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UNCONDITIONAL SURRENDER OF JAPAN

I. The Policy of Unconditional Surrender in Relation to the Legal powers of a Military Occupant

1. If it is assumed that it may be necessary to exercise powers after the unconditional surrender of Japan in excess of the legal powers of a military occupant but without violating international law, certain difficulties are presented. It is believed, however, that a careful analysis of the principles of international law involved will show that these difficulties are not insuperable.

2. The approach should be through recognition that the limitations which the law of military occupation impose on the occupant arise from the relationship of three considerations: (a) military necessity which permits the occupant to take whatever measures are necessary to achieve his objectives provided they are not definitely prohibited by the law of war, (b) humanity and good faith, which prohibit acts which cause unnecessary suffering or violate definite military conventions and (c) precariousness of the occupation, which forbids policies which could not be realized until the occupation will probably be over.

3. The occupant is not the sovereign of the territory, consequently in proportion as his tenure is limited, he is forbidden to take measures which, because prejudicial to the sovereign's policy, would be undone upon the latter's return. Changes in

the social, economic, and legal system of the country ought not to be initiated by an occupant whose tenure will be so brief that he can not realize his policy. It would be a wanton hardship to the population of the territory if the occupant overturned their institutions for a few months only to have the returning sovereign, by virtue of the principle of postliminy, restore the status quo ante on his return. For this reason, occupants have ordinarily been obliged to confine their action to the assurance of security and the maintenance of order in the area, excluding measures of social, economic, and legal reform.

4. The principle of law, however, imposes this limitation only because of the precariousness and brevity of the occupation flowing from the usual intent to use the occupation only as an instrument of war to be terminated when victory is won, and the frequent inadequacy of the power of the occupant to maintain it longer even if that long. If, however, the occupant intends his occupation as an instrument to bring about radical reforms in the occupied state and has the power to make his occupation firm enough and enduring enough to assure his ability to do so, the principle of the law permits him to take the necessary measures provided only that he does not violate the rules of international law based upon considerations of humanity and good faith.

5. The occupant in such a position can legislate and modify property titles as could a sovereign but he cannot massacre the population, commit acts of perfidy or confiscate property without compensation because such acts would be violations of his duty flowing from the principles of humanity and good faith.

6. This distinction between laws of war resting upon humanity and good faith and those resting upon the precariousness of the belligerent's position have been widely recognized in other connections. Thus Feilchenfeld (International Economic Law of Belligerent Occupation, Washington 1942 p.11) writes, "In the absence of legal limitations occupants might go to extremes in the adoption of hostile measures that might force inhabitants to take part in a war against their own sovereigns and fellow countrymen; that might inflict changes of a fundamental kind. The very precariousness of their situation might tempt them to rush the adoption of such changes. Nineteenth Century jurists and the Hague regulations embodying their thoughts, tried to meet these and other dangers by drawing logical conclusions from a dogmatic and analytical distinction between "mere" occupants and full sovereigns. (Par. 44 and 45 and see also paragraphs 114 and 326). The Budapest Articles of Interpretation of the Pact of Paris, while recognizing that a violator of the Pact may be denied many of the advantages which international law would normally give to a belligerent yet provided "the Pact does not affect such humanitarian obligations as are contained in general treaties". A similar thought was

accepted in the Harvard Research Draft Convention on Aggression. (Supplement, American Journal of International Law, 1939). An aggressors position may be assumed to be more precarious than that of a lawful belligerent and his powers as an occupant should, consequently, be reduced. . Similarly, states engaged in suppressing aggression, because of a superior military and legal position should be in a less precarious position, and, consequently, their powers as a military occupant should be correspondingly increased.

7. If an occupant has the power to continue his occupation indefinitely and to induce other states to acquiesce in his conquest, he can convert his occupation into "subjugation" or "completed conquest", gaining for himself all the rights of a sovereign. If he can go this far, it would seem inconsistent to say he cannot go the lesser distance of declaring and continuing his occupation only so long as necessary to carry out the social, economic, and legal reforms which he proposes provided he has the power to do so and can gain the acquiescence of other states. If, in fact, he gains a position by his arms assuring a capacity to effect these reforms, it would, therefore, seem that international law should permit him to take the necessary measures even though they go beyond the powers of an occupant with more limited aim and more precarious position.

8. Against this conclusion is the statement often made that "Establishment of such sovereignty through annexation is, as a matter of course,

always dependent on full conquest, so-called debellatio. Before that is achieved, wartime precariousness of rulership cannot cease to exist. Premature declarations of complete annexation have, therefore, been regarded as invalid Since a belligerent occupant is not a permanent sovereign it is deemed to be beyond his competence to engage in permanent changes in regard to fundamental institutions". (Feilchenfeld, *opcit* par. 29, 326). This seems to imply that the precariousness of the occupant's position which prevents him from making fundamental reforms in a territory necessarily continues until peace is restored. But Feilchenfeld indicates that this relationship is not inevitable. Subjugation, he points out, is not necessarily related to territorial occupation nor is it necessarily related to the termination of war (par. 390, 391). It would seem also that it is not necessarily related to intention to annex. (See memorandum by Jessup). The issue is the precariousness of the occupant's position and if that position is, in fact, not precarious, he is permitted to carry out objectives falling short of annexation but extending farther than military objectives.

9. This argument suggests that if the United Nations intend by unconditional surrender, the achievement not only of their war aim (complete submission of the enemy), but also some of their political aims, (the establishment of certain basic reforms in the enemy's social, economic, political and legal systems) and if the United

Nations have the power and ingenuity to continue occupation until this aim is accomplished, they can legally take the measures within the territory necessary to that end provided these measures do not violate the rules of international law resting on principles of humanity and good faith. This, of course, would not prejudice the capacity of the military occupant to develop and utilize a native government to effect such reforms if that method seemed the most expedient.

10. This interpretation of unconditional surrender would fall short of annexation. It would not deny the persistence of the sovereignty of the enemy states, nor would it prevent relaxation of the direct exercise of military authority as the social and political objectives were achieved and collaboration of the population in the maintenance of the new state of affairs was assured.

II. Procedures for Effecting Unconditional Surrender

1. The procedure by which unconditional surrender should be effected and the legal consequences which flow from unconditional surrender depend upon:

- (a) The intention of the United Nations
- (b) The capacity of United Nations to give effect to their intentions

2. Military invaders have usually manifested one of four intentions:

- (a) to occupy the territory subject only to the general laws of war,

(b) to occupy the territory subject to the terms and conditions of a military convention (capitulation or armistice) made in accord with laws of war, (c) to acquire the territory subject only to the general rules of international law, or (d) to acquire the territory subject to the terms and conditions of a treaty (preliminaries of peace or treaties of peace made in accord with international law.) These four intentions have been respectively described as (a) occupation, (b) capitulation, (c) subjugation, and (d) cession.

3. Occupation and capitulation assume the continuance of war and differ from subjugation and cession, which have assumed the restoration of peace. Occupation, however, resembles subjugation in being a condition which flows from unilateral declaration with power to effect it and both differ from capitulation and cession which rest upon contract. Capitulation, however, is a contract between military commands, while cession implies a contract or treaty between states.

4. While these four types of intention have been the most common, international law does not prevent victorious belligerents from having intentions different from any of them and from giving legal effect to those intentions by suitable measures if they have the power to do so. Thus, there have been cases where occupation has gradually merged into subjugation and courts have held that measures in excess of the normal power of an occupant were validated by the subsequent subjugation.

(Litsendo fer vs. Webb 20 How. 176, 1857; Cross vs. Harrison 16 How. 184, 190; Moore, Digest of International Law Vol. VII, p. 259),

There have also been cases where a capitulation or armistice has included political terms which constituted a preliminary peace and in which such preliminaries of peace have actually restored peace. In such cases, however, the negotiators must have power to represent the state. (W.E. Hall, International Law, 8th edition, p. 873-4) Occupations have sometimes been continued after peace has been restored and occupations have occurred in times of peace. In such cases, it has been held that the occupant is presumed to be limited by the rules of war. (See instruction of Secretary of State Hughes concerning France occupation of the Ruhr, 1923, Hackworth, Digest of International Law, Vol. VI, p. 385). Sometimes capitulations, armistices, and treaties of peace have provided explicitly for military occupation (See capitulation of Metz, 1870, Art. 2, printed in U. S. Rules of Land Warfare, 1914, p. 80; and Treaty of Versailles, June 28, 1919 Art. 430). Capitulations have more commonly specified only the withdrawal of troops of the defeated power but in such cases it is implied that the victorious troops will forthwith occupy the area. (See Capitulation of Santiago, 1898; Manila, 1898; Port Arthur, 1904; in U.S. Rules of Land Warfare 1914, p. 83-87). In the case of a treaty of peace, however, there would be no such right to occupy foreign territory unless specified in the treaty. (The question of whether France was authorized by the Treaty of Versailles to occupy the Ruhr Valley in 1923 was

controversial). Sometimes in cases of subjugation the victor has assumed obligations to the conquered people in a military agreement. (See capitulation of Vereeniging between the British command in South Africa and representatives of the Boer Burgers, Phillipson, Termination of War and Treaties of Peace, p. 423).

5. In view of this flexibility permitted by international law, the first step in deciding upon the process of Japanese unconditional surrender would appear to be a clear statement of the consequences, which the United Nations intend from unconditional surrender, particularly (a) whether they intend it to be an instrument merely to achieve the military submission of the enemy or an instrument for achieving fundamental reforms in the enemy's political, economic, and social system, (b) whether they intend it to end the war or to be followed by a period of military occupation, (c) whether they intend it to destroy the sovereignty of the enemy states or merely to limit that sovereignty or hold it in abeyance for a period of time. The United Nations should also understand that the legal consequences of their acts in enemy territory after unconditional surrender will vary with the probability that their control will be continuous and effective, and that the validity of agreements depends on the legal competence of the signatories to any such agreement. Consequently, they should make up their minds (a) whether or not they are prepared to maintain forces in enemy territory in the quantity and for the time necessary to effect their purposes; (b) whether or not they wish to recognize any enemy authority as competent to contract for the enemy state at the

time of surrender, and (c) whether or not they wish to utilize procedures which, under their own constitutions, are adequate to make valid political agreements.

6. It is believed that the United Nations intend unconditional surrender as a means for accomplishing basic reforms in the enemy countries but that they do not intend it to restore peace immediately nor to destroy the sovereignty of the enemy states. It is clear that a formal restoration of peace providing for a continuance of occupation would not be regarded as a "real" peace by the enemy people. It is further believed that the United Nations are prepared to take the measures necessary to effect their policies in the enemy territory and would prefer not to recognize any competent enemy government at the time of unconditional surrender. It would be doubtful whether any government existing at the time of unconditional surrender would really be competent to bind the enemy state even if the United Nations should recognize it.

7. If these assumptions are correct, unconditional surrender should be effected by a declaration stating the fact and not by a contractual instrument. The latter would imply duties by the United Nations and might provide a basis for controversies with the enemy. It would ^{also} raise issues as to the legal powers of the contracting parties. A declaration on the other hand should be made by the person or persons exercising the greatest degree of military, political, and symbolic power in the enemy states. It should simply state that such person or

persons surrender unconditionally and that no obstruction will be offered to the carrying out of the policies of the United Nations. This should be followed by a declaration by the military authorities of the United Nations accepting the surrender and specifying certain immediate acts to be taken such as delivery of arms and evacuation of areas to be taken and stating that future requirements will be made by proclamation from time to time.

8. Such declarations would not institute a contractual arrangement, would not impose any legal obligations on the United Nations other than those flowing from general international law, and would not raise any issues of the legal competence of the persons making the declarations but would imply only the practical ability to carry out their declarations. It is clear that the military authorities of the United Nations would be competent to make such declaration as the terms merely accept surrender and make certain military requirements.

9. After this transaction, the United Nations could proceed to a military occupation of the territories of the enemy. If it should be found that measures beyond those permissible for a normal military occupant were required, they could be taken and insofar as they were, they would convert the military occupation into a partial subjugation. So long as the United Nations are in a position of firm control which would make it possible for them to annex the territories if they wished, they could legislate beyond the powers of a mere occupant provided^{only} they

have the intention and the capacity to continue their occupation so long as necessary to assure the effectiveness of this legislation.

10. Since, however, under the law of the United States, the President and the military authorities may not take measures by virtue of the existence of war beyond that of military occupation (Fleming vs. Page; Mitchel vs. Harmony) if it is found that measures concerning property or other legislation are required beyond the powers of military occupation, Congress should be asked to pass a joint resolution authorizing the President to take whatever measures are necessary in enemy territory to effect the policies of the United Nations.

III. Form of Unconditional Surrender

The following suggestion is a possible form for the unconditional surrender of Japan:

1. I, Hirohito, Emperor of Japan, with advice of my Ministers, Privy Council, and Military Command, hereby surrender my armies, land, and people unconditionally to the United Nations.
2. The armies, officers and people of Japan offer no opposition, obstruction or resistance to any measures which the United Nations and those acting on their behalf may consider necessary to carry out their policies.
3. Confident that I may rely upon the justice of the United Nations I have yielded to their power.

The acceptance of this surrender could be in the following form:

1. _____, Commander of the United Nations' forces in the Far East, hereby accept this surrender.
2. The following provisions will be scrupulously carried out at the times prescribed: (Here would follow detailed provisions concerning delivery of arms, evacuation of areas, return of allied prisoners, etc.)
3. I will proclaim further requirements from time to time.

The consequences of a temporary exercise of the powers of a conquered government by the victors without actual annexation of the territory of that country and termination of its political existence are not clearly defined by international law. After "completed" conquest and annexation, the annexing government completely and permanently supersedes the former government, which ceases to exist. The powers of a military occupant, on the other hand, are confined to what is necessary for the maintenance of security and order in the occupied territory, and the occupant is bound by detailed rules of international law which do not permit general changes in the permanent law of policy of the enemy state. The situation following unconditional surrender will perhaps most closely resemble that of a general de facto government. Such a government has been considered competent to exercise all the powers of the state in both domestic and foreign affairs during the ^{period} ~~XXXX~~ it enjoys that status. (Tinoce Arbitration, Great Britain versus Costa Rica, American Journal of International Law 1924, Vol. 18, pp. 132-7; Hopkins (U.S.)

Mexico, September 8, 1923, Report of Commissioners, 1927, pp. 42

This competence arises from the relative security of tenure of such a government distinguishing it from the more precarious situation of military occupants and of local de facto governments (E. H. Fellenzfeld, the International Economic Law of Belligerent Occupation, 1942, pp. 11-12, 87, 89, 131-2).

General de facto governments have usually assumed that their rule will be permanent. The United Nations, however, contemplate eventual restoration of independent governments in Japan and Germany. In this respect the situation will resemble that of political occupations such as the United States in Cuba (1899-1901) and Great Britain in Egypt (1882-1919). These occupations differed from protectorates in being de facto situations in which the powers of the occupant did not rest upon a formal international instrument, but upon unilateral declarations supported by effective power.

It appears to be the declared policy of the principal United Nations, and particularly of the United States, for those nations to exercise the powers of a general de facto government over Germany and Japan for such period as is necessary to carry out their policies. If, through unconditional surrender, the United Nations acquire such secure control that they can in fact exercise those powers, they would have the competence under international law, during the period of such control, to

substitute themselves for the governments of Germany and Japan in foreign as well as in domestic affairs and to direct the utilization of the consulates and embassies, including the archives of those enemy governments. As a consequence they should be free to continue or to discontinue the services of the protecting powers appointed by Germany or Japan.

Further justification for the assumption of these powers may be found in the general recognition of the United Nations, not as ordinary belligerents, but as participants in a vast sanctioning operation to suppress aggressors who initiated hostilities in violation of treaties to which they as well as the United Nations and the neutrals were parties. This circumstance justifies the declared intention of the principal United Nations to act "on behalf of the community of nations" and warrants neutral powers in recognizing the competence of the United Nations to assume whatever powers are necessary to perform functions in the general interest of the community of nations.