; *Larraga v. Banez*, 47 *Official Gazette*, p. 696; *Del Rosario v. Sandico*, 47 *Official Gazette*, p. 2866; *Piñon v. Yanga*, G. R. No. L-5532, prom. May 13, 1953.

[178] *Loc. cit., supra* note 55 at 141; see the Court's answer to Hyde in the motion for reconsideration in *Gibbs v. Rodriguez, supra*, reprinted in 27 *Phil. L. J.* 489

[179] See *supra*, note 46, and note 173.

[180] Even Fraleigh, *loc. cit., supra* note 2 at 107, conceded the power of sequestration, *in abstracto*, to the belligerent occupant: "Economic warfare being what it is, Mr. B., there is some basis for upholding the authority of a belligerent occupant to sequester property owned by residents of territory held by opposing belligerents. It may be possible to justify the sequestration of a bank account as an exercise by a belligerent occupant of its right to seize 'munitions of war.'"

rights depends on the *degree of harm* wrought to the creditor by the occupant's decrees."

Assuming then the initial legality of the issuance of the fiat currency and the sequestration decrees, did such issuance and decrees become violative of international law when the value depression of the fiat money reached a certain point? If so, at what point? What particular degree of depreciation is necessary to render illicit an act originally licit? Any particular moment of time fixed for commencement of illegality will be manifestly arbitrary. Further, the extent of the duty of the occupant to prevent inflation, which, it is assumed, Hyde was referring to in emphasizing the degree of harm as the test of contingent illegality, is vague and very ill defined. Feilchenfeld is not even certain that such a duty of the occupant exists.[181] Fraleigh suggests that such duty is too heavy a burden to place upon an occupant.[182] It is doubtful whether our knowledge of the behavior of money has advanced to the point where it can be said that inflation is due to the failure of the authority maintaining the currency to take appropriate regulatory measures. There is further the question of whether the occupant can be expected to employ the necessary control measures. The attitude of the people of the occupied regions towards the occupation money, one of mistrust and covert contempt in the Philippines at least, and at best uncertainty, certainly exerts an effect on the inflationary trend. The inhabitants have reason to expect that reoccupation will carry with it monetary reform, either complete repudiation or at least devaluation. With each defeat of the occupant on the battlefront, the purchasing value of the fiat currency tends to decrease at an accelerating rate. These attitudes are quite beyond the reach of control measures by the occupant. Under such conditions, it is difficult to see how the occupant can save the purchasing power of the currency.

In the Philippines, other factors not attributable to the occupant contributed to the net effect. Agricultural production, which before the war had never reached the point of sufficiency for domestic needs, was sharply cut down by military operations against guerrilla forces.

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[181] *Op. cit., supra* note 3 at 82: "While the Hague Regulations are silent on the question, it would seem that the occupant has the right, and possibly the duty, to take adequate measures for the prevention of extreme inflation. The prevention of inflation would seem to include measures fixing the relationship between the various kinds of locally circulating currency on the one side, and prices of goods and money of third jurisdictions on the other." It will be recalled that price control regulations were promulgated by the occupant, while the other measures suggested were not applicable, since there was but a single currency in actual circulation and foreign exchange ratios were useless under the occupant's scheme of trade.

[182] *Loc. cit., supra* note 2 at 114.

The contracting volume of supplies naturally pushed up the prices. Add to this the burden of feeding the occupant's large army and one is tempted to the conclusion that the depreciation was perhaps due not so much to the deliberate malice of the occupant as to laws of economics which operate with increased intensity under abnormal conditions of war. Assuming that the obligation does exist, as was pointed out before, the Japanese occupant did take regulatory or control measures to prevent depression of value of the occupation currency. These measures failed to achieve their purpose and the occupant apparently could only step up the rate of printing of new issues. It cannot be categorically said that the occupant failed to satisfy his duty, if any; neither can the depreciation be laid entirely at his door.

Perhaps the most that one can be said is that the occupant may not take steps deliberately calculated to induce inflation.[183] And that is really superfluous, since it is to his own interest to prevent inflation. What benefit would he derive from "destroying debtor-creditor relationships" between the inhabitants and nationals of enemy belligerents? In dealing with the occupant's currency practices, it is useful to remember that this is one of those cases where the present rules on belligerent occupation are conspicuously inadequate. The Hague Regulations assumed a definite kind of normal peace optimum, the nineteenth century kind. The peace time level has declined constantly in regard to their main object, namely, the protection of private property. While types of clear or unveiled confiscation may still be exceptional, the same cannot be said of many kinds of quasi-confiscatory acts, among which the increased regulations of property and the increased liberty to manage private interests by currency manipulations are most prominent. So long as one does not impose a higher standard on belligerent occupants than on peace time sovereigns, it seems to follow that the acts of the Japanese occupant can no longer be subject to objections to which they would have been subject a generation ago.[184] Considering the treatment meted out by the *belligerent sovereigns* to enemy property, tangible or intangible, found within their domains as set forth in their respective trading with the enemy legislation,[185] it should not be so surprising to find *belligerent occupants* meting out similar treatment to enemy property found in occupied countries. Hyde argues for a wider freedom for the former and castigates the Supreme Court of the Philippines for equalizing

[183] *Ibid.*

[184] FEILCHENFELD, *op. cit., supra* note 3 at 18-19.

[185] See Carroll, *loc. cit., supra* note 100; also Bullington, J. P., the Treatment of Private Property of Aliens in Belligerent Territory (1943), *Proc. Am. Soc. Int. L.* 59 at 61-64.

the financial powers of the two under international law.[186] Unfortunately, he does not express the reasons for the distinction; a distinction which certainly cannot be greater than that between the belligerent occupant and the peace time sovereign.

As to the matter of coverage for the occupation currency, it has been previously mentioned that as far as the case of the Philippines was concerned, none has ever been discovered. This would not seem to be decisive of the illegality of the occupant's acts. The inscription on military currency ordinarily exhibits no promise to pay and no indication that an obligation has been undertaken by the issuer;[187] certainly the military pesos contained no such promise or obligation. Occupation currency as such has no place on the liability side of the occupant's budget. He does not engage his own credit but that of the occupied country,[188] in which he exercises, for the time being, a sort of vicarious sovereignty. No reserves or other coverages are held by the occupant against the notes issued, and no rule of international law requires him to do so. The relevancy of coverage seems at most to be indirect, having reference to the increase or decrease of confidence that its presence or absence entails and the consequent repercussions on the "intrinsic" or purchasing value of the currency. On the assumption that the sovereign of the occupied country was or will be finally defeated, the "redemption" of the occupation currency is left to the sovereign, that is, the exchange of the occupation currency for regular national money, as part of the assessment of occupation costs.[189] Ordinarily then, this problem of redemption of occupation currency is of limited significance, since the victorious belligerent will usually impose on the defeated party the duty of redemption in concept of occupational costs or of indemnity depending on whether the occupant or the sovereign was the victor.[190] Since specialized circumstances of bipolarization have combined to

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[186] *Loc. cit., supra* note 55 at 146. What he refers to in p. 162 is not the situation of belligerent occupation, as the term has been used here, but military occupation after the cessation of hostilities, in which situation the raison d'etre of sequestration has ceased.

[187] NUSSBAUM, *op. cit., supra* note 83 at 497.

[188] Mann, *loc. cit., supra* note 136 at 275.

[189] This was the view of the Allied Powers in the last war; see *Occupation Currency Transactions, supra* note 136 at 31, 84, 95, 117; and SOUTHARD, THE FINANCES OF EUROPEAN LIBERATION (1946), p. 49.

[190] Thus in Treaty of Peace with Italy, art. 76 (4) (49 *U.N. Treaty Series* 159) provides that "The Italian Government shall assume full responsibility for all Allied military currency issued in Italy by the Allied military authorities, including all such currency in circulation at the coming into force of the present treaty." The Treaty with Hungary, art. 32 (4) (41 *U.N. Treaty Series* 204) and the Treaty with Roumania, art. 30 (4) (42 *U.N. Treaty Series* 66) contain identical provisions.

absolve the defeated occupant from the burden of redemption, the loss necessarily fell on the people of the occupied territory.[191] The *Haw Pia* decision merely left undisturbed the incidence of the loss, part of which fell on the nationals of the victorious belligerents, who could have shifted the loss where it properly belongs.

Assuming *arguendo* that Hyde's assertion of illegality was wholly correct, the question arises, does international law oblige the restored sovereign to repudiate the occupant's measures or at least to provide for revaluation of payments? Hyde asserts that it does so oblige the restored sovereign, this apparently without regard to the latter's own conceptions of policy nor to peculiar conditions frustrating normal expectations of redemption. The Inter Allied Declaration's phraseology does not support the contention that "it is evidence of a definite undertaking by the Republic to undo the consequences of acts mutually regarded as wrongful." In this situation it will be helpful to find out to what extent the other restored severeign actually provided for repudiation or revalorization of payments in inflated occupation currency.

In Burma, the legislature, apparently dissatisfied over the results reached by the High Court of Judicature,[192] enacted the Japanese Currency Evaluation Act of 1947. Under this Act, the general rule regarding payments made during the occupation with occupation currency on account of debts incurred either before or during the occupation was that such payments served to discharge fully such debts, provided the creditor had accepted such payments.[193] With respect

[191] Included in the Philippines' claim for reparation (*supra*, note 87) under the heading of "commandeered goods and services" was the value of the military pesos issued by the occupant before being revaluated according to the Ballantyne Scale. The figure adopted by the Committee on Reparations as to the estimate of the amount of military pesos issued was ₱11,148,642,000 (See 1 *Bulletin of Philippine Statistics*, 1945, No. 2). An estimate by a Japanese "Liaison Officer of the Central Liaison Office, Tokyo, Japan" of the notes issued from January, 1942 to July 1945, amounted to ₱6,459,642,000. The correct figure probably lies somewhere these two extremes. In any case, the Philippines later changed its claim for the full face value of the military notes, an untenable position, and revalued its claim in accordance with the Ballantyne Scale and came up with the figure of ₱535,220,000. This figure, together with the claim for goods and services not paid for at all by the Japanese occupant, appeared in the revised total estimate of reparation claims—₱13,054,521,000. (*Philippines Herald*, July 15, 1951). These figures are offered not as accurate estimates, but to show the enormity of the loss cast on the people of the occupied country and may help to explain the attitude of the Supreme Court in refusing to augment that loss by compelling repayment by debtors thus exempting Allied nationls from their share of the burden.

[192] See *supra* note 134.

[193] Section 4. *Chan Taik v. Ariff Moosajee Doophy*, Burma Law Reports (1948) 454 at 478 held that payments into court pursuant to a judgment decree was not volun-

to debts incurred during the occupation and remaining unpaid at the time of reoccupation, the Act provided:

> "* * * where any debt had been incurred or contractual obligation entered into during the period of the Japanese occupation, which could have been discharged by payment in Japanese currency notes, and if such debt or contractual obligation or any part thereof remained unsatisfied or undischarged at the time of the British Military reoccupation of the area where such debt or contractual obligation was incurred or entered into, the said debt or obligation * * * shall be satisfied or discharged by payment in legal currency notes or coins to be calculated in accordance with the value of the Japanese currency notes (as set forth in the Schedule attached hereunder)." [194]

It will be noticed that the Supreme Court of the Philippines reached substantially the same results that the Japanese Currency Evaluation Act achieved, i.e. validation *en toto* of war time payments of pre-occupation debts and revaluation of unpaid occupation debts.

In Singapore, we find a more elaborate statutory scheme. The general rule of complete validation of payments in occupation currency of pre-occupation debts was followed.

> "Subject to the provisions of subsection (2) of this section, where any payment was made during the occupation period in Malayan currency or occupation currency by a debtor or by his agent or by the Custodian or a liquidation officer purporting to act on behalf of such debtor, to a creditor, or to his agent or to the Custodian or a liquidation officer purporting to act on behalf of such creditor, and such payment was made in respect of a pre-occupation debt, such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payments." [195]

The Ordinance however provided for the revalorization of such payments under certain conditions. Those cases were:[196]

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tary acceptance within the meaning of Section 4. In such case, the creditor was not estopped from challenging later the efficacy of the judicial deposit. Compare this case with the results reached by the Supreme Court of the Philippines, *supra* note 170.

[194] Sec. 3(1) as quoted in E Maung, Enemy Legislation and Judgments in Burma, 30 *J. Comp. Leg. Int. L. (3d Series—1948)* 11 at 15. The Schedule is less detailed than the Ballantyne Scale:

I Period	*II Legal Currency*	*III Japanese Currency*
Calendar year 1942	100	100
Calendar year 1943	75	100
Calendar year 1944	40	100
Calendar year 1945	5	100

[195] Section 4(1) of the Debtor and Creditor (Occupation Period) Ordinance, No. 5 of 1949, (October 1, 1949), *1950 Supplement to the Laws of the Colony of Singapore*, vol. 1, p. 14 at 17.

[196] Subsec. (2), sec. 4, *ibid.* The Sliding Scale of the Value of Occupation Currency was based on the value of $100 Malayan Currency in terms of Occupation

"(a) where the acceptance of such payment in occupation currency was caused by duress or coercion; or

(b) where such payment was made after December 31, 1943, in occupation currency in respect of a pre-occupation capital debt, exceeding 250 dollars in amount, which—

(i) was not due at the time of each payment; or

(ii) if due, was not demanded by the creditor or by his agent on his behalf and was not payable within the occupation period under a time essence contract; or

(iii) if due and demanded as aforesaid, was not paid within three months of the demand or within such extended period as was mutually agreed upon between the creditor or his agent and the debtor or his agent; or

(c) where such payment was made in occupation currency to a Custodian or liquidation officer in respect of a pre-occupation capital debt exceeding 250 dollars in amount except where payment as aforesaid was caused by duress or coercion."

With respect to unpaid debts contracted during the occupation, revalorization was required, "unless such debt was expressly made payable otherwise than in occupation currency." [197] Again it will be recalled that this last rule was also arrived at and followed by the Philippine Supreme Court.[198] An inspection of the various scales set forth in the margin will show that the depreciation was most severe in Singapore. Despite this fact, neither complete repudiation or revalorization of war time payments was adopted.

In the other British colony of Hongkong, the same treatment was provided for by the restored sovereign. Thus,

"Where any payment was made during the occupation period in—occupation currency by a debtor—to a creditor—and such payment was made in respect of a debt—

Currency:

	1942	*1943*	*1944*	*1945*
January	100	105	455	2000
February	100	117	590	2380
March	100	131	765	3100
April	100	153	860	3850
May	100	179	870	4950
June	100	224	910	6340
July	100	254	1010	7980
August	100	282	1210	10500–95000
September	100	302	1400	
October	100	320	1530	
November	100	337	1720	
December	100	385	1850	

[197] Section 6, *id.* at 19.

[198] See *supra* note 174.

(a) payable by virtue of an obligation incurred prior to the commencement of the occupation period and

(b) accruing due either prior to or after commencement of the occupation period, such payments shall, subject to the provisions of subsection (2) be a valid discharge of such debt—

(c) at the official rate prescribed by the occupying power." [199]

The Ordinance provided for revaluation of war time payments under the same circumstances set forth in the Singapore Ordinance. The same rule of revaluation of unpaid occupation debts was also followed.

Finally, in Indonesia, we find decrees promulgated by the Dutch Governor General before the final settlement of the Indonesian Question, providing almost identical rules on revaluation of unpaid debts incurred during the occupation period.[200] However, unlike in the Philippines, Burma, Singapore, and Hongkong, the Dutch authorities provided further for the revalorization of payments made during the occupation on account of preoccupation debts.

"If an obligation had been created before the circulation (occupation) period, but payments thereon were made in Japanese *'circulatiebiljetten'* during the occupation—such payments shall be considered as valid performances up to the percentage, fixed in section 2, of the amount of *'circulatiebiljetten.'* " [201]

In the light of the foregoing survey of the legislation of restored sovereigns in Southeast Asia, it seems that Hyde's statement that in this region "payments which were made on preoccupation debts dur-

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[199] Section 3, Debtor and Creditor (Occupation Period) Ordinance, June 17, 1948, *Hongkong Government Gazette*, Supp. No. 1, June, 1948.

[200] Art. 53, *Staatsblad von Nederlandsch-Indie*, No. 70, May 3, 1947. Grateful acknowledgment is due to Mr. Walter Koenig for translating this decree for the writer.

[201] Art. 52(1), *ibid;* section (2) art. 52 provided for the following table of percentages to be credited:

Up to end of August, 1943	100%
September, 1943	90%
October, 1943	80%
November, 1943	70%
December, 1943	60%
January, 1944–September, 1944	50%
October, 1944	40%
November, 1944	30%
December, 1944	20%
January, 1945	10%
February, 1945	9%
March, 1945	8%
April, 1945	7%
May, 1945	6%
June, 1945	5%
July, 1945	4%

ing the occupation are not credited with the face value but only according to a scale," is rather too broad and yields an inaccurate impression. Only in Indonesia were war-time payments of preoccupation debts consistently revalued. The special conditions for revaluation of wartime payments of preoccupation debts provided for in Hongkong and Singapore are minor qualifications to the general rule of total validation of such payments. It may possibly be relevant also to consider that the Hongkong and Singapore ordinances were promulgated by a *colonial* sovereign undisturbed by nationalist movements unlike in Burma, while Netherlands East Indies statute was a decree of a *repudiated colonial* sovereign.

It seems a reasonable inference to be drawn from the above statutory survey that the restored sovereigns of the countries occupied by the Japanese have not acted as if they felt the compulsion of an international legal obligation to undo the occupant's acts supposedly illegal because they destroyed the debtor and creditor relationship. The restored sovereigns apparently consider themselves free to determine whether they will institute monetary reforms or not, and if so, the extent to which the reform will be carried. Of course where the *a priori* existence of such an obligation has been clearly demonstrated, acts to the contrary will not militate against the existence of the obligation. But where the obligation is at least doubtful, practice to the contrary would tend to be persuasive of its non-existence. In any case, it is probably true that Professor Hyde was a little hasty in attributing an international delinquency to the Supreme Court and the government of the Philippines.[202]

[202] Mann, *loc. cit., supra* note 136 at 277: "It is a question of private law to what extent judicial revalorization of debts repaid in greatly depreciated military currency is possible. In extreme cases, the legislator will no doubt intervene * * *. But the liberated state's failure to effect legislative or judicial revalorization will not amount to an international wrong, unless it involves an abuse of rights. There is in particular no evidence supporting Hyde's charge that, when in the *Haw Pia* case, the Supreme Court of the Philippines recognized the Japanese military currency as legal tender and capable of discharging a peso debt according to the nominal value, this constituted 'internationally illegal conduct' * * *."