

BERICHTE UND URKUNDEN

Suspension of Diplomatic Relations between Occupied Japan and Neutral States

Confidential diplomatic documents have been disclosed in five series thus far. The author here reappraises the legal aspects of the Japanese occupation by considering one area, the deprivation of Japan's diplomatic competence by the Allied Powers.

Details on Deprivation of Diplomatic Competence

It has generally been believed that deprivation of Japan's diplomatic competence was initiated by the direction of the Supreme Commander for the Allied Powers (hereinafter SCAP) on October 25, 1945. The prelude to the deprivation drama, however, had already been played out in a neutral nation, Switzerland, on the day following the notification of acceptance of the Potsdam Declaration¹ (August 15, 1945 – 18 days prior to Japan's signing of an Instrument of Surrender²). The whole episode took place in a background of differing treatment of the former Axis powers regarding their external relations. Germany had already been deprived of her diplomatic competence while Austria's diplomatic and consular relations with the United Nations, without the previous permission of the Allied Council, and with other nations, with the Council's permission, were recommenced in 1946 (under art.7 of the Second Control Agreement of June 28, 1946³); however, Austria's diplomatic and consular relations

¹ The Department of State Bulletin, vol. XIII, no. 318, July 29, 1945, p. 137.

² Microfilm of Diplomatic Documents which have been disclosed are filed in Japanese Archives (Tokyo) reel number A'-1002.

³ Treaty Series No. 49 (1946). London, His Majesty's Stationery Office Command 6558, 1946. Stephan Verosta, *Die internationale Stellung Österreichs* (1947), p. 109.

with Spain were not recommenced because of the Russian use of the veto power in the Allied Council.

The prelude actually took the form of an emergency cryptogram sent from Minister Kase stationed in Bern to the then Foreign Minister Tōgō (No.890⁴ – receipt August 16, 1945). The content was as follows:

«A la demande du Gouvernement des Etats-Unis d’Amérique le Département Politique a l’honneur de transmettre à la Légation du Japon le message suivant destiné au Gouvernement de Japon: «The Japanese Government will immediately instruct its diplomatic and consular offices in neutral countries to surrender custody of all property and archives to representatives of Allied Powers. The Japanese Government will likewise authorize the appropriate government protecting its interests to relinquish diplomatic and consular property and archives to the custody of Allied Powers in belligerent countries»».

In response to this request of the U.S. Government, Minister Tōgō sent on the same day an emergency cryptogram on behalf of the Japanese Government entitled “On matters relating to diplomatic mission premises in neutral nations and others” (No.367⁵) to Minister Kase, asking that the message be conveyed to the U.S. Government through the Swiss Government (and that it be conveyed also to Japan’s diplomatic missions in other neutral countries – Sweden, Portugal, Eire, Afghanistan and the Vatican⁶). The text was the following:

“As the request in question falls under no articles of the Potsdam Declaration which Japan has accepted, the Imperial Government cannot comply with the request which the U.S. Government made via Swiss Government”.

Meanwhile, Minister Okamoto, in Stockholm, informed Foreign Minister Shigemitsu, in a cryptogram sent on August 18, 1945 (No.533⁷) of the statement which the Swedish Under-Secretary of Foreign Affairs had made during the official meeting with Minister Okamoto. The cryptogram read:

“... It has been revealed that the Swedish Government responded to the United States, United Kingdom and others in discussions with the Allied Powers that there were precedents in the past concerning this problem and that drastic measures would never be taken where no legal bases could be found, as the situation differs in the Japanese and German surrenders”.

The U.S. Government made no formal response to the rejection of the U.S. Government’s request by the Japanese Government, but Japan’s

⁴ *Ibid.*, A’-0119.

⁵ *Ibid.*, A’-0119.

⁶ *Ibid.*, A’-0119. [Author’s translation].

⁷ *Ibid.*, A’-0120. [Author’s translation].

Legation in Afghanistan was placed under seal without prior warning on August 27, 1945. This incident came to the knowledge of the Japanese Government by emergency cryptograms dated August 28, 1945 (Nos. 210 and 211⁸) dispatched from Minister Shichida to Foreign Minister Shigemitsu. The cryptograms were entitled: "On matters relating to a raid on Legation in Afghanistan". In summary:

"Upon the request from the United States Chargé d'Affaires through the Afghan Foreign Ministry to pay an official visit, Minister Shichida complied with the request, and found that representatives from the United States, the United Kingdom, the Union of Soviet Socialist Republics and China, as well as France were present [the Union of Soviet Socialist Republics unilaterally denounced the Japan – Union of Soviet Socialist Republics Neutrality Pact and joined the war against Japan on August 8, 1945 on the grounds that Japan had rejected the Potsdam Declaration]. The Representatives compelled Minister Shichida to accept the immediate sealing of the archives and property of the Legation, and to sign the Memorandum which specified the transfer of the above at any time upon request by an authorized official from the Allied Powers. Minister Shichida tried to resist in some way; however, he ultimately signed the following five documents – in a private capacity – and submitted them to the United States delegate, as he realized his resistance would yield no significant effects but would only complicate the problem".

The text of the Memorandum effecting transfer was:

"Motoharu Shichida, Imperial Japanese Minister in Kabul, agree[s] that effective 3:30 p. m. Kabul time, August 27, 1945, all archives in the Imperial Japanese Legation will be placed under seal by the Allied mission and I personally undertake that these seals will not be broken and that no archives, funds or property of the Imperial Japanese Government wherever situated in Afghanistan will be removed, destroyed, or otherwise disposed of.

Having received no instructions from my Government, I sign this document under protest and at the insistence of the Allied representatives.

Signed Motoharu Shichida
August 27, 1945".

Even though done under compulsion from the delegates of the five Allied Powers and performed in a private capacity, the action which Minister Shichida took was effectively equal to the conclusion of an agreement. Sealing of the legation, therefore, was based upon agreement of the parties and, moreover, was implemented by the Allied delegates, although not

⁸ *Ibid.*, A'-0120. [Author's translation].

under the authority of the Afghan Government. If the Minister had not yielded and had not signed, the Allies would have been able lawfully to seal the legation with the cooperation of the Afghan Government only in the limited – and here hypothetical – case that Japan was subjugated or if such an act had been explicitly stipulated in the Potsdam Declaration. In any case, this sealing of the Japanese legation by the Allies drove the first wedge between Japan and the neutral countries.

After the Japanese Government had had the benefit of considering Minister Shichida's report, Ministers Okamoto in Sweden and Kase in Switzerland were sent the following messages by emergency cryptogram (No.719)⁹ from Foreign Minister Shigemitsu on September 6, to be delivered to the Allied Governments via various neutral governments:

“As the request in question falls under no articles of the Potsdam Declaration, which Japan had accepted, the Imperial Government herein makes an official protest to the representatives of the United States, the United Kingdom, the Union of Soviet Socialist Republics, China and France stationed in Kabul against their act upon the Imperial Government Legation in Afghanistan”.

The message had been drafted in September 3 (the Instrument of Surrender was signed on September 2).

No response was made to the above protest, which was made twice by the Japanese Government; however, the Allies, on October 25, in 1945, issued the following direction as to “Transfer of Custody of Diplomatic and Consular Property and Archives” to the Japanese Government under the signature of the SCAP (SCAPIN 189)¹⁰.

“1. By direction of the Allied Powers, the following instructions are given the Imperial Japanese Government for prompt compliance:

A. In countries where Sweden or Switzerland are acting as protecting powers over Japanese interests, with the exception of those countries enumerated in sub-paragraph B below, the protecting power concerned will be instructed by the Japanese Government to turn over intact and without delay to representatives of the four Allied Powers who have been instructed to receive them, physical custody of all Japanese diplomatic and consular property and archives in the country concerned. The protecting power, however, should continue to exercise routine functions of protection of Japanese nationals.

B. In the United Kingdom, the Union of Soviet Socialist Republics, China, the United States, the British Commonwealth, France and the Netherlands,

⁹ *Ibid.*, A'-0120, [Author's translation].

¹⁰ *Ibid.*, A'-0001.

including colonies and dependencies thereof, the protecting power concerned will be instructed by the Japanese Government to turn over intact and without delay to the government of the country in which they are located, physical custody of all Japanese diplomatic and consular property and archives in the country concerned.

C. In all neutral countries, the Japanese Government will instruct the Japanese mission in such country [*sic*] to turn over intact and without delay physical custody of all Japanese diplomatic and consular property and archives to representatives of the four Allied Powers who have been designated to receive them. Routine functions of protection of Japanese nationals in such neutral countries may be turned over to Sweden or Switzerland since these powers are acting as protecting powers for Japanese interests elsewhere.

D. The Japanese Government will immediately recall Japanese diplomatic and consular representatives in neutral countries and will cease further relations with foreign governments except as stated in sub-paragraph A and C above, or in accordance with such procedures as are hereafter established".

With this direction the curtain rose on the first act of the drama of deprivation.

In short, the Allied Powers had commanded the Japanese Government to close down all Japanese diplomatic mission premises abroad (embassies, legations and consulates), to transfer custody of diplomatic and consular property and archives, and to sever all diplomatic relations by recalling all staff in the diplomatic and consular offices in neutral countries. This direction was the Allies' response to the Japanese note of protest.

After being so notified, the Japanese Government informed under the name of Foreign Minister Yoshida (cryptogram No. 840¹¹) Japanese diplomatic missions in Dublin, Stockholm, Bern and Lisbon of the Allies' direction. The Government, on the same day, instructed Okazaki, Director General of the Central Liaison Office (CLO), to meet General Richard J. Marshall, Jr., the Deputy Chief of Staff of General Headquarters of the United States to request an explanation as to the reasons for the above request.

At the bottom of this cryptogram was written the following:

"... As the request in question falls under no articles of the 'Potsdam Declaration', which Japan had accepted, the Japanese Government is seeking an explanation as to why the Allied Powers have made the said request".

Marshall stated as follows in the ensuing meeting¹²:

¹¹ *Ibid.*, A²-0119. [Author's translation].

¹² *Ibid.*, A²-0119. [Author's translation].

“The request has followed the direction given by the Allied Powers; thus the General Headquarters (GHQ) is not in a position to add any explanation of the matter beyond simple notification to the Japanese Government. If there is any document in which the position of the Japanese Government is clearly delineated, we might transmit it to the U.S. Government”.

After this statement, as General Douglas MacArthur – with whom Foreign Minister Yoshida had on October 29 attempted to make an appointment – was absent, Yoshida met with Deputy Chief of Staff Marshall and handed him a “Memorandum”. The other party promised to convey Yoshida’s Memorandum to the U.S. Government after minor editorial modifications. At the same time, however, “when Marshall asked the Japanese Government to issue instructions, including the request given in said order, to her diplomatic and consular representatives abroad ...”, “... the Foreign Minister promised the same”¹³ before he left. In other words, Marshall claimed implementation of the direction as a condition for the promised forwarding of the Memorandum to the U.S. Government.

Subsequent to the meeting of October 29, mentioned earlier, the Japanese Government gave instructions on October 31, under the name of Foreign Minister Yoshida, to Minister Kase (Switzerland) and Okamoto (Sweden) to take actions in line with the Allies’ direction (emergency cryptogram No.851)¹⁴, and concurrently transmitted the “Memorandum”¹⁵ (described later – p. 106 ff.) to the GHQ.

In the wake of these events, the Japanese legation in Bern completed the transfer of its property and archives to the official representative of Switzerland, and the representative and Minister Kase jointly signed the Protocol on transfer¹⁶. Meanwhile, the Legation Office in Sweden was placed under seal on November 1, followed by the official signing of a Protocol by Minister Okamoto on November 20, by which he completed all procedures for the transfer¹⁷.

As Act II of the deprivation drama, the Allied Powers, through SCAP, issued a direction regarding “Official relations between the Japanese Government and representatives of neutral nations” to the Japanese Government on November 4 as follows (AG 091.1 [4 Nov.45] GS – SCAPIN 237)¹⁸:

¹³ *Ibid.*, A²-0119.

¹⁴ *Ibid.*, A²-0119.

¹⁵ *Ibid.*, A²-0119.

¹⁶ *Ibid.*, A²-0120.

¹⁷ *Ibid.*, A²-0120.

¹⁸ *Ibid.*, A²-0001.

“Except as hereafter authorized by the Supreme Commander for the Allied Powers you will cease to carry on relations with neutral governments or representatives thereof in Japan. You will inform such representatives now in Japan that the existence of diplomatic missions is not deemed consistent with the purposes and character of the Allied Occupation in Japan and of the position of the Supreme Commander for the Allied Powers, and refer them to the Supreme Commander for the Allied Powers for future contacts with the Japanese Government”.

The Government, after being so notified, dispatched Vice Minister of Foreign Affairs Matsushima on November 7 to meet with Chief of the Government Section of GHQ, Crist, at his request. At the end of the meeting, the question and answer which follow were exchanged after discussion as to how to interpret the words written in the direction¹⁹.

“Crist: Is there anything I can do for you?”

Matsushima: We received the second direction . . . and ask you for a detailed explanation as to why such a direction was necessary. As all means of communication with neutral nations on protection of Japanese citizens etc. will be suspended, we hope this matter will be deliberated upon by the GHQ. Actually, a draft memorandum . . . has already been approved. You might take a look at it (submitting draft Memorandum).

Crist: (After reading it through) We will respond to it when the draft is immediately submitted in an official manner”.

On the following day, the 8th, the Government sent a note “Pro Memoria”²⁰, which clearly set out the above point made to the GHQ. Its contents were:

“In view of traditional friendly relationships between Japan and the neutral countries, the Japanese Government is not in a position without the latter’s consent to cease, in execution of the present directive, diplomatic and consular functions of these countries in Japan. The Japanese Government begs, therefore, to be more fully informed of the views of the General Headquarters on the implications of the present directive, and of the plans with which to manage the situations resulting therefrom, so that it may be able to offer the neutral Governments concerned satisfactory explanations about the steps to be taken.

The Japanese Government considers it necessary to maintain after the execution of the present directive, minimum numbers of Swiss and Swedish liaison officials in Japan as well as Japanese liaison officials in these two countries in order to carry on functions relating to the protection of Japanese nationals. It is

¹⁹ *Ibid.*, A’-0119.

²⁰ *Ibid.*, A’-0119.

sincerely hoped that the General Headquarters will offer favourable considerations for the fulfilment of the desires of the Japanese Government”.

While the Japanese Government was awaiting the Allies’ reaction to this “Pro Memoria”, the Deputy Chief of the Government Section of the GHQ, Caize, indicated to Vice Minister for Foreign Affairs Matsushima on November 17 that the Allies’ response would be delivered shortly. Although the response, a memorandum, was dated November 18, the date on which the Japanese Government actually received it was, strangely enough, November 22 – even though it had been stated that the direction issued on November 4 was to be promptly executed²¹. On the 19th, Foreign Minister Shigeru Yoshida delivered a “Note Verbale” describing details of the direction to the Swiss Minister and Swedish Chargé d’Affaires stationed in Japan. This “Note Verbale”²² was entitled “On suspension of contacts with diplomatic representatives of neutral nations”. Interesting to note here is the fact that this “Note Verbale” was already drafted on the 6th, prior to the meeting between Matsushima and Crist, and two days subsequent to the receipt of the second direction.

The Memorandum prepared by the GHQ and received by the Japanese Government on the 22nd (AG 091.112 [18 Nov.45] GS – SCAPIN 299 – response to the “Pro Memoria” of the Japanese Government) read as follows²³:

“1. Receipt is acknowledged of your letter of 8 November 1945, transmitting a Pro Memoria on the above subject.

2. The memoranda of this headquarters of 25 October 1945 and 4 November 1945, directed the Japanese Government to discontinue foreign relations both in Japan and abroad as inconsistent with the present military occupation of Japan and the supreme authority of the Supreme Commander for the Allied Powers [emphasis added in both places]. Consent on the part of neutral governments is, therefore, not required or involved.

3. It is understood that Switzerland and Sweden will continue, as desired by the Japanese Government, routine functions in the protection of Japanese nationals in neutral countries. For this reason and for the reasons referred to in the preceding paragraph, the request for the authorization of Japanese liaison officers to supervise these functions is not approved.

4. As regards the maintainance of neutral liaison officers in Japan, the Supreme Commander is taking steps to inform the neutral governments concerned

²¹ *Ibid.*, A’-0119.

²² *Ibid.*, A’-0119.

²³ *Ibid.*, A’-0119.

that they may appoint diplomatic agents or representatives of that character to maintain contact with the Supreme Commander for the Allied Powers.

5. You will report immediately the steps taken in compliance with the memorandum of 25 October 1945”.

Some parts of the directions of October 25 and November 4 dealt with Japanese diplomatic missions in the respective countries of the Allied Powers, other parts with Japanese diplomatic missions in neutral nations together with those of neutral nations in Japan. Japan had been in a state of belligerency with the Allied Nations until then; thus, no diplomatic relations existed between them. This situation prevailed even in the post-war time until peace was officially restored. The direction of October 25 was only related to the custody of diplomatic and consular property and archives; nonetheless, the portion dealing with neutral nations had serious implications, and the diplomatic relations which Japan had ordinarily maintained with these countries were permitted only through SCAP. Sweden and Switzerland could be contacted only via SCAP when the interests of Japanese nationals abroad had to be secured. Accordingly no direct contact between neutral nations and Japan was permitted. Thus, Japan's active right to send her envoys and consuls and her passive right to receive foreign envoys and consuls were suspended, and her right to conclude treaties with foreign nations and to express her intentions according to international law within the powers of her own organs was curtailed. In other words, Japan completely forfeited her diplomatic competence. As for how Japan would cope with matters relating to diplomatic representatives of neutral nations after relations were ruptured, the following agreements were reached between Matsushima and Crist at the meeting held on November 29²⁴.

“(1) When needs arise for contact with diplomatic representatives of neutral nations to settle matters pending between the parties and to conduct requisite procedures to secure the interests of nationals, documents to the representatives and a copy thereof shall be submitted to the GHQ for transfer.

(2) The Ministry of Foreign Affairs shall be responsible, as in the past, for offering conveniences to the diplomatic representatives of neutral nations”.

On December 8 SCAP issued to the Imperial Japanese Government the following direction on “Relations of Japanese Government with Foreign Diplomats in Japan” (AG 091.1 [8 Dec.45] GS)²⁵.

²⁴ *Ibid.*, A'-0119.

²⁵ *Ibid.*, A'-0001.

“With reference to the two questions raised in the memorandum dated 29 November 1945 received from Mr. S. Matsushima, Vice-Minister for Foreign Affairs, during his call at this headquarters on 29 November 1945, you are directed as follows:

1. Official communications dealing with pending questions or with routine functions of protection of Japanese nationals in neutral countries, which the Japanese Government wishes to transmit to neutral governments or the representatives thereof, will be delivered to this headquarters through the usual channel, for transmittal to the governments or representatives concerned, in sufficient copies to permit necessary distribution.

2. Compliance with memorandum from this headquarters subject: Official Relations Between Japanese Government and Representatives of Neutral Nations, file AG 091.1 (4 November 45) GS, will not relieve the Japanese Government of its responsibility to provide suitable quarters, fuel, subsistence, medical and other care to foreign diplomats on the standard scale and in accord with international custom as announced in memorandum from this headquarters, subject: Treatment of Foreign Diplomats in Japan, file AG 091.112 (21 Oct.45) GD.

3. Such contacts will be maintained with foreign diplomats as may be necessary to provide them with food and other facilities in accord with paragraph 2 above. Official matters such as covered in paragraph 1 above will not be discussed”.

Moreover, GHQ requested that a third measure be put into practice, which was based upon the direction of December 10, 1945, concerning the “Cessation of communications between the Japanese Government and its former diplomatic and consular representatives abroad” (AG 091.1 [10.Dec.45] GS – SCAPIN 413). Paragraph 1 of the direction stipulated the following²⁶:

“1. Except as authorized by this Headquarters, the Japanese Government will, from the receipt of this Memorandum, discontinue all communication between itself and former Japanese diplomatic and consular representatives abroad for any purpose other than to effect compliance with the provisions of Memorandum dated 25 October 1945 from this Headquarters, subject: ‘Transfer of Custody of Diplomatic and Consular Archives and Property’, and for the purpose of informing such representatives of the provisions of this Memorandum”.

By a GHQ directive of December 15 (AG 091.112 [15.Dec.45] GS) the previous direction of October 25 for transfer of custody of diplomatic and

²⁶ *Ibid.*, A'-0001.

consular property and archives also became applicable to the Vatican. Its contents were as follows²⁷:

“1. Reference is made to Memorandum dated 25 October 1945 from this Headquarters to the Imperial Japanese Government, subject: Transfer of Custody of Diplomatic and Consular Property and Archives.

2. The Japanese Government is directed to extend application of subject memorandum to its mission to the Vatican, following the procedure set forth therein relative to missions to neutral countries.

3. Communication between the Japanese Government and its representatives at the Vatican for the purpose of complying with this directive is authorized. Copies of all communications sent or received in connection therewith will be furnished to this Headquarters at the earliest practicable date”.

The Government gave instructions as required to Minister Harada on December 17. The Minister completed the transfer through the Vatican and concurrently notified the Vatican of cessation of official diplomatic relations. This constituted the final curtain of the deprivation drama, by which Japan was completely isolated from the rest of the world. It was the advent of the “Second Seclusion”, less than a century after the first. However, this isolation was different from the previous seclusion, imposed by the Tokugawa Shōgunate²⁸, because it was imposed by the foreign Allied Powers.

How do the measures taken by the Allies appear in the light of international law?

Legal Basis for Deprivation of Diplomatic Competence

The loss or restriction of diplomatic competence of a given country is limited to cases in which either: (1) The country has been devastated after defeat in war and subjugated by its former enemy, or has been annexed to the foreign country pursuant to the treaty concluded with the latter (her entity as a nation thus being extinguished), or (2) The country concerned gives her consent to the relinquishment or restriction of her diplomatic competence to a foreign nation(s) or a confederation of States. If these events had fallen under the second category, the diplomatic competence would have been reduced within the boundaries defined by the instruments setting out the terms of such consent and Japan's diplomatic competence in

²⁷ *Ibid.*, A'-0001.

²⁸ Since 1639 (until 1853), when the decree closing the frontiers (SAKOKU-REI) was issued by Tokugawa Shōgunate, by which Japan, except the port of Nagasaki was cut off from the outside world (contact there being possible only with the Dutch and the Chinese).

the areas affected would instead have been taken over by the foreign nation(s) or the union of States.

Hence the question arises: "Did any agreement exist between Japan and the Allies in which Japan expressed consent to the relinquishment or restriction of her diplomatic competence by the Allied Powers"?

The international agreements which legally bound Japan and the Allies were the Instrument of Surrender of September 2, 1945 (Japan pledged fulfilment in good faith of the provisions in the Potsdam Declaration in Clause 6 of this document) and the preceding communications that were exchanged on August 10 or 14²⁹. The restrictions on diplomatic competence *vis-à-vis* neutral nations which were stated in Sections 25 (A) and (B) – although not actually carried into effect – of the Italian Armistice Agreement dated September 29, 1943³⁰ were not mentioned in the above documents that bound Japan. Sections (A) and (B) of the Italian Agreement read as follows:

"25. (A) Relations with countries at war with any of the United Nations, or occupied by any such country, will be broken off. Italian diplomatic, consular

²⁹ The prevailing view in Japanese academic literature is that the Japanese occupation by the Allied Powers (principally U.S. Forces) was based upon the international agreements. See especially Ryoichi T a o k a, *Shūsenjo no Nippon no Hotekichii* [Legal Status of Japan after World War II], *ibid.*, A'-0120. His article had been written as an Expert Opinion to the Japanese Foreign Ministry in spring of 1946, but it is still much valuable today and it has given me much of useful suggestions. In Germany Hermann Mosler, *Der Einfluß der Rechtsstellung Deutschlands auf die Kriegsverbrecherprozesse, Süddeutsche Juristenzeitung (SJZ) 1947, p.366: »Japan nahm die Bedingungen des Potsdamer Ultimatums vom 26.7.1945 unter dem Vorbehalt der Beibehaltung des Kaisertums an, die von den Alliierten zugesichert wurde. Der der Kapitulation vom 2.9.1945 vorausgehende Notenwechsel über diese Frage zeigt, daß der Besiegte nicht nur, wie im Falle Deutschlands, eine einseitige Erklärung abgab, sondern daß auch die Sieger sich auf völkerrechtlicher Ebene verpflichteten«.*

The preceding exchanged communications were:

- a) Note of the Japanese Government of August 10 regarding their Acceptance of the Provisions of the Potsdam Declaration,
- b) Answer of the United States Government of August 11 to the Japanese Government on Behalf of the Governments of the United States, the United Kingdom, the Union of Soviet Socialist Republics and China,
- c) Communication of the Japanese Government of August 14 Addressed to the Governments of U.S., U.K., U.S.S.R. and China,
- d) Note of the Japanese Government of August 14 to the Governments of U.S., U.K., China and U.S.S.R. Expressing its Desire with Reference to the Execution of Certain Provisions of the Potsdam Declaration,
- e) Notification of the U.S. Government of August 14 to the Japanese Government of Acceptance of Surrender Offer, and Surrender Orders.

³⁰ Martens Nouveau Recueil Général de Traités, 3rd series, vol.41, pp.876 ff. (880).

and other officials and members of the Italian Land, Sea and Air Forces accredited to or serving on missions with any such country or in any other territory specified by the United Nations will be recalled. Diplomatic and consular officials of such countries will be dealt with as the United Nations may prescribe.

(B) The United Nations reserve the right to require the withdrawal of neutral diplomatic and consular officers from occupied Italian territory and to prescribe and lay down regulations governing the procedure for the methods of communication between the Italian Government and its representatives in neutral countries and regarding communications emanating from or destined for the representatives of neutral countries in Italian territory”.

Even though the legal basis for SCAP's right to interfere with Japanese diplomatic functions was not in fact explicitly stated in the articles of the Instrument of Surrender and the Potsdam Declaration, if Japanese missions abroad had in fact tried to use her diplomatic relations with neutral nations in order to evade proper fulfilment of some article in these documents, the direction of SCAP which suspended the direct contact between Japan and neutral nations and which directed all diplomatic communications through SCAP would have been justified as a measure to enforce due performance of the treaty obligations.

The Allied Powers, however, would have first been obliged to prove that such an action had in fact occurred. Generally, the party which tries to place restrictions on the sovereignty of another country must set forth the legal justifications for such intended action. It is not the responsibility of the country upon whom an obligation is imposed to prove its legality; rather, it is the duty of the nation which imposes a requirement to verify its lawfulness.

In this context, the Japanese Government inserted the following in the last paragraph of a Memorandum sent to GHQ on October 31³¹, after considering information published on the radio and in the newspapers in the United States after October 25, 1945, when the direction was issued:

“It is earnestly desired that when the Allied Powers have investigated the activities of these Japanese representatives and when it has been clearly established that their presence in neutral countries will not be harmful to the Allied Powers, the Japanese Government hopes these representatives will be enabled to resume their normal routine functions as before ...”.

This statement of the Japanese Government was not a request for verification that the activities of her diplomatic missions in neutral nations had performed actual hindrances to the Allies in their enforcement of the Pots-

³¹ Microfilm (note 2), A²-0001.

dam Declaration, but was simply an indication of the hope that perhaps her diplomatic functions would be restored if the Allies' investigations proved the absence of actual hindrance. Observable here was the discouragingly passive approach of the Japanese Government regarding its rights under traditional international law.

It is clear, however, from the documents in question – whatever negotiating posture the Japanese Government adopted – that no articles could be found in the international agreements between the two parties which entitled the Allies to deprive Japan of diplomatic competence, nor was any justification for the extraordinary measures made according to any international legal standard.

Remedy for Deprivation of Diplomatic Competence

The occupation of Japan was based on the international agreements terminating the hostilities (Japanese courts recognized their validity) and the authority of SCAP was therefore not that of an omnipotent ruler, but was restricted by the same agreements. The Japanese Government was legally bound to observe and fulfil all directions (Instrument of Surrender, Clause 6) which SCAP issued for the enforcement of the Potsdam Declaration (*i.e.* the nine objectives enumerated therein)³², and measures deemed appropriate for the implementation of the surrender articles (*ibid.*, Clause 8).

³² The nine basic objectives set forth in the Potsdam Declaration were:

“1) To eliminate for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world. (Clause 6).

2) To limit the Japanese sovereignty to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine. (Clause 8).

3) To disarm and completely demobilize the Japanese military forces. (Clause 9).

4) To mete out stern justice to all war criminals, including those who have visited cruelties upon our prisoners. (Clause 10).

5) To remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people and to establish freedom of speech, of religion and of thought, as well as respect for the fundamental human rights. (Clause 10).

6) To exact just reparations in kind. (Clause 11).

7) To dismantle such industries which would enable Japan to re-arm for war. (Clause 11).

8) To establish in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government. (Clause 12).

9) To occupy Japan until these objectives have been accomplished. (Clause 12)”.

The sovereignty of Japan was restricted in many areas by the agreements (especially the restriction of capacity to act on the international plane, *Handlungsfähigkeit*). The restriction of sovereignty by imposition of obligations based upon international treaty, however, must be restrictively interpreted in case of doubt. This is a principle of interpretation in international law which was confirmed in the Permanent Court of International Justice's judgment of August 17, 1923 in the *Wimbledon* case³³. The judgment read as follows³⁴:

«Que ce soit par l'effet d'une servitude, ou par l'effet d'une obligation contractuelle que le Gouvernement allemand est tenu envers les Puissances bénéficiaires du Traité de Versailles de laisser l'accès du Canal de Kiel libre et ouvert aux navires de toutes les nations, en temps de guerre comme en temps de paix, il n'en résulte pas moins pour l'Etat allemand une limitation importante de l'exercice du droit de souveraineté que nul ne lui conteste sur le Canal de Kiel; et cela suffit pour que la clause qui consacre une telle limitation doive, en cas de doute, être interprétée restrictivement. Toutefois, la Cour ne saurait aller, sous couleur d'interprétation restrictive, jusqu'à refuser à l'article 380³⁵ le sens qui est commandé par ses termes formels. Ce serait une singulière interprétation que de faire dire à un traité exactement le contraire de ce qu'il dit». (Emphasis added).

With respect to the three directions given by the Allies to deprive Japan of her diplomatic competence (the directions issued on October 25, November 4 and December 10, respectively), the Japanese Government in the first place had the right, as a countermeasure, to question whether the directions were a prerequisite for the implementation of any provision in the Potsdam Declaration. If she had exercised this right, the Allies would have had the legal obligation of verifying the need for the directions. If the

³³ On the *Wimbledon* case, see Tsune-Chi Yü, *The Interpretation of Treaties*, pp.140-152; I. von Münch, in: Strupp-Schlochauer, *Wörterbuch des Völkerrechts*, vol.3, pp.850-854.

On the restrictive interpretation of treaties see Rudolf Bernhardt, *Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.40) (1963), pp.176-178. But Bernhardt denies the rule of the restrictive interpretation; Lauterpacht also denies this rule and insists on the principle of effectiveness. See *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, *British Year Book of International Law*, vol.26 (1949), pp.67f.

³⁴ *Recueil des Arrêts, Série A, No.1*, pp.24-25.

³⁵ Art.380 provided: "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality".

Allies had not responded to the inquiry, or if any response had been deemed inappropriate, Japan could have made repeated protests against the illegal orders or have asked the Allies to withdraw them. Of course, her protestations would not have been of a nature which would immediately have had the effect of nullifying the directions. By following the appropriate necessary legal procedures, however, the Japanese Government could have left the problem to the realm of judicial settlement (an arbitration tribunal or, later on, the International Court of Justice). If the directions had then been proven legally groundless after reference to this procedure, the Allies would have been obliged to withdraw the directions and to cancel them retroactive to the date of issuance.

The power to protest against these orders and to question their legality on behalf of the Japanese nation and nationals during the days of occupation came under the régime of control over speech and writing and this power was limited solely to government officials. Popular resentment against occupation policies thus had no direct vent. This is to be seen from SCAP's Memorandum to the Japanese Government on censorship policy over press and radio of September 10, 1945 (SCAPIN 16³⁶), Press Code for Japan on September 19 (AG 000.73 [18.Sept.45] CI-SCAPIN 33³⁷), Radio Code for Japan (AG 000.77 [22.Sept.45] CI-SCAPIN 43³⁸), the Memorandum on press censorship of September 24 (AG 311.7 [24. Sept.45] CI-SCAPIN 52³⁹), and the Memorandum on mail censorship (AG 311.7 [1.Oct.45] CI-SCAPIN 80⁴⁰); these documents established the basic principles of GHQ's information and media policy, especially para.4 of the Press Code for Japan of September 19, 1945, which read as follows: "There shall be no destructive criticism of the Allied Forces of Occupation and nothing which might invite mistrust or resentment of those troops"; also laid down were the criteria for censorship. Hence the freedom of speech, the freedom to publication and the freedom of the press were all completely controlled by the Civil Censorship Detachment which was accountable to the Assistant Chief of Staff, G-2. So why did the Japanese officials themselves not take action to transmit protests under the circumstances?

³⁶ Microfilm (note 2), A'-0001.

³⁷ *Ibid.*, A'-0001.

³⁸ *Ibid.*, A'-0001.

³⁹ *Ibid.*, A'-0001.

⁴⁰ *Ibid.*, A'-0001.

The first probable reason lay in the Japanese Government's wish to retain the Emperor System (or the status of the Emperor). This viewpoint was informed by the deeply held concern of government officials that the Emperor System might be abolished unless the Japanese Government acceded to the Allies' demands. Nonetheless it was the Allied Powers who sought the early surrender of Japan and its successful occupation by the maintenance of the Emperor System and it was certainly still arguable that the continuance of this system was the most desirable option from the Allies' point of view.

The second reason was the apprehension held by officials that if they did protest they might be dismissed and their political careers might be interrupted on account of political incompetence and disobedience. However, if the Ministers involved and their subordinates had stood firm against the Allies' illegal directions, the people would have concurred and have supported them. They could therefore have been returned to power by the support of the people even if discharged (as was the case following Konrad Adenauer's dismissal in occupied Germany).

Conclusion: Legal Aspects of the Japanese Occupation Reassessed

1. As to the legal features of the Allies' occupation of Japan, there are two dominant competing classifications of the nature of the occupation: One is "Post-war Occupation"; the other is "Occupation by Control" (or "Control by Occupation"). Both, nevertheless, are neologisms, coined in an attempt to rationalize the occupation of Japan in the light of "*de facto* problems". The occupation of Japan has been termed in some court cases as "Post-war Occupation" (e.g. the judgments of the Tokyo District Court on March 25, 1959⁴¹ and of the Tokyo High Court on January 25, 1961⁴²), but also as "Occupation by Control" (e.g. the judgments of the Tokyo District Court on February 19, 1954⁴³ and the same on January 28, 1959⁴⁴).

However, the occupation of Japan can be seen to be of the type *occupatio sui generis*, unprecedented in world history prior to World War

⁴¹ No. 9117 [WA] of 1952. Kakyusaibansho Minjisaibanreishu, vol.10, p.566.

⁴² No.794 [NE] of 1959, *ibid.*, vol.12, p.56.

⁴³ No case number, Kōtōsaibansho Keijihanreishu, vol.7, p.1475.

⁴⁴ No.72 [GYO] of 1956, Gyoseijikensaibanreishu, vol.10, p.139.

II⁴⁵. This perception is arrived at when we view the Allies' occupation from the aspects of a) the title of occupation, *i.e.* by an agreement between the occupied and the occupying countries (as also occurred in the occupation of the Rhineland – on the basis of the Armistice Agreement of November 11, 1918⁴⁶); b) the purpose of the occupation, *i.e.* to ensure achievement of the eight basic objectives in the Potsdam Declaration⁴⁷ (they were much wider than the purposes pursued in occupying the Rhineland), and c) the authority of the occupying party, which was dependent upon the agreement between the occupied and the occupying nations, and was accompanied by the continuing existence of the wartime government of the occupied State. These factors place this occupation in a special position within the framework of international law and mark a development in the law on belligerent occupation.

2. Moreover, although the occupation has been called indirect rule, there were some instances in which direct rule occurred (as typical examples: a strike prohibition against the general strike on January 31, 1947, an order to suspend publication of the "Akahata" [Red Flag] newspaper of the Japanese Communist Party on June 26, 1950 and an order to suspend publication of its successors or affiliates on July 18, 1950; there are some – also problematical – decisions in which Japanese courts approved measures of direct rule)⁴⁸.

3. The phrase "Japan accepted the Potsdam Declaration and unconditionally surrendered to the Allied Powers" can still be seen in some court cases (e.g. judgment of the Tokyo High Court of April 28, 1962⁴⁹) and senior high school textbooks of Japanese history, a fact which demonstrates the one-sided formation of public opinion under censorship. It is noteworthy, however, that the correct use of the term "surrender" means military surrender, and nothing more.

4. While SCAP insisted, as evidenced in its Memorandum to the Japanese Government of November 18, 1945, that the occupation of Japan was a

⁴⁵ T a o k a regards the Japanese occupation as a new kind of occupation without precedent, Microfilm (note 2), A²-0120.

⁴⁶ On the occupation of the Rhineland, see Strupp-Schlochauer, *Wörterbuch des Völkerrechts*, vol.3, pp.125-127; Ernst Fraenkel, *Military Occupation and the Rule of Law* (1944).

⁴⁷ *I.e.* the remaining eight objectives, the ninth, occupation of Japan, having already been achieved (see note 32).

⁴⁸ Judgments of the Supreme Court of October 3, 1963 (No.1277 [O] of 1960, Saikosaibanshosaibanshu Minji No.68, p.145) and of April 17, 1964 (No.903 [O] of 1962, Shōmugeppo, vol.11, p.723).

⁴⁹ No.1678 [NE] of 1961, Shōmugeppo, vol.8, p.1207.

military occupation, and thus not one based upon international agreement, SCAP did not observe the Hague Regulations of 1907 respecting the Laws and Customs of War on Land. The Japanese courts made orders beyond those allowed by the 1946 Constitution that had been imposed by the Allies⁵⁰ and denied the application of the Hague Regulations. In Germany and Austria, however, in contrast to Japan, these are many examples of some courts applying the Hague Regulations⁵¹.

A typical example of the non-observance by SCAP of the Hague Regulations – in particular art.43 thereof – occurred when the Allies forced the Japanese Government to accept the MacArthur draft as a draft revision to the Constitution⁵², threatening – at the meeting on February 13, 1946 – between Director of the Government Section of GHQ, General Whitney, with three subordinates and Japanese representatives (Foreign Minister Yoshida with three subordinates) – that unless this draft were accepted the security of the Emperor System would not be preserved.

Another interesting example of the non-observance thereof by SCAP occurred when the Korea War broke out in June 25, 1950. GHQ, whose commander-in-chief MacArthur was appointed to the commander of the so-called United Nations Force by the U.S. president Truman, ordered the

⁵⁰ In Japan e.g. judgments of the Supreme Court of April 2, 1952 (No.114 [KU] of 1951, Saikosaibansho Minjihanreishu, vol.6, p.387), April 8, 1953 (No.685 [RE] of 1949, Saikosaibansho Keijihanreishu, vol.7, p.775) October 10, 1960 (No.186 [O] of 1951, Saikosaibansho Minjihanreishu, vol.14, p.2441), October 3, 1963 (No.1277 [O] of 1960, Saikosaibanshoshaibanshu Minji, No.68, p.145) and April 17, 1964 (No. 903 [O] of 1962, Shōmugeppo, vol.11, p.723). In Germany e.g. judgments of the Constitutional Court of Bavaria of December 10, 1948 ([Vf.64–VI–47] Verwaltungsrechtsprechung in Deutschland, vol.1 [1949], p.376) and of the Federal Supreme Court of April 6, 1951 ([I ZR 39/50] Entscheidungen des Bundesgerichtshofs in Zivilsachen 1, p.363). In Austria e.g. judgments of the Constitutional Court of July 2, 1949 (Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes, 1949, No.1835, p.268), and December 16, 1949 (Österreichische Juristen-Zeitung [ÖJZ] 1950, p.120).

⁵¹ In Germany e.g. judgments of the Administrative Court (VGH) of Stuttgart of August 5, 1947 ([II 37/47], SJZ 1948, p.153), of the Federal Supreme Court of February 7, 1952 ([IV ZR 74/51], Der Betriebs-Berater 1952, p.157), November 14, 1956 ([IV ZR 136/57], Neue Juristische Wochenschrift 1957, p.222) and of the Federal Administrative Court (BVerwG) of July 5, 1961 ([VC 139.60] Entscheidungen des Bundesverwaltungsgerichts 12, p.312). In Austria e.g. judgments of the Supreme Court of October 1, 1947 (ÖJZ 1947, No.790, p.521), of the Constitutional Court of March 2, 1950 (Österreichische Gemeinde-Zeitung 1950, No.18, p.22), of the Supreme Court of May 16, 1951 (Juristische Blätter [JB] 1952, p.138) and June 20, 1951 (JB 1952, p.343) (see Ignaz Seidl-Hohenveldern, Réparation des dommages d'occupation en Autriche, Journal du Droit International 1952, pp.562–599).

⁵² This is the reformed Japanese Constitution of 1946.

Japanese coast guard to cooperate to the operation of the mine sweeping by the U.S. navy in the Korean water area – within a scope of the so-called United Nations Action. In course of this cooperation among the mines salvaged by the Japanese coast guard, which during the Second World War were fallen off by the U.S. air force, the mines forbidden by the rules of war were found out.

SCAP also asserted that, if necessary, actual force would be exercised to implement the U.S. policy toward Japan (in this Memorandum “supreme authority of SCAP” was said to be exactly the same as “the assumption of supreme authority”⁵³ in the Berlin Declaration of June 5, 1945). For this reason, Japan is still living with the reminders of this former U.S. policy towards Japan (e.g. the Self-Defence Forces⁵⁴, and the tone of translation in the 1946 Japanese Constitution bears witness to the directive policy of the occupying power).

5. Finally, it should be remembered that the Allies’ occupation has not terminated as yet. This is because the four Northern Islands (Kunashiri, Etorofu, Habomai and Shikotan), long-standing Japanese territories and not forming part of the Kuril Islands which were handed over to the Soviet Union by the Yalta Agreement on February 11, 1945, are still in fact under occupation by the U.S.S.R. Japan by no means wishes to conclude a peace treaty with the U.S.S.R., and, needless to say, does not intend to sign the treaty on neighbourly friendship and cooperation, which the U.S.S.R. has proposed, until this problem of the northern territories⁵⁵ is settled.

⁵³ In the introduction of the Berlin Declaration one finds the following terms: “The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany ...” [emphasis added]. Consequently, it is submitted that in the occupation of Japan there existed an analogy of Germany. This was the view contained in the “United States Initial Post-Surrender Policy for Japan” proclamation of September 22, 1945. This policy was confirmed and repeated in the “Basic Post-Surrender Policy for Japan” proclamation (FEC Policy Decision of June 19, 1947), which was the unilateral statement of the U.S. Government and did not bind Japan; SCAP resorted to force to implement the U.S. policy toward Japan.

⁵⁴ Regarding the Self-Defence Forces, it is still contested today whether the Self-Defence Forces infringe art.9 of the 1946 Constitution and are unconstitutional (Naganuma Nike J base Case, Komatsu base Case etc.). Art.9 para.2 provides: “In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized”. (Art.8 para.2 of the MacArthur draft of February 13, 1946 provided: “No army, navy, air force, or other war potential will ever be authorized and no rights of belligerency will ever be conferred upon the State”).

⁵⁵ On the history of the Northern Territories see Kanae Taijudo, *Japan’s Early Prac-*

Despite the experiences of the occupation, it was certainly fortunate for Japan that the proposal for a joint occupation of the Japanese territories by four Allied Powers, the U.S., U.K, U.S.S.R. and China (JWPC 385/1)⁵⁶, was suspended at an early stage, and a tragedy like that which befell Germany and Austria was spared Japan.

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tice of International Law in fixing its Territorial Limits, Japanese Annual of International Law, No.22 (1978), pp.1-8.

⁵⁶ This proposal for a joint occupation was made before Japan had received the Potsdam Declaration. It was put forward not for considerations of international politics, but principally to reduce the costs of American troops in Japan and was drawn up by JWPC (Joint War Plan Committee of the U.S.), which was an organ (in JCS) entrusted with the task of drawing up the strategic operation plan.