RESTITUTION IN INTERNATIONAL LAW

BY ISTVÁN VÁSÁRHELYI

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The question of restitution in the sense of international law as well as the historical development of its criteria in the technical sense of the term are analysed by the author. The problem is approached from the stand point of martial law. The author draws a clear distinction between the restitution due to a delict under international law (particularly martial law) and the *in integrum* restitution, when the properties sequestrated by discriminatory war measures from the possession of the rightful owner are released when the emergency measures are cancelled.

The problems arising in connection with World War II., e.g. the problems of restitution of properties removed by the Germans from the territory of their own allies, and the binding force of the restitution principles of rights under international law, created by the United Nations, are fully treated by the author.

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INTRODUCTION

The fundamental aim of the present treatise is to deal with restitution in the sense of the term as used in International Law, and not with restitution under Civil Law as it has developed from Roman law. The latter is based on essentially identical principles in the Municipal Legal Systems of all nations. The purpose of restitution under Civil Law is to remedy the prejudicial legal effects of a strictly speaking lawful and yet, for a certain reason, inadmissible act, by way of restituting the original legal situation. The concept of restitution, in the sense of the term as used in Civil Law, is clear and does not require a specific legal explanation.

Not so the restitution in the meaning used in International Law. As it is pointed out below,[1] many jurists had to admit that in the literature considerable confusion prevails about restitution in the meaning of the term as used in International Law, which has very remarkable practical consequences. There are jurists who treat restitution in International Law as a legal category identical with restitution in Civil Law, so Professor Erich Kaufmann himself, according to whose opinion both restitution in International Law and restitution in Civil Law are: "Wiederherstellung einer Rechtslage, die durch ausserordentliche, der normalen Abwicklung des Rechtsverkehrs nicht entsprechende Umstände gestört worden war."[2] In this way restitution both in International Law and in Civil Law would be an *in integrum restitutio*, the preliminary condition of which is not a delict. It is certain that on the international level the definition of Professor Kaufmann perfectly conforms with the concept of restitution prescribed by the provisions of the Hague Convention IV. *(Landkriegsordnung);*[3] release from requisition of property which could be seized under Article 53 of the Convention in time of war. The definition of Professor Kaufmann covers also the obligation under the Peace Treaties to release the property that was taken away, by discriminatory war measures, from the disposal of the persons entitled thereto, what amounts to an *in integrum restitutio* similar to the release of an attachment by virtue of the Hague Convention. As it shall be set forth in this treatise, the point in all these cases is the elimination of legal changes brought about without an illegal act; the restitution of a former situation. This kind of restitution, the *in integrum restitutio* not requiring unlawfulness as a criterion, however, may, in our opinion, not be correctly qualified on the level of International

[1] See p. 54.
[2] Kaufmann (1949) 1. Heft.
[3] Dölle (1950), paragraph 11.

Law as a genuine restitution. Restitution in the sense of the term as used in International Law — even if its form were an *in integrum restitutio — is aimed at the reparation of the effects of a proceeding that was unlawful under International Law.*[4] Consequently, our statement is not far from the conception of those international jurists who bring restitution of International Law into a causal connexion with international delinquency, as for instance Dionisio Anzilotti, who expresses this opinion in his *Lehrbuch des Völkerrechts* perhaps in the most classical way. Accordingly, restitution in International Law includes the reparation of all international wrongs — both those committed under the law of peace and those committed under the law of war — and its criterion is the *Unrechtmässigkeit*, the established *Unschuldigkeit*, *Unerlaubtheit* ("unrechtsmässigerweise besetzte Gebiete", "unschuldig verhaftete Personen", "unerlaubterweise beschlagnahmte Güter", and so on). The legal purpose of general restitution in International Law is in every case the restitution of a situation which would have subsisted if the wrongful act had not been committed. Below, at the suitable context we quote[5] a fundamental judgment of the old Permanent Court of International Justice to which nearly all international jurists discussing this question refer in some form (thus besides Anzilotti, also Liszt, Oppenheim and Lauterpacht, Guggenheim, Verdross, Marcel Sibert and others), and the essential part of which reads as follows: "...le principe essentiel qui découle de la notion même de l'acte illicite est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait... existé si ledit acte n'avait pas été commis". We could stop at this statement and at the consequences attached thereto ("restitution en nature ou, si elle n'est pas possible, paiement d'une somme correspondant à la valeur qu'aurait la restitution en nature" etc.), if we restricted our analysis to general international delinquency and to general restitution in International Law. The development of International Law has, however, not been closed by the solution of these problems, and the confusion about the question is caused by the very fact that in jurisprudence often no distinction is made between concepts standing near to one another, moreover, it has been attempted to reduce considerably divergent concepts to a common denominator. As we have said already, this holds true, in the first place, in respect of the two kinds of *in integrum restitutio* (one in Civil, the other in International Law), in respect of restitution in the proper sense of the term, based on an international delinquency, and the *in integrum restitutio* of International Law which is independent, in the given case, of a delinquency; — moreover, in respect of the following concepts, standing near to one another, yet different in juridical meaning: restitution based on a general delinquency and "restitution based on a delinquency committed in war"; "restitution" and "war reparation"; the "reparation" of international wrongs in general and the "war reparation" in the proper sense of the term, and so on. We think if we were able to distinguish correctly between all these categories,

[4] Italics in the text and in the quotations are mine.
[5] See p. 74.

we should ultimately succeed in eliminating those legal difficulties, too, which have so far been in the way of the legal and practical solution of a great and important question of International Law, i.e. the problems relating to *restitution of property wrongfully removed from a temporarily occupied territory of an enemy*. This is the main purpose of our treatise.

We approach the problem from the side of the law of war, that is to say, we do not start from the general delict of International Law, although, from a theoretical point of view, we could arrive at our final conclusions in this way, too, but we try to present the formation of the new law of restitution in the perspective of the development of the International Law of war, and we want to deduce it from the legal evolution.

In the first chapters of our treatise, by applying this method, we try to point out that as early as in the Middle Ages, but particularly since the appearance of Rousseau it was a fundamental principle of warfare that on the theatre of military operations private property had to be respected. It was forbidden, apart from some exceptions, either to confiscate or to involve it without necessity into military operations. On the other hand, based on the Anglo-Saxon conception which became dominant, all States were considered to be authorized to take discriminatory measures on their own territory as regards "enemy property", incorrectly named so according to the Rousseau Principle. In this period of legal evolution the concept of restitution under war law covered only the restoration of property that had been taken away at the beginning of or during the war or, in other words, their release from the restrictions. In order to elucidate the formation of the genuine law of restitution, it is necessary to point out that the restoration of this kind, i.e. restitution of the original legal status of property that had been *legally taken away* or placed under restrictions, *is not restitution in the proper sense of the term*. The use of this terminology is confusing and it is more correct to designate this legal act by the English term "restoration", as it was used e.g. in the English text of the Paris Peace Treaty, to which also the authentic Russian text is conform. In the analysis of the Peace Treaties of Paris and the Environs of Paris the term "restoration", i.e. the repeal of the discriminatory war measures (the *in integrum restitutio)*, has, as a matter of course, to be separated from war reparations; both are treated by the Peace Treaties if not as identical, but at any rate as analogous categories, both being qualified as war *Wiedergutmachung*.

We can better approach the concept of genuine restitution in International Law if we acquaint ourselves with the illegalities of the German warfare in the course of the two World Wars. We think it necessary to deal in our treatise in detail with the war crimes committed by the Central and Axis Powers which — besides violating the generally adopted provisions of the respective international agreements, in the first place of the Hague Convention — were especially aimed at the spoliation of the occupied territories, the removal of public and private property found there. In World War I these proceedings were not yet as extensive and wide-spread as to justify the establishment of an entirely new legal institution in addition to the general restitution of International Law. Reparation under

International Law consisted in the returning of identifiable property in kind, and this reparation differed from the reparation due for a general delinquency of International Law only inasmuch as the giving back of such property was based on the principle of territoriality and was to be carried out by the State to the State, irrespective of the person of the owner. Fascism, as is well known, later turned the removal of property by force into a general form of military operations within the scope of its inhuman warfare and, as will be shown, went so far as to force the civilian populations, by way of police and military measures and by all means of civil pressure, to hand over "spontaneously" and entirely or almost gratuitously to the Governments or the subjects of the Axis Powers all their property, rights and interests, for the expropriation of which Fascism found no legal title. These acts of Fascism forced the Allied Powers, representing the conscience of the civilized world, to organize an International Military Tribunal for individual retaliation against the crimes committed, including the crimes of removal of property by force, on the one hand, and on the other, to lay down such special rules with regard to reparation between States for "the removal of public and private property by force", which go *far beyond the general provisions of International Law having been in force till then, and for which there were no leading cases, just as there had been no precedents in the history of warfare between civilized nations for the crimes committed, either.*[6] These rules have started the formation and crystallization of the system of restitution of International Law in which we see — in view of its fundamentally new theoretical legal construction, of the strict determination of the elements of the statement of facts and the legal consequences attached thereto — in contradistinction to all other categories of so-called restitution, the final development of the new legal institution of restitution in the technical sense of the term.[7]

While the post-war legal literature alludes to restitution of removed property, it does not seem to take notice of its specific features. In the latest edition of his *Völkerrecht*, published in 1955, Verdross does not even mention the restitution of removed property, as a special problem. Marcel Sibert (1951) and Guggenheim (1952—54) in his second volume both treat restitution of removed property — without analysing its specific traits — as an essentially identical institution with "restitution" of property seized under discriminatory war measures, or sequestrated and/or placed under compulsory administration.

Marcel Sibert writes in this respect as follows:[8] "Les clauses de restitution incluses dans les traités cités ne se limitent pas aux biens indûment prélevés et transportés à la suite d'actes de force ou de contrainte. La mise sous séquestre des biens ennemis, simple mesure conservatoire et d'administration, peut bien trouver grâce devant le droit; le principe du respect que l'on doit à la propriété privée (!)[9] interdit pareille indulgence à l'égard

[6] See p. 66.

[7] See Weiss (1946) about the "umfassendere, interstaatliche Rechtsidee".

[8] Sibert (1951) § 212, para. 2. The preceding paragraph (No. 1) deals with restitution of "property removed by force" in the proper sense of the term.

[9] The exclamation mark is mine.

des saisies opérées sans motif de droit ou à l'égard des transferts portant sur des biens, droits et intérêts de ressortissants ennemis quand ils résultent de mesures de force ou de contrainte prises par les gouvernants du pays adverse en considération même de la guerre. D'apparence moins brutale que les précédentes, de telles manifestations sont tout aussi illégales et exigent les mêmes réparations: réintegration dans les biens, droits et intérêts dont il s'agit."

Guggenheim mentions also the settlement of the problem of the "biens spoliés", of looted property together with the problem of the settlement of war damage. He writes in the Chapter on "Réparation dans les traités de paix" as follows: "Les clauses économiques et financières des traités de paix conclus après la seconde guerre mondiale prescrivent... la restitution des biens spoliés dans les territoires occupés, de même que la restitution des biens situés en territoire ennemi ayant appartenus à des ressortissants des Nations Unies et confisqués. L'obligation de restitution comprend également les biens publiques des États faisant partie des Nations Unies. Lorsque les biens eux-mêmes ne peuvent être restitutés et lorsqu'il s'agit d'autres dommages, les dommages-intérêts sont évalués aux deux tiers du montant nécessaire pour se procurer des biens correspondants ou pour suppléer à la perte subie."[10]

It appears from these quotations that the "property removed by force", which is designated by Marcel Sibert as "biens indûment prélevés et transportés à la suite d'actes de force ou de contrainte" and by Guggenheim as "biens spoliés", is ranged by both excellent authors into the same category as the property called by them "biens ennemis.. mis sous séquestre" or "biens situés en territoire ennemis... et confisqués", although the latter decisively belong to another legal category; Sibert and Guggenheim believe, however, that essentially the same legal effect is attached to the fact of removal by force as to discriminatory proceedings.

In Volume II of the 1952 edition of their work, Oppenheim and Lauterpacht refer perhaps the most explicitly to the specific regulation concerning restitution of property removed by force. By the way, the whole system of their work takes the historical evolution of law into account in the most sensible manner. The authors embed their theses most clearly into historical evolution and thus, to a certain extent, project before us also the legal principles and their historical connexions from which restitution in the proper sense of the term results. This structure of Oppenheim and Lauterpacht's work is, on the other hand, the chief reason and also the explanation of the fact that in the interest of theoretical elucidation of the fundamental problems we refer in our treatise relatively more frequently to this work than to any other standard work.

Among the monographs published after the war we find hardly two or three works that go into the merits of the problem of specific restitution of property removed in times of war in a tortious way. Among these the most important seem to be the work already mentioned of Dr. Erich Kaufmann, Professor of Munich, entitled *Die völkerrechtlichen Grundlagen und Grenzen*

[10] Guggenheim (1953—54).

der Restitutionen, the treatise by Dr. Gottfried Weiss, Professor of Zürich, entitled *Beutegüter aus besetzten Ländern* and by Martin about *The Paris Peace Treaties*. The standpoint of the German jurists concerning the decrees of restitution issued in Germany by the Allies appears from the theoretical comments on these decrees of the professors of TübingenSchmoller, Maier and Tobler, pusblished in the collection named *Handbuch des Besatzungsrechts*.

The material provided by these sources, however, is by no means sufficient to acquaint us with the characteristics of the law of restitution, as it has developed after World War II. Its knowledge and its scientific analysis contained in our treatise is essentially based on an enquiry into those norms of International Law, those rules and regulations and international documents which express the intentions and legal conceptions of their creators. The central part of our work dealing with restitution in the technical sense of the term is based, apart from the viewpoints taken from general International Law, primarily on the legal principles expressed by the Allied Powers having occupied Germany, on their "declarations", and finally on the legal rules and published implementing instructions which we have collected with conceivable difficulties from official collections of documents and from various official and private publications.

We want to prove in our treatise that the Powers who had occupied Germany did not wish, by decreeing the norms of restitution, *to protect exclusively the interests of the victorious Powers but represented the sense of justice of the whole civilized world*, and did so in a uniform way, irrespective of the differences in their social systems. It follows, in the first place, that they had in their mind the restitution not only of the property removed delictuously from their own territory, but also of the assets so removed from the territory of all United Nations; it resulted from this that *the procedure of restitution was extended by them to those countries with which they had originally been at war* and which had in the course of the war been occupied by Germany or Italy, or had come under their control. Thus it was extended also in favour of Hungary.

We desire to prove the general validity of the new legal principles of restitution by analysing the situation of neutral States and by demonstrating that the legal principles proclaimed by the Allies on behalf of the civilized world were also binding on them in spite of the fact that the victorious Powers could not enact legal rules by right of their victory with the effect of legally binding neutral States. Apart from adhering to international conventions, the neutrals have, as we shall see, also accepted in their municipal legislation the "umfassendere interstaatliche Rechtsidee", from which the legislation concerning restitution of the Allies originated, and the "Charter" of which was the "*Declaration of London*", issued by eighteen United Nations.

Going over the legal rules of restitution established by the Allies partly directly and partly through the Paris Peace Treaties and the international agreements concluded with neutral States, as well as over the legal rules enacted in an autonomous way by the neutrals, we find the important statement verified that the fundamental principles of the new legal institution of restitution were established by the Allies as competent legislators

in an essentially uniform way, with a uniform effect in all relations. We are going to analyse in detail these fundamental principles in our treatise and shall draw our inferences in general directly from the Declaration of the principles having an international binding force, from the practice of the courts, and the rules of law. As the principles of law have not been systematized in a scientific way, we can hardly rely on scientific sources in this respect and, after the analysis of the international evolution already mentioned, we shall have to consider precisely the elucidation of the legal principles and their systematization as our fundamental task in order to be able to draw the most important inferences with regard to the law of restitution.

We do not want to expose in this Introduction in detail the legal principles relating to restitution as defined and systematized by us. Chapter IV of our treatise presents, we hope, clearly the characteristics of the whole legal system of restitution as it has developed in consequence of the German warfare during World War II. Although the legal principles of this system undoubtedly aimed, in the first place, at repairing the loss and damage caused to the Allies and to other United Nations by the Axis Powers and by the satellite countries through the removal of property by force, they were intended later to ensure the restitution of property tortiously removed, according to uniform principles and in favour of all countries having fallen victims to the fascist methods of warfare, and became ultimately the pillars of a general system of restitution of removed property.

Though, as we have said, we do not consider the comprehensive exposition of the charcteristics of the new legal institution of restitution, analysed in detail in Chapter IV, as the task of the Introduction, yet we think it necessary to point out briefly the conspicuous characteristics of the restitutions ordered in Germany and in the former satellite countries by the Allied Occupying Powers and the Peace Treaties, as the basis of the new system.

The first of these specific characteristics is that *the duty of restitution extends to all assets that were removed by the Germans or their allies "völkerrechtswidrig"*, by force or menace or under the pretence of a contract, from a territory occupied by them, provided the property can be discovered in the territory of such a country in the possesion or detention of whomsoever (acquirers whether in good or bad faith). In this fundamental question we are in striking contrast with those German jurists[11] who 1) claim as a preliminary condition of the obligation of restitution the existence of an illegality under civil law, instead of a "Völkerrechtswidrigkeit", and 2) consider the putting aside of the protection of the *bona fide* acquirer inadmissible also in International Law.

It is a decisive characteristic of the new legal institution of restitution that it is governed not by the proprietary title of Civil Law but by the principle of Public International Law and also, on the active side, by the principle of territoriality. There seems to prevail an unjustified confusion in this field resulting from the muddling up of the elements of an injury

[11] Schmoller, Maier, Tobler, scholars of Tübingen, and others (see p. 16).

under Civil and International Law. In this respect we are similarly opposed to the German jurists,[12] but we disapprove of the American and West-German application of law and the German judicial practice as well.[13]

Another particular characteristic of the new institution of restitution is that the *duty of restitution does not involve an internal compensation* and does not even grant a legal claim for reimbursement of the price paid. As a matter of course, the German jurists consider also this provision as unjust, but so do some neutral jurists (for instance Gottfried Weiss) and the English A. Martin (1947) as well.

From a formal legal point of view it is a striking characteristic of the new system of restitution that *the proving by the claimant State of the application of force or duress is not a precondition of restitution.* The provisions enacted both in Germany and in the satellite States *presume the existence of "force or duress"* in all cases when properties originating from occupied territories "have passed" to their territories (the institution of "*Kollektivzwang*" is also disapproved of by the German jurists. See below).

Chapter V is devoted to the higher viewpoints which have induced the legislation of neutral States, in the first place Swiss legislation, moreover — in the person of the well-known authority Gottfried Weiss — the Swiss jurisprudence, to bow before the legal system of restitution created by the Allies and to acknowledge, in fact, fully the general legality of the legal principles contained in the "London Declaration", as well as their proper obligation to effect restitution.

In the same Chapter, while analysing the detailed rules of restitution of property removed to neutral territory, we make the statement, which we consider very important from the point of view of the appreciation of the legal principles of restitution, that 1) the duty of restitution of a neutral State having acquired some culpably removed property is, *in ultima analysi*, based on an international delinquency in the same way as the duty of the country that removed it: "they connive indirectly in the unlawful measures of the occupant"[14]; and that 2) consequently, the fact that in neutral relations those persons who "in völkerrechtswidriger Weise beraubt oder... um den Besitz und Eigentum gebracht worden sind", must institute specific judicial proceedings directly against the possessor or detentor, *does not alter in any way the Public-International-Law character of the claim for restitution.* The law of restitution of the neutrals, on the other hand, brings, in the most unmistakable way, into prominence the legal principle of restitution (attacked so much, as we have pointed out above, by the German jurists) that *an acquisition in good faith* in accordance with Civil Law *does not exempt from the obligation to give back the removed property.* In the system of restitution of the neutral States the general principles proclaimed by the Allies become all the more effective as the "London Declaration" wanted, above all, to render the reference by neutrals to *bona fide* acquisition impossible. The neutrals have wholly

[12] Among them Kaufmann.
[13] Dölle (1950).
[14] Oppenheim—Lauterpacht (1952—56) Vol. II, §. 147 J.

and completely accepted the legal principle according to which *no third country or person may make a profit* out of such a grave international delinquency as that committed through the spoliation of the territories occupied by the Axis Powers.

Our treatise deals in a separate part, and as a matter of course, more circumstantially with the property removed by force from Hungary. As we have pointed out in several passages, the rules of restitution relating to the property removed from Hungary principally and essentially concern also the other countries that were occupied or controlled by Germany and her allies, but lack of space did not permit us to treat separately of their problems. From that part of our treatise it appears pregnantly that in view of the criminal occupation of our country and of the effectiveness of German violence enhanced also by the Hungarian fascist "puppet governments", the Allies creating the law of restitution wanted to apply substantially the same legal principles of restitution (principle of Public International Law and the principle of territoriality, the principle of identification, the irrelevance of the person of the owner and the presumption of "force or duress") with regard to property removed from Hungary as regarding property removed from the territory of the United Nations. Accordingly, they applied the legal principles of restitution whose general international legal validity is supported precisely by this application of law without any discrimination. Our statement that the provisions of the Paris Peace Treaties regarding restitution, namely the provisions laid down in favour of both the United Nations and Hungary, are not of a nature of creating International Law but only of declaring it, is considerably backed up by the fact that these legal principles had been applied already before the conclusion of the Peace Treaties, of the own free will of the Allies. Undoubtedly the Hungarian Peace Treaty did in no way weaken the effect of the previous dispositions of the Allies as regards restitution. The events that took place in the sphere of restitution after the coming into operation of the Peace Treaty render it, nevertheless, necessary to analyse exhaustively Article 30 of the Treaty and to prove that the Treaty did not entitle the Allies to alter the general provisions of restitution to the disadvantage of Hungary and even less to stop prematurely and unilaterally the restitution under Public Law of the property removed from Hungary. Without having the intention of writing a polemical treatise, we criticize in detail the proceedings of the United States, who wanted to bring a political pressure to bear on Hungary by ordering the Hungarian Commission of Restitution to leave the US zone of occupation, and thus hindered the execution of restitution in its very important last phase. We point out in this respect that what is termed the decontrol procedure instituted by the American authorities and later on entrusted by them to the German authorities: the liberation of property removed in favour of the so-called verified owners could in no way replace the Public-Law restitution and that, therefore, — if it is true what we say about the general validity and the binding force of the rules relating to restitution — Hungary has suffered on the part of the United States a wrong of Public International Law. This wrong was continued also by West Germany when the Western German

authorities refused to meet their liabilities of restitution based also on the proper duty of the country, and when, in the Bonn Treaties, — in spite of the fact that West Germany expressly recognized in principle Hungary's claim to restitution, just as the Allies did — it did not commit itself to the general continuation of restitution of Public International Law, illegally stopped by the Allies, but undertook to effect interstate restitution in respect of merely certain properties removed from Hungary (of jewels, silver commodities, period furnitures, and of cultural goods), and even this under conditions established unilaterally. Moreover, Hungary suffered an international wrong on the part of Western Germany also by the fact that the Bonn Conventions laid down unilateral rules of procedure concerning the enforcement of private claims to restitution by way of judicial proceedings.

The question of restitution of property removed from Hungary to the West on the occasion of the forcible evacuation and held up in Austria is dealt with in Chapter VIII.

It appears from the events related in that Chapter that the rules concerning restitution of property removed to Austria both from the territory of the United Nations and from the territory of the former enemy States, among those from Hungary, laid down by the Military Governments of the Powers Occupying Austria are identical with those established by the allied authorities in Germany. This followed not only from the fact that the same Governments exercised the supreme power over Austria as over Germany (although the international status of the former was, already under the occupation, different from that of Germany), but especially from the fact that, as we have said, by regulating the restitution of property removed by force, *the Allies aimed at the enforcement of a general legal principle*. As long as restitution was managed by the allied authorities also in Austria, this legal principle was essentially realized to the advantage of Hungary, too. We have ascertained, however, the fact that the conduct of Austria became unlawful in relation to Hungary when first Great Britain and later the United States, making arrangements to liquidate their organization of restitution in Austria, ceded the management of restitution of property removed from Hungary to the Austrian Government. In spite of the fact that Austria had in relation to the United Nations already substantially executed the orders of the Allies concerning restitution of property, the Austrian authorities were not willing to continue the restitution proceedings in relation to Hungary on the basis of the principles applied by the Allies till then. Referring to the fact that Austria was not bound by a written international agreement to restitute Hungarian property, they refused to grant restitution of property under Public International Law and assumed the attitude that the verified Hungarian owner might claim from the present possessor the handing out of the property in accordance with the rules of Private International Law. In addition to that, the Austrian authorities were by no means disposed to give up the protection of the *bona fide* acquirer.

We hope that we have succeeded in substantially clearing up the confusion about the duty of restitution concerning removed property. In our

view it is decisive to state that the specific legal principles, analysed by us and relating to restitution of property removed by force or menace from an occupied (or controlled) territory, were proclaimed by the United Nations constituting the overwhelming majority of the International Community. We likewise deem the statement decisive that these principles were established not only to the advantage of the victors but of all interested States, and that they laid charges not only on the defeated States but also, in given cases, on the neutrals and on any other State to the territory of which looted property was taken, or which simply tolerate that such property shall be stored on their territory. On the basis of the general character of these legal principles we are going to draw, in Chapter IX, the final conclusion that the legal principles of restitution in the technical sense of the term, set out in detail in our treatise, have a binding force for all States belonging to the Community of Civilized States. As a consequence of these principles it cannot be contested that property, removed in a culpable way from occupied territories (by force or menace or under the pretence of a contract) and lying either on the territory of the State having committed the delinquence or on the territory of any other State, has to be restituted by virtue of Public International Law, independently of the person or the good or bad faith of the owner. If a State does not fulfil this obligation, it commits a wrong of Public International Law and is bound by virtue of this to pay full compensation.

The question of this compensation is analysed in Chapter X, relying on well-known and recognized theses of jurisprudence. There is no controversy between the jurists in respect of the fact that the commission of an international delinquency involves an obligation of reparation under International Law. There is no controversy either about the rule that this reparation is primarily due to the State injured. Finally the jurists agree (among them Strupp, Guggenheim and Verdross) in what is so clearly explained by Anzilotti concerning damages suffered by private persons as a consequence of *völkerrechtswidrige Handlungen*. The decisive question our treatise wants to answer in this respect is the following: does a State commit an international delinquency involving an obligation of reparation *if it fails to fulfil its obligation of restituting removed property or does not fulfil it in conformity with the legal principles established by the Allies?* If the binding force of the legal principles of restitution laid down by the Allies exists — which it does, as we have proved it —, and if a conduct in contravention to these legal principles having binding force is *illegal*, the fact cannot be contested that a State which has committed an injury is liable for the loss and damage *primarily to the State which suffered the injury* and that the most suitable measure of the loss and damage — but not their limit — is the prejudice sustained by the private persons. The question how the State having received the compensation distributes it among the private persons depends, as we are to point out in our conclusions, on the Municipal Law of the State.

CHAPTER I

PRIVATE PROPERTY IN WAR

In the course of the international legal evolution a question hotly debated throughout centuries was to what extent private property of the nationals of an enemy State may be drawn into the warfare, i.e. falls under the law of war.

In earlier times war was generally looked upon as a "*bellum omnium contra omnes*", every subject of the belligerents was at war with every subject of the other belligerent, irrespective of sex or age, the property and the person of everybody was a free prey, there was no difference between the members of the armed forces and the civilian population. The first serious step towards a more civilized law of war was taken by the Magna Charta (1215) which in the interest of commerce reassured the other nations that their nationals and the property of the latter would be respected and protected on the territory of England even if a war broke out between their countries. This legal principle prevailed afterwards till the beginning of modern times when the much more cruel rules of maritime law began to assert themselves more and more on the whole domain of the law of war. These rules granted the right to seize and confiscate all private property sailing in enemy ownership, moreover to confiscate neutral property, too, if the latter was entrusted to the protection of an enemy flag. Under the influence of maritime law thereafter the opinion prevailed again in the law of war throughout long centuries that nations waged war equally against the enemy State and its nationals, that every subject of a belligerent State was the enemy of all subjects of the other belligerent State, that all property of enemy aliens was subjected to military operations, to acts of war. The principle of universal warfare was professed by the most eminent scholars of several well-known schools of International Law. Thus, this principle was proclaimed by Hugo Grotius and by one of the most appreciated international jurists of the 17th century, by the well-known Swiss scholar Vattel. Rousseau established a new philosophical principle, the essence of which was that a State wages war only against the other State and not against its population and that, accordingly, hostilities may only be directed against fighting forces and organs of the State, and cannot affect the life and property of private persons. "La guerre n'est point une relation d'homme à homme — says Rousseau in the Contrat Social —, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs. Enfin chaque état ne

peut avoir pour ennemis que d'autres états, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport."[1]

1. THE ROUSSEAU PRINCIPLE AND THE ANGLO-SAXONS

The Rousseau Principle, from the essence of which it follows that the person and property of private individuals may not be involved into military operations and according to which the private property and the rights of enemy aliens are not to be affected by war, changed with its powerful strength the whole legal character of warfare and no country could withdraw itself from its effect. In the conception of the law of war in the 19th century the philosophy of Rousseau asserted itself in a decisive way and, as a consequence, the legal principle took root according to which it was not allowed to confiscate or to destroy, without reason, private enemy property either on the proper territory of the belligerent State or on the battle-field. Only the Anglo-Saxon nations did not accept the Rousseau Principle without reservation. The military law of these nations was too strongly saturated with the requirements of sea warfare, among which the most fundamental was precisely that every enemy property could be confiscated.

It is true that from the coming into being of the *Consolato del Mare* (14th century) till the Crimean War (1854) there was a constant struggle between the maritime powers, in the first place between Spain, Holland, Britain and France about the question whether enemy goods sailing under neutral flag and neutral goods sailing under enemy flag might be confiscated or not. In that respect, however, that enemy private vessels and enemy goods born by them may be confiscated under all circumstances, the centuries did not bring any change into sea warfare. Although the Paris Declaration on maritime law (1856) laid down that enemy goods are protected by a neutral flag (except contrabands) and that, apart from contrabands, neutral goods sailing under enemy flag may not be confiscated either, the full application of the Rousseau Principle in sea warfare was frustrated by the resistance of Great Britain. How much this was true, how strongly British sea warfare was based on the principle of the possibility to confiscate private enemy property and how vainly the other interested States tried to enforce the application of the Rousseau Principle in sea warfare, all that is clearly explained in Chapter IV, on sea warfare, of the book of Oppenheim, the great English jurist.[2] Oppenheim says frankly: "It cannot be denied that the movement, since the middle of the 18th century for the abolition of the rule that private enemy vessels and sea-born goods may be captured, might, during the second half of the 19th century, have met with success but for the decided opposition of Great Britain" — and in the following sentence he gives the explanation thereof: „Public opinion

[1] Rousseau (1820) p. 15.
[2] See Oppenheim—Lauterpacht (1952—56) Vol. II. § 178.

in Great Britain was not and is not prepared to consent to the abolition of this rule; and there is no doubt that its abolition would involve a certain amount of danger to a country like Great Britain, whose position and power depend chiefly upon her navy." — It may be attributed to this state of affairs that though the Anglo-Saxons could not withdraw themselves on the domain of war on land from certain *practical consequences* of the idea of Rousseau, they nonetheless remained, on the whole, adherents of Vattel's doctrine. Their conception concerning the law of war on land shows, therefore, a certain *duality*, while the whole continent has unanimously adopted Rousseau's ideology. This duality, which had developed in an empirical way, revealed itself in the fact that in war on land Great Britain was disposed to accept the viewpoint according to which belligerents were not allowed to *confiscate* either private enemy property lying on their territory or the claims of enemy subjects, yet she professed firmly that war was waged not only against the armed forces of the enemy, but also against the whole population and against private economy; that the national of an enemy State was the enemy of Great Britain, an alien enemy; that the civil law intercourse with him (the trading with the enemy) was forbidden; that his property was enemy property, in respect of which — apart from confiscation — all those measures were legitimate which prevented the enemy subject to dispose during the war of his property situated in Great Britain and to enforce his claim existing in British relation.

We may say that Great Britain gave up, only *à contre coeur*, the principle of the possibility to confiscate private enemy property, which followed from the Vattel doctrine: this concession has never been complete and this way of thinking has asserted itself all along the proceedings applied against Alien Enemy Property.

2. STRUGGLE BETWEEN CONTINENTAL AND ANGLO-SAXON CONCEPTIONS. THE HAGUE CONFERENCES

The substantial difference between the continental and the Anglo-Saxon conception vigorously manifested itself as soon as at the Conferences, held on the initiative of the Russian Government before and after the turn of the century at The Hague, *the codification of the law of war on land* was accomplished. In the Hague Convention IV, adopted at the Second Hague Conference in 1907, the powers participating in it endeavoured — at least in their own way — to make warfare in all respects more "humanitarian" and, therefore, drew a sharp line between the combatant and non-combatant population (between the "*nocentes*" and the „*innocentes*") and tried to withdraw from the war the persons and the property belonging to the non-combatant population. The Hague Convention IV[3] (more precisely its Annex concerning the "Laws and Customs of War on Land"), which in its Article 22 contains the general statement that the belligerents

[3] Enacted by the Hungarian Act XLII of the year 1913 — German quotations from the Annex to Liszt (1925).

have no unlimited right to choose the arms injuring the enemy, lays down in Article 23 paragraph *g* the following provision:

> "In addition to the prohibitions provided by special conventions, it is especially forbidden . . . to destroy or seize the enemy's property *(Wegnahme)*, unless such destruction or seizure be imperatively demanded by the necessities of war."

According to Article 46 of the same Convention: "Private property can not be confiscated", whereas under Article 47 "Pillage is formally forbidden". The binding force of these fundamental provisions was accepted without reserve by Great Britain, too, yet a legal controversy arose in the years following the Second Hague Conference about paragraph *h* of Article 23 of Convention IV, according to which (equally apart from the prohibitions provided for by special conventions)

> „. . . it is especially forbidden to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party."

The Continental Powers, whose way of thinking was saturated with the philosophy of Rousseau, attributed a general effect to paragraph *h* of Article 23 and — also referring to the motivation of the original German proposition relating thereto — firmly emphasized that this paragraph

> "desires to extend the principle of the inviolability of private property to the incorporeal rights and forbids on the whole domain of the rights of obligations all such legislative measures which would make impossible in time of war to the national of an enemy state to enforce his rights based on a contract before the courts of the enemy state."[4]

Great Britain refused officially such an interpretation and then it became evident that — referring to reasons based on the structure of the Conventions — she exclusively recognized the applicability of the said paragraph and of the whole regulation in connexion with the occupation of enemy territories and only in respect of an occupied territory, but as regards the development of the legal relations between enemy subjects in case of war, she persisted in supporting the Vattel Principle, according to which belligerents are indeed authorized to declare the subjects of an enemy State "enemy nationals" and their property "enemy property", to punish all kinds of intercourse with enemy subjects, to prevent the enforcement of enemy claims against their own nationals and to take specific measures with regard to enemy property situated on their territory.

The "confiscation" of enemy property situated on the territory of belligerents is prohibited also according to the Anglo-Saxon conception, the source of the prohibition, however, is not the Hague Convention IV but the customary rules of International Law developed in this domain since the Napoleonic wars.

[4] Cf. A. Meszlény (1927).

3. WORLD WAR I. DISCRIMINATORY MEASURES IN CONNEXION WITH "ALIEN ENEMY PROPERTY"

The theoretical conceptions came into collision in practice at the outbreak of World War I. The situation at this time was that the Powers generally recognized the legal principle, also laid down in the Hague Convention, by virtue of which private property has, with certain exceptions, to be respected in the course of war on land and it is prohibited to confiscate it or to include it without necessity into military operations. Likewise it was a generally recognized principle of sea warfare, maintained also by the Paris Declaration of 1856 and considered as sacred and unviolable also by the Anglo-Saxons, that on sea all enemy mecrhantmen and all enemy cargos may be captured and confiscated and that only the enemy cargo born by neutral ships, if it has not the character of contraband, and the neutral cargo sailing on board of enemy ships and having not the character of contraband are exempt from capture and confiscation.

Concerning the property situated on the proper territory of a belligerent State and owned by "enemy" subjects, as well as the rights and interests of these subjects, the Continental Powers adhered to the Rousseau Principle, and the Anglo-Saxon Powers — apart from the question of confiscation — continued to accept the Vattel Principle.

The British "Trading with the Enemy" Act of 1914 attempted to codify in a civilized form the exceptional treatment to be applied with respect to enemy property in times of war. Departing from the fact that "all intercourse and especially trading with alien enemies became *ipso facto* by the outbreak of war illegal"[5], this Act placed all enemy property, rights and interests under the administration of the "Custodian of Enemy Property", laying down that all payments in favour of alien enemies may only be performed to the hands of the latter and that the Custodian's task is to invest in an appropriate way all payments collected in favour of enemy subjects and to administer all kinds of property of enemy subjects till the end of the war. In principle such a procedure should have resulted in the preservation of the substance of the alien property, however experience has proved that the taking away of the property and interests from the disposition of the person entitled thereto inevitably brings about, even in the case of the most conscientious administration of sequestration, a diminution of the value of the property in question. If we add to this that the Custodian was in many cases forced to carry through the liquidation of certain properties or at least to begin it during the war, we may state that the war measures taken by Great Britain with regard to alien enemy property were in practice very near to confiscation. Oppenheim himself so characterizes the proceeding of the British: "Sometimes these measures stopped short of divesting the enemy of ownership of the property; but in other cases the business or property were liquidated, and were represented at the close of hostilities by nothing else than the proceeds of

[5] Oppenheim—Lauterpacht (1952—56) Vol. II. § 101.

their realisation, often enough out of all proportion to their value."[6] The attitude of Great Britain concerning the intercourse with the enemy and the compulsory measures to be taken with regard to alien enemy property situated on its territory was wholly adopted by the "Trading with the Enemy" Act enacted in 1917 by the United States where, by the way, the whole modern legal evolution in this respect ran parallel to that of Britain.

The Continental Powers which, as we have mentioned it, were until World War I nearly without exception opposed to the British views concerning alien enemy property, adopted during World War I the legal conception — first as a consequence of the actual measures taken by England (France) or by way of reprisal against them (Germany), later as a result of international legal and economic solidarity developed on the side of the *Entente*, finally accepting it as a rule of general binding force of International Law — according to which *all belligerent States are entitled to take discriminatory measures with regard to "property, rights and interests" of the nationals of an enemy State, situated on their own territory*. Thus, in the course of World War I sooner or later all belligerent States took compulsory measures against property, rights and intersets of the subjects of enemy States, situated on their proper territory. As Artur Meszlény (1927) emphasizes, during World War I Hungary was perhaps the only one among the belligerent States that — we do not examine here why — "consequently remained on the basis of the Rousseau Conception" and whereas, for instance, in England and in France the rule of another law, the law of war was inaugurated at the outbreak of the war, in Hungary, by virtue of the Act LXIII of 1912, the law of the state of peace continued to remain in force, and the Government was only authorized to effect certain changes in it within rather narrow limits and only to the necessary extent.

Meszlény points out that the Hungarian war laws did not contain provisions "authorizing the Government to disregard enacted international treaties on the ground of exceptional power", nor provisions in pursuance of which "the Hungarian Government would be authorized to deprive the subjects of States at war with us of their legal capacity, or capacity to sue, or to take away their property and to deprive them of the means of living". We further quote from Meszlény's work this interesting statement which concerns World War I: "our laws did not define the notion of alien enemy and therefore we could not attach to this notion any consequences either". Hungary — he says — could only take discriminatory measures against alien subjects by way of reprisal. "The British and French nationals could here freely continue their commercial or industrial activity or administer their estates even if they did not reside here. They could enforce their claims arising therefrom and thus they were neither deprived of the means of substance nor had they to fear that their enterprises would become ruined as a result of the war." Consequently, the interesting statement stands out from Meszlény's work that, when the whole *Entente*, with Great Britain and by then also with France at the head, accepted

[6] *Op. cit.* § 102.

it as a basic principle that *it was legitimate and* from the point of view of warfare even *necessary for belligerents to take discriminatory measures against alien enemy property, Hungary did not accept this standpoint as a principle.*

4. INTERNATIONAL LEGALITY OF DISCRIMINATORY MEASURES IN WAR

The Treaties of Peace terminating World War I did not only tacitly acknowledge the international legality of the discriminatory measures applied in connexion with the private property of "enemy subjects", but they explicitly codified it as a rule of International Law. Paragraph *d)* of Article 232 of the Trianon Peace Treaty lays down that:

> "As between the Allied and Associated Powers and their nationals on the one hand and nationals of the former Kingdom of Hungary on the other hand, as also between Hungary on the one hand and the Allied and Associated Powers and their nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraph 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty."

Analogous provisions are contained in the corresponding Articles of the Peace Treaty of Versailles and of the other Peace Treaties around Paris. According to these provisions it is lawful for a belligerent State to take exceptional war measures relating to property, rights and interests of the nationals of the enemy State situated on its territory (such nationals are more and more generally designated by the term "alien enemies", in contradiction to the Rousseau Principle) and even to order the alienation of such assets ("measures exceptionelles de guerre et mesures de dispositions"). Accordingly, the discriminatory measures taken at the outbreak of the war were lawful. The question, however, how property, rights and interests affected by these measures had to be treated after the war depended, in the system of the Peace Treaties around Paris, on the circumstance whether the "enemy property" was situated on the territory of a victorious or of a vanquished State.

One thing is certain: by having given the force of International Law to the custom of the Anglo-Saxon States which took measures aimed at depriving the owners of alien enemy property of their rights, the Peace Treaties around Paris closing World War I consolidated and converted into a statute an international tendency which had been strongly attacked from many sides until then.

The international legal evolution concerning alien enemy property followed unchanged, also after World War I, the general line of the Anglo-Saxon attitude codified already by the Peace Treaties around Paris. This resulted from the fact that the principles of the law of war of the Anglo-Saxon school were advantageous not only to the Anglo-Saxon Powers but also to quite

a number of Continental Powers, in contrast to the interests of the so-called Central Powers defeated in the World War. The fact that the power relations, developed after World War I, seemed to be stabilized in the period between the two World Wars, especially during its first part, in other words the fact that in this period Great Britain, the United States, France and the so-called "Little Entente" seemed to maintain their power position, resulted in the — international legality of the regulation, contained in the Peace Treaties and running counter both to Rosseau's doctrine and to the former continental theory of law, being on the whole recognized, although its appropriateness was contested by many people, particularly for economic reasons.

5. WORLD WAR II

At the outbreak of World War II the Anglo-Saxon Powers, as a consequence of their proper and already generally recognized legal custom, put into operation anew the "Trading with the Enemy" Acts, and sequestrated and took under compulsory administration all property, rights and interests of enemy nationals situated on their territory; they did so in a form entirely developed by then, through the intermediary of the Custodian of Enemy Property. The Anglo-Saxon attitude found by this time an almost general application in other States of the continent, too, which — as we have said — originally took a critical view with respect to the Anglo-Saxon Vattel Conception. In accordance with the international legal principles entirely accepted, at the beginning of World War II, the private property of subjects of enemy States was qualified, in nearly all States, as "enemy property", and this was why — as can be read in the treatise of Endre Nizsalovszky (1947)

> "the declaration of the Hungarian Delegation made in 1946 in Paris to the effect that Hungary has always respected the property of the subjects of enemy States was bound to remain ineffective in consequence of the inveterated Anglo-Saxon legal conception."

In reality, in the course of World War II, the situation in Hungary with respect to foreign property was substantially identical with the conduct of Hungary during World War I. In effect, apart from those exceptional legal provisions which were equally applied to national and foreign property situated in Hungary (and disregarding the anti-Jewish laws which constituted a specific legal category), the right of disposal of foreign nationals with regard to their property situated in Hungary or their interests in enterprises operating in Hungary was, as a rule, not restricted, that is to say, Hungary formed an exception to the general international legal practice.

6. THE PRINCIPLE OF RESTITUTION OF PROPERTY SEQUESTRATED IN WAR (RESTITUTION—RESTORATION)

We have exposed above the proceedings followed with regard to the "alien enemy property" at the outbreak of and during the war and we have pointed out that the compulsory administration of private enemy property, rights and interests is to be regarded as lawful according to the principles of the Anglo-Saxon legal system, which has acquired a leading position in the World.

Let us now examine more explicitly how in the course of international legal evolution the question was regulated: what shall happen to the private property, rights and interests of enemy nationals at the termination of the war?

It is obvious that in the course of the centuries this problem depended on the question dealt with above, namely on the point of view adopted by the International Law of war with regard to private "enemy" property.

In those periods when private property fell a free prey to the enemy, brute force fully prevailed, as a matter of course, also at the conclusion of peace. The question of confiscated or destroyed private property did not give much headache. Afterwards, in the 17th century, in spite of the prevalence of the Vattel Theory with all its might, such peace treaties were concluded, one after the other, as ordered, on the basis of reciprocity, the complete returning of all private property sequestrated at the outbreak of war. The treatises published in 1947 on the "Legal Aspects of the Peace Treaty in Civil and Economic Matters"[7] quote literally Article XXII of the Peace Treaty of the Pyrenees of 1659, terminating the Spanish—French War, which lays down that the commodities and properties of the subjects of the other State sequestrated at the time of the declaration of war are to be returned honestly and in good faith to the owners in both kingdoms. The same obligation of mutual restitution was later on established by the Peace Treaty of Paris concluded in 1783 between Great Britain and the North-American Colonies (see *ibidem)*. These peace treaties were the forerunners of the international practice from which the prohibition of the confiscation of private property sequestrated at the outbreak of war arose, although this prohibition was not recognized by everybody. The delicts committed during war against the customs based on the Rousseau Principle did not entail *ipso iure* the obligation of compensation until the coming into operation of the Hague Convention IV, but, as exposed below[8] only in case if the peace treaty contained such an explicit provision. Since Rousseau, however, it was required by customary law that at the conclusion of peace also the *private property* sequestrated during the war on a territory occupied temporarily by the enemy, or removed therefrom should be restituted to their owners. The question of restitution of *public property* after a war was, of course, regulated according to power relations: either implicitly in accordance with the principle *uti possidetis*,

[7] Magyar Jogászegylet Könyvtára, nov. 25, p. 59.
[8] See p. 66.

or expressly by the stipulations of the peace treaty. In this respect it is interesting to note that the Napoleonic peace treaties, even the Paris Peace Treaty of 1814, did not contain any general provisions concerning the restitution of works of art removed by Napoleon from the museums of Europe; on that occasion France could still keep these treasures of art for itself. Neither did the Second Paris Peace Treaty of 1815 contain provisions regarding the sort of the treasures of art: these were restituted to the allied monarchs before the Peace Treaty was signed partly by Louis XVIII "out of complaisance", partly on the ground of a simple military measure, and Wellington could only point out in his relative note that the restitution of treasures of art was lawfully claimed by the Allies as "leurs Etats respectifs (en) ont été successivement et systématiquement dépouillés par le dernier Gouvernement révolutionnaire de France, *contrairement à tout principe de justice et aux usages des guerres modernes*".

After all, the international conception that private property is prohibited to be drawn into warfare and certain public properties (for instance treasures of art, administrative and judicial archives)[9] are forbidden to be removed or sequestrated, more precisely that such private and public property has to be "restituted" after the war (restituer à leur légitime *propriétaire* = = restore to the legitimate owner)[10] resulted from the spreading of the doctrine of Rousseau, yet was not legally established until the conclusion of the Hague Conventions.

When afterwards the Hague Conventions — allowing for certain exceptions which were understandable from the viewpoint of belligerents — codified the prohibition of confiscating private property and certain types of public property on an occupied territory, which prohibition had till then only the force of customary law, they completed this by the provision of Article 53 of the Hague Convention IV, by virtue of which

> "all appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots or arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but *must be restored and compensation fixed when peace is made.*"

Accordingly, in this phase of legal evolution the obligation of restitution covered the private property sequestrated on an occupied territory, the public property exempted from sequestration and also those private enemy goods which were on the own territory of a belligerent State the objects of sequestration at the outbreak of war. (Only the property confiscated under the maritime prize law was excepted, with regard to which the practice of the old times survived: no international legal rule laid down that these, too, should be restored at the end of the war; the will of the stronger prevailed.)

[9] See also §§ 15 of the Peace Treaty of Zürich signed on November 10, 1852. and of the Peace Treaty of Vienna signed on October 3, 1866.

[10] See Wellington's note of Sept. 15, 1815.

In the period of World Wars I and II, as we have said, the provisions of the Hague Convention prohibiting the confiscation of private property and of certain kinds of public property (inasmuch as occupied territories were concerned) and the analogous customary rules of International Law prohibiting the confiscation of enemy property situated on the territory of belligerent States, remained unchanged in force, while, on the other hand, International Law regarded it as entirely legitimate to sequestrate and to put under compulsory administration the private "enemy" property, the rights and interests situated on the territory of a belligerent State, and in given cases even their liquidation. *The sequestrated property, rights and interests,* however, *were, in principle, to be restored to the owners at the end of the war.*

In this way, naturally, reciprocity ought to have been respected at the restoration.

Still, according to paragraph 1 *d*, of Article 232 of the Treaty of Trianon[11] all exceptional war measures taken by the belligerents were qualified as legitimate under International Law; paragraph *a* provided, however, that on the territory of the defeated States such measures should — inasmuch as the liquidation (though lawfully begun) had not yet been completed — in conformity with the general rules of International Law

> "... be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners" ("les biens, droits et intérêts dont il s'agit seront restitués aux ayants-droit").

Further in paragraph *e* it laid down that the

> "nationals of the Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Kingdom of Hungary, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto."

And finally it disposed in paragraph *f* as follows:

> "Whenever a national of an Allied or Associated Power is entitled to property which has been subjected to a measure of transfer in the territory of the former Kingdom of Hungary and expresses a desire for its restitution, his claim for compensation in accordance with paragraph *e* shall be satisfied by the restitution of the said property if it still exists in specie" ("il sera satisfait à la réclamation prévue au paragraph *e*, lorsque le bien existe encore en nature, par la restitution dudit bien").

On the other hand, the Trianon Peace Treaty declared in paragraph 1*b* of Article 232, in contradiction to the general rules of International Law, that the victorious States reserve the right to retain and liquidate all enemy property, rights and interests situated on their territory. Concerning

[11] See p. 27.

the seizure and confiscation effected on the sea, Article 361 equally provided in a unilateral way that

> "Hungary accepts and recognizes as valid and binding all decrees and orders concerning Hungarian ships and Hungarian goods and all orders relating to the payment of costs made by any Prize Court of any of the Allied or Associated Powers, and undertakes not to put forward any claim arising out of such decrees or orders on behalf of any Hungarian national."[12]

What is the explanation of this discriminatory treatment employed in the Peace Treaties around Paris?

7. ABSENCE OF RECIPROCITY IN THE PEACE TREATIES AROUND PARIS

The answer can only be that though the exceptional war measures were in principle qualified by the victors of World War I on both sides as lawful, in accordance with the International Law dictated by them, but the steps taken by the vanquished were regarded — indirectly — as wrongful, because the victors qualified the very participation of the vanquished in the war as criminal and on this ground declared, with a general moral validity, that:

> "Hungary and her allies are responsible for causing the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Austria—Hungary and her allies."

(Article 161 of the Trianon Peace Treaty and the analogous articles of the other Peace Treaties around Paris. — The damage, if any, caused by discriminatory measures also falls under the quoted provision.) Our opinion is corroborated by what we may read in this respect in connexion with both World Wars in Oppenheim—Lauterpacht:[13]

> "The differential treatment of the property of the victors and the vanquished can properly be explained by the fact — there is no other explanation — that, as stated in the Preamble of these Treaties, the defeated States bore the responsibility for participation in the war of aggression. This is a test wich after the two World Wars was — in the absence of a more impartial agency — applied by the victor. Yet it is not a test entirely devoid of value. This is so in particular when the victors represent the overwhelming majority of the members of the international community and *when their actions can*, with a substantial approximation to truth, *be conceived* as *enforcement of International Law.*"

Oppenheim—Lauterpacht evidently alluded by this to the Peace Treaties terminating World War II, to which the comment in question textually

[12] See the analogous Articles of the Peace Treaties of St-Germain and Neuilly.
[13] (1952—56) Vcl. II. p. 330.

belongs ("these Treaties"), and the Preamble of which expressed indeed the standpoint of the four Great Powers adopted at that time. Although the data published since the termination of World War II do not leave any doubt in that respect that the policy of the West contributed to a great extent to the outbreak of World War II, the responsibility for World War II is without any doubt borne, according to the unanimous public opinion of the whole world, in the first place by Germany and her allies. Oppenheim—Lauterpacht extend their explanation also to the Peace Treaties terminating World War I, but the public opinion of the world is in the question of the responsibility concerning World War I considerably divided: whereas, on the one hand, according to the official standpoint of the Powers having signed the Peace Treaties, the responsibility of Germany and her allies for the war was unilateral, on the other hand, according to the socialist conception, World War I was on both sides an imperialist war[14] and, therefore, it was not justified, after all, to establish the unilateral responsibility of the Central Powers. The inference may be drawn from all this that, from the point of view of International Law, it was not justified to compell the defeated belligerents to abrogate, after the end of the war, the exceptional war measures (which were declared to be *legitimate* on both sides), as it was required by customary International Law, whereas the victors were authorized to maintain their similar measures, with reference to the war responsibility.

Whatever the case may be, there can be no doubt about it that by virtue of the Peace Treaties around Paris: *a)* the property, rights and interests falling under "the exceptional war measures or measures of transfer" had to be returned by the defeated Powers to the nationals of the Allied and Associated Powers or restored respectively, and *b)* the nationals of the Allied and Associated Powers were entitled to compensation — unless restitution in kind took place — "in respect of all damage or injury inflicted upon their property, rights or interests by the application either of the exceptional war measures or measures of transfer." We would like to stress here that the Peace Treaties around Paris designate the returning and/or restoration of property, rights and interests affected by discriminatory measures by the term "*restitution*" in the French text, but by the term "*restoration*" in the English translation. The meaning of the two words is almost identical,[15] the slight difference is, however, not negligible and from the difference in terminology some interesting conclusions will be drawn later on for the support of our theses.

The Peace Treaties around Paris contain the first modern codification concerning *individual* restitution (restoration) of property, rights and interests taken away by means of discriminatory war measures from the disposal of the persons entitled thereto, which remedy was based till then only on customary law. After the principles having been determined in the Hague Conventions, as referred to above, the obligation of restitution of property sequestrated in times of war remained strictly speaking un-

[14] Cf. Graefrath (1954).
[15] Black (1951) p. 1477 Muret-Sanders: *Encyclopedic Dictionary.*

codified, and the same applies also to the obligation of restitution of property removed during a war. As it appears from what we have said above, these legislative acts established, according to the terminology of Article 232 of the Trianon Peace Treaty,[16] the following obligations:

1. a duty of *restitution* (restoration) as a result of the termination of the war, in favour of the nationals of the Allied and Associated Powers both in respect of property, rights and interests taken away — though lawfully — by *discriminatory* measures, and of property alienated in favour of a third person by a disposition of transfer, if it is situated on the territory of Hungary, further

2. a duty to pay *compensation* for the damage or injury sustained with respect to property, rights and interests as a result of *discriminatory* measures, as well as for the loss and damage incurred in consequence of a transfer, in case of the desired restitution would not be possible.

The decisive preliminary condition of both restitution (restoration) to private persons of property sequestrated as a result of the war and, in given cases, of compensation to be paid to such interested persons, is the existence of a *discriminatory* measure. The legal purpose of restitution (restoration) in favour of a private person is the elimination of the consequences of a discriminatory measure, the re-establishment of the former legal position: *in integrum restitutio*. The restitution into the unlimited exercise of a right cannot be regarded as having the same character as the reparation of a war damage, although the fact of depriving a person of his right during a war causes in general a prejudice, too (in consequence of which the *in integrum restitutio* also amounts to the reparation of an injury).

8. REPARATION AND RESTITUTION (RESTORATION) AFTER WORLD WAR I

As a matter of course, the Trianon Peace Treaty did not forget the loss and damage suffered by the nationals of the Allied and Associated Powers in respect of any of their property wherever situated (either within or outside Hungary) *not by reason of a discriminatory measure*, but "as a direct consequence of the hostilities or military operations of any kind".[17] These losses were, however, not classed into the same category as the claims that could individually be put in for restitution by private persons, occasionally through the medium of their Governments (according to the provisions contained under the title "Property, rights and interests"), but into the category of the claims for "reparations" raised by the victorious States against the vanquished States, and they served as one of the legal titles for the establishment of global reparation.[18] As a consequence of the fact that the war was qualified as an aggressive war, the compensation for all loss and damage incurred with regard to private property was

[16] See also the analogous Articles of the other Peace Treaties around Paris.
[17] The same applies *mutatis mutandis* to the other Peace Treaties around Paris.
[18] See Appendix 1 to Art. 162 of the Treaty of Trianon.

provided by the Treaty of Trianon — in accordance with its whole structure — not in the meaning of the term used in Civil Law, as a compensation individually determined, but as a reparation having the character of an indemnity of war, to be discharged by Government to Government. In this connexion we have to recall the fact that, evidently in consequence of the fourteen Points of Wilson, the Peace Treaties closing World War I avoided in a hypocritical way the use of the term "indemnity", which was to be paid as the consequence of the former wars, so e.g. of the French—German War in 1870—1871 to the victor, without any further justification, exclusively by virtue of the victory. The Peace Treaties around Paris did not want to impose on the vanquished an explicit "indemnity of war" but supported the claim of the victors by the legal argument that the aggressor Germany and her allies were bound to "repair" the loss and damage caused by their acts and in general by the war unleashed by them, to the attacked States and their subjects. The various categories of these losses and damages are enumerated in the Peace Treaties around Paris in the respective Chapter on "Reparation". Thus, Part VIII of the Treaty of Trianon dealing with "Reparation" refers to the joint and several responsibility for the war and holds the Hungarian Government responsible — in our opinion, as mentioned above, in a contestable way — for all loss and damage suffered by the Allied and Associated Powers and their subjects in consequence of the war imposed upon them by the aggression of Austria—Hungary and her allies (Art. 161). In the detailed enumeration contained in the Appendix of the Chapter it is stated that Hungary's responsibility extends also to the losses that arose in connection with any kind of property belonging to the Allies or their subjects, wherever situated, as the direct consequence of hostilities or military operations. Accordingly, in the case of the global reparations due to the victorious States, having the character of an indemnity of war, the basis of the obligation of the defeated States, its direct reason was the *general war responsibility*, which included in principle the totality of the victors' war losses. It does not include, however, the losses that the victors sustained by reason of discriminatory measures; their elimination must be carried out according to the Peace Treaty, as we have mentioned it, not by reparation in the technical sense of the term but by *in integrum restitutio* (restoration). *The question of reparation within the technical meaning of the term must therefore be entirely separated from the restoration of property taken away by discriminatory measures, which is in integrum restitutio.*

As referred to above, the Treaty of Trianon itself[19] entirely separated the liability for reparation, based directly on war responsibility, from the unilateral restoration of private property, rights and interests taken away by discriminatory measures, more precisely from the unilateral duty of restoration, the latter being only in loose connection with war responsibility. All such claims to compensation that could be raised as a direct result of the war imposed on the Allied and Associated Powers, inclusive of the claims for losses suffered in private property as direct consequence of

[19] The same applies also to the other Peace Treaties around Paris.

hostilities or military operations whatsoever, *were included by the Treaty of Trianon into the global sum of reparation*, having the character of a war indemnity. All these claims within the scope of global reparation had to be settled directly by Governments towards Governments. On the other hand, the claims that aimed at compensation for losses incurred in consequence of exceptional war measures and measures ordering a transfer taken in connection with property, rights and interests of nationals of the Allied and Associated Powers, *did not belong at all to the domain of claims to reparation between Governments.*

The return and restoration of private property, rights and interests, that were the object of discriminatory measures, and the compensation to be paid for losses incurred therein are dealt with by the Treaty of Trianon in an entirely different context, in the Chapter on "Property, Rights and Interests", sharply separated from the question of "reparation", and are regarded, in contradistinction to war reparation, as appertaining to quite a different category. By the way, this restitution (restoration) can all the less belong to the scope of "reparation", as the discriminatory measures, we repeat, have been recognized as essentially lawful by the Peace Treaty — although the unilateral obligation of restitution and restoration, *without reciprocity* is, according to the Treaty, to a certain extent the result of *war responsibility*. The obligation does not serve for the exculpation of war responsibility but only for the restoration of the old legal status of affairs disturbed by the fact of the war. We must say that if the *discriminatory* measures had not been recognized by the Peace Treaties in general *as lawful*, we should have to consider the reciprocal duty of restitution (restoration) as the result of the Rousseau Principle, according to which private property must not be affected by war, and inasmuch as it has been affected, an *in integrum restitutio* (entire restoration) has to take place. As it appears, however, from what has been said hereinbefore, the victorious Anglo-Saxon Powers, since they did not stand on the ground of the Rousseau Principle, wanted the exceptional war measures themselves to be accepted as legal from the point of view of International Law. They had, therefore, to refer — not explicitly but only implicitly[20] — to general war responsibility, as the explanation of the obligation of restitution established unilaterally to the charge of the vanquished. In any case, war reparation and restoration of property, rights and interests are, in the system of the Trianon Peace Treaty, matters of logically different types, consequently the separation of the two obligations, we repeat, is by all means justified. Reparation claims and within their scope compensation for loss and damage incurred in private property are dealt with by the Treaty of Trianon structurally separated from the restoration of the legal situation disturbed by war measures, so much so that, for instance, pursuant to Article 161, the Hungarian Government was under the obligation within the scope of reparation representing war indemnity

> "to cede to the Allied and Associated Governments the property in all merchant ships and fishing boats belonging to nationals of Hungary" (Annex III, para-

[20] See Oppenheim—Lauterpacht (1952—56). Vol. II. § 101.

> graph 1), and "to cede a portion of the Hungarian river fleet up to the amount of the loss mentioned" (Annex III, paragraph 5),

all this with a view to replacing merchant ships and fishing boats lost or damaged owing to the war. The Government was further bound

> "to replace the animals, rolling-stock, machinery, equipment, tools and like articles of a commercial character which have been seized, consumed or destroyed by Hungary, or destroyed in direct consequence of military operations... by animals and articles of the same nature" (Annex IV, paragraph 2).

Accordingly, the cession to the Government of an Allied and Associated Power of the river fleet or of a portion thereof, or of animals, rolling-stock, machinery etc. or of a portion thereof in order to replace a loss incurred in the war is "reparation" of a war indemnity character, whereas if such assets had fallen under the effect of an exceptional war measure or of a measure of transfer, the prejudice which arose thereof for private persons should have been eliminated by Hungary in the scope of restoration.

9. RESTITUTION OF REMOVED PROPERTY IN THE PEACE TREATIES AROUND PARIS. BEGINNING OF RESTITUTION IN THE TECHNICAL SENSE OF THE TERM

The restitution of cash, animals, movable effects and securities (and of other properties) removed by the Central Powers from the territory of the Allied and Associated Powers in violation of International Law[21] and then seized or sequestrated, likewise unlawfully, for their own purpose was to be effected equally between Governments by virtue of Article 168 of the Treaty of Trianon, under the title of "reparation".[22] In other words: while the Treaty makes a sharp distinction between *in integrum restitutio* (restoration) aiming at the restoration of property, rights and interests, on the one hand, and reparation, on the other, it treats the restitution in kind of removed property (what in our terminology is: restitution "in the technical sense of the term", in contradistinction to the various other legal institutions covered by this denomination dealt with below) in a structurally erroneous way within the scope of "war reparation", and does not separate it textually from the latter: this is evidently due to the then incomplete legal development of restitution in the technical sense of the term. Thus the individual *in integrum restitutio* — which otherwise purports in the system of the Peace Treaties closing World War I exclusively to eliminate, after the war, the legal effects of discriminatory measures taken during the war and recognized by the international legislators as having been lawful — becomes in this system considerably confused with the duty of restitution in the technical sense of the term, based on an international delinquency, namely on the violation of the explicit provisions

[21] See p. 59.
[22] See also the analogous Articles of the other Peace Treaties around Paris.

of the Hague Convention, more exactly on the removal of property, and both get mixed up with reparation having the character of a war indemnity.

For this reason it seems to be advisable to make some kind of distinction between *in integrum restitutio*, restitution in the technical sense of the term, and reparation in the nature of a war indemnity. A correct legal and terminological analysis of the Peace Treaties around Paris themselves renders this possible. As pointed out hereinbefore, the individual *in integrum restitutio* should have been designated already in the system of the Peace Treaties around Paris rather by the English expression "restoration" (restauratio), while the technical term "restitution" should have been exclusively reserved for the returning of removed property. Such a "restitution" in the proper sense of the term does not mean the restoration of the original legal status of rights but the returning of chattels to their original place, the territory of the country whence they were removed, in accordance with the original practical meaning of the French word "restitution": "restituer = replacer". As we have pointed out already, this does not mean that the territorial replacement, the carrying back of removed property would completely be devoid of certain characteristics of general *in integrum restitutio* of International Law, since such a replacement creates a preliminary condition for the restoration of the right of ownership. One thing is certain: though the provisions of the Peace Treaties around Paris concerning restitution of removed property, taken in a territorial sense, did not yet develop completely the concept of restitution in the technical sense of the term, as an independent legal institution, this specific legal concept detached itself in these Peace Treaties from the general legal institution of the *restitutio in integrum* and *assumed an independent existence*.

The *in integrum restitutio* purporting to eliminate the legal effects of discriminatory measures and of alienations is identified by the Peace Treaties around Paris with the returning of removed property only in their denomination (both are "restitutions"), whereas the question of removed property was, as pointed out before, for fundamental reasons, not regulated under the title of "Property, Rights and Interests" dealing with discriminatory measures but (although, as we have said, this is not entirely right, either) under the title of "Reparation". The reason is that the removal of property was *summarily* ranged by the Peace Treaties around Paris (Treaty of Trianon, Article 162, Annex and Article 168)[23] among those losses and damage for which Germany and her allies had been made responsible on the ground of a general principle, according to which these countries were bound to make reparation

> "for causing the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Austria—Hungary and her allies" (Article 161 of the Treaty of Trianon).[24]

[23] See also the analogous Articles of the other Peace Treaties around Paris.
[24] See p. 37.

On the other hand, the returning of removed property, in other words, the restitution in the technical sense of the term, was not included in the scope of "reparation" of a war indemnity character but *formed a separate legal category*. For this very reason, in our opinion, it would have been better to apply already in the Peace Treaties around Paris the term "Reparation and Restitution", instead of the term "Reparation", as it happened later in the Paris Peace Treaties terminating World War II.[25]

In the question of the international justification of reparation and of the general responsibility for all loss and damage caused in the course of World War I, the public opinion of the world is, as referred to above,[26] considerably divided. As World War I was on both sides an imperialist war and so Germany and her allies could not be made unilaterally responsible for it, the socialist conception does not consider the global reparation determined in the Peace Treaties around Paris justified from the point of view of International Law; according to this conception, this is incontestably but an "indemnity of war" based on the right of the victor. While there is a disagreement between experts in International Law as to whether the claim to "reparation" for the loss and damage caused was lawful, there is, and there can be, no divergence of opinion in respect of the rule that the *removal of property is contrary to the laws of war* and that such property is to be restituted under any circumstances. In other words, the restitution of removed property (though it is treated by the Peace Treaties around Paris in a similar way as are the legally contestable commitments in the nature of an indemnity of war) must be distinguished from the latter, since from the viewpoint of International Law such a genuine restitution is at any rate lawful, considering that the removal of private property and, beyond certain limits, also of public property is in itself a serious delinquency of International Law, irrespective of general war responsibility. Accordingly, although in the system of the Peace Treaties around Paris restitution of removed property belongs, from a formal point of view, to the scope of war reparation, it is nevertheless possible with the help of a correct legal analysis to separate completely the global reparation following World War I in the nature of a "war indemnity" from restitution in the technical sense of the term, as well as from "*in integrum restitutio*" (restoration) dealt with in the Chapter about "Property, Rights and Interests".

Genuine restitution, as referred to above,[27] is regulated by Article 168 of the Treaty of Trianon literally as follows:[28]

> "en sus les paiement ci-dessus prévus, la Hongrie effectuera, en si conformant à la procédure établie par la Commission des réparations, la restitution en espèces des espèces enlevées, saisies ou séquestrées ainsi que la restitution des animaux, des objets de toute sorte et des valeurs enlevées, saisis ou

[25] See p. 32.
[26] See p. 37.
[27] See under the subtitle: "Restitution of removed property in the Peace Treaties around Paris. Beginning of restitution in the technical sense of the term".
[28] See also the analogous Articles of the other Peace Treaties around Paris.

séquestrés, dans le cas où il sera possible de les identifier soit sur les territoires appartenant à la Hongrie ou à ses alliés, soit sur les territoires restés en possession de la Hongrie ou de ses alliés jusqu'à complète exécution de présent Traité."

("In addition to the payments mentioned above Hungary shall effect, in accordance with the procedure laid down by the Reparation Commission, restitution in cash of cash taken away, seized or sequestrated, and also restitution of animals, objects of every nature and securities taken away, seized or sequestrated in the cases in which it proves possible to identify them, on territory belonging to, or until the complete execution of the present Treaty in the possession of Hungary or her allies.")

This provisions of the Treaty determines in a decisive way the difference between reparation of a war indemnity character and restitution in the proper (technical) sense of the term: restitution may not be regarded as a "war reparation" because it is to be effected in every case over and above the "reparation" of a war indemnity character. This is laid down definitely in the last paragraph of Article 173 of the Treaty of Trianon, according to which "in no case, however, shall credit be given for property restored in accordance with Article 168."

On the other hand, in the system of the Treaty of Trianon the provision contained in Annex I of Article 162 cannot be qualified as a rule of restitution by virtue of which compensation may be claimed from Hungary for any damage caused

"in respect of all property, wherever situated, belonging to any of the Allied or Associated States or their nationals, with the exception of naval or military works or materials, which has been carried off, seized, injured or destroyed by the acts of Hungary or of her allies on land, on sea or from the air, or damaged directly in consequence of hostilities or of any operations of war."

These compensations are not of the same nature as the restoration of "determined" property, but belong to the domain of global reparation having the character of a war indemnity. The obligation layed down in the Annexes of Article 161[29] relating to the "replacement" (not to the restoration) of objects destroyed or consumed as a consequence of hostilities — the value of which is precisely for this reason to be deducted from the amount of the global reparation[30] — may not be regarded as a "restoration", nor may it be considered as a liability for restitution in the technical sense of the term. The payments and/or deliveries effected under this title are equally of a war indemnity character.

Besides the general obligation of restitution referred to in Article 168, the Treaty of Trianon also contains rules about specific restitution in the technical sense of the term, to which the essential principles governing general restitution apply similarly. Thus, specific restitutions correspond to general restitutions mainly inasmuch as *the restitution has to be effected territorially, by a Government directly to another Government.* A specific

[29] See p. 37.

[30] See also the analogous Articles of the Peace Treaties around Paris.

liability for restitution is provided by Article 175 of the Treaty of Trianon in favour of the Allied and Associated Powers in respect of "all records, documents, objects of antiquity and of art, and all scientific and bibliographical material taken away from the invaded territories", and the same liability is established by Article 176 concerning those similar objects which were taken away not from the territory of the Allied and Associated Powers but from what are termed ceded territories since the commencement of the war. Finally, a specific liability for restitution is laid down by Article 177 of the Treaty of Trianon in respect of

> "all the records, documents and historical material possessed by public institutions which may have a direct bearing on the history of the ceded territories".

All these specific restitutions are to be effected equally over and above the global reparation in the nature of a war indemnity, in the same way as the restitution of removed property in general (Article 175 of the Treaty of Trianon).

10. REPARATION AND RESTITUTION IN THE PEACE TREATIES AROUND PARIS DEALT WITH IN JURISPRUDENCE

The difference between "reparation" and "restitution" considered from the viewpoint of International Law and also of the Peace Treaties closing World War I[31] is dealt with, among others, by Erich Kaufmann (1949), University professor in Munich, and by Schmoller, Maier and Tobler (1957), jurists of Tübingen.

In the works of these jurists the purpose of making a distinction between reparation and restitution is, among others, to help the elucidation of the notion of restitution, as Schmoller, Maier and Tobler say: "angesichts der Unklarheit, die heute hinsichtlich des Restitutionsbegriffs besteht". The works in question, however, — though they contain several correct statements shared by us — did not succeed in eliminating the confusion which prevails about restitutions because, in consequence of the linguistic identity of the denomination, they seem to mix up 1. general *Wiedergutmachung* of International Law with "war reparation" of the Peace Treaties and 2. *in integrum restitutio* (restoration) of the Peace Treaties with genuine territorial restitution of removed property.

In consequence of the facts that: 1. the term "*Wiedergutmachung*" is not only used by the above-mentioned jurists in the same meaning as by Anzilotti, Liszt, Oppenheim and others (as the sanction of an "international delinquency") but, within the context of the Peace Treaties, it is identified with "war reparation", and that 2. "*in integrum restitutio*" in the general meaning of the term as used in International Law is without any doubt the most frequent form of "*Wiedergutmachung*": the term "*restitution*"

[31] These works deal fundamentally with the problems of the period following World War II.

often appears in the works in question *as an identical concept with "war reparation" itself.*

Departing from the original French text of the Peace Treaties (see paragraphs *e*, *f* and *h* of Article 232 of the Treaty of Trianon), the German jurists qualify as "restitution" and at the same time as a part of "*Wiedergutmachung*" in war the cancellation of war discriminatory measures. This appertains in our opinion to the general legal category of "*in integrum restitutio*" and may not be included into the category of "*Wiedergutmachung*" or of restitution in the technical sense of the term. The "restitution" of identifiable boats and other crafts belonging to inland navigation which, since the outbreak of the war, passed from the possession of the Allied and Associated Powers into German (Hungarian) possession, enacted by paragraph 6 of Annex III attached to Article 242 of the Treaty of Versailles (Treaty of Trianon, paragraph 5 of Annex III of Part 8), was, according to all four German scholars, likewise war reparation. They qualify it as restitution in the technical sense ot the term, in spite of the fact that the property ordered to be returned in kind had not been removed by way of a delinquency: this is, however, a fundamental criterium of restitution in the technical meaning of the word.

Particularly Kaufmann qualifies the goods to be supplied in lieu of properties (e.g. animals) removed from an occupied territory as a form of reparation: "Beide Restitutionsarten, die 'à l'équivalent' und die 'à l'identique', sind gegenüber der Geldentschädigung privilegierte Formen der Wiedergutmachung."

Correctly, as a matter of course, the "restoration" of all property that was removed by the Central Powers in violation of the Hague Convention from territories occupied by them has to be qualified according to the system of the Peace Treaties around Paris as restitution. Not the Peace Treaty but Article 53 of the Hague Convention decrees the "restitution" at the end of the war of all property seized and sequestrated lawfully by the enemy, on the occupied territory in the course of the hostilities.

What is the legal difference between restitution and reparation after World War I according to the work of Kaufmann and that of Schmoller, Maier and Tobler?

In the opinion of Kaufmann the decisive difference between the two legal categories consists in the fact that war reparation is a debt of the vanquished State and is, accordingly, to be discharged by way of handing over goods belonging to the economy of the State, whereas restitution is the returning of properties "die niemals rechtmässiger Bestandteil der deutschen Volkswirtschaft geworden, sondern rechtmässiges Eigentum der alliierten Staatsangehörigen geblieben waren".[32]

Concerning the same subject Schmoller, Maier and Tobler say:[33]

> "Der Unterschied zwischen den beiden Arten von Verpflichtungen zur Herausgabe von Sachen: der Restitution und der Reparation liegt darin, dass der Restitutionsanspruch, obwohl er ein völkerrechtlicher ist, der nach Auffassung

[32] Kaufmann (1947) para. 14.
[33] (1957) § 52, item 4.

aller Völkerrechtslehrer nur von Staat zu Staat geltend gemacht werden kann, sich doch auf einen fortbestehenden privatrechtlichen Eigentumsanspruch des Staatsbürgers des besetzten Gebietes gründet, dem die Sache wider seinen Willen weggenommen wurde..." "In den Fällen der Geltendmachung von Reparationsansprüchen, in denen gleichfalls die Herausgabe bestimmter Sachen gefordert wurde, ist kein Eigentumsanspruch vorhanden, sondern der allgemeine Wiedergutmachungsanspruch wird ausnahmsweise statt als Geldforderung als Forderung auf Wiedergutmachung in natura erhoben."

Dr. Langen and Dr. Sauer, West-German jurists, adopt the same standpoint[34] and state as follows:

"Unklar ist vorläufig noch die rechtliche Konstruktion des Restitutionsanspruches"... "Nach dem Sinn dieses Wortes handelt es sich um eine Rückgabe, die an den ursprünglichen Eigentümer zu erfolgen hat.[35] (!) Dieser ist also der Berechtigte. Da ihm der Gegenstand wider Willen entzogen ist, so ist grundsätzlich kein anderer inzwischen Eigentümer geworden, er ist Eigentümer geblieben und handelt nach dem alten Satz:" *Ubi rem meam invenio, ibi vindico.*"

We do not deem acceptable either the statement of Kaufmann or that of the other German scholars and we think that with their argumentation they wanted to contribute to the protection of particular German interests. These interests required the recognition of the concept of a restitution based in the last resort on a claim of Civil Law and not on an injury caused to the national economy, having its legal ground — in contrast to reparation — in the fact that the property (which had been removed according to Schmoller, Maier and Tobler "in an illegal way from the viewpoint of Civil Law" and according to Kaufmann "contrary to International Law") remained throughout, from the beginning to the end, in the ownership of the despoiled inhabitants of the occupied territory and did not become part of German economic life.

The correctness or falseness of the statement concerning the legal basis of restitution, namely the question whether the international legal ground of restitution consists in the unchanged continuance of private ownership or, as we affirm and prove it, in the right of the injured State for the retransportation of the property tortiously removed from its territory, this question will have a decisive importance later on in the course of the development of the notion of restitution in the technical sense of the term, during and after World War II.

Restitution in the technical sense of the term is, in our opinion, — as we have said before and as it is admitted even in the whole argumentation of Kaufmann — still considerably mixed up in the Peace Treaties terminating World War I with *in integrum restitutio* being the sanction of all international delinquencies, with "restoration" meaning the rescission and quashing of all war discriminatory measures (elimination of "Zivilschäden"),

[34] Langen, Sauer (1949). (This work has after all not been published and some of its inferences are considered as outworn by the authors themselves.)

[35] The exlamation mark is mine.

moreover with war reparation based on the general war responsibility. We repeat: the concept of restitution in the technical sense of the term correctly means, already in the system of the Peace Treaties, only the *returning of objects and values removed in violation of International Law* from occupied territories or seized and sequestrated there, and the difference between restitution and war reparation may be established in the fact that *the basis of war reparation is the general war responsibility and its object is to furnish compensation for loss and damage caused by the war*, on the one hand, while on the other, the *legal ground of restitution is, irrespective of war responsibility, the violation of the rules of warfare, and its object, the individual returning of wrongfully removed property.*

We cannot accept the above-quoted definition of restitution given by Kaufmann for the very reason that he includes various kinds of legal institutions, designated in the text of the Peace Treaties by the term "restitution", into one and the same legal category, and omits to give the definition of restitution in the proper, technical sense of the term, which has developed into a specific legal institution, though it is also the subject-matter of his own treatise. This restitution, as we have said, differs fundamentally both from *in integrum restitutio* being the sanction of a general delinquency of International Law and from *in integrum restitutio* purporting to quash the war discriminatory measures, of which the existence of a delinquency is not a condition. Its legal basis is in any case a war delinquency and its purpose is not *in integrum restitutio* in the legal meaning of the term but a *replacement, Rücklieferung*, in the practical sense of wrongfully removed property.

The provisions relating to restitution *in natura* of property removed by the Germans and their allies in World War I did not contain any disposition exceeding the simple returning of the property, that is to say, the *normal reparation* of the international delinquency committed. No matter how considerable and extensive the forcible removals made in the war had been, public opinion did not yet see therein more than a violation of the Hague Conventions, and it did not seem justified to create a specific *legal institution* for the reparation and reprisal of these delinquencies, considering in particular the global war reparation destined to ensure anyway the economic victory. According to what has been said above, *restitution as a specific legal institution began* all the same *its independent existence with the conclusion of the Peace Treaties around Paris*, subjected to rules different from those governing general *in integrum restitutio* of International Law.

11. CRITERIA OF RESTITUTION IN THE TECHNICAL SENSE OF THE TERM IN THE SYSTEM OF THE PEACE TREATIES AROUND PARIS

The fundamental rules of the restitution of removed property, according to the Peace Treaties around Paris may be summed up as follows :

1. restitution has to be effected in kind *(en espèce);*

2. its prerequisite is that the objects shall be discovered and identifiable on the territory of the State which removed them, or on the territory of her allies;

3. the returning must be effected not to the individual owner but to the injured State.

The Peace Treaties around Paris do not lay down further detailed rules in respect of restitution. Article 168 of the Treaty of Trianon only provides that restitution shall be effected in accordance with the procedure laid down by the Reparation Commission. It is, however, certain that in contra-distinction to claims for *in integrum restitutio*, the individual ownership had not to be certified in connection with a claim to restitution, only the fact of removal from the territory of one of the Allied or Associated Powers (the data required for the establishment of the identity had to be given); that the property had to be returned territorially to the State concerned and that only the Allied and Associated Powers were the beneficiaries of restitution. The Peace Treaties around Paris do not contain provisions to the effect that the vanquished States would be, for instance, bound to reacquire on the territory of other countries the property removed by them, or that also a bona fide acquirer should be under the obligation to return property subject to restitution, or that the organs or officials of the Central Powers would be obliged to co-operate in the search after removed property. In such respects the Peace Treaties did not want to affect the general provisions in force.

Reciprocity was not decreed by the Peace Treaties around Paris in respect of restitution in the technical sense of the term, nor in respect of *in integrum restitutio* of property, rights and interests. Exceptions were only provided for by the Treaty of Trianon as regards restitutions qualified above as "specific", and here, too, only inasmuch as the Successor States were bound to give up to Hungary the records, documents and material dating from a period not exceeding twenty years which had a direct bearing on the history or administration of the territory of Hungary (Article 178). The Treaty of Trianon also recognizes the claim of Hungary concerning the scientific and artistic objects forming part of the intellectual heritage (Article 177). In these cases, however, the question was not the returning of removed property during the war from a territory occupied by a foreign Power, but the division of collections which were, according to the spirit of the Treaty of Trianon, for a long time illegally kept at a place they did not belong to.

We consider the absence of reciprocity in respect of restitution in the technical sense of the term (in the system of the Peace Treaties closing World War I) even less justified than in connection with restoration of "property, rights and interests". Out of the violation of the rules of warfare *(ex delicto)* the same liabilities arise for both parties, whence out of the removal of property the same liability for restitution. At least in principle, neither of the parties may lawfully be exempted from this liability.

12. REPARATION, RESTORATION AND RESTITUTION IN THE ARMISTICE AND PEACE TREATIES CLOSING WORLD WAR II

The system of the Peace Treaty of Trianon which, according to what has been said above, makes sharp distinction between war reparation and the restitution of the legal state of affairs that existed prior to the war and which separates theoretically the restitution in kind of removed property to be effected directly between Governments over and above reparation, from the global reparation in the nature of a war indemnity, was maintained in its entirety by the Treaties closing World War II. The system analysed above of the Treaty of Trianon is exactly followed by the Hungarian Armistice Convention signed on January 20, 1945, as well as by the Hungarian Peace Treaty signed on February 10, 1947, and by the analogous international treaties concluded by the other satellite States.

The Hungarian Armistice Convention dated on January 20, 1945, treats in paragraph 1 of Article 12 the question of reparation to be paid by virtue of the war responsibility to the Soviet Union, Czechoslovakia and Jugoslavia and in paragraph 2 the problem of reparation due to the Western Powers. Article 13 of the Armistice Convention contains general provisions relating to the restitution of legal rights and interests and to the returning of property, in other words, as we have analysed it, regarding the elimination of the detrimental effects of discriminatory measures.

We may state that the analogous structure of the Armistice Convention and of the Treaty of Trianon in the question of reparation and the restoration of the legal state of affairs shows a definite direction as to how the relative provisions of the Peace Treaty of Paris signed on February 10, 1947, are to be rightly interpreted. The identical construction of the relative parts of the Treaty of Trianon, the Armistice Convention of January 20, 1945, and the Hungarian Peace Treaty of Paris, frequently even their identical terminology strongly support the thesis that the Paris Peace Treaty in its Articles 23, 24, and 25, entitled here distinctly "Reparation and Restitution" (accordingly, "Reparation" on the one hand and "Restitution" on the other) provides in respect of all war damages suffered whereso-ever by the Allied and Associated Powers as belligerents, and treats *separately the question of compensation for injuries directly inflicted upon private property in consequence of the war and the question of the restitution in kind of property removed from the territory of the United Nations.* On the other hand, Article 26 of the economic provisions, which is similar to the Chapter about "Property, Rights and Interests" of the Treaty of Trianon and to Article 13 of the Armistice Convention wants to provide exclusively for the (unilateral) restoration of the legal state of affairs in connection with the property, rights and interests in Hungary of the nationals of the United Nations, injured by discriminatory measures taken in this case by the party undoubtedly responsible for the war and to be qualified for this reason as indirectly illegal.

Article 26 of the Paris Peace Treaty — to which, by the way, the corresponding Articles of the other Peace Treaties signed at the same time resemble — provides in paragraph 1 that

"Hungary *shall restore* all the legal rights and interests in Hungary of the United Nations and their nationals as they existed on September 1, 1939, and *shall return* all property in Hungary of the United Nations and their nationals as it now exists."

According to the not authentic French text included here for the purpose of collation:

"...la Hongrie rétablira tous les droits et intérêts légaux en Hongrie des Nations Unies et de leurs ressortissants et restituera... tous les biens leur appartenant en Hongrie, dans l'état ou il se trouvent actuellement."

Paragraph 2 reads as follows:

"Le Gouvernement Hongrois restituera tous les biens, droits et intérêts visés au présent article, libres de toutes hypothèques et charges quelconques dont ils auraient pu être grevés du fait de la guerre, et sans que cette restitution donne lieu à la perception d'aucune somme de la part du Gouvernement Hongrois." (The Hungarian Government undertakes that all property, rights and interests falling under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Hungarian Government in connection with their return.)

The same paragraph obligates Hungary to nullify all measures, including seizures, sequestrations or controls, taken by her against United Nations property between September 1, 1939, and the coming into force of the Peace Treaty.

Finally, according to paragraph 4 the Hungarian Government undertakes to restore to complete good order all property returned to the United Nations nationals *(biens restitués)* and in cases where property cannot be returned *("ne pourra être restitué")* or where as a result of the war a United Nations national has suffered a loss by reason of an injury or damage inflicted on his property in Hungary, the Hungarian Government undertakes to pay compensation in Hungarian currency. (The much contested question of compensation.)

Accordingly, when examining the question of compensation, just as in the case of the liability to compensation enacted in Part VIII of the Treaty of Trianon under the title "Reparation" and Part X under the title "Economic Clauses", we have to make a decisive distinction also in the system of the Paris Peace Treaty of 1947 between the claim for a global war reparation which may be set up by the Allied and Associated Powers against the Government of the vanquished State, on the one hand, and individual claims which may be put in by private persons in connection with restitution (restoration) of property, rights and interests, on the other.

Moreover, by reason of the analogy existing between the Treaty of Trianon and the Paris Peace Treaty both in their structure and in the details, we may safely say that the war "reparation" to be paid by virtue of the Paris Peace Treaty and exclusively due to the Soviet Union, to

Czechoslovakia and Yugoslavia comprises the same categories of compensation as are enumerated in the Annex to the Chapter of the Treaty of Trianon relating to reparations. In fact, the global reparation paid by Hungary to the Soviet Union, Czechoslovakia and Yugoslavia on account of the loss and damage caused to persons and property by reason of its participation in the war covers all damages enumerated in the Annex to Article 162 of the Treaty of Trianon, accordingly also the losses that were caused in the property of private persons "by the hostilities or the direct consequences of acts of war whatsoever". On the other hand, the individual *in integrum restitutio* connected with property, rights and interests of private persons, located in Hungary and possibly placed under compulsory measures[36] or, in given cases, the individual compensation, does not fall under the category of "war reparation". By having waived their claim for reparation due to them by virtue of Article 12 of the Armistice Convention, the Western Powers have also given up the claim for global reparation payable according to the words of the Treaty of Trianon (referred to here by analogy) for all individual war damage to the Governments. And as far as the nationals of these countries are concerned, in this category no other liability rests on Hungary, on the analogy of the Treaty of Trianon, than the obligation to effect restitution, more precisely restoration in respect of any property, rights and interests possibly violated in the war. This liability comprises only those losses and injuries which were inflicted upon these properties, rights and interests by reason of a discriminatory measure

The conceptual difference between restitution (restoration) and reparation can, of course, not be neglected from the viewpoint of International Law. For our own problem, however, the clearing up of the confusion evolved between the notions of *in integrum restitutio* and restitution in the technical sense of the term is without doubt of greater importance.

The French text of the Peace Treaties closing World Wars I and II (which is in the case of the Peace Treaties around Paris authentic and in the case of the Paris Peace Treaties an unauthenticated translation), comprises, as we have mentioned it, within the concept of "restitution" both the restitution of rights taken away (though according to the prevalent view lawfully) by discriminatory war measures and the return of property removed by the Germans and their Allies in violation of International Law (wrongfully). Some scholars of International Law, who treat of the question of restitution only in a wider connection (for instance Marcel Sibert 1951 and Guggenheim 1953), do likewise not make any distinction between the two kinds of restitution and qualify both in the last resort as an *in integrum restitutio* (the elements of which in point of fact both posses), they omit, however, the discussion of elements decisively important for International Law, which distinguish one from the other and sharply separate them conceptually and in their effects, too. It is interesting to observe that the original English and Russian texts of the Paris Peace

[36] As to the practice followed by Hungary in connection with war discrimination see p. 29.

Treaties terminating World War II apply consistently the terms "restoration" and "returning" (respectively the corresponding Russian terms) at every passage where the French text applies the term "restitution" in order to express the *in integrum restitutio*, the individual returning and/or restoration of property, rights and interests taken away from the persons entitled thereto by discriminatory war measures. In the same way, the original English text of the Paris Peace Treaty speaks of "restoration" in Article 27 providing the restitution of the property, legal rights and interests of the persons who suffered persecution on account of their racial origin or religion, whereas the French text reads as follows: "la Hongrie prend l'engagement. . . de restituer lesdits biens et de rétablir lesdits droits et intérêts légaux". Last not least, our statement that the Paris Treaty wants to make a sharp distinction between individual "returning and restoration" of property, rights and interests, on the one hand, and "restitution" of removed property, on the other, is confirmed in a decisive way by paragraph 3 of Article 30 which — and this emphasizes already the practical importance of the question in International Law — uses the terms "restoration" and "restitution" one beside the other: "the restoration and restitution of Hungarian property shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany". As we are going to point out, the connection of this passage with paragraphs 1 and 2 of Article 30 proves that while paragraph 1 of Article 30 deals with the restoration of the ownership of those Hungarian properties that were also formerly situated on the territory of Germany and as such stood under the "enemy property control" applied by the Allied Occupying Powers, paragraph 2 of Article 30 provides for the return of those properties that were removed by force or duress from Hungary by the German armed forces or authorities.[37]

"Restitution" as a legal concept taken in the technical sense is, in the international legal terminology developed during and after World War II, *reserved for the designation of the returning* (in German: *Zurückerstattung, Rücklieferung*)[38] *of property wrongfully removed, in violation of the rules of International Law, from a territory temporarily occupied by the enemy:* this is restitution in the technical sense of the term.

On the other hand, the nullification of discriminatory measures taken with respect to "property, rights and interests" situated on the territory of the belligerents and the restoration to complete good order of the rights of the persons entitled thereto: the *in integrum restitutio — of which*, accordingly, *a previous unlawfulness is no prerequisite* — may in the same terminology properly be designated by the English denomination *"restoration"* (the corresponding German expression is: *Wiederherstellung).*

[37] The germs of the above terminology are contained, as referred to above, already in the Peace Treaties around Paris. The English translation of the Treaty of Trianon, where the restoration of rights taken away by discriminatory measures is in question (Art. 232, para. *a)*, speaks, in contradistinction to the French "restitution", of "restoration", there, however, where the Peace Treaty provides for the returning of removed property (Art. 168), it applies in conformity with the French text the term: "restitution".

[38] See *Kontrollratsdirektive* V. 21. I. 1946.

The uniform designation of the two concepts by the same term "restitution", used in the French texts of the Peace Treaties around Paris, did not yet cause any appreciable trouble owing to the relatively infrequent occurrence of removals of property in violation of International Law; it creates, however, a certain amount of confusion in consequence of the degeneration of the German warfare in World War II and because the removal of property became quite systematic. In this situation the legal motives, the criteria and the legal effects of restitution are different.

CHAPTER II

THE CONDUCT OF THE ENEMY ON A TEMPORARILY OCCUPIED TERRITORY

1. THE HAGUE CONVENTION IV

The Hague Convention IV concerning the laws and customs of war on land contains explicit provisions as to the principles applicable in respect of public and private property in case of an *enemy occupation*. While in bygone days, as we have said, the general rule was that belligerents were authorized to appropriate or requisition without any formality all public and private property which they found on enemy territory, in consequence of the general evolution of International Law since Rousseau, the Hague Convention laid down the principle that both public and private property must be respected as far as possible: the respect for enemy's property is the rule, its appropriation (its seizure) is the exception which may only be justified by the nature of warfare and the necessities of war. This general principle of law, as quoted above in another connection, is enacted by Paragraph *g* of Article 23 which provides that "it is forbidden. . . to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Within the scope of this legal principle the Convention makes a distinction on the one hand between public and private property, on the other hand between movable and immovable property and between the different categories thereof.

The principle of the regulation is that while public property, whether movable or immovable, may as a rule be appropriated (seized) without compensation for the aims of warfare, private property may in general not be involved in warfare and if it is appropriated (seized), whether it be movable or immovable, *compensation has always to be paid.*

2. PUBLIC PROPERTY IN THE HAGUE CONVENTION IV

Articles 53 and 54 dispose in respect of movable public property, and Article 55 in respect of immovable public property.[1]

[1] "Article 53

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the state which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases

The occupying State must safeguard the substance of the immovable public property with the care of a usufructuary, it may not sell or otherwise alienate it; it may, however, dispose without restriction of its produce, it may make use of public buildings for whatever purpose, consequently also for a purpose contrary to their destination, the proceedings of the occupying State must, however, always be justified by the necessities of war. In respect of the seizure of the enemy's movable public property situated on the occupied territory the Convention contains only the restriction that all movable public property taken away must serve directly or indirectly but expressly the purpose of concrete *military operations* (necessities of war are not sufficient). In contradistinction to the general rule that the proceeds of public real estates and movable public property may be seized by the occupying Power and may be used within fixed limits for its own purpose, the Hague Convention provides that the produce of public buildings destined for religious, charitable and scientific purposes or connected with arts, the revenue from other real estates in public ownership and the movable property of institutions serving the same objectives may not be appropriated. Such property shall be treated like private property even if it is State property set aside for specific purposes. The property of municipalities, too, has to be treated as private property and cannot be seized either.[2]

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governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 54

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Article 55

The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules the of usufruct."

[2] Art. 56 of the Hague Convention IV contains in these respects express provisions and reads as follows:

"Article 56

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when state property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

3. PRIVATE PROPERTY IN THE HAGUE CONVENTION IV

The Hague Convention declares the inviolability of private property as a central principle by formulating it in Articles 46 and 47 as follows:

> "Article 46, Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected.
> Private property cannot be confiscated.
> Article 47. Pillage is formally forbidden."

Consequently, while in the case of public enemy property, as a matter of course, the rule is that it may be seized and the prohibition of requisition is the exception, in the case of private property there is in principle no room for requisition (for seizure or confiscation). However, 1) private real estates may be made use of and utilized in accordance with the rules of usufruct, moreover they may even be transformed for war aims in the same way as real estates in public ownership, 2) as far as movable property is concerned, in principle it cannot be confiscated, but, as can be read in Article 53, means of transport, depots of arms and ammunition of war as well as war materials (including stores and supplies, foodstuffs and all other war materials) may be seized even if they belong to private individuals, with the "natural" reservation, of course, that all properties requisitioned must be restored in kind or compensation has to be paid for them when peace is made. Historic monuments, works of art and science in private ownership cannot be seized at all. For these Article 56 quoted above excludes all seizure even when belonging to the State. The Hague Convention protects most energetically the objects destined to scientific, artistic, cultural and humanitarian aims. The robbing or removal of such property belonging to individuals is qualified as a particularly serious war crime. The crime in these cases cannot be justified by any necessity of war, whereas other movables, provided they can be utilized for military operations, may be requisitioned, as mentioned above, against compensation by virtue of Article 53. The requisition of a historic monument is not justified even if it is built of a material of value for warfare: a statue mustn't be removed even if it is made of precious bronze.[3]

4. REQUISITIONS AND CONTRIBUTIONS

Private enemy property is the most extensively affected by war in consequence of requisitions (supplies in kind and in money for the provisioning of the occupying army). The principle "war must support war", according to which belligerents were originally authorized to appropriate all public and private enemy property for the purpose of warfare, culminated during the evolution of law, beside the appropriation of public property, more and more in requisitions and contributions (see hereinafter). Prior to the legal evolution of modern times it was out of question for the occupants

[3] Cf. Oppenheim—Lauterpacht (1952—56) Vol. II, § 142.

to pay in cash for requisitions or to give receipts in order to render the enforcement of the claims possible at a later date. Then, in the legal situation created by the Hague Conventions, the customary rule became a codified statute which had originated in Rousseau's conception of war and developed by the 19th century; according to this rule, requisitions (including the possibly legitimate requisitions of certain private property) may only be effected against payment in cash or against acknowledgement by receipt and even so *only if the movables in question (or services) are absolutely necessary for the requirements of the occupying army*. Ever since the agreement reached at the First Hague Conference in respect of the laws and customs of war on land, it has been beyond doubt that requisitions may only be carried out for meeting the necessities of the occupying army and that *they must by no means serve the purpose of meeting the general needs of belligerents*, i.e. to reinforce their economy.

The Hague Convention permitted requisition only as a necessary evil justified by war and tried to bind the hands of belligerents as far as possible in order to restrict the intervention into the property relations of the civilian population under occupation. Apart from the fundamental provision quoted above that requisitions may only be effected for the purpose of the needs of the occupying army against payment in cash or acknowledgement by receipt, the Hague Convention tried to restrict the right of requisition also by enacting that a requisition may only be ordered by the competent military commander in the occupied locality but not by commanders of smaller units, and especially individual military or civilian persons are not allowed to order or to effect it of their own free will.

The authors of International Law mention as typical examples of admissible requisitions those of foodstuff, clothes and means of transport, furthermore the so-called quartering: all that has immediately to be paid for in cash, if not, a receipt must be given to the private person or local municipality concerned. The price is, of course, established by the military commander himself, the payment of the amount due must in principle be made "as soon as possible", although it is not contrary to law if the payment is deferred up to the end of the war and the question which State shall bear the charge of the payment remains to be regulated in the armistice or peace treaty.

The legal principles connected with requisitions were in view of their importance separately codified by the Hague Convention IV, in spite of the fact that they would have logically followed from the provisions of Article 46 by the terms of which „private property cannot be confiscated". It seemed necessary to regulate separately the question of the permissibility of the seizure and of the requisition of private property, because its seizure and appropriation for war aims was, according to the usage, only possible in certain individual cases (although it might concern larger quantities of material of military importance, such as depots of arms, stocks of clothes and food, means of transport and so on), whereas requisition charged wide circles of the population with supplies in kind and thus justified the enacting of provisions of general effect. It may be said that all commanders are entitled to effect individual seizures or requisitions who happen to get

hold of a depot of arms or food, provided that the conditions referred to in Article 53 of the Hague Convention exist, whereas pursuant to Article 52 the requisition of horses or food in a locality or a larger district may only be demanded on the authority of the commander of the respective district.[4]

An even more severe disposition is contained in the Convention in respect of (the) so-called contributions. Article 49 provides expressly that apart from ordinary taxes, dues and tolls, money contributions may only be levied for the needs of the army, so for instance for the payment of the countervalue of requisitions or for the purpose of military administration, etc. In case of contributions in money, however, it is much more difficult to establish whether the occupying army actually needs them in order to meet its proper requirements, and thus such contributions would give free scope for the violation of the rules of the law of war. Article 51 of the Hague Convention aims at preventing the extortion of the civilian population by providing as follows:

> "No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.
>
> The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.
>
> For every contribution a receipt shall be given to the contributors."

Article 50 of the Convention lays down particularly that no penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals, what, however, does not preclude, according to the provision, those military reprisals which in principle may be applied by an occupying army in the case of illegitimate acts of war committed by the population.[5] The collection of the ordinary revenues of the State may in no case be regarded as illegitimate requisition of private property: the occupying Power is not only authorized to collect such revenues but it is its duty,

[4] Article 52 of the Hague Convention IV relating to requisition reads as follows:

> "Article 52
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> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
>
> Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> Contributions in kind shall as far as possible be paid for in cash: if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

[5] In this connection see foot-note 8. on page 56.

too, in return for which it is bound to defray the expenses of the administration of the occupied territory.[6]

5. WAR DESTRUCTION

The greatest damage to private enemy property can, of course, be inflicted by direct military acts. It is well known that up to the modern times there was no written rule of law forbidding to belligerents to burn up or destroy private enemy property exclusively out of revenge, although the milder way of warfare of the 19th century already began to develop the customary rule according to which all superfluous and aimless destruction is forbidden. By the general prohibition enacted in para. *g* of Article 23 of the Hague Convention IV,[7] International Law declared forbidden all destructions not only in respect of private but also of public property, unless it is imperatively demanded by the necessities of war. Thus, in the first place, any general destruction and devastation which has no imperative operational objective, is qualified as forbidden, although, and that is a serious defect of the Hague Convention IV, *the decision of the question whether a destruction has an operational objective or not, is entrusted to the belligerent himself*. So, for instance, according to the wording of the Hague Convention giving occasion for so many abuses, the tactics of the scorched earth in the interest of securing the retreat of an army, the destruction of a village or town in case of a general insurrection might be permitted and the devastation of an occupied territory in the fight against partisans and the guerillas might be considered admissible as well.[8] According to Article 56 of the Hague Convention, the destruction of, or damage to, historical institutions, works of art and science, and historical monuments, and, according to the correct meaning of the provision, also the destruction of, or the damage to, schools, churches and hospitals is in no case excusable; such acts are expressly qualified as *war crimes*.

[6] Article 48 of the Hague Convention IV provides in this respect as follows:

> "Article 48
>
> If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was so bound."

[7] See pages 23 and 51.

[8] The horrors of the German warfare in World War II induced the Powers having defeated Fascism to try to fill this serious gap in codified International Law. The Geneva Convention of 1949, with a view to protecting the civilian population, expressly provides that the destruction of the movable or immovable property of private persons, of the State, or of other public authorities, or of social or co-operative organizations is prohibited except when military operations render such destruction absolutely necessary (Article 53). The same Convention restricts considerably the

It follows as a matter of course that, according to the Hague Convention, the destruction (devastation, deterioration) in war is permitted in all cases when it is required by the interests of a direct military attack or defense. Such proceedings are likewise allowed if they are necessary in the interest of the reinforcement or provisioning of the troops or for reconnoitring. Finally, belligerents are entitled to destroy or deteriorate everything they may appropriate on the strength of International Law, so especially all arms, ammunitions and supplies they have taken or requisitioned from the enemy and which for instance in the case of a retreat, they cannot carry away. However, the *requisition with the objective of destruction is* by virtue of Article 52 of the Hague Convention *not permitted:* this Article considers only those requisitions as legitimate which are destined to meet the demands of the occupying army and not those serving the objective of warfare in the wider sense of the term.

Here we have to mention the Articles relating to military attacks and bombardments, as such provisions of the Hague Convention which deal with the question of the acts of warfare directed against the person and property of the non-combatant population: Besides para. *g)* of Article 23 referred to above several times, which forbids in general any destruction and seizure not "imperatively demanded by the necessities of war", Articles 25—28 of the Convention and partly also Article 56, also mentioned before, fall under this category. Pursuant to Article 25 of the Hague Convention

> "The attack or bombardement by whatever means of towns, villages, dwellings or buildings which are undefended is prohibited."

The stress falls here on the fact that *undefended* localities are not permitted, under any circumstances, to be attacked or bombarded, except, of course, in the event of a direct military attack or defense. In this article the passage according to which *all forms* of bombardment of undefended towns and places are forbidden has an importance of principle: it comprises, apart from the attacks on land, also the bombardments by air forces. At the

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right of requisition, too, by laying down that foodstuffs and medical supplies available on the occupied territory may only be requisitioned if the requirement of the civilian population has been taken into account. On the other hand, this question is sharply elucidated by Gyula Hajdu (Hajdu—Búza, 1958, p. 427) who writes as follows: "The laws and customs of war serve the purpose that the wars breaking out between the States shall not destroy more life and value than it is necessary to decide by the contest of forces whose will shall assert itself".

In the partisan question Gyula Hajdu points out: "The Hague Conventions were concluded by imperialist Powers. Consequently, their tyrannical interests would have been seriously endangered if they had not been able to treat the armed formations appearing on the territories occupied by their armed forces as rebels who in the event of being captured are to be sentenced to death. At the Geneva Conference of 1949, however, they could not avoid to recognize the importance of the partisan fights, the heroism of the partisans. This recognition manifested itself in the fact that the partisans were put under the protection of International Law and were granted the right to the same treatment as the members of regular armed force" *(op. cit.* p. 390).

time of the Hague Conventions this was the only serious allusion to aerial warfare.[9]

From the foregoing it is clear that in the field of the protection of propriatory rights on occupied territories the Hague Convention declared unlawful all acts by which an occupying Power disposes of enemy real estates whether in public or in private ownership, going beyond the right of a usufructuary; by which he appropriates, without a legitimate reason, movables belonging to private persons; by which he confiscates movable public enemy property which is neither directly, nor indirectly utilizable for military operations,

[9] As far as air warfare is concerned, at the time of the First and Second Hague Conferences, which preceded World War I, no definite principles were yet developed in respect of its regulation. The Contracting Parties only obscurely felt that the maxims of humanity had to be extended to the employment of the aerial weapons, too. Thus was introduced into Article 25 of the Hague Convention IV concerning warfare on land the provision according to which "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

The insertion of the expression "by whatever means" into this provision of law of the warfare on land codified in a general sense the intention of the civilized States that the person and property of the peaceful population shall in the same way be protected against airraids as against attacks on land or sea.

In the First World War the particular importance of air warfare already manifested itself and simultaneously also the necessity of regulating it independently and in a somewhat different manner from the warfare on land and sea. On the ground of the resolution of the Washington Conference of 1922 on the limitation of armaments the Commission of Jurists appointed by the Conference met at The Hague in 1923 and elaborated certain "Air Warfare Rules" which, although they have not been ratified and, therefore, did not become part of positive International Law, are nevertheless apt to reflect the general opinion of the international legal world in respect of air warfare. These Hague Air Warfare Rules are based on the principle that the humanitarian principles must also prevail in air warfare and that accordingly all direct attacks against the person and property of the non-combatant population are forbidden. The Rules declare as an unquestionable international principle of law that aerial bombardment is only legitimate when directed against a military target. The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the military operations of land forces is prohibited and the belligerent State is liable to pay compensation for such attacks (!). At the World Conference of 1932 on the limitation of armaments the Powers confirmed the principle that it was absolutely prohibited to launch raids upon the civilian population, this resolution, however, did likewise not become written International Law. Irrespective of this, the protection of the non-combatant population against aerial attacks has to be considered as an international rule of law already on the ground of that general provision of law, according to which the non-combatant population is to be exempted from whatever attacks, consequently from all attacks on land, on sea and otherwise (Hague Convention, Article 23, para. *g)*.

As it is unanimously stated by the authors of International Law, in air warfare it has to be taken into account that the rules of humanity, the sparing of the civilian population cannot be wholly and completely carried out, particularly as it is nearly impossible to define precisely the notion of military target, and to avoid completely the injuring of the civilian population in the course of a bombardment of such objectives. In spite of this, direct raids upon the person and property of the peaceful population are qualified by the authors of International Law without exception as illegitimate, and there is agreement to the effect that, as Oppenheim puts it *(Air-warfare* § 214 *e)*, "a just balance be maintained between the military advantage and the injury to non-combatants".

The humanitarian international jurists, led by the object of protecting the inviolability of civilians, go so far in their efforts towards codification that, *de lege ferenda*,

especially objects serving religious or cultural aims; by which he seizes private property suitable for military objects or utilizable for such purposes without giving a counter-value or a receipt; by which he appropriates or utilizes, under whatever circumstances, objects of art or of a scientific character being in private ownership; finally, by which he violates the provisions of the Convention concerning supplies in kind (requisitions) or contributions. And the dispositions prohibiting any aimless destruction and devastation have likewise the protection of the propriatory rights of the civilian population in view, apart from their primary destination: the prohibition of the inclusion of the inhabitants into warfare.

The legal thesis which obtained such a great importance in the First and Second World Wars and according to which it is forbidden to remove from an occupied territory any private or even public property, and to merge it into the proper economic life of the occupant, clearly appears both from the whole spirit of the provisions of the Hague Convention referring to propriatory rights and especially from the wording of the relative Articles.

6. BINDING FORCE OF THE HAGUE CONVENTION IV

There was some discussion between jurisconsults as to the binding force of the Hague Convention IV. The Convention was signed and ratified by 43 States, which declared thereby that they recognized and considered as binding on themselves the principles of law laid down in the Convention, a great part of which had, in consequence of the legal custom since Rousseau, the force of a customary rule anyway. The scientific dispute between the scholars arose in respect of the legal effect of the "General Participation Clause" contained in the Convention. According to the wording of this Clause the Convention has binding force only if all belligerents are parties to it. But both in World War I and World War II some of the belligerents (e.g. Liberia in the First and Czechoslovakia in the Second World War) had not signed the Hague Convention IV. There was, however, complete agreement among jurisconsults that this circumstance did not change in any way the general binding force of the rules contained in the Hague Convention IV, as nobody could deny that "most of its provisions were declaratory of existing customary Law"[10].

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they deem that if the principle of sparing the civilian population cannot otherwise be realized, one has to abstain wholly and completely even from raids on military targets, just as the employment of submarines ought to be prohibited if it inflicted more damage on human lifes than the sinking of the ship were advantageous from the point of view of warfare. After all, the authors of International Law come to the conclusion that, since it is a fundamental aim of the law of war to keep the person and property of civilians out of the scope of warfare, the best solution would be the entire prohibition of air bombardments, in the same way as it would be justified to forbid wholly and completely also the sinking of merchantmen by submarines. It is interesting that this thesis was adopted by the Powers at the Disarmament Conference of 1932, such a rule of law, however, did not come into existence.

[10] Oppenheim—Lauterpacht (1952—56) Part II. § 68.

This standpoint was adopted in 1946 by the Nuremberg International Military Tribunal with the force of international legislation when it declared that ". . . the rules laid down in the Convention were recognized by all civilised nations and were regarded as being declaratory of the laws and customs of war. . ."[11].

Consequently, there can be no doubt about the unlimited binding force of the Hague Convention IV, and neither of the belligerents denied the validity of the "Rousseauian" prohibitions contained therein in the course of the First or the Second World War.

7. THE REALITY OF GERMAN WARFARE IN WORLD WARS I AND II. ECONOMIC WARFARE. PILLAGE OF OCCUPIED TERRITORIES

In spite of the unanimity referred to above, the judgement of the literature of International Law is likewise unanimous in ascertaining that the so-called Central or Axis Powers trampled the rules of warfare codified by the Convention and recognized by all civilized nations, and especially the rule according to which the destructions of war must be restrained to the measure justified by military necessities. One of their gravest acts was the serial pillage of occupied territories and the systematic removal of both public and private property.

We have to say it here that the "Vattel Principle" (applied by the Anglo-Saxons in contradistinction to the general legal conception of the continental Powers), together with the general principles of warfare on sea, which were of an even earlier date than the former, contributed to a large extent to the fact that the principle of the legitimacy of economic warfare became in its substance generally accepted, albeit it was contrary to the spirit of the Hague Conventions. If we examine more thoroughly the principles of law applied in World Wars I and II by the belligerents, we have to come to the conclusion that they were guided by the conviction that the issue of the war depended on the question, which of the parties would ultimately succeed in economically starving the other party, in the strictest sense of the word, into surrender. The war aimed in the last resort at the economic ruining of the enemy, at the economic capitulation. The circumstance that after all both World War I and World War II were directed towards the achievement of economic victory, resulted in the fact that the two Wars assumed a more and more totalitarian character, and we must conclude that with the exception of the Soviet Union who waged her Great Defensive War so as to crush the armies, the military victory as the object of both parties essentially amounted to the entire annihilation of war potential, and this rendered for many people the interpretation possible that all acts of war and all proceedings directed against the war potential of the enemy, in the widest sense of the term, were permitted even by the Hague Conventions. Whereas, however, the Hague Conventions desired to restrict the acts of war essentially

[11] Judgment of the Tribunal, *Am. Journal*, Jan. 1947.

to the battlefield, and declared all deviations from this principle as contrary to International Law, in World War I and especially in World War II the necessities of warfare wiped more and more away the dividing line between the front and the "*Hinterland*", the home territory. The possibilities of destruction became in consequence of the unheard of development of the technics of warfare on land and sea, and particularly of air warfare more and more unlimited, the frontier line between the "property, rights and interests" of the combatant and non-combatant population became continually more indistinct, the concepts of military interest and of military target kept on widening. In warfare on land the lightening-fast advances and retreats made, as we have said, even the strategy of the scorched earth appear as justifiable from the point of view of International Law.[12] On the sea the unlimited submarine warfare and the reciprocal blockade effaced all differences between commercial transports of goods and those serving direct war objectives, all kind of protection of merchant shipping ceased and on the strength of the principle of all-out warfare all shipments destined to belligerents, whether they had a hostile or a neutral origin, could be considered as serving to increase the enemy's war potential. Furthermore, although the belligerents surprisingly persisted in maintaining the principle that aerial bombardment was only legitimate when directed against a military target, nevertheless among all the destructive means of warfare it was precisely the aerial bombardment that became — partly in consequence of the entirely arbitrary and ever more extensive interpretation of the notion of military targets, partly on the score of so-called reprisals, but in the end deliberately and avowedly with the aim of terrorizing the adversary as much as possible — in the course of the war more and more utilized for the destruction of private property.

Historically it is doubtless that the belligerent States conducted their warfare both in the First and in the Second World War in such a way that it became an *economic warfare*, and their chief objective was the economic victory over the enemy. We may also state that the difference between the proceeding of the hostile States found its explanation not in a fundamental difference in their jurisprudence but on the contrary: in World War I the Central Powers (originally adherents of the doctrine of Rousseau) and in World War II the so-called Axis Powers, although being opposed to the Anglo-Saxons, applied the "philosophy of Vattel" (which had originally complied with the interests of the Anglo-Saxons) partly by removing from and partly by destroying on the spacious hostile territories occupied by them an immense quantity of public and private property; in doing so they transgressed the explicit provisions of the Hague Convention which had been inspired by the principles of Rousseau and were recognized as having binding force by the whole world, also by them.

However it may be, one thing is certain: even if it were true that the philosophy of Vattel — predominating to a certain extent in the Anglo-Saxon conception of the rules of war — actually diverted warfare in the direction of *bellum omnium contra omnes*, still it was obviously not this

[12] See p. 63.

philosophy which led the Germans on the way of a warfare that took no account of the Hague Convention. Irrespective of this, their warfare was characterized in World War I and in World War II as well by the brutality which resulted in the last resort in the horrors of fascism and turned the Second World War completely into the war of fascism. The violation of the Hague Convention was not the unique crime of German warfare, it is doubtless, however, that in the course of the violation of the "Laws and Customs of the War on Land" *the pillage of occupied territories, the removal and the destruction of public and private property was one of the most serious crimes committed by the Germans.*

8. REMOVAL OF PROPERTY IN WORLD WAR I

The removal and the destruction of property was already in the First World War a characteristic of German warfare. There can be no doubt about it that, when examining the German warfare in World War I in connection with the provisions of the Hague Convention, Oppenheim—Lauterpacht[13] (1952—56) correctly state that these rules "were during the First World War systematically violated by the Central Powers, which carried off public moveable property of all kinds, even though of no military value, following the example of Napoleon I, who seized works of art during his numerous wars and had them taken to the galleries of Paris." And further[14] "..the rules regarding moveable private property found in enemy territory... were systematically violated by the Central Powers during the First World War. Live stock, particularly cattle and horses, were seized in Belgium and the occupied parts of France and carried off to Germany. Factories and workshops were dismantled and their machinery and materials carried away. Cash was taken from private banks. These are but examples of the wholesale seizure of private property practised by Germany and her allies in the countries which they occupied."

Apart from this uncontested flagrant violation of the Hague Convention, let us remember the successive destruction in public and private property committed by Germany and her allies already during World War I with ruthless disregard of International Law. We have said above that pursuant to the Hague Convention all destructions not imperatively demanded by the necessities of war were absolutely forbidden. All destructions were forbidden which were the outcome of a spirit of plunder or revenge. And yet such was the effect of German warfare according to the words of Oppenheim—Lauterpacht[15]:

> „during the First World War, the dreadful and utter devastation of houses, orchards, vineyards, and trees in the area from which the German armies in France withdrew in the spring of 1917, and of the coal-mines, factories, and dwellings in Cambrai and elsewhere which marked the German line of retreat in the autumn of the following year."

[13] (1952—56) Vol. II. § 138, para. *a*.
[14] *Op. cit.* Vol. II. § 143, para. *a*.
[15] *Op. Cit.* Vol. II. § 150.

It is possible, of course, that the Germans qualified such devastations as being important from a strategic point of view and if they had had an opportunity to discuss it, they would have doubtless tried to prove that with these acts they did not infringe the Hague Convention.

In consequence of the turn of the military situation, especially as Germany and her allies were for the longest time in possession of large hostile territories, these belligerents were obviously in the best physical position to violate the provisions of the Hague Convention relating to the protection of public and private property. We do not examine the question what would have been the conduct of their adversaries in a similar situation, although it is a fact that the two war principles of the Anglo-Saxons (the prize law, the alien enemy property) were based on a philosophy opposed to the Rousseau-conception prevailing in the Hague Convention. Because of the adoption of these principles the Anglo-Saxons cannot be entirely discharged from the responsibility for a warfare infringing the principles of the Hague Convention.

9. THE PILLAGE OF OCCUPIED TERRITORIES IN WORLD WAR II. THE NUREMBERG TRIAL. INTERNATIONAL CRIMINAL RESPONSIBILITY OF THE GERMAN LEADERS

The successive violation of the laws of warfare committed in World War I, however, does not come into consideration beside those acts which were committed by the fascism on the domain of the rights of property in World War II and which pursuant to Article 6 of the "Charter" of the International Military Tribunal of Nuremberg have to be regarded as establishing — apart from the interstate consequences — the individual war responsibility of the major war criminals. In its judgement of October 1, 1946 passed against the major war criminals[16] the International Tribunal made such statements and declared the perpetration of such crimes as proved that it seems interesting to quote more precisely some characteristic parts of the judgment relating to the rights of property.

After having fixed that 1. the circumstance that some belligerents were not signatory parties to the Hague Convention, in spite of the "General Participation Clause", does not deprive this Convention of its general binding force, all the more as "the rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the law and customs of war"[17], and 2. after having enumerated with dramatic succinctness the crimes of the German warfare committed against humanity[18], finally 3. after having stated under the title "Pillage of Public and Private Property", specifying the crimes committed in respect of the

[16] Judgment of the Tribunal, *Am. Journal*, Jan. 1947.
[17] See also p. 60.
[18] Judgment of the Tribunal. *Am. Journal*, Jan. 1947, p. 224—234.

rights of property, that the Articles 48, 49, 53, 55 and 56 of the Hague Convention

> "dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation and these should not be greater than the economy of the country can reasonably be expected to bear",

the judgment quotes the instructions given by Göring to the administration of the Polish occupied territories which expressly ordered that

> "there must be removed from the territories of the Government General all raw materials, scrap materials, machines, etc., which are of use for the German war economy. Entreprises which are not absolutely necessary for the meager maintenance of the naked existence of the population must be transferred to Germany, unless such transfer would require an unreasonably long period of time and would make it more practicable to exploit those enterprises by giving them German orders, to be executed at their present location."

The judgment states on this basis as follows:

> "These resources were requisitioned in a manner out of all proportion to the economic resources of those countries and resulted in famine, inflation, and an active black market."

As far as the crimes committed in the USSR are concerned, the judgment states the following fact: "The occupation of the territories of the USSR was characterised by premeditated and systematic looting." Referring to one of the instructions of Alfred Rosenberg the judgment declares: "In addition to the seizure of raw materials and manufactured articles, a wholesale seizure was made of art treasures, furniture, textiles and similar articles in all the invaded countries." Robert Scholz "Chief of the special staff for Pictorial Art" reported in July 1944 to Rosenberg that "During the period from March 1941 to July 1944 the special staff for Pictorial Art brought into the Reich 29 large shipments, including 137 freight cars with 4174 cases of art works." And when some defendants defended themselves by asserting that the removal of art works aimed at their "conservation", the judgment referred to this instruction of Himmler:

> "To strengthen Germanism in the defence of the Reich, all articles mentioned in Section 2 of this decree are hereby confiscated... They are confiscated for the benefit of the German Reich, and are at the disposal of the Reich Commissioner for the strengthening of Germanism."

The various cases of systematic pillage and plunder were separately enumerated in the reasons of the particular judgments passed in the criminal cases of the major war criminals.

The pillage and plunder of the occupied territories in connection with the unprecedented, unheard-of crimes committed against peace and humanity induced the Governments of the Soviet Union, the United States, Great Britain and France to declare already during the war, on October 30,

1943 in their common Declaration published in Moscow their resolution to surrender the war criminals to the countries against which they committed their crimes and to bring the major war criminals before an International Tribunal. This International Tribunal which was established in Nuremberg on the strength of the four-power Agreement signed on August 8, 1945 was the first in history set up expressly for the enforcement of the general and some special rules of International Law by way of criminal proceedings, in contradistinction to the judicial proceedings instituted by the military courts of various countries, in compliance with their respective international obligations, against their proper nationals or against hostile persons surrendered to them for punishment on account of war crimes committed on their territory. (As a matter of fact, the setting up of international courts of justice was also decreed by Article 227 of the Versailles Peace Treaty in order to call the German Emperor to account, as well as by Articles 228, 229 and 230 of the same Treaty and the analogous Articles of the Peace Treaties of Trianon, St. Germain and Neuilly for the punishment of some other persons who had committed criminal acts against several nationals of the Allied and Associated Powers; but these provisions have never been implemented.) The establishment of such an International Tribunal proceeding and administering justice on the ground of International Law[19] according to an internationally elaborated "Charter" was rendered necessary by the gravity and quantity of the crimes committed by the fascists in World War II mainly against the laws and customs of war. The crimes falling within the jurisdiction of the Tribunal, are, as mentioned above, enumerated by Article 6 of the Charter. The war crimes in the technical sense of the term are defined by Point b of Article 6 as follows: „War Crimes: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction not justified by military necessity."

The Tribunal of Nuremberg, expressing the conscience of the whole civilized world, considered the war crimes committed by the fascists so grave that it sentenced nearly all major criminals to death or to the most severe imprisonment. In reply to the defence pleaded by the accused that only States could be the subjects of International Law, the Tribunal examined thoroughly the question whether in spite of this individual persons were liable to being accused for an international delict. The question was decided by the Tribunal — in accordance with the opinion of the majority of international jurists — in a positive sense.

[19] The Tribunal at the same time when stating in its judgment that it exercises its jurisdiction on the strength of the sovereignty of the four Powers resulting from the unconditional surrender of the German Empire, adds that the "Charter" is not the product of arbitrary power exercised by the victors but the expression of International Law in force, and is in itself a contribution to that Law (Judgment of the Tribunal, *Am. Journal*, Jan. 1947).

Oppenheim—Lauterpacht[20] state

> "...In particular the entire law of war is based on the assumption that its commands are binding not only upon States but also upon their nationals whether members of their armed forces or not. To that extent no innovation was implied in the Charter annexed to the Agreement of Aug. 8, 1945, for the punishment of the Major War Criminals..."

In spite of all this, private persons are rarely held responsible on the strength of International Law. The setting up of a special International Tribunal for the punishment of the war criminals of World War II is, as we have said, explained by the particular gravity of the crimes committed. Moreover, this is the fundamental explanation of the fact that for the reparation between States of one category of the war crimes committed, namely of the plunder of public or private property, the international legal evolution during and after World War II established rules going far beyond the provisions of general International Law in force till then, and almost classified the grave breach of the relative provisions of the Hague Convention as a *sui generis* international crime. The world was so much shaken by the illegalities and cruelties of the German occupation during World War II that special rules and proceedings had to be drawn up for the reparation of the removal of property, just as, for instance, the gaps of the Hague Convention in respect of the protection of the civilian population had to be filled by a quite new international instrument, the Geneva Convention of 1949.[21] As far as the principles and rules of law are concerned which were applied after World War II in connection with the reparation of the removal of public and private property, i.e. with restitution in the technical sense of the term, there is no precedent in International Law for numerous cardinal provisions among them. These rules, however, are according to the jurists fully justified by the fact that there was no precedent for the crimes committed in the history of the wars of civilized nations either, and by the new principle of International Law characterized by an eminent representative of the Swiss science of International Law, by Dr. Gottfried Weiss as "eine umfassendere, interstaatliche Rechtsidee". His treatise entitled "Beutegüter aus besetzten Ländern und die privatrechtliche Stellung des schweizerischen Erwerbers"[22] will be analysed in detail hereafter.

10. ARTICLE 3 OF THE HAGUE CONVENTION IV. THE GENERAL INTERNATIONAL DELINQUENCY AND ITS SANCTIONS. THE RESPONSIBILITY OF THE STATE IN INTERNATIONAL LAW

As pointed out above, the Hague Convention IV laid down numerous international legal prohibitions in order, as Oppenheim—Lauterpacht[23] say,

[20] (1952—56) Vol. I. § 153a.
[21] *Op. cit.* Vol. II. § 172b.
[22] *Schw. Juristenzeitung*, 15 Sept. 1946.
[23] (1952—56) Vol. II. § 259a.

to ensure the "legitimate warfare". However, albeit the violation of the laws of war has always been qualified as a delinqency of International Law, until the conclusion of the Hague Convention IV a customary rule provided that the damage inflicted by the violation of the rules of legitimate warfare, in contradistinction to the losses caused by a general delinquency of International Law, did not involve *ipso iure* the duty of reparation but only if this was expressly stipulated in the peace treaty.

The violation of the Hague Convention IV concerning the Laws and Customs of War on Land is expressly qualified by Article 3 of the Convention as a delinquency involving the obligation to pay compensation. The violation of the Hague Convention is made in point of fact by this Article 3 of the Convention an international delinquency falling under the same category as other international delinquencies. The same Article enacts the responsibility of the State for all acts infringing the Hague Conventions committed, whether by command or arbitrarily, by persons forming part of the armed forces.

Article 3 of the Hague Convention IV reads as follows:

> "A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Franz von Liszt (1925) defines the general international delinquency as follows:

> "Völkerrechtliches Delikt ist die von einem Staate ausgehende schuldhafte, rechtswidrige Verletzung eines völkerrechtlich geschützten Interesses eines anderen Staates."

Oppenheim and Lauterpacht[24] define "international delinquency" as follows:

> "An international delinquency is any injury to another State committed by the Head or Government of a State in violation of an international legal duty. Equivalent to acts of the Head and Government are acts of officials or other individuals commanded or authorized by the Head or Government."

Let us contrast this with Fauchille[25] statement:

> "On doit considérer comme des actes illicites tous actes d'un Etat qui sont en contradiction avec une règle quelconque du droit international, qu'il s'agisse d'une règle conventionnelle ou ... coutumière. Ces actes illicites constituent ... des délits internationaux."

Consequently, the definitions of international delinquency given by Liszt, Oppenheim and Fauchille rather differ in their wording from each other, in their substance, however, they are in harmony and they also agree

[24] *Op. cit.* Vol. I. § 151.
[25] (1922—26) Vol. I. p. 513.

with the definition given by the majority of the scholars in modern International Law, so by Anzilotti, Strupp, Verdross, Rousseau, Ago, Kozhevnikov and Marcel *Sibert*. There is *perfect agreement* in so far as:

a) the basic criterion of an *international delinquency* is the international wrong, the internationally unlawful infringement of the interests of another State that are protected by International Law;

b) the *subjects* of international delinquencies are in principle the States;

c) the *State is responsible* for every infringement of International Law committed by any organ of the state power and under certain conditions also for such infringements committed by private persons.

There is *no uniformity*, of course, in the standpoint of jurisprudence in some questions of detail concerning the State's responsibility and particularly in the question of *culpability (Verschulden)*.

1. In the first place the standpoint of jurisprudence is not uniform in respect of the meaning of this expression: a wrong "originating from the State" ("von einem Staate ausgehende Verletzung. . ."). Oppenheim and Borchard make a distinction between "original" and "derivative" ("direct" and "indirect") responsibility of the State and taken all in all a similar distinction is made by Liszt and Fauchille, too. According to this the State is originally responsible for all wrongs committed by the head of State or the Government in their official capacity and for such acts of "subordinate" State organs and of private persons "as are performed at the Government's command or with its authorisation". These acts are qualified by all jurists as "international delinquencies". According to the system of Oppenheim, a "vicarious responsibility", that is to say a derivative, indirect responsibility lies upon the State for these acts of the organs qualified to exercise the state power which they commit by exceeding their powers or by violating the rules of Municipal Law, as well as for the "internationally injurious" acts of private persons. The essence of this responsibility is the duty to prevent such international wrongs with the necessary care, moreover to punish and to compel the perpetrator of the act or omission to pay damages (for which, if the State neglects it, it is "*ex delicto*", "originally" responsible).

The system of Oppenheim was not adopted by the general international practice which assumed the standpoint that there cannot be made any distinction between the original and derivative responsibility of the State. Provided that the person entitled thereto availed himself of all legal remedies admitted by the Municipal Law, the State is substantially likewise responsible for all acts of its organs committed by them in the course of the exercise of the state power, irrespective of the fact whether the wrong was committed by a higher or a subordinate organ, and whether it was ordered or authorized by a higher organ or not. Only the wrongs committed by private persons have a specific character. According to some jurists, a "secondary" responsibility rests on the State for the acts committed by private persons injuring the interests of other States that are protected by International Law. To this responsibility refers the rule of International Law providing that the State (besides having the legal duty of preventing it) is bound to forbid private persons to commit illegal acts to the prejudice of other States and,

if necessary, to institute criminal proceedings against the offenders; in the event of the neglect of this obligation the State is "*ex delicto*" responsible.

In general, neither according to the system of Oppenheim, nor to the general international practice can a State be called to account for the acts of its organs by which they strikingly exceed their powers in a way observable by anybody. The last paragraph of Article 8 of the Draft prepared at the Hague Conference of codification in 1930 wanted to codify this expressly by laying down the following:

> "Toutefois, la responsabilité internationale de l'Etat ne sera pas engagée si l'incompétence du fonctionnaire était si manifeste que l'étranger devait s'en rendre compte et pouvait, de ce fait, éviter le dommage."

However, in contradistinction to the general rules of the State's responsibility, we have to mention that, in some quite exceptional cases, the State is responsible for its organs irrespective of whether they have proceeded in their official or in private capacity. From the point of view of our subject matter the rule of Article 3 referred to above of the Hague Convention IV concerning the Laws and Customs of War on Land is particularly important and interesting. This holds the State, in general, responsible for all acts committed by persons forming part of its armed forces, so the State becomes responsible even if such individuals perpetrate an international delinquency off duty or directly contrary to a superior command. Besides the State's absolute responsibility for any violation of the Hague Convention IV, we have to speak separately of the question to what extent a criminal *ex delicto* responsibility of international character may rest on private persons. This problem is connected with the much discussed question whether individuals may be considered as subjects of International Law.

2. As we have pointed out, according to the generally adopted legal opinion, the State is in principle responsible for any acts and omissions injuring the internationally protected interests of other States and being committed by the State's organs and, in certain cases, by private persons under its jurisdiction as well. Verdross[26] says "Nach der herrschenden Ansicht können Subjekte eines völkerrechtlichen Unrechts nur Staaten (und dgl.), nicht aber Einzelpersonen sein." He adds, however, that "ein Streit besteht darüber ob ausnahmsweise Einzelmenschen als solche völkerrechtlich berechtigt oder verpflichtet werden können."

The former international legal conception, which was still contained in the first three editions of the standard work of Oppenheim, professed quite definitely that "States only and exclusively are subjects of International Law." The later legal evolution and in the first place Oppenheim—Lauterpacht themselves in the recent editions of their work questioned to a certain extent the exclusiveness of this principle of law and departing from the international punishability of pirates and similar people, as well as from the fact that "it is an established principle of customary International Law that individual members of armed forces of the belligerents — as well as individuals generally — are directly subject to the law of war and may be punished

[26] (1955) p. 296 ff.

for violating its rules", lay down that — albeit "primarily" at any rate States are the subjects of International Law — "it is essential to recognize the limitations of that principle." This limitation is expressed by Oppenheim[27] as follows:

> "...Although States are the normal subjects of International Law, they may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subjects of International Law."

In other words, Oppenheim—Lauterpacht expressly recognize in respect of both rights and obligations that the individual may be invested with the capacity of being a subject of International Law.

In contrast to the doctrine thus formulated by Oppenheim—Lauterpacht according to which the international responsibility of the State is not exclusive, only primary, Verdross gives a more general account of the present position of the theory of International Law by declaring that, according to the standpoint generally adopted by jurisprudence, the State is exclusively the subject of international rights and duties; only certain jurists admit certain clearly defined exceptions to this principle, whereas according to others the principle is absolute and there is no exception to it.

Vedross himself recognizes the international legal responsibility of the individual only in the case of war crimes:

> "Eine ... individuelle Veranwortung unmittelbar auf Grund des allgemeinen Völkerrechts besteht ausschließlich für Kriegsverbrecher: wegen jener Handlungen, die sie ... unter Verletzung des Kriegsrechtes begangen haben. Die Verfolgung dieser Delikte ist nach Kriegsbrauch, also unmittelbar auf Grund des Völkerrechts zulässig."[28]

Apart from war crimes, Verdross does not recognize any individual international responsibility *ex delicto*. In his opinion, the piracy, the transport of contraband, and the breach of sea blockade are only so-called *"delicta iuris gentium"* by which the individual infringes in the last resort certain rules of Municipal Law created on the strength of a particular authorization granted by International Law to the respective State.

The statements of Verdross concerning the international rights of the individual are remarkable. These rights are qualified by him as — to say the least — doubtful, albeit he recognizes that certain international treaties may grant to "certain groups of men" the right to sue foreign States before international courts of justice. This was the situation e.g. in the case of the Mixed Arbitral Tribunals created after the First World War when, according to his words, "einer bestimmten Gruppe von Menschen eine vr. Rechts- und Handlungsfähigkeit in begrenztem Umfange eingeräumt wurde." Verdross remarks: "Die vr. Rechte des Individuums sind (daher) nur wirksam, wenn sie von Normen des zwischenstaatlichen Rechts getragen werden."

[27] Oppenheim—Lauterpacht (1952—56) Vol. I. § 13a.
[28] Verdross (1955) p. 112.

Consequently, according to Verdross, even if the individual may in certain cases be considered a subject of International Law, this can only be recognized as a characteristic vested in him by the State on the ground of International Law.

The socialist international jurists unanimously reject the principle according to which an individual might be considered to any extent as a subject of International Law. According to the socialist view, the aim of the recognition of the individual as subject of International Law is to obscure the significance of Sovereignty[29],

> "as in that way they want to put in line with sovereign States the persons they wish to make appear as subjects of International Law". ..."Although the International Law contains provisions creating rights for individuals[30] these persons cannot enforce their rights directly against foreign States, but only through the intermediary of their proper States, because the rights were acquired by the State for its citizens, consequently their violation constitutes an infringement of the rights of the State and reparation may only be claimed by it."

According to the same conception, International Law cannot directly obligate individuals, although Kozhevnikov (1957) states

> "though in case of an international delinquency the subject of responsibility is the State, the subject of criminal responsibility is the natural person."

In the question of the international punishability of war crimes the most important document prepared in modern times is the Nuremberg judgment of October 1, 1946 which was signed in perfect agreement by the American, English, French and Soviet judges of the International Tribunal.

3. One of the most discussed questions of international responsibility is whether culpability *(Verschulden, culpa)* is a basic criterion of an international delinquency or if the objective fact of the violation of an international rule of law is sufficient for the establishment of international responsibility *(Erfoglshaftung)*.

Verdross (1935) characterizes the situation concerning this question as follows:

"Während in der älteren Lehre unbestritten war, dass eine völkerrechtliche Verletzung nur dann den Staat verantwortlich macht, wenn der Tatbestand von dem verletzenden Staatsorgane schuldhaft gesetzt, oder unterlassen wurde, besteht gegenwärtig eine Meinungsverschiedenheit darüber, wie weit ein solches subjektives Tatbestandsmerkmal vr. bedeutsam ist."

The following tendencies can be distinguished (the first three of which have been analysed by Verdross):

a) The tendency represented by Grotius, developed from Roman Law and based on the principle *qui in culpa non est, ad naturam nihil tenetur,*

[29] Hajdu—Búza (1958) pp. 112 ff.
[30] Cf. Krylov (1947).

which considers culpability as a condition of the responsibility of the State. This tendency had been predominating up to the appearance of Triepel and Anzilotti, and is the basis of the doctrine of Liszt, Oppenheim and Fauchille, too, according to which without *culpa*, i. e. "*Verschulden*" there is no international delinquency.

Liszt in his definition quoted above points out that the condition of the setting in of the consequences of the international delinquency is in all cases "die schuldhafte, d. h. vorsätzliche oder fahrlässige Handlung." This statement of Liszt, however, alters in the edition revised by Fleischmann, precisely as a consequence of the gaining ground of Anzilotti's conception, in the direction of the *Erfolgshaftung*. This revised edition points out: "die reine Erfolgshaftung ist dem Völkerrecht nicht ganz fremd, doch führt sie nur zu minderen Folgen."

Oppenheim's conception is this[31].

> "An act of a State injurious to another State is nevertheless not an international delinquency, if committed neither wilfully and maliciously nor with culpable negligence." (§ 154).

In § 164, discussing the duty of the State to prevent as much as possible its own nationals from carrying out acts injuring the rights of other States, Oppenheim alike includes into the definition of the delinquency the criterion of culpability, pointing out that:

> "A State, which either intentionally and maliciously or through culpable negligence does not comply with this duty, commits an international delinquency for which it has to bear original responsibility."

b) In contradistinction to the doctrine of culpability based on the theory of Grotius, the standpoint of the pure *Erfolgshaftung*, that is to say of perfect objective responsibility, was assumed first by Triepel and later and particularly by Anzilotti who rejected the *culpa*-theory and professed that the State is always responsible for its proper conduct, for the objective fact of the breach of the rule of law attributable to the State, irrespective of the fact whether the act or omission serving as basis of its responsibility was committed intentionally or through culpable negligence by its organs or by private persons. As Anzilotti points out in the "Responsabilité"[32]

> "en réalité, la violation du droit international est dans la conduite de l'Etat, qui n'a point prohibé ou empêché les faits dont il s'agit: l'acte illicite au point de vue du droit international est, en pareille cas, l'omission de l'Etat et non pas l'action positive des individus."

Anzilotti was decisively influenced in the formulation of his theory by Article 3 of the Hague Convention IV, repeatedly quoted above, concerning the responsibility of belligerents for all violations of the laws and customs

[31] (1952—56) Vol. I. §§ 154 and 164.
[32] (1929) p. 14.

of war on land committed by any persons forming part of the armed forces. He drew therefrom the inference that the evolution tends towards the creation of a system "bei dem es für die Fragen der Verantwortlichkeit nur auf objektive Gesichtspunkte ankommt."

c) Anzilotti's energetic and decisive intervention did not succeed in eliminating entirely the principle of culpability. The legal conception of Strupp and Schön meant a compromise between the principle of culpability and the pure *Erfolgshaftung*. Both were of the opinion that the responsibility of the State is established if its organs commit an act, whether *kompetenzwidrig* or *kompetenzgemäss*, injuring the interests of another State protected by International Law, irrespective of the fact whether in connection with the perpetration of the act there has been any culpability on the part of the State *(reine Erfolgshaftung bei positiven Handlungen)*. However, according to this view, culpability is also a condition of the responsibility of the State if it commits a wrong by omission. Strupp and Schön have mainly in mind such cases where the State would be bound to display due diligence in order to prevent a wrong which may be committed by private persons or by its own organs in violation of International Law and neglects to do so *(Schuldhaftung bei Unterlassungen)*. The practical application of the combined *Schuldhaftung* and *Erfolgshaftung* professed by Strupp and Schön encounters after all the same difficulty as the application of *Schuldhaftung* in general: it is difficult to define the notion of "culpability". It is particularly difficult to define it in connection with the neglect of "due diligence". When all is said and done, the very difficulties and contradictions arising in connection with a legally precise definition of culpability have induced Anzilotti to reject entirely the *Schuldtheorie* in the doctrine of the State's responsibility.

d) As Oppenheim[33] points out, in the question of culpability the situation today is that "there is an increasing tendency among modern writers to reject the theory of absolute liability and to base the responsibility of States upon fault." In the international practice of modern times this statement was decisively corroborated in the well-known Corfu Channel case. (The legal dispute between Great Britain and Albania before the International Court concerning the damage caused by the minefield laid down in the channel to the British men of war passing through, 1949). In this case the Court pronounced among others that "in view of every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States, the Albanian authorities were under the obligation to notify or give warning of the presence of a minefield in Albanian waters. As the Court found in the circumstances of the case the Albanian authorities must be presumed to have had knowledge of the minefield, Albania was bound to pay compensation for the damage caused by the explosion of the mines."

e) In his final analysis also Verdross assumes the standpoint that albeit the responsibility of the State is in principle established by an objective infringement of the rules of International Law, pure *Erfolgshaftung* can

[33] Oppenheim—Lauterpacht (1952—56) Vol. I, § 154N.

nevertheless only be recognized in exceptional cases. "Eine Verantwortlichkeit des Staates (wird) grundsätzlich angenommen, wenn der Schaden entweder vorsätzlich oder fahrlässig verursacht wurde." But Verdross seems to make insofar a concession to the principle of objective responsibility as he thinks that a *culpa levissima* is sufficient for the establishment of the State's international responsibility.

Summing up: in the question of culpability we cannot speak even now of a uniform standpoint. However, we may fix as an important fact from the point of view of our subject-matter that the violation of the Hague Convention IV by belligerents or by persons forming part of the armed forces *constitutes*, merely on the ground of the infringement of the provision of law, an *international delinquency, irrespective of culpability, and establishes, besides the possible criminal responsibility of private persons, the entire responsibility of the State.*

Jurisprudence (in the first place Liszt, Anzilotti, Oppenheim, but also Kozhevnikov) determines the consequences under International Law of an international delinquency in an almost literally uniform way: "The principal legal consequences of an international delinquency are reparation of the moral and material wrong done."[34]

The fundamental form of the reparation of all international delinquencies is according to the general International Law, as it is well-known, the *in integrum restitutio*, the restitution of the former legal situation, the basic form of which, however, is the *restitutio in natura*, the returning of the thing to the owner, the restoration of the real right. If this is not possible or if the owner (the State acting on his behalf) renounces his claim, *in integrum restitutio* may be substituted by an indemnity, to which the compensation for the damage (if any) caused by the delinquency is to be added. On the ground of an international delinquency the injured person is in principle always entitled to *in integrum restitutio*, however, as explained above in connection with *in integrum restitutio* in war, the existence of an international delinquency is not a condition of the *restitutio in integrum*. In Chapter X we shall deal in detail with the question of compensation substituting the *in integrum restitutio*.

The classical analysis of *in integrum restitutio* as the natural sanction of an international delinquency may be found in the decision Serie A N° 17 of the Permanent Court of International Justice, the chief passages of which read as follows:

> "Le principe essentiel qui découle de la notion même de l'acte illicite est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait ... existé si ledit acte n'avait pas été commis. Restitution en nature, ou sie elle n'est pas possible, paiment d'une somme correspondant à la valeur qu'aurait la restitution en nature, — allocation, s'il y a lieu, de dommage-intérêts pour la perte subie, et qui ne serait pas couverte par la restitution en nature (etc.): tels sont les principes desquels doit s'inspirer la determination du montant de l'indemnité due à cause d'un fait contraire au droit international."

[34] Oppenheim—Lauterpacht (1952—56) Vol. I. § 156.

Erich Kaufman (1949), Professor at the University of Munich, gives a definition concerning restitutions, by including into the same legal category all legal institutions of the most diverse character, designated by the term "restitution": the *in integrum restitutio* as the sanction of the international delinquency of general International Law and the various kinds of restitution in war. The definition of Kaufmann, according to which "*Restitution ist die Wiederherstellung einer Rechtslage, die durch ausserordentliche, der normalen Abwicklung des Rechtsverkehrs nicht entsprechende Umstände gestört worden war*" covers doubtless, besides the *in integrum restitutio* of general International Law, also the *in integrum restitutio* of the law of war, not presupposing a delinquency, but does not adequately cover the particular notion of "restitution" in the technical sense of the term, which is based on a war delinquency and is an independent legal institution.

CHAPTER III

THE DEVELOPMENT OF THE LAW OF RESTITUTION DURING AND AFTER WORLD WAR II

In World War II, as we have explained above in detail, the Axis Powers committed, on the vast territories occupied by them, such grave crimes in respect of the rights of property, and the removal and destruction of public and private property reached such dimensions that the Allied and Associated Powers deemed it justified to declare pillage and destruction as specific war crimes and to punish most severely the leading statesmen and commanders in chief of the Axis Powers. The establishment of the individual culpability and the punishing did, of course, not affect the international responsibility resting — in the last resort — upon the States themselves owing to the violation of the laws and customs of war. On account of the internationally illegitimate removal of property, as we have pointed out above,[1] the guilty States and in the given case third countries, too, were charged with such a severe duty of restitution for which there had been no example in International Law — not even in connection with the restitutions provided for in World War I, and which gave a new legal content to the restitution of war law. In the recent evolution of International Law, the restitution under war law means the independent legal institution which ensures the return, on the ground of certain criteria, according to certain rules, of property removed by force or duress from the occupied territory of a State.

1. REPARATION AND RESTITUTION IN THE TECHNICAL SENSE OF THE TERM IN THE PARIS PEACE TREATIES

The restitution of removed property is dealt with by the Peace Treaties terminating the Second World War, just as by the Peace Treaties around Paris, separately from the "Economic Clauses" relating to the restoraton *(in integrum restitutio)* of property, rights and interests, yet not in the Chapter bearing the title "Reparation", but in the Chapter "Reparation and Restitution". In these Treaties, as we have already referred to it,[2] the basic difference between "reparation" and "restitution" is expressed already in the title: the restitution is dealt with by the Paris Peace Treaties separately from reparation, though only in a separate paragraph. As far as reparation is concerned, we have already mentioned elsewhere that whilst

[1] See p. 66.
[2] See p. 32.

in the Peace Treaties around Paris reparation was — according to the socialist conception — without reason imposed on the vanquished as a consequence of unilateral war responsibility, World War II is qualified by the whole world, both by the capitalist and by the socialist conception, as a just and defensive war on the part of the Allied so that the so-called United Nations opposed to Germany and her allies were indisputably entitled to claim the reparation of the war damage suffered by reason of the aggression and particularly of the occupation of a part of their territories.[3]

The amount of reparation comprised the direct and indirect damage suffered by the attacked State and its national economy owing to the aggression. The losses incurred by private persons were — as a result of the experience gained in the course of the execution of the Peace Treaties closing World War I — not a subject of reparation. However, the international legal ground of the global reparation agreed upon in the Peace Treaties terminating World War II was at any rate the criminal aggression of Germany and her allies (see Paragraph *a* of Article 6 of the Charter of the International Military Tribunal of Nuremberg: "Crimes against Peace"). Moreover, it is this aggression that on the one hand, makes legitimate the absence of reciprocity in respect of the restauration of "property, rights and interests" taken away by discriminatory measures from the persons entitled[4] and that, on the other hand, explains the provisions of the Peace Treaties exempting the Allies (the United Nations) from the responsibility for any delinquencies possibly committed by them.

Finally, if it is true what we have said in analysing the First World War, that namely the breach of the laws and customs of war (of the Hague Convention) committed by the removal of public and private property entailed, as a delinquency, the duty of restitution even if general war responsibility did not exist, the unquestionable responsibility for the Second World War by all means fully justified that *new international principles of law were developed for* the restitution of the property removed in this war — in a permanently aggressive way — *which principles were more severe than those having been in force till then.*

[3] Here we have to mention that in the Peace Treaties concluded with the so-called Satellite States in the Article concerning "Reparations" the Soviet Union — albeit the aggressive character of the Second World War in the nature of a *sui generis* delinquency would have justified from the point of view of International Law a full compensation — renounced her claim to full indemnification for the losses caused by the occupation of her territories and by the military operations carried out thereon. (The same applied in the Hungarian relation to the other two States concerned: to Czechoslovakia and Yugoslavia, too, whereas in the relations between the Western Powers and Hungary the question of such losses could hardly come up.) The Soviet Union took into consideration that the "Satellites" not only "broke off relations with Germany", and "have withdrawn from the war" but "have also declared war on Germany", and contented herself with a compensation amounting to only a part of the losses suffered by her.

[4] See p. 32.

2. THE DECLARATIONS OF THE ALLIES DURING WORLD WAR II

The Allies declared in a solemn way already during World War II their intention that after the victorious termination of the war they would enforce a new legal regulation in respect of war restitutions, justified by the mode of warfare of the fascists. The Allies were afraid that by the time they would succeed in crushing Fascism the Axis Powers would have plundered economically the countries and provinces occupied by them to such an extent that their reconstruction would encounter the greatest difficulties in spite of the victory.

Beside the war waged between nations, the most shameful campaign of world history was led by Fascism against the defenceless population. Apart from the fact that within the territory of its power Fascism qualified as enemy a certain circle of the citizens determined by their race, religion or origin, against whom it applied first on the economic and personal domain the most inhuman discriminatory policy, in order to liquidate them later physically, and when Fascism overwhelmed a considerable part of the world, it extended the personal warfare beyond the circle of those persecuted on account of their race and origin to the whole civilian population of the occupied territories of the belligerent States, removing them arbitrarily to compulsory labour and depriving them of their private property.

Disregarding all international rules and customs developed till then, German Fascism turned the removal of property into a general form of warfare, i.e. it not only compelled the inhabitants of the occupied territories to hand over all kinds of supplies and not only laid under contribution their property by means of requisitions and other methods known in the law of warfare, but it removed from the countries and territories coming under its power the economic equipments and means of production both in public and in private ownership if they could be used for their own purpose. Moreover, it went so far that it compelled the civilian population by police and military measures and by all means of civilian pressure to cede without countervalue and "voluntarily" all their property, rights and interests for the requisition of which it did not find any legal title.

Consequently, apart from the fact that the inhuman warfare of the fascists induced the Allies, as we have pointed out before, to declare, still during the war, their legal standpoint that the war criminals may and must be individually held responsible by way of international criminal proceedings, the Allies were also induced by the flagrant illegalities committed by the fascists in connection with the public and private property to lay down solemnly their position in respect of 1. removals by force or duress and appropriations committed by the fascists openly or with the appearance of legality, and their effects, and 2. particularly in respect of the gold looted on the occupied territories.

1. The solemn Declaration made on January 5, 1943, in London, signed by the Great Powers concerned, among them by the Government of the Soviet Union and by the Governments of 13 members of the United Nations, wanted to prevent that the Axis Powers should acquire by what-

ever means, without an appropriate countervalue, and should in neutral foreign countries dispose of properties situated on the territories under their occupation or control, or properties situated anywhere and belonging to the inhabitants of such territories. The Declaration reminded in advance those third persons who might acquire such property and who could, from the point of view of Civil Law, otherwise be considered as being in good faith that the Allies will, after the victorious termination of the war, do everything they can in order to annul such transactions and to compel also the neutral countries which may turn this property to profit, to draw the consequences following therefrom. These proceedings had in International Law doubtless the character of an innovation of revolutionary importance, as before the London Declaration it was inconceivable that a victorious belligerent might enforce his rights against others than the vanquished, and might cause a prejudice to neutral States by reason of any act committed by the enemy.

Because of its importance we publish here literally the text of the Declaration of January 5, 1943.

"Inter-Allied Declaration

Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control

January 5, 1943.

Declaration

The Union of South Africa, the United States of America, Australia, Belgium, Canada, China, the Czechoslovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, Greece, India, Luxemburg, the Netherland, New Zealand, Norway, Poland, Yugoslavia, and the French National Committee;

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the Governments and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the Governments making this declaration and the French National Committee 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 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.

The Governments making this declaration and the French National Committee solemnly record their solidarity in this matter.

London, January 5, 1943."

In absence of an appropriate rule of International Law, till the coming into existence of the London Declaration, the neutrals could not have been accused of an infringement of International Law, even if they knew

or had to know that the property, rights and interests acquired by them had come as a consequence of the exercise of actual power by way of a violation of the laws of war into the possession of certain occupying powers or of their nationals. The warning contained in the solemn Declaration wanted to preclude the possibility that the neutrals might refer, in the case of property robbed by the Axis Powers, to their good faith. As a matter of course, primarily the Axis Powers themselves remained responsible for the wrongs committed, the London Declaration, however, laid down the standpoint of the Allies that also the neutrals were bound to restitute the property, rights and interests acquired by them.

2. In the Declaration of February 22, 1944, Great Britain, the United States and the Soviet Union declared: "that they would not recognize the transference of title to the looted gold which the Axis at any time has held and has disposed of in worldmarkets."

3. The international value and importance of the Declarations cited under 1. and 2. was considerably increased by the "Final Act" of the Conference of Brettonwoods signed on June 22, 1944, in which the representatives not only of the Great Powers but of all United Nations attending the Conference proposed that "the participating states call upon the governments of neutral countries to take immediate measures to prevent any disposition or transfer within their territory of assets looted by the Axis Powers".

As a matter of course, the solemn Declarations quoted above did not by themselves have the effect of creating law; they wanted, however, to lay down that the formal provisions of International Law having been in force till then were considered by the countries representing the public opinion of the civilized world as obsolete and that, according to them, the far-reaching requirements of justice and equity had to be observed in the domain of restitutions, too, in order to restore the seriously violated World order.

After the termination of World War II the London Declarations of January 5, 1943, and February 22, 1944, played a very important role in the domain of the restitution of public and private property because the Axis Powers, as we have pointed out, had acquired and/or robbed from the territories under their occupation or control public and private property of considerable value (very much monetary gold) partly by way of open pillage and partly by bringing aggressive pressure to bear both upon authorities and upon private people, and had alienated a considerable part thereof with a view to acquiring foreign exchange in neutral countries (in the first place in Switzerland and Sweden, but also in other countries). From the point of view of International Law the Declaration of January 5, 1943, was particularly important as its basic principles were later formally confirmed by the Paris Peace Treaties terminating the Second World War, by the decrees issued in Germany and Austria by the occupying Powers, by the agreements concluded with some neutral States, as well as by the municipal legislation of the latter; these basic principles concerned primarily the restitution of property removed by force or duress, the invalidation of transactions concluded and of transfers effected in favour of third persons.

CHAPTER IV

FINAL DEVELOPMENT OF RESTITUTION IN THE TECHNICAL SENSE OF THE TERM AS A NEW LEGAL INSTITUTION

1. RESTITUTION OF PROPERTY REMOVED TO GERMANY. THE SOURCES OF LAW

Restitution in the technical sense of the term, as a new legal institution, was developed in its final form in the first place by the occupying Powers of Germany: the Soviet Union, the United States, Great Britain and France. The Allied Control Council formed by the representatives of the four Great Powers which, owing to the unconditional surrender, represented simultaneously the victorious Powers and the deteated Germany defined the new notion of restitution and gave directives concerning the proceedings of restitution to the Military Governments of the various zones of occupation. The definition had a binding force primarily for the United Nations represented by the Great Powers and for Germany. The directives given by the Allied Control Council and the Acts and Instructions issued by the Military Governments on the ground of these directives framed, on the one hand, International Law, and, on the other, Municipal Law in Germany.

The fundamental sources of law are:

the *Proclamation* of the Control Council No 19 of September 2, 1945;

the "*Militärregierungsgesetz*" No. 52;

the "*Directives*" issued by the Control Council in January, February, March and April 1946;

the *instructions of implementation* issued by the various occupying Powers.

The Allied Control Council ordered the population already in its Proclamation issued on September 2, 1945, to declare and preserve all property removed from the territory of the United Nations and being in German possession, and obliged the German authorities to carry out the rules of preservation prescribed by the Allies.

The *Militärregierungsgesetz* No 52 "on the subject of the seizure and control of property" (promulgated alike in every zone of western occupation) decreed the "seizure and control" in the first place of all German public and "nazi" property and of the former enemy property situated in Germany, in the second place of the property that had been sequestrated by force or an illegitimate act, or had been taken away or robbed from the possession of somebody outside the territory of Germany, *irrespective of whether this had been carried out by a legislative act, by a procedural act enveloped into a legitimate form or in any other way.*

This Act was the practical basis of the whole restitution procedure in Germany.

The conditions of restitution and the mode of its implementation are fundamentally regulated by the "Directives" issued by the Control Council

in January, February, March and April 1946 (*Kontrollratsdirektive* of January 21, 1946, *Kontrollratsdirektive* of March 8, 1946, and *Viermächte-Verfahren für Restitutionen* of April 17, 1946). These Four-Power Directives form the basis of the detailed and in substance concordant regulations issued by the Military Governments of the various zones of occupation. The material and formal legal contents of the whole new legal institution may best be known from the Military Government Regulations, Title 19 (MGR 19) issued by the American Military Government. The text of MGR 19 corresponds in its more important parts literally to the text of the "Directives" of the Control Council referred to above.

The general instructions of implementation of the Military Governments are supplemented by numerous "Memoranda" (internal dispositions) which, together with a number of other governmental measures, have to be regarded as the authentic interpretation of the basic provisions. (In the American zone the Memoranda and Bulletins of the so-called OMGUS: "Office of Mil. Gov.—US Zone".)

The "Charter" of restitution of property removed to Germany is contained in the "Directive" issued by the Allied Control Council on January 21, 1946. The Charter reads as follows:

"K o n t r o l l r a t s d i r e k t i v e

vom 21. 1. 1946 CONL/P (46) 3, abgeänderte Fassung

Bestimmung des Begriffes "Restitutionen"

1. Die Frage der Rückerstattung von Eigentum, das von den Deutschen aus alliierten Ländern weggeführt wurde, ist in jedem Falle auf der Erklärung vom 5. I. 1943 zu prüfen.

2. Die Rückerstattung hat sich in erster Linie auf identifizierbare Güter zu beschränken, die zur Zeit der Besetzung des betreffenden Landes vorhanden waren und vom Feind gewaltsam aus dem Gebiet des Landes weggeführt wurden.

Unter die Rücklieferungsmassnahmen fallen auch identifizierbare Güter, die während der Besatzungszeit hergestellt und durch Gewalt erworben wurden.

Alles andere Eigentum, das vom Feinde weggeführt worden ist, kommt für die Rückerstattung in dem Masse in Frage, wie sich die Restitutionen mit den ebenfalls durchzuführenden Reparationen in Einklang bringen lassen. Jedoch behalten die Vereinten Nationen das Recht, für dieses "andere Eigentum", falls es unter dem Titel Reparationen entnommen werden sollte, von Deutschland eine Entschädigung zu erhalten.

3. Bei Gütern von einmaligem Charakter, deren Rücklieferung unmöglich ist, wird eine besondere Anweisung die Art von Gütern festsetzen, bei denen ein Ersatz in Frage kommt, die Art dieses Ersatzes und die Bedingungen, unter denen diese Güter durch gleichwertige Gegenstände ersetzt werden können.

4. Die sich ergebenden Beförderungskosten innerhalb der gegenwärtigen deutschen Grenzen und alle zur ordnungsmässigen Beförderung notwendigen Reparaturen hat Deutschland zu tragen. Dazu gehören auch die Bereitstellung von Arbeitern und Material, wie auch die erforderlichen organisatorischen

Massnahmen. Alle so entstehenden Aufwendungen fallen mit unter die Restitution. Ausgaben ausserhalb Deutschlands hat das Empfängerland zu tragen.

5. Der Kontrollrat wird alle Restitutionsfragen zusammen mit der Regierung des Landes behandeln, aus dem diese Gegenstände weggeschafft worden sind".

The *Direktive* quoted above, although a concordant legislative act of the four Great Powers on the subject of German restitution, cannot yet be regarded as the condification of International Law. But together with the other orders of the Control Council and with the successive regulation issued in the course of the restitution procedure by the Allied Military Governments it helped to develop the customary rules that clearly expressed the legal conception of the Allies (shared by all other United Nations) which had already been indicated during the war, and so *it laid the foundation of the International Law of restitution.*

2. THE SYSTEM OF RESTITUTION OF THE PARIS PEACE TREATIES AS EVOLVED OUT OF THE RESTITUTIONS FROM GERMANY

The system of restitution of the Peace Treaties concluded with the so-called satellite countries after World War II took shape in the form of written International Law as a result of the international practice pursued by the Allies in Germany in connection with restitution.

The Italian, Hungarian, Rumanian, Bulgarian and Finnish Peace Treaties signed on February 10, 1947, expressed the difference existing between the legal characters of "reparation" and "restitution" also in a formal way, by regulating them in separate Articles. We have mentioned before that, according to the Tübingen scholars Schmoller, Maier and Tobler,[1] restitution and reparation — both being, as these scholars express themselves, "eine Form der Wiedergutmachung völkerrechtlichen Unrechts" — differ from each other in so far as, albeit both can only be enforced "von Staat zu Staat", behind restitution there still exists a claim under Civil Law, while in connection with reparation there does not exist any such claim even if its object is the delivery of a certain thing (as in some Articles of the Treaties of Versailles, of Trianon etc.; see above); the only difference between such exceptional and the usual cases of reparation consists in the fact that the State, instead of reparation in money, claims reparation in kind. In contrast with the standpoint of the German scholars, we shall expose our own position in detail in the appropriate context;[2] here we only repeat that the German standpoint is a natural consequence of the German reaction to the new, severe type of restitution which was realized in the legislation and legal practice of the Allies in Germany and, in the last resort, in the rules of International Law developed by them in that

[1] (1957) § 52 p. 3.
[2] See pp. 87. ff.

direction. The main point to be stressed here is that *restitution is treated by the Paris Peace Treaties in accordance with the legal principles of the Allies as an entirely independent legal institution.*

3. THE PROVISIONS OF THE PARIS PEACE TREATIES CONCERNING RESTITUTION

The provisions of the Paris Peace Treaties concerning restitution are contained — apart from the Finnish Peace Treaty, as a rule in identical terms — in Article 24 of the Hungarian Peace Treaty, in Article 24 of the Rumanian and in Article 23 of the Bulgarian Peace Treaty. The Italian Peace Treaty regulates the question in a somewhat different way, in view of the specific provisions relating to the restitution of the looted gold.

Article 24 of the Hungarian Peace Treaty reads as follows:

"Article 24

1. Hungary accepts the principels of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, property removed from the territory of any of the United Nations.

2. The obligation to make restitution applies to all identifiable property at present in Hungary which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transaction by which the present holder of any such property has secured possession.

3. If in particular cases, it is impossible for Hungary to make restitution of objects of artistic, historic or archaeological value, belonging to the cultural heritage of the United Nations from whose territory such objects were removed by force or duress by Hungarian forces, authorities or nationals, Hungary shall transfer to the United Nations concerned objects of the same kind as, and of approximately equivalent value to, the objects removed, in so far as such objects are obtainable in Hungary.

4. The Hungarian Government shall return the property referred to in this Article in good order and, in this connection, shall bear all costs in Hungary relating to labour, materials and transport.

5. The Hungarian Government shall co-operate with the United Nations in, and shall provide at its own expense all necessary facilities for the search for and restitution of property liable to restitution under this Article.

6. The Hungarian Government shall take the necessary measures to effect the return of property covered by this Article held in any third country by persons subject to Hungarian jurisdiction.

7. Claims for the restitution of property shall be presented to the Hungarian Government by the Government of the country from whose territory the property was removed, it being understood that rolling stock shall be regarded as having been removed from the territory to which it originally belonged. The period during which such claims may be presented shall be six months from the coming into force of the present Treaty.

8. The burden of identifying the property and of proving ownership shall rest on the claimant Government, and the burden of proving that the property was not removed by force or duress shall rest on the Hungarian Government."

4. THE CHARACTERISTICS OF THE RESTITUTION CARRIED OUT IN GERMANY AND IN THE FORMER SATELLITE STATES

The comparison of the texts of the basic directive of the Allied Control Council in Germany and of the Paris Peace Treaties proves already in itself that here the point in question is *the application of indentical laws elaborated by the Allies in detail.* The provisions of the Paris Peace Treaties concerning restitution are not even in the nature of framing new principles of law but only proclaim already previously developed legal maxims.

These principles of law were intended to ensure in the field of restitution, in consequence of the degeneration of the warfare of the fascists, a more severe regulation than that applied after World War I in the same domain, a regulation which seemed solely liable to comply with the requirements of the sense of justice.

With the help of the instructions of implementation issued by the Military Governments in Germany (the MGR Title 19 issued in the American zone of occupation) and of the internal dispositions relating to the details of implementation (the Memoranda and Bulletins of OMGUS), we may analyse the main characteristics of restitution carried out in the vanquished States (in Germany and in the satellite States) as follows:

A) THE INTENTIONS OF THE ALLIES

As far as the intention of the Allies is concerned, they invested the London Declaration of January 5, 1943, with the force of an authentic interpretation. The defeated States had to recognize expressly this Declaration, and when some legal doubt arose, in connection with the procedure of restitution, it had to be examined "in the light of the Declaration."[3] This meant that the individual claim for restitution had to be interpreted in the most extensive way, and *the criteria of restitution had to be established* not on the ground of the strict law but *on the strength of the principle of equity destined to restore the whole violated international legal order.*

B) THE GROUP OF THE STATES ENTITLED TO RESTITUTION

Restitution was not only stipulated in favour of those States with which the Axis Powers were at war (the so-called Allied and Associated Powers),[4] but besides them in the given case *primarily* to the advantage of France and of those United Nations whose diplomatic relations with the Axis

[3] *Kontrollratsdirektive* vom 21, 1, 1946 (paragraph 1), Hungarian Peace Treaty, Art. 24 (paragraph 1).

[4] See pp. 66, 122.

Powers had been broken off (see Article 36 of the Hungarian Peace Treaty). The fact that the group of States entitled to restitution was extended by the Peace Treaties, beside the direct belligerents, to the other United Nations, is the first sign showing in the direction that, according to the modern legal conception of International Law, the victorious Powers — being responsible for the fate of the World — are bound to see that the violated international legal order is restored even if its beneficiaries were not directly these victorious Powers. The Allies, however, owing to their above-mentioned sense of responsibility, could not stop even here, and the above-mentioned "*umfassendere interstaatliche Rechtsidee*"[5] induced them to *extend the group of the States entitled to restitution* first in principle, later also in practice, *to all those formerly hostile States that had, in the course of the war, fallen victims to the occupation or control by Germany or her allies.*[6] The *Kontrollratsdirektive* of April 17, 1946, (*"Viermächte-Verfahren*, Teil I, Punkt 3") wanted to render such an extension of the right to restitution in principle possible; the provision reads as follows:

> "3. Staaten, die auf Restitution Anspruch haben
> Es können nur solche Staaten einen Anspruch auf Restitution erheben, deren Gebiet ganz oder teilweise von den Streitkräften Deutschlands oder seiner Verbündeten besetzt war, und die zu den Vereinten Nationen gehören oder durch den Alliierten Kontrollrat ausdrücklich bezeichnet sind."

Paragraph 2 of Part II of the *Kontrollratsdirektive "Viermächte-Verfahren"* thereafter determines the circle of the *„anspruchsberechtigte Länder"* more precisely as follows:

> "Der Ausdruck 'anspruchsberechtigtes Land' ist auf jedes Land anwendbar, das sich an der Erklärung vom 5. Januar 1943 beteiligt hat, und auf solche anderen Länder, die gegebenenfalls später vom Kontrollrat ausdrücklich bezeichnet werden, *wenn das Gebiet des betreffenden Landes ganz oder teilweise von bewaffneten Streitkräften Deutschlands oder seiner Verbündeten besetzt war* und das Land einen Anspruch auf rückgabepflichtiges Eigentum ... vorlegt."

This determination is the most explicit reference to the fact that, according to the new legal conception of the Allies about International Law, entitled to restitution are not exclusively the victorious States but all the States having once been temporarily under German (or Italian) occupation.

The practical extension of the right to restitution was carried out by the Memoranda of May 1, 1947, No. 2 and of May 28, 1947, No. 6 of OMGUS which — considering its interest for Hungary — we shall cite hereafter in connection with the question of the restitution of property removed from Hungary. As a matter of course, the Allies made at the comprehensive regulation of the conditions and modalities of restitution a certain distinction between United Nations and former enemy States in favour of the first ones.

[5] See pp. 66 and 122.

[6] As to the identical character of the notion of "occupation" and "control" see p. 135 ff.

C) THE FUNDAMENTAL PRINCIPLES OF RESTITUTION OF PROPERTY REMOVED FROM THE TERRITORY OF THE UNITED NATIONS

In connection with the restitution of the property removed by the Axis Powers the vanquished are, by virtue of the Peace Treaties and the orders of the Military Governments in Germany, under the obligation to return all removed property which 1: is to be found on their territory (Section 5); 2: is identifiable (Section 6); 3: has been removed by the application of force or duress (Section 7).

5. THE PUBLIC-INTERNATIONAL-LAW PRINCIPLE

A) THE PRINCIPLE OF TERRITORIALITY; TITLE TO RESTITUTION

Restitution is not an obligation of Private International Law, but of Public International Law. Neither in the active relation (subjective right) nor in the passive relation (subjective duty) is the right of ownership operative in it but *exclusively the principle of territoriality.*

In the relation of the United Nations all property removed from their territory is to be restituted, irrespective of whether the owner has been a national of one of the United Nations or not. It is beyond doubt that by the legal principle of restitution not the interests of the owner but those of the political economy are protected: restitution is not aimed at setting up the right of ownership of individual persons but *at repairing the serious injury caused to the whole economic life of the countries concerned.* (From the point of view of the individual owners it would have been indifferent to what degree the whole occupied hostile territory has been plundered. Nevertheless, the severity of restitution is justified precisely by the particular gravity of the delinquency, the pillage of the occupied territory as a whole).

B) THE PUBLIC-LAW PRINCIPLE ACCORDING TO THE GERMAN JURISTS

According to the frequently quoted standpoint of Schmoller, Maier and Tobler, restitution is a duty of Public International Law, but only inasmuch as it is to be fulfilled *"von Staat zu Staat":* the States, however, proceed on the ground of the civil law claims and obligations of their nationals.

Professor Kaufmann (1949) does not state this in that form. He explicitly recognizes the public-law character of the claim to restitution.[7] By contrast-

[7] Kaufmann (1949) paragraph 19:

> "Nun ist es gewiss richtig, dass das Restitutionsbegehren von der alliierten Regierung gestellt wird und dass sie es ist, der das restituierte Objekt von der betreffenden Besatzungsmacht "freigegeben" wird. Das ändert aber nichts an der Tatsache, dass die Wirtschaft des alliierten Landes dann nicht nur um den Wert der von ihren Staatsangehörigen empfangenen Gegenleistung, sondern auch um den Wert des restituierten Objektes auf Kosten der deutschen Wirtschaft bereichert wird, ohne dass diese eine entsprechende Gutschrift erhält."

ing, however, restitution and reparation, he points out the following *legal difference* existing between them: in the case of restitution the handing over of such property is claimed which belongs invariably to the assets of the old owner, whereas reparation is effected to the charge of the debtor country's proper national wealth. Despite the partial truth contained in this statement, to which we shall refer hereafter, it implicitly contains also the somewhat incorrect opinion according to which restitution is supposed to be carried out on the ground of the right of ownership. In another passage, however, Kaufmann, equally implicitly, recognizes again the right of the injured Government to treat differently "die ... ohne Gegenleistung erworbenen Objekte einerseits, und die gegen Entgelt erworbenen Objekte anderseits... indem sie erstere dem Privateigentümer zurückgibt, letztere aber für sich behält..."

By implicitly recognizing the right of the claimant State to retain the restituted property in certain cases for itself and to return it in other cases to the owner, Professor Kaufmann acknowledges that the returning of the removed property is carried out primarily *not only to the hands but also to the benefit of the State*, and the further destiny of the restituted property depends on the provisions of Municipal Law. In other words, the German scholar accepts after all the public-law and territorial character of restitution also in the meaning as it is expressed in a still unsettled form in the Peace Treaties closing the First World War and later in a crystallized form both in the dispositions of the Military Governments of Germany and in the Paris Peace Treaties. According to this interpretation, it is *irrelevant who the owner of the removed property has been on the* occupied territory and *which national of the Axis Powers* has taken possession of it as a result of the removal. That State is entitled to restitution *(Rücklieferung)*, from the territory of which the property has been removed and it must be carried out by that State (Axis Power, satellite State or, as we shall see hereafter, neutral State too), on the territory of which the removed property can be found.

Our standpoint is in no way impaired either 1. by the above-quoted statement of Schmoller, Maier and Tobler (1957) according to which: "...der Restitutionsanspruch, obwohl er ein völkerrechtlicher ist, der nach Auffassung aller Völkerrechtslehrer nur von Staat zu Staat geltend gemacht werden kann, sich doch auf einen fortbestehenden privatrechtlichen Eigentumsanspruch des Staatsbürgers des besetzten Gebietes gründet, dem die Sachen wider seinen Willen weggenommen wurden...",

2. or by the statement of Professor Kaufmann (1949) that "...die zugrunde liegende Auffassung ging vielmehr dahin, dass die zu restituierenden Gegenstände niemals rechtmässiger Bestandteil der deutschen Volkswirtschaft geworden, sondern *rechtmässiges Eigentum der alliierten Staatsangehörigen geblieben waren.*"

Ad 1. The fact that behind the claim of Public International Law there is also a claim of Civil Law does not mean at all that the State would act in the protection of a Civil-Law claim, on behalf of the owner: *the legal basis of the claim to restitution of Public International Law is in every case an injury of Public International Law.* Such an uncontestable injury of

Public International Law is the violation of the Hague Convention and especially the forcible removal of public and private property from occupied territories. Consequently, as a matter of course, in the majority of cases Civil-Law claims stand behind the action of the State. This, however, only establishes the claim of Public International Law and does not transform it into a claim of Civil Law.

Ad 2. We can agree with Professor Kaufmann inasmuch as we also consider it as one of the fundamental theses of restitution that *no further legal title can be acquired* in property removed by force or duress, or otherwise "*völkerrechtswidrig*". But does this mean that the restituted property regains *uno ictu*, by the fact of restitution itself, its previous legal status under Civil Law? That is to say, is restitution of a public-international-law character effected directly in favour of private persons? Not at all, and *precisely this is the difference between restitution of Public Law and restoration of Civil Law*. There is no doubt that, as a rule, the practical purpose of restitution under Public International Law of removed property is that the property should come back into the possession of the former civil-law owners. This, however, does not alter the fact that restitution is an act of Public International Law based on a delinquency of Public International Law, the legal effect of which consists in the returning of the property to the State, and a separate internal legislative act or legal disposition is required for the returning of the property to the civil-law owners. *Restitution, as an act of Public Law, is completed by the delivery effected to the State,* the restituted property comes thus under the operation of Municipal Law. This explains that, as Professor Kaufmann also refers to it, it is *in ultima analysi* possible under Municipal Law that the State may not give back certain property restituted by virtue of Public International Law to the previous owners,[8] in spite of the fact that no change of Civil Law ensues in the ownership of the property in consequence of the removal of the property.

Let us now see how we can prove, in addition to this general statement, that what prevails in the legal institution of restitution that has developed during and after World War II is not the propriatory claim of Civil Law but the principle of Public International Law and the principle of territoriality.

A. Martin (1947) British jurist makes the following statement on this very important question:

> "It is noteworthy that a United Nations Government claiming restitution need not prove that the property in question was owned by one of its nationals: *it is sufficient to show that the property had been removed from its territory.* In other words, restitution claims are based exclusively on the territorial and not on the personal jurisdiction of Governments."

The Hungarian Peace Treaty expresses incontestably the principle of territoriality in Paragraph 2 of Article 24 when it says:

[8] See p. 87.

> "the obligation to make restitution applies to all identifiable property at present in Hungary, which was removed by force or duress ... from the territory of any of the United Nations..."

This provision of the Peace Treaty explicitly avoids to speak of property taken away from the ownership of any of the United Nations and/or of their nationals and having passed into Hungarian ownership. The text speaks of property to be found on the *territory* of Hungary and removed from the *territory* of any of the United Nations. All property having been removed from the territory of any United Nation, irrespective of the fact in whose ownership it was, had to be restituted if it could be found on the territory of Hungary, in the ownership of whomsoever.

The other Peace Treaties (the Finnish Peace Treaty with some differences) and the German Military Governmental Rules contain provisions identical with those in the Hungarian Peace Treaty.

The German MGR 19—101 defines the objective and the substance of restitutions as follows:

> "The objective regarding "Restitutions" is expeditiously to locate and return to the appropriate claimant nations all property subject to restitution as defined in MGR 19—100.1 and 12—101.2 which has been identified."

The principle of territoriality has been such a general rule of restitution that even those properties had to be restituted that were occasionally owned on the territory of any of the United Nations by nationals of the Axis Powers provided they had been removed by force or duress from the territory of the country concerned. There evidently existed precedents, particularly in those cases where nationals of the Axis Powers owned shares in an enterprise having its place of business on the territory of any of the United Nations. A very interesting evidence for that is the Memorandum No. 12 dated on November 7, 1947, of OMGUS concerning the possibility of restituting property of German origin. The Memorandum provides that

> "it will be the policy of the Branch ... to consider as non-restitutable any property which was taken by the Germans from Germany to an occupied country, which remained under German control in the occupied country and which, in its original form was thereafter taken back to Germany",

and goes on to lay down that there is no obstacle to restitution in a

> "mere financial control over the holder of property in occupied territory, such as may have been exercised for instance by a German firm over a subsidiary or other affiliated company to which property was sold and shipped from Germany."

The statement that the territorial claim and not the ownership is relevant in the case of restitution is expressly corroborated by the Memorandum of great importance of the OMGUS dated on July 28, 1948, concerning "normal commercial transaction". Paragraph 2 *d* of the Memorandum provides that the property is to be restituted *even if the owner* — a national

of the interested United Nation — declares that, for the property found on the territory of Germany, he has obtained an appropriate payment and thus, as far as he is concerned, *does not want to get it back*. The property must nevertheless be restituted, "*da ja die Claims staatliche Claims sind* und nicht solche von Einzelpersonen."

Finally, the fundamental provision of the Peace Treaties and of the orders issued by the Military Governments in Germany — according to which 1. the claims can only be presented by the Government of the interested State to the Government of the State obliged to carry through the restitution, 2. only the Government of the State concerned is entitled to take over and to acknowledge receipt of the property — signify the decisive effectiveness of the Public-Law principle and of the principle of territoriality in connection with the claims for restitution.

Ad 1. The relative text of the Peace Treaties (Article 24 of the Hungarian Peace Treaty) lays down that

> "Claims for the restitution of property shall be presented to the (Hungarian) Government by the Government of the country from whose territory the property was removed."

Paragraph 1 of Part II of the *Kontrollratsdirektive (Viermächte-Verfahren)* of April 17, 1946, regulates the declaration of the claim as follows:

> "Es werden nur solche Ansprüche zur weiteren Bearbeitung angenommen, die durch die Regierung der anspruchsberechtigten Länder oder in deren Namen gestellt und von einem beglaubigten Vertreter dieser Regierung unterzeichnet sind. Alle Ansprüche, die von natürlichen oder juristischen Personen oder in deren Namen gestellt werden, sind ohne weitere Prüfung abzuweisen."

Do we need a more categorical declaration by the Allies as legislators to prove that a claim for restitution as such may only be presented by Governments? This four-power rule of law unmistakably expresses that the claims for restitution are presented by the Governments — in contradistinction to the doctrine of Schmoller, Maier and Tobler — not in their capacity as diplomatic representatives of the persons entitled thereto but in their proper name and for their own benefit.

Ad 2. MGR 19—501 provides, in conformity with what has been said before, that "only the accredited agents of the country receiving the property (the restitution missions) are authorized to take over and to acknowledge receipt of the property prescribed in the so-called permit of release." The restitution missions were invested by the Military Government with specific powers (MGR 19—102,3). They were authorized "to visit the location of restitutable property for purposes of identification, examination, supervision of packing and shipping and signing of necessary receipts and other documents."

The right of the representatives of the States to take over the objects released in the course of the restitution procedure was *exclusive*. The owners were not entitled either to reclaim or to take over the removed property,

so that the authors of International Law mention, as a specific exceptional possibility, the right of the United Nations by virtue of which the returning (the restitution in the technical sense of the term) of the property removed from their territory to a neutral territory could be claimed, beside the Governments, also by the proprietors.

In order to prove that the restitution had to be effected *irrespective of the person of the owner* to the benefit of the country concerned, i.e. by way of bringing back the removed property into the national economy of the country concerned, we find a particular evidence in the Memorandum No. 4 dated on May 1, 1947 of OMGUS which deals, curiously enough, with the question of the restitution of Hungarian vehicles. For the sake of correct argumentation we anticipate what we shall relate later about the restitution to be carried out for the benefit of Hungary. For the moment it is enough to point out that the conditions of the implementation of restitution stipulated for the benefit of Hungary in respect of the property removed to Germany were determined by the Allies, as we have seen, in an almost identical way as in respect of the restitutions effected to the advantage of the United Nations. What does now the Memorandum No. 4 of May 1, 1947, say?

> "...2. Pursuant to directives received from Washington, restitution will be made of all property, including motor vehicles, removed from Hungary by force or without compensation during the period from 15 October 1944 to 15 May 1945. In order to prove force it will be sufficient for the Hungarian Restitution Mission to show that the removal was made by general direction of the puppet Hungarian Nazi Government during the period in question.
> ... 5. Subject to the above, restitution will be made irrespective of:
> *a)* whether the vehicle was brought to Germany by its Hungarian owner and sold by him to a German; or
> *b)* whether the vehicle was brought to Germany by its Hungarian owner and is now in possession of the same Hungarian owner;
> ... 7. In cases where restitution is made of vehicles in possession of their Hungarian owners (see paragraphs *a* and *b* above), *it should be made clear to such owners that the claimant country* and not the owner is entitled to restitution.[9]"

It is clear from the above that the restitution has to be made in favour of the country concerned, even if the owner himself became, for instance, resident in Germany and is in possession of the removed property. In this case *the owner himself is bound to make the object available for retransportation into the interested country*. For this reason the above-mentioned Memorandum of July 28, 1948, issued by OMGUS in respect of the personal property of the United Nations' refugees disposes separately, as of an exception.

[9] See p. 90.

C) THE PRINCIPLE OF TERRITORIALITY; THE DUTY OF RESTITUTION. THE SITUATION OF THE *BONA FIDE* ACQUIRER OF RIGHTS

As we have pointed out above, the Public-International-Law principle and the principle of territoriality are effective not only in respect of the claim for restitution but also in respect of the legal duty of restitution.

This principle is expressed, in the Hungarian Peace Treaty, in the first place, in para. 1 of Article 24 as follows:

> "Hungary shall return ... property removed from the territory of any of the United Nations." The same legal duty rests — apart from Germany — also on the Italian, Rumanian, Bulgarian and (regarding the property removed from the Soviet Union) on the Finnish Governments.

The restitution concerns, of course, primarily the property removed from the territory of the United Nations by the vanquished Axis Power (satellite State) that signed the Peace Treaty. According to the spirit of the London Declaration, however, the range of this obligation covers a large field and, as Mr. A. Martin (1947) points out, a joint and several responsibility for the delinquencies committed by the Axis Powers (satellite States) rests on all these Powers, binding them to restitute all property located on their territory which has been removed by any of these Powers from the territory of the United Nations and is now in the ownership, possession or detention of whomever.

The principle of territoriality is emphatically expressed in the provision relating to the passive restitution (to the duty of restitution) in pursuance of which restitution is to be made regardless of any subsequent changes in the ownership of the property removed, that is to say

> "irrespective of any subsequent transactions by which the present holder of any such property has secured possession" (Hungarian Peace Treaty, para. 2 of Article 24).

This principle stresses the absolute character of the legal duty of restitution.[10] This means that it is irrelevant whether the removed property found on the territory of an Axis Power (satellite State) is in the possession (detention) of the direct acquirer or of his successor and whether it has been acquired, according to the Municipal Law, in good or bad faith. *The entire abandonment of the protection of the bona fide acquirer is one of the most salient characteristics of the new institution of restitution* which distinguishes it from all previous similar institutions of International Law. The unprecedented pillage of the occupied territories, as we have pointed out, required the application of unprecedented sanctions. The *bona fide* possessor could, in all other cases, refer with success to the acquisition in good faith, yet the new legal principles created by the Allies did not allow of such objection. And this new legal conception has been considered so just by the whole World that, as we shall see it, *even the*

[10] Martin (1947) p. 278.

neutral States yielded to this argument and accepted the principle that the property removed to their territory has to be restituted irrespective of the mode of its acquisition.

When they defined the obligation of restitution of the defeated countries the victors did not limit themselves to follow up the changes in the possession of the removed property which took place on the territory of the Axis Powers (satellite States) but they bound the States having signed the Peace Treaty to take all possible measures with a view to the restitution of such property that persons under their jurisdiction possess and keep in a third country (Hungarian Peace Treaty, para. 6 of Article 24). The Allies entrusted to the satellite States, signatories to the Peace Treaty, the choice of the measures deemed necessary and possible in order to require the restitutable property kept abroad by persons under their jurisdiction. For the restitution of property possessed by persons under the jurisdiction of a vanquished State and safeguarded on neutral territory, only the defeated State was, of course, responsible, as the fact of the location of such property did not yet involve the responsibility of the neutral State.[11]

D) INTERNAL COMPENSATION

The fact that the passive restitution (the legal duty of restitution) rests on the States concerned irrespective of the good or bad faith of the individual possessor is stressed by the circumstance that there is nowhere any provision decreeing the duty of these States to compensate their nationals or inhabitants suffering an injury by reason of restitution.

According to Schmoller, Maier and Tobler[12] the State bound to restitute should in this respect make a distinction between the "*echt*" and the "*unecht*" duty of restitution. It should qualify the duty of restitution as "*echt*" if the property has passed wrongfully, according to Civil Law, into the possession of the German acquirer (through the direct application of force or duress),[13] making thus all later acquisitions unlawful. And it should qualify the restitution as "*unecht*" if it involves the return (and the internal expropriation) of property which has been acquired, although *wrongfully* according to International Law, but *lawfully* according to Civil Law, and which, consequently, belongs according to this conception (in contra-distinction to the opinion of Professor Kaufmann, 1949) "*rechtlich*" to the assets of the possessor. In connection with the "*echt*" restitution (based on an acquisition in bad faith, or being otherwise "*mangelhaft*") no internal claim for compensation arises, of course, in the opinion of the German scholars; in the case of an "*unecht*" duty of restitution, however, when the property has been acquired according to the German scholars in good faith (they consider the greatest part of the contracts concluded under the "appearance of legality" as being *bona fide* titles) the interested person should, in their view, be in any case indemnified by his own State. As we

[11] See Chapter V.
[12] (1957) § 52 p. 20.
[13] *Op. cit.* § 52 p. 22.

have mentioned, in the opinion of the German jurists (the correctness of which is contested by us) in such a case, strictly speaking, a general legal duty of reparation is in question, and so the following principle applies: "erfüllt ein einzelner aus seinem eigenen Vermögen eine Reparationspflicht, so hat er nach allgemeinen Rechtsgrundsätzen einen Erstattungsanspruch, da er eine besondere Leistung zugunsten der Allgemeinheit erbracht hat".[14]

Anyway, the problem of internal indemnification in itself (unless otherwise provided by an international treaty), would stand apart from the scope of International Law. Schmoller, Maier and Tobler, however, pass over to the domain of International Law by challenging the international legality of the provision of the Allies by virtue of which the wrongfully removed property has to be restituted on the strength of the principle of territoriality, irrespective of the mode of its acquisition and of the good or bad faith of the present possessor. But while the German jurists may in the question of internal indemnification reasonably assert that in cases where the last acquirer has to be considered under Civilian Law as being in good faith, the State should only be entitled to expropriate objects belonging to the property of such an acquirer against compensation, they ought to ground their criticism on an entirely different basis when the question is whether the Allies have acted in conformity with International Law when they ordered the restitution of properties the acquisition of which could possibly be qualified as *bona fide* under Municipal Law, without assuming any legal standpoint in the question of internal indemnification, as they have done in other cases affecting matters of Civil Law (see for instance Articles 29 and 32 of the Hungarian Peace Treaty). MGR 16—241 in Germany itself directly prohibited the indemnification of German nationals with the force of municipal legislation.[15]

By stipulating the absolute legal duty of restitution the Allies in many cases doubtlessly claimed from certain States the carrying out of expropriations of a confiscatory character, though otherwise they generally raised legal objections against such measures. Nevertheless, we cannot say that the Allies as legislators should have contradicted themselves by their conduct: *the reparation of the international delinquency committed by the pillage of the occupied territories has been much more important than the protection of the rights of the individual acquirers.*

The German jurists are in particular unable to acquiesce in the fact that the Allies as legislators went so far in ensuring the absolute character of restitution as to have made the obligation of returning removed property independent not only of the good or bad faith of the acquirer but also of the question whether the inhabitants concerned of the former occupied territory had obtained a consideration (a purchase price) or not, and if so, how much. The Allies on their part have nowhere ordered the return of the purchase price received. This is found "surprising" by the British scholar A. Martin (1947). If, however, we take into consideration that the essence of the new law of restitution consists precisely in the fact that

[14] *Op. cit.* § 52 p. 20.
[15] *Op. cit.* § 52 p. 21 J.

all property removed from the territories occupied by the Germans and their allies through an international deliquency should be restituted without examination of the individual circumstances, so we must regard it as logical that particularly in the case of the vanquished States, when the international responsibility for the delict is direct, the restitution of the property found on their (or on their allies') territory should not even be made dependent on the repayment of the purchase price possibly received.

The omission of the examination of the individual circumstances of the acquisition follows from the same decisive consideration which served as a basis for the London Declaration of January 5, 1943, and led to the formation of the legal concept of the *"Kollektivzwang"*.[16] According to this consideration, *taking into account the plundering methods of the Germans, it must be presumed,* until proof of contrary, *that any property passed wrongfully from the occupied territories in the territory of the Axis Powers,* even if the acquisition was based on an apparently legal contract. It appears clearly from the London Declaration that, according to the conception of the Allies, in consequence of the general application of these plundering methods, the "apparently legal" transactions must in principle be regarded as delinquencies of the same gravity as the acquisitions by way of "open plunder or looting", "even when they purport to be voluntarily effected". As we have pointed out, the chief objective of the London Declaration was exactly to forewarn everybody that the Allies would also prevent the pillage of the territories occupied by the Axis through these methods. Those who wanted to acquire a right originating from an occupied territory must have known the risk they ran and so they could not claim the protection due to acquirers in good faith.

Above we have discussed the question of the protection of the *bona fide* acquirer, of the repayment of the purchase price possibly received by the owner being a national of the United Nations and of the internal indemnification in general in the relation of the vanquished States. We shall speak of these questions in neutral relations in connection with the application of the provisions relating to the legal duty of restitution to the neutral States.

E) "RESTITUTION IN KIND". RESTITUTION OF MONETARY GOLD. ARTISTIC, HISTORIC, ARCHAEOLOGIC PROPERTY

The principle of territoriality manifesting itself in connection with what is termed passive restitution (legal duty of restitution) particularly follows from those provisions of the Peace Treaties and the dispositions of the Military Governments in Germany which require in certain cases a "restitution in kind" in contradistinction to the generally stipulated "specific restitution" *(restitutio in specie).*

As we have seen, it is a fundamental principle of the provisions regarding restitution that only such property as can actually be discovered is to be returned. If a property was removed by the Axis Powers from the occupied

[16] See p. 103.

territories but it cannot be found, the State concerned is not liable to restitution even if there is evidence that the object was removed by one of its nationals, or if it passed otherwise, in a verifiable way, to its territory. In other words, the principle of territoriality is applicable not only to the benefit of the United Nations but *also to their disadvantage*. If the removed property cannot be discovered, no duty of indemnification or substitution rests on the State according to the legal principles layed down by the Allies. (Restitution in the technical sense of the term differs in this essential point, too, from the general *in integrum restitutio* of International Law.[17]) In connection, however, with the property having once been discovered, the duty of indemnification or substitution of the State is absolute.[18] The provisions of the Peace Treaties and of the orders issued by the Military Governments of Germany provided only in respect of two groups of property, the removal of which was qualified as particularly serious, that if the individual objects cannot be restituted, restitution in kind must be effected by the country territorially concerned. These two groups were: the *looted monetary gold, works of art and historic or archaeologic property*.

a) The Axis Powers, as it is well-known, removed from the territories occupied by them the whole monetary gold reserve. The London (Gold) Declaration of February 22, 1944, was issued by the United States, Great Britain and the Soviet Union when they made certain that Germany had necessarily been constrained to exhaust her whole gold reserve with which she had entered into the war.[19] The Declaration of February 22, 1944, in connection with the London Declaration of January 5, 1943, of a general character,[20] which has been characterized by Covey T. Oliver (1955) as being "*the most authorative pre-peace treaty statement of the general restitution principle*", wanted to make it impossible that any acquirer of rights (a neutral, too) might allege that he acquired in good faith monetary gold from the Government or from nationals of the Axis Powers. To be sure, the Hague Convention IV, as we can read it in its Article 53, authorizes the belligerent occupying hostile territory to "take possession of cash, funds, and realizable securities, etc. which are strictly the property of the state",[21] the reparation of the general pillage committed by the Axis could, however, not have been considered as complete if the Allies had recognized the right of disposition of the Axis regarding the so-called "looted gold" *(Raubgold)*. *Schmoller*, *Maier* and *Tobler*[22] state that "die Beschlagnahme von 'Gold und Wertbestände' eines besetzten Staates... als Beute nach Art. 53 LKO[23] dem besetzenden Staat gestattet ist... Dieser erwirbt hier Eigentum" and point out in addition that "man wird zwar annehmen müssen, daß eine Rückgabepflicht für Beute statuiert werden kann, aber

[17] See p. 74.
[18] See p. 113.
[19] See Covey T. Oliver (1955).
[20] See p. 79.
[21] As to the gold reserve of the banks of issue see Oppenheim—Lauterpacht (1952—56) Vol. II, § 137 J.
[22] (1957) § 52 p. 13.
[23] "*Landkriegsordnung*" — Hague Convention IV.

es bedarf hierfür einer vertraglichen Grundlage". The Allies, as we know it, considered themselves, by virtue of the unconditional surrender, even without a *vertragliche Grundlage* entitled to dispose of all *Raubgut* found in Germany,[24] moreover to claim the handing over of such property which had passed from German into neutral possession. But from the viewpoint of International Law it is perhaps even more important that the Allies "representing the overwhelming majority of members of the international community"[25] considered themselves, in view of the gravity of the cases authorized to proclaim a new international legal principle even contrary to the Hague Convention, and *to declare the German course of action "unlawful" with a retroactive effect.*

Concerning the restitution of the monetary gold looted by nazi Germany and fascist Italy and its appropriation for reparation due to the Western Powers, eighteen States, namely Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxemburg, the Netherlands, New-Zealand, Norway, South-Africa, the United Kingdom, the United States and Yugoslavia[26] concluded on January 14, 1946, a convention in Paris under the title "Agreement on reparation from Germany, on the Establishment of an Inter-Allied Reparations Agency and on the Restitution of Monetary Gold". One of the subject-matters of this Agreement was the pooling of the looted monetary gold discoverable in Germany and its distribution among the signatory Powers in proportion to their losses sustained in gold. The second subject-matter was the release of all German property situated in neutral foreign countries from the German ownership or control, the recovery of the gold that had been unlawfully transported into neutral countries and "*inter alia*" its distribution among the signatories as reparation. We shall speak of the latter question below in connection with the extension of restitution to the neutrals.[27] Concerning the question of the "looted monetary gold" discovered in Germany it is interesting to mention that, according to the data of Schmoeller, Maier and Tobler, the banks of issue of the plundered countries declared the pillage of 700 tons of monetary gold, of which 220 tons were found in Germany. This gold formed part of the property liable to restitution in spite of the fact that it did not comply with the legal criteria of restitution, as no specific restitution of "identifiable" property[28] but a proportionate division was in question.

[24] It is evident that if the Allies had concluded a treaty with Germany, they would have stipulated the restitution of the gold removed to Germany in the same way as they have provided in Article 168 of the Treaty of Trianon (Treaty of Versailles, Art. 238) that "en sus des paiements ci-dessus prévus (consequently, apart from the reparations) la Hongrie effectuera, en se conformant à la procédure établie par la Commission des Réparations, la restitution en espèces (in specie) des espèces enlevées, saisies ou sequestrées ... etc.". As we have pointed out, in the Peace Treaties closing the First World War this was fundamentally the restitution in the technical sense of the term (see p. 75).

[25] Oppenheim—Lauterpacht (1952—56) Vol. II. p. 331.

[26] Mann (1947). To these States later Italy and Austria adhered.

[27] See p. 124.

[28] See p. 101.

In spite of the impossibility of individual identification we may speak here of restitution because by applying the eliminating method it was at any rate possible to establish that the monetary gold found in Germany could — in consequence of the manifest exhaustion of the German gold reserve — not be owned by Germany and thus those Governments whose gold reserve had been removed by the Germans were entitled to claim at least the restitution of the gold found there (or in German deposits kept in neutral countries). The monetary gold found in Germany might be regarded by the Allies as being "identified" taken as a mass and, accordingly, its restitution could essentially be qualified as specific restitution and not as restitution in kind.

In view of the grave consequences of the looting of the gold reserves and, to a certain degree, of the secondary role played by Italy among the Axis Powers, a restitution in kind was stipulated by the Allies in the Peace Treaty signed with Italy. (We can infer from this what would have the Allies stipulated in this respect if they had concluded a Peace Treaty with Germany.)

Article 75, paragraph 8 of the Italian Peace Treaty reads as follows:

> "Le Gouvernement italien restituera au Gouvernement de la Nation Unie intéressée tout l'or monétaire ayant fait l'objet de spolations par l'Italie ou transféré indûment en Italie, ou livrera au Gouvernement de la Nation Unie intéressée une quantité d'or égale en poids et en titre à la quantité enlevée ou indûment transférée. Le Gouvernement italien reconnait que cette obligation n'est pas affectée par les transfers ou les enlèvements d'or qui ont pu être effectués du territoire italien au profit d'autres puissances de l'Axe ou d'un Pay neutre."

Pursuant to this provision the removed monetary gold has to be restituted by Italy in the first instance individually, insofar, however, as this is not possible as the gold cannot be found in Italy — for instance by reason of its having passed abroad — the removed gold has to be substituted by gold of the same weight and standard. Italy is responsible not only for the gold removed by her but — and this has perhaps an even greater legal and practical importance — also for the gold removed by the other Axis Power and "*indûment*" transported to Italy. And Italy is responsible not only in the case where the gold was utilized by herself, but — and this was again of major practical importance — also if the gold was removed from her territory to the territory of another Axis Power or to a neutral territory. All this proves according to Martin (1947) that the basis of the responsibility of Italy in connection with the removed gold is not the delinquency committed by her but the territoriality in itself. This responsibility is founded on the mere fact that the removed gold was, if only temporarily, on her territory. "In essence — says Martin — these provisions of the Treaty amount to the proposition that a belligerent may be held fully accountable for property looted by its allies, even if it should have done no more than harbour the loot for some time during the war." The expression, "transféré indûment en Italie" evidently proves not only the joint and several responsibility of the Axis Powers for the delinquency

committed by the removal of property but in the quoted context it means that, according to the standpoint adopted by the Allies, the restitution has to be made by the territorially interested Government in favour of the other Government territorially concerned, and may be based on an international delinquency committed by a third State. In contradistinction to Martin's statement and particularly taking into account the responsibility of the neutrals for the property removed to their territory we may state that *in ultima analysi* the State to the territory of which the restitutable property has passed may not keep it on its own territory without becoming guilty of a certain complicity in the delict. (See below the analysis of the position of the neutrals.)

We emphatically stress here that the particular restitution referred to in the present section concerns only monetary gold, as the restitution of the non-monetary gold (objects, jewels) falls under the provisions relating to ordinary individual restitution.

b) In the same way as the Peace Treaties terminating the First World War (Art. 175—177 of the Treaty of Trianon) and the Hague Convention itself (Art. 56), the new rules of restitution contain specific provisions concerning the property of artistic, historic and archaeological value. The removal of these objects is a *sui generis* war crime for which, as we have referred to in the appropriate context, Article 56 of the Hague Convention expressly provides the "*Ahndung*", the criminal retaliation. This Article lays down with a binding force that such property "even when state property shall be treated as private property" (that is to say, it shall not be taken away). From this particularly protected legal situation follows the provision of the rules of restitution according to which, if from the territory of a United Nation objects belonging "to the cultural heritage" of the said Nation have been removed and their restitution in kind is impossible, they shall be substituted — so far as practicable — by objects of the same kind as, and of approximately equivalent value to, the property removed, found on the territory of the defeated States and belonging to whomsoever. (These moveables have to be acquired by the State bound to make restitution.) Paragraph 3 of Article 24 of the Hungarian Paris Peace Treaty provides in this matter that

> "if, in particular cases it is impossible for Hungary to make restitution of objects of artistic, historic or archaeological value, belonging to the cultural heritage of the United Nation from whose territory such objects were removed... Hungary shall transfer to the United Nation concerned objects of the same kind as, and of approximately equivalent value to, the objects removed, insofar as such objects are obtainable in Hungary."

The other Paris Peace Treaties provide likewise. Concerning the property of artistic, historic and archaeological value *("Güter von einmaligem Character")* removed to Germany, the MGR 18 provides on the ground of the above-quoted paragraph 3 of the "*Kontrollratsdirektive*" dated on January 21, 1946, in the same spirit.[29]

[29] See p. 82.

Apart from the restitution of looted monetary gold, the restitution of objects of artistic, historic or archaeological value is the only case in which the rules of restitution depart from the individual returning and require, under certain circumstances, a restitution in kind.

This is also a convincing evidence for the fact that restitution is independent of both the person of the plundered owner and the person of the present possessor (detentor), and also for the fact that in respect of the restitution of removed property, in the active and in the passive relation as well, exclusively the principle of *territoriality prevails*.

6. IDENTIFICATION OF PROPERTY *(IDENTIFICATIO)*. IRRELEVANCE OF THE PERSON OF THE RIGHTFUL OWNER

The principle of territoriality, which comprises the principle that *restitution is a duty independent of the person of the injured owner* and is to be fulfilled *in favour of the injured country*, is closely connected with the second basic condition of restitution: only that property has to be restituted which is identifiable on the territory of the State concerned. The essence of "identification" consists in the individual establishment of the fact that the object concerned is identical with the one claimed by the interested United Nation as having been removed by force or duress from her territory (see hereafter). In the case of restitution the identity of the object is to be established; the rules of restitution do not attach any importance to the question, who was its legitimate owner on the occupied territory. In MGR 19—203 the basic order concerning restitution reads as follows:

> "*a)* Claims may be submitted in a form which sets forth as much as possible of the following data:
>
> 1. description of item claimed for restitution;
>
> 2. maximum available identification data such as factory serial number, specifications and any special marks or characteristics of the item;
>
> 3. last known location of claimed items within claimant country prior to removal to Germany and approximate date of such removal;
>
> 4. last known location of claimed item in Germany;
>
> 5. last known resident of claimant country who was owner or custodian of claimed item prior to its coming into control of the enemy within the territory of claimant country; and
>
> 6. whether or not the property was in existence at the time the occupation of the claimant country began.
>
> *b)* Each claim must include a statement, setting forth so far as possible, the facts and circumstances surrounding the removal of the claimed item from the territory of the claimant country."

The verification of the "ownership" in respect of property removed to Germany was required by the Allies only "*inter alia*" and alternatively (last known owner or custodian), in order to be able to ascertain whether

they succeeded in finding the property having been removed by the Germans from the occupied territory. The name of that resident of the claimant country who was the last known owner or custodian of the claimed object prior to its coming under the control of the enemy on the territory of the claimant country manifestly lent itself as an obvious basis for the identification of removed property. If, however, these data were not available, the restitution authorities had to content themselves with other data suitable for the identification (see especially paragraphs 1—3 of the printed form). The order quoted above says, therefore, that the claim shall set forth as much as possible of the data specified. And it is decisive from this point of view that the form prescribed for the submission of the claims did not even contain a question as to the person of the "legitimate" owner of the property on the former occupied territory. The Allies only demanded the indication of that datum which alone was important for the establishment of the identity, namely the designation of the person from whose ownership or custody the property in question had been removed. The German Military Government Regulations required only in this instance the designation of the owner. They did not examine anywhere else, in whose "legitimate" ownership the property had been as this was an irrelevant circumstance from the viewpoint of restitution.

The Regulations of the Military Governments of Germany reflect most clearly the standpoint and the intentions of the Allies as legislators concerning the question of restitution. For this reason they may be regarded in this respect as the most complete interpretations of the Paris Peace Treaties. The Paris Peace Treaties, in accordance with their whole structure, deal very briefly with the question of identification. Paragraph 8 of Article 24 of the Hungarian Peace Treaty (and the analogous points of the other Peace Treaties) lay down concerning the identification the following:

> "the burden of identifying the property and of proving ownership shall rest on the claimant government".

From this text the inference might possibly be drawn that the claimant Governments are in relation to Hungary and to the other satellite States bound to prove, besides the verification of the identity, also the *present* ownership of the removed property. This would mean that — to acquire the possession of the removed property — the United Nations should have to verify in relation to these States the existence of more conditions than in relation to Germany herself. The restitution proceedings brought to a close (also in Hungary) prove, however, that this was not the case. The United Nations were, also in relation to these countries, only bound to notify, in the interest of the most accurate establishment possible of the identity of the removed property, among others, the designation of the natural or juristic person from the ownership (custody) of whom the respective object had been removed by one of the Axis Powers. That is to say, the States having signed the Peace Treaties demanded, just as the allied military authorities in Germany, only a loose verification of the "ownership" having existed at the time of the removal and not of the

ownership at the moment of the restitution, and they demanded this only in the interest of the establishment of the identity. The German Military Government Regulations, together with the Peace Treaties, consider the fact that the identifiable objects found on the territory of the respective country were removed from the territory of the United Nation concerned as a fundamental criterium of the legal duty of restitution.

7. FORCE OR DURESS. THE "*KOLLEKTIVZWANG*"

The third preliminary condition of restitution in favour of the United Nations is, as we have pointed out already, that the identifiable property found on the territory of the defeated Powers (in certain cases even of neutral countries; see hereafter) was removed by an Axis Power from the territory of a United Nation "by force or duress".

The removal by "force and duress" is doubtlessly one of the most essential elements of the international delinquency substanciating the restitution. It is, therefore, very important to establish what is to be understood by "force and duress". More precisely: when has, according to the Allies as the legislators in this field of International Law, the existence of force or duress to be considered as having been ascertained? The fundamental provision in this question, just as in all other relations of restitution, is the instruction contained in paragraph *a)* of MGR 19—1001, namely

> "The question of restitution of property removed by the Germans from Allied countries must, in all cases, be examined in light of the Declaration of 5 January 1943".

Among the criteria of restitution the "Declaration" in question has without doubt the greatest importance from the viewpoint of the establishment of the existence of "force or duress".

In respect of the interpretation of "force or duress" in the strict sense of the term the London Declaration goes decisively beyond the concept of physical force and psychical duress under Civil Law when, as it is well known, it lays down that the Allies are firmly resolved to declare invalid any "acquisitions of rights" that took place on occupied territory, whether they were carried through by way of open looting or plunder or by way of *transactions apparently legal in form.* On this ground, pursuant to MGR 19—100 2a), the term "force" covers the physical and psychical duress, the looting, theft, larceny and all other forms of "dispossession" included, whether these acts were carried out by German authorities, by officials of the civil or military administration or by individuals. And it covers all acquisitions, too, based on requisitions or on the orders or regulations of the military and occupation authorities. Consequently, besides the property removed by the application of open force or threats all property, rights and interests are likewise subject to restitution that were acquired apparently lawfully, in fact, however, by force or duress.

The conceptual definition of "force or duress", as a matter of course, in the relation of the countries having concluded the Peace Treaties, does

not differ from the above definition of the Allies proclaimed in MGR 19. These countries have solemnly recognized the ideal source of the definition, the London Declaration, just as its binding force is expressed in German relation in paragraph *a)* of MGR 19—100.2. A. Martin (1947) says:

> "It is clear from the general context of the treaties that this term (i.e. 'force or duress') also covers cases where property was taken away, ostensibly with the consent of the lawful owner or holder; and indeed, cases where, to all appearances, due consideration was given. It must, however, be patent from the circumstances of the case that the consent of the owner or holder had been obtained by misrepresentation or threats."

It would have been, however, in the light of the methods employed by the Germans, nearly impossible to establish subsequently when was there actual force or duress behind an apparently lawful contract, and such an investigation would have completely frustrated the intention of the Allies proclaimed in the London Declaration. In effect, as we have already alluded thereto, the Germans brought such means of civil and military pressure to bear upon the authorities and the civilian population of the occupied territories that *behind the will expressed in any form* by whatever military or civil organs or agents there loomed, virtually as a matter of course, *the menacing armed forces of the power*. This explains that, according to the conception of the Allies and the provisions of the German MGR-s,

1. all properties (rights and interests) have been subject to the absolute duty of restitution that had been acquired by the Germans or by their allies by individually employed force or threat (paragraph *a* of MGR 19—100.2)[30] and

[30] Paragraph *a)* of MGR 19—100.1 reads as follows:

> "Restitution will be limited, in the first instance, to *identifiable* goods which existed at the time of occupation of the country concerned and which have been taken by the enemy, by force, from the territory of the country. Also falling under measures of restitution are identifiable goods produced during the period of occupation and which have been obtained by force. All other property *removed* by the enemy is eligible for restitution to the extent consistent with reparations. However, the United Nations retain the right to receive from Germany compensation for this other property removed as reparations."

Paragraphs *a)* and *b)* of MGR 19—100.2 read as follows:

> "*a)* With respect to paragraph *b)* of MGR 19—100.1, where an article has been removed by force at any time during the occupation of a country, and is identifiable, the right to its recovery is an absolute one. The word 'force' covers duress which may occur with or without violence. In this concept are also included looting, theft, larceny and other forms of dispossession whether they were carried out by an order of the German authorities, or by officials of the German civil or military administration, even when there was no order of the German authorities, or by individuals. Also included are

2. the duty of restitution is not absolute if the property has been removed by the Axis Powers from the territory of the United Nations without the use of force or threat but in any other way. This applies in the majority of cases to the property acquired "through apparently lawful means" (paragraph *b* of MGR 19—100.2).

In connection, however, with the execution of the German MGR 19 the Memorandum issued by OMGUS on June 19, 1946, does not, as a rule, *require the verification of the individual "force or duress"* but, in paragraph 3*a*, provides as follows:

> "all claims for restitution ... must be accompained ... by a *statement* as to whether or not force was employed in the *removal* of the goods..."

And paragraph 3*b* adds thereto as an authentic interpretation:

> "if the goods existed in the claimant nation at the time of occupation, it will be *presumed* that force was employed in their removal and restitution will be made."

Accordingly, in such cases (that is, if the goods had already existed at the time of occupation) it was deemed sufficient for the "claimant nation" to assert that force had been employed at the removal of the goods; the contrary had to be proved by the person liable to make restitution.

If goods produced during the German occupation were in question, according to paragraph 3*c* of the OMGUS order mentioned above it had to be proved that force had been employed at the removal.

Consequently, paragraphs 3*a*, *b* and *c* of the OMGUS Memorandum define the execution of the MGR 19—100 para. 2*a*, i.e. of *the absolute duty of restitution.*

The MGR 19—100.2*b* presupposes the illegitimate procedure even if the interested United Nations themselves could not allege definitely that the Germans employed force or duress in the given case. The property "removed" in that way was, however, not subject to "absolute" restitution in contradistinction to the case where the claimant nation affirmed the employment of force or duress, but its restitution depended to a certain degree on the appreciation of the occupying Allied Powers ("eligible for restitution"), i.e. inasmuch as the restitution athorities took into consider-

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acquisitions carried out as a result of duress, such as requisitions or other orders or regulations of the military or occupation authorities.

b) In paragraph *b)* of MGR 19—100.1, by use of the words, all other property removed by the enemy it was desired to include all property which was removed in any other way. This implies that restitution of property may be claimed whatever may have been the means or the reasons of dispossession. But the property removed in such manner does not entail an 'absolute right' to restitution, which may be granted only within the limits consistent with reparations."

ation the necessities of the reparations[31] and of the German economic minimum. How strong the intention was to have all presumably wrongfully removed property restituted, appears from the fact that the Memorandum of OMGUS of June 23, 1948, lays down that:

> "1. Henceforth claims will not be released or handed over for the German economic minimum...
>
> 2. In consequence of this, with the exception of the cases of the nations having concluded Peace Treaties, the missions must only prove that the claimed object has actually been removed during the time of occupation."

Accordingly, from that time on, the United Nations had not even to assert that their goods had been removed by use of force or duress. *By reason of the general unlawful conduct of the Germans it was presumed that any goods belonging to the United Nations could only have passed wrongfully to the territory of Germany or her satellites.*

The regulations of the occupation authorities in Germany passed, as we have pointed out, to a certain extent in a crystallized form into the Paris Peace Treaties of 1947. According to the text of these Treaties (Art. 24, para. 8 of the Hungarian Peace Treaty):

> "the burden of identifying the property and of proving ownership shall rest on the claimant government and the burden of proving that the property was not removed by force or duress shall rest on the Hungarian Government."

Above we have spoken of the question of identifying the property and of verifying the ownership. The existence of "force or duress" was presumed by the Peace Treaties in all cases where a property belonging to the United Nations was found on the territory of the Axis Powers (satellite States), in the same way as it was presumed by the occupation authorities in Germany. The contrary, i.e. that it had not passed from the territory of the United Nations to the territory of the Axis Powers by the employment of force or duress but in a lawful way had to be proved by the latter. As Martin (1947) says:

> "the *presence* of United Nations property in enemy territory raises a "rebuttable" *presumption* that it had been wrongfully removed."

The whole idea, the intentions and legal conception of the Allies were, according to the German scholars, unmistakably formulated by the head of that time of the American Military Government, who in his report on the debate between the four Great Powers on this question pointed out that "(dass) Frankreich die Rückgabe aller Gegenstände gefordert habe, die aus den seinerzeit besetzten Ländern nach Deutschland gebracht

[31] In a considerable part of the cases such workshops were to be made available for the purpose of reparations which comprised also property subject to restitution. Cf. *Kontrollratsdirektive* vom 21, 2, 1946, para. 2. See p. 82.

worden seien, auch dann wenn sie nicht gewaltsam und unter Druck entfernt worden wären"; then he came to the following conclusion:

> "Nach heftigen Auseinandersetzungen kamen wir überein, dass alles Eigentum aus der Zeit der deutschen Besetzung, sofern nicht das Gegenteil bewiesen werde, als unter Gewalt und Druck entfernt und daher als Rückerstattungsgut gelten solle. Die Rückgabe von Gegenständen, die während der deutschen Besetzung hergestellt und nach Deutschland gebracht worden waren, sollte in Erwägung gezogen werden."

In connection with this quotation the German jurists make the following interesting statement:

> "Bezeichnend für die Rechtsauffassung der Besetzungsmächte ist die Definition des "Raubs", die die holländische Regierung in einem Memorandum, das sie der Reparationskonferenz in Paris unterbreitet hat, zugrunde legt: "All goods by their nature fit for restitution which the enemy, his agents or his subjects, by favour of the occupation of the whole or part of the Netherlands, have removed *from the country's national patrimony* as it existed before the occupation, either directly by acts of the transfer or of dispossession or indirectly by purchases or by transactions effected by means of payment which were created, imposed or extorted by the enemy due to the occupation."

In any case, there is no doubt that the legal ground of restitution is the flagrant and continuous violation of the Hague Convention committed by the removal of property, and the fundamental criterion of this consists, also according to the legislation of the Allies, in the employment of "force or duress". The Allies, however, as it is evident from the regulations quoted above in detail, considering those unprecedented methods by which the Germans had terrorized and despoiled the occupied territories, as it was established in the course of the Nuremberg trial in accordance with the rules of procedure, deemed the laying down of the principle legitimate, according to which in respect of the acquisitions of rights by the Axis *the use of force or duress has to be presumed* and the burden of showing the contrary, must, in contradistinction to the general rules of Civil law, be shifted on the acquirer of rights.

We have mentioned that the German jurists are only willing to recognize force or duress as a legal ground of restitution if it took the form of such an individual (or at least individually effective) activity that led to the conclusion of a contract being void or voidable under Civil Law.

The German jurists deny that the Allies could, in connection with the pillage of the territories occupied by the Germans, in an internationally lawful way apply the notion of the "*Kollektivzwang*", i.e. they deny that the Allies were entitled to proceed, in their legislation, from the assumption that the whole population of the occupied territories had been in every respect under a continuous duress and threat; therefore, all property that had "come" from the occupied territories to the territory of the vanquished

States (occasionally of the neutrals) was restitutable in principle. The German scientific position itself recognizes, however, that in a considerable part of the cases the existence of duress justifying restitution has to be admitted even without individual force having been made use of (so, for instance, in the case of purchases by the Wehrmacht or by any other organ of constraint). This may be, in their view, contested in those cases when the business circles of the occupied territories "sich von sich aus bemühten einen Auftrag zu bekommen". The German jurists add to this: "Ein allgemeiner 'Kollektivzwang' oder eine Nichtigkeit wegen Währungsschadens ist dagegen abzulehnen."

The Axis Powers could prove their assertion that in obtaining the goods no force or threat had been used, solely by showing that the goods had been acquired by way of a normal *commercial transaction*. Considering the difficulties of interpretation, OMGUS defined on July 28, 1948, in an exhaustive Memorandum,[32] when in connection with the "removal" of property, in the opinion of the Allies, the existence of a commercial transaction might be regarded as proved, against the presumption of "force or duress". This Memorandum of OMGUS, which reflects the legal conception of the Allies concerning restitution in other respects, too, is quoted hereafter in a slightly abridged form:

"2. Normal Commmercial Transaction

Property removed from an occupied country is considered not to be subject to restitution if it came to Germany in the course of a transaction essentially commercial in character. No hard and fast rules can be laid down as to what constitutes a normal commercial transaction and each case will have to be decided on its own merits in the light of the London Declaration of 5 January 1943. However, some general principles by which we will be guided can be stated as follows:

a) It is incumbent upon the German holder to prove that a normal commercial transaction took place.

. . .

b) The mere fact that payment was made does not establish a normal commercial transaction.

. . .

c) The transaction which must be to have been a normal commercial transaction is the one by which the property came to Germany. Subsequent sales in Germany by one person to another are immaterial.

. . .

d) A certification by the seller in formerly occupied territory to the effect that he received payment and does not want the property back will be disregarded since restitution claims are Government claims and not those of individuals.

. . .

[32] Cf. pp. 90 and 92.

e) We are evolving a practice under which normal commercial transaction is being viewed in the light of business dealings between the non-German seller and the German purchaser before and during occupation.

...

f) The fact that the non-German seller made the offer is of no probative value since it is well known that firms in occupied countries very often were directed to offer their production to specified German firms.

...

g) We consider that the fact that an article was ordered before occupation established normal commercial transaction although delivery took place during occupation."

It must be added that the conduct of the Germans and the other Axis Powers in World War II on the occupied territories was so full of unlawful elements that the Allied regarded a considerable part even of the commercial transactions as having been arrived at under duress.

8. OTHER VIEWPOINTS OF RESTITUTION IN GERMANY AND IN THE SATELLITE STATES

In connection with the restitutions in favour of the United Nations four important aspects must still be mentioned:

A) the question of the time limit;
B) the duty of facilitating the search for goods;
C) the duty to conserve the goods to be restituted;
D) the possible liability to indemnification or compensation.

All the four aspects are essentially in connection with the absolute and general character of restitution.

A) THE TIME LIMIT

The Paris Peace Treaties fix a relatively short time limit: six months for the global restitution, manifestly in the interest of a certain limitation of the nearly unprecedented intrusion into the domain of established rights.

After the expiration of this time limit the Governments of the United Nations cannot, in principle, submit an interstate claim to the vanquished State having signed the Peace Treaty. (During the restitution, as we have pointed out, in principle nobody but the Government could lay a claim to the restitution of removed property.)[33] With the expiration of the time limit restitution on the strength of the Peace Treaty, i.e. the reparation of the losses suffered by the economic life of the country concerned in consequence of the removal of goods was closed, after this the property could only be claimed from the detentor by virtue of the ownership in pursuance to the rules of Private International Law.

[33] See p. 91.

In view of the fact that the majority of removed property came to Germany (and particularly to the USA zone), the occupying Powers ensured for the restitution missions of the United Nations a longer period of activity lasting several years, in consequence of which they were practically in a position to carry through the global restitution entirely. The original time limits lasted till the summer of 1948, yet according to Schmoller, Maier and Tobler[34] they were prolonged for the United Nations (as to Hungary, see below) in all three western zones according to need: by January 1, 1951, the restitution procedure was closed in the USA zone, in the British zone it was drawing to its end, in the French zone it was still going on.

The countries, signatories to the Peace Treaty, in which the search for removed property could not be carried out within the prescribed time limit, for instance also Hungary, prolonged the time limit in favour of the interested United Nations by virtue of special agreements.

As it is evident from what has been said above, the restitution claim was in any case due to the State within the time limit fixed. It is, however, interesting to examine whether, within the time of interstate restitution, on the ground of the fact of "dispossession",[35] only the State could lay a restitution claim of Public International Law, or could the dispossessed owner himself lodge a direct claim of reclamation under Civil Law, too? In Martin's opinion, "in the absence of any express waiver in the Treaties, there is no reason why private individuals or corporations should not pursue their claims direct, — this view is strongly supported by the municipal legislation of the neutral states which clearly recognize the original owner's independent right of action". In our opinion, the question whether a United Nation granted or not to her nationals an "independent action", depended, unless otherwise provided by international agreement, only on her municipal legislation. There is no doubt, however, that if a United Nation granted to her nationals during the time of restitution also an independent action, the State bound to make restitution was not bound by the rules of restitution newly created by the Allies, but only by the normal rules of general Private International Law. In other words, the "dispossessed owner" did not obtain by virtue of the Peace Treaties the special favours of the provisions of restitution, but could only enforce his claim by means of an ordinary legal action taken against the present possessor or detentor. Such an owner could obtain procedural or similar favours solely by virtue of the municipal regulations of the debtor State.[36]

B) SEARCH FOR PROPERTY. CO-OPERATION OF THE STATE LIABLE TO MAKE RESTITUTION

Closely connected with the determination of the time limit of restitution was the provision of the Peace Treaties (and the disposition of the Military Governments in Germany) which decreed that the country liable to restitution

[34] (1957) § 52. p. 16.
[35] Martin (1947) p. 282.
[36] See the legislation of Switzerland, p. 117.

> "shall co-operate with the United Nations in, and shall provide at its own expense all necessary facilities for, the search for and restitution of property liable to restitution."

The delinquency committed by the removal of property was qualified so grave by the Allies that they not only ordered the restitution of the objects discovered and identified by the interested United Nations but imposed the obligation upon the authorities and the whole population of the defeated countries to assist the injured countries in the search for removed property and even to bear the costs of the search. The Military Governments of Germany obliged by a rigorous order all natural and juristic persons (namely all "persons under public or private law")

> "who...
> *a)* possess, hold or shelter,
> *b)* have possessed, held or sheltered,
> *c)* have or believe they have knowledge of the present location of, or
> *d)* have moved, assisted in moving, ordered move or transmitted instructions to move any PROPERTY REMOVED FROM AN AREA OCCUPIED BY GERMAN FORCES..."

to make a declaration in writing, upon pain of punishment, of all such goods, knowledge, and action through the competent German authority (MGR 19—504). An order of the same character was issued by virtue of their obligation undertaken in the Armistice Convention also by the Hungarian Government (Nr 527/1945 M. 5) and by the other Governments having signed a Peace Treaty. Without that, the removed properties could have hardly been found within the prescribed time limit. Accordingly, the legal duty of restitution comprised not only the delivery of the removed property but also its "discovery". Those who failed to make the declaration also committed a crime. France and Belgium, from the territory of which the Germans had removed the relatively largest amount of property by open force or apparent transactions, prepared *registers suitable for the identification* of the restitutable goods, particularly of machines and works of art, and the respective Governments were bound to see to it that the individuals, enterprises and institutions concerned should examine whether they possessed some object figuring in the register. The International Law that has developed after the Second World War attaches to the international delinquencies on this point, that is also on this point, considerably wider consequences than the International Law in force till then.

C) CONSERVATION OF PROPERTY

The Paris Peace Treaties do not provide expressly for the conservation of the property liable to restitution, evidently because the very conclusion of the Peace Treaty and the provision contained therein pursuant to which

> "the obligation to make restitution applies to all identifiable property at present in (Hungary) ... etc."

(Hungarian Peace Treaty, Art. 24 para. 2) furnished sufficient certainty that all property having been removed to these countries will not be let out therefrom. The Peace Treaties also guaranteed that the substance of the goods will not be injured. Paragraph 6 of the quoted Article (and the analogous paragraphs of the other Peace Treaties) provides that

> "the ... government shall return the property... in good order and, in this connection, shall bear all costs in Hungary relating to labour, materials and transport."

In connection with the property removed to Germany the danger of loss or deterioration was much greater. Therefore the MGR 19 and the announcements of the provinces issued by virtue of it lay down upon pain of prison and penalty as follows:

> "All custodians, curators, officials or other persons having possession, custody or control of PROPERTY REMOVED FROM AN AREA OCCUPIED BY GERMAN FORCES as defined in Paragraph 5 below are required, in addition to making a declaration as required above, to:
>
> *a)* hold all such property pending directions of Military Government and pending such direction, not to transfer, deliver, or otherwise dispose of the same;
>
> *b)* preserve, maintain and safeguard, and not to cause or permit any action which will impair the value or utility of such property;
>
> *c)* maintain accurate records and accounts with respect to all such property.
>
> No person shall do, cause or permit to be done, any act of commission or omission which results in damage to or concealment of any of the properties covered by this order."

Considering the *implicit* provisions of the Peace Treaties and the *explicit* provisions of the MGR we may state that, in shaping the international legal order and with a view to preventing the circumvention of the international legal duty of restitution, the Allies deemed justified to hold responsible the Governments for the *conservation of the property in good condition* as long as the restitution was carried through.

In compliance with the provision of the Peace Treaties ordering that the country to the territory of which the property was removed is bound, in the interest of returning the property in good order, to bear the transportation expenses, too, the MGR 19—400 contains the following analogous provision:

> "relevant transportation expenses within the present German frontier and any repairs necessary for proper transportation, including the necessary manpower, material and organization, are to be borne by Germany and are included in restitutions. Expenses outside Germany are to be borne by the recipient country."

D) COMPENSATION FOR PROPERTY LOST OR DESTROYED AFTER IDENTIFICATION

As we have several times pointed out, the very essence of restitution is to make it in a specific way individually and that only such property is subject to restitution as can be discovered and identified on the territory of the country. In principle neither substitution nor compensation may be claimed for property, although having been verifiably removed, that cannot be found, apart from the two cases of restitution in kind (see above), except, of course, if a particular international delict rests on the country liable to make restitution (see below the Chapter X on compensation). Nevertheless, according to the regulations of the military authorities in Germany, substitution or compensation may be claimed in the case when the removed property has already been discovered and identified on the territory of the respective country. In virtue of the disposition of August 30, 1949, of the German "Headquarters BDR Division", the obligation to pay "compensation" exists in respect of those goods which

> "*a)* ...although identified ... were used (by the German economy) under authority of Military Government officials after the receipt of the restitution claims, —
>
> *b)* ...have been *destroyed, stolen or disposed of* in other ways after receipt of the claim and identification;
>
> *c)* ...have been delivered as reparations after the receipt of the claims."

The Paris Peace Treaties do not speak explicitly of the legal duty of compensation. This, however, was obviously unnecessary as these Treaties clearly established which properties, under what conditions, and in what state had to be "restituted". The failure to carry out in due form the restitution constituted a breach of the Treaty and entailed the consequences thereof. The above-quoted Order in council of the Hungarian Government,[37] for instance, by laying down that all individuals, all heads of public corporate bodies and public institutions, and all public authorities "are bound to declare all objects transported in the course of the war from the territory of the United Nations to the territory of Hungary, to preserve them carefully and to maintain them in good order", and by qualifying the omission of the duty of declaration as theft, the neglect of the duty of preservation and care as malversation, expressed that the objects in question were to be considered as foreign deposits, with all the effects of such a legal situation.

[37] See p. 111.

CHAPTER V

THE NEUTRALS AND RESTITUTION

1. THE LONDON DECLARATION AND THE GOOD FAITH OF NEUTRAL ACQUIRERS OF RIGHTS

The solemn warning of the London Declaration signed on January 5, 1943, that the lawfulness of the acquisition of property tortiously removed from the territory of the United Nations will not be recognized by the Allies, was directed, according to the words of the Declaration, "primarily" to the neutral countries. The Declaration, as we have pointed out already, had no binding force on the neutrals, nor did it have the character of a rule of International Law: it did not declare null and void the acquired rights even in respect of the vanquished. "Sie erhebt noch keine unmittelbaren Restitutionsansprüche, sondern bedeutet nur Vorankündigung späterer Forderungen auf Restitutionen."[1] Notwithstanding, the legal principles proclaimed in the Declaration were not to remain the unilateral statements of the Allies, since these principles were confirmed by the Powers representing the German sovereignty in the MGRs and by the other defeated countries in the Peace Treaties. In consequence, the duty of those States to return the property removed by force or threat and to annul the transactions concluded as well as the transfers to third persons, became also formally a rule of International Law.

The norms in question, however, in spite of the wide-spread range of their application, represented still only the will of the victors as against the vanquished. The general validity in International Law of these legal principles was essentially characterized by the fact that the Allies partly induced the neutrals to issue Municipal Laws in conformity with the spirit of the London Declaration, and partly concluded with the neutrals particular agreements with a view to invalidating the transactions by which these countries or their nationals acquired removed property or rights and interests previously acquired by force or threat, although apparently lawfully. And it is a decisive fact here that the neutrals could not refuse to accept explicitly the legal principles expressed by the Allies in the London Declaration and to recognize their legal duty of restitution in conformity with these principles. It is common knowledge that in the first place Switzerland and Sweden, as the most interested countries, tried to resist, as long as possible, the political pressure of the Allies and by referring to the acquisition in good faith, to stand up against the restitution claims put in by the Allies. It has proved, however, uncontested that, as a result of the public warning contained in the London Declaration, the neutrals can no longer refer to an acquisition in good faith either, and have to recognize

[1] Schmoller, Maier, Tobler (1957) § 52 p. 6.

the general lawfulness of the international legal principles proclaimed by the Allies.

2. INTERNATIONAL DELINQUENCY; ALSO THE BASIS OF THE NEUTRALS' DUTY OF RESTITUTION

So far we have explained that the basis of the restitution duties in the technical sense of the term, as they developed after World War II, was always an international delinquency, and not only the delinquency committed by the interested Axis Power but also the delinquency perpetrated by any other Axis Power, for which the interested Axis Power was held jointly and severally responsible. Does this general principle hold true in respect of the restitution stipulated to the charge of the neutrals, too? In our opinion, there can be no doubt that in the last analysis the ground of the restitution duty of the neutrals is equally international delinquency. It is a fact, as we have said above, that until the London Declaration the neutrals could, in the absence of an appropriate international rule of law, not be accused of having violated the positive International Law even if they knew or had to know that the property, rights and interests acquired by them had got into the possession of the Axis Powers or their nationals by the violation of the International Law of War. The solemn declaration, however, proclaimed by the Allies in the name of eighteen nations made it clear to the neutrals that by the subsequent acquisition of property having been obtained by way of an international delict or by permitting such a subsequent acquisition, as a matter of fact, they, too, committed a delict or at least participated in it. The London Declaration did not constitute a delinquency, it expressed, however, that according to the sense of justice of the civilized world no subsequent rights might "*bona fide*" be acquired on property having been obtained by means of such a serious violation of International Law. Accordingly, the property nevertheless acquired in this way had to be restituted „*ex delicto*" by the neutrals just as by the vanquished. This standpoint of the Allies, in connection with which Martin[2] mentions that

> "in the case of a neutral ... it is difficult to find a legal (as distinct from a political) explanation (for the Swiss precedent)... without resorting to a new principle of international law",

is corroborated with the conviction of the science of International Law by Oppenheim—Lauterpacht:[3]

> "There is little room for doubt that acts of deprivation of property in disregard of International Law are incapable of creating or transferring title. Neutral States which by failing to take the requisite and practicable steps for preventing

[2] (1947) p. 280.
[3] (1952—56) Vol. II. note to § 147.

> their subjects from acquiring the property in question connive indirectly in the unlawful measures of the occupant and incur a responsibility whose novelty probably does not preclude it from being enforced by appropriate international remedies."

It results from the quoted statement of Oppenheim—Lauterpacht that, after having stated that by virtue of a fact infringing International Law no title can be created or transferred, in other words that such an acquisition or transfer of rights is null and void, the authors consider the neutral States as being bound to take practicable steps for preventing their nationals from acquiring such property. If they fail to take these steps, they become an accomplice in the illegal measures taken by the occupying Powers and, therefore, incur an international legal responsibility for the enforcement of which the appropriate means have to be found.

What else is this if not the implicit introduction into jurisprudence of the concept of the crime of receiving and concealing stolen goods as a *sui generis delinquency of International Law* (a quasi delict)?

3. THE OPINION OF DR GOTTFRIED WEISS ABOUT THE NEUTRALS' DUTY OF RESTITUTION

The "new principle" represented by the Allies, namelly the principle that such a grave violation of the international legal order has to be internationally prosecuted and that nobody may make a profit out of it, was confirmed on the part of the neutrals by an eminent Swiss jurist, Dr Gottfried Weiss (1946) in his profound treatise which attributes, in accordance with us, to the legal principles in question an even greater importance than to the Hague Convention. Professor Weiss alluding to the Hague Convention says:

> "Wir sind uns bewusst, dass diese Umschreibung (according to the Hague Convention) völkerrechtlicher Grundsätze angesichts der Erlebnisse des zweiten Weltkrieges ... innere Vorbehalte mannigfaltigster Art zu wecken geeignet ist.
>
> Aber trotzdem, oder gerade darum, ist es nötig, sich auf diese Grundsätze zu besinnen und sich zu ihnen zu bekennen. Es darf keine Diskussion darüber geben, dass die Schweiz im Verhältnis zu den besetzten Ländern jene Prinzipien anerkennt und dementsprechend jeden völkerrechtswidrigen Eingriff in das Eigentum in besetzten Gebieten als wiederrechtlich betrachtet und dass kein Erlass und keine Anordnung einer Besetzungsmacht daran, von unserem Standpunkte aus gesehen, etwas zu ändern vermochte.
>
> Ebenso selbstverständlich bleibt es bei dieser grundsätzlichen Einstellung auch hinsichtlich solcher völkerrechtswidrig weggenommener Güter, die auf irgendeine Weise ihren Weg in die Schweiz gefunden haben. Sie sind für uns mit dem Makel der widerrechtlichen Wegnahme behaftet."

The statement of Professor Weiss is a sharp and definite position taken up in contradistinction to the German scientific standpoint, contested also by us, according to which only those acquisitions by third persons may be considered as "*mangelhaft*" which are void or voidable from the

viewpoint of Civil Law.[4] The position taken up by the Swiss Professor Weiss corroborates in an even more energetic way than Oppenheim—Lauterpacht the "new international principle", as it was expressed in the London Declaration of January 5, 1943, and in the legislation of the Allies concerning restitution. We quote here the lines of the treatise of Professor Weiss concerning the London Declaration and the question most sharply contested (from the Swiss viewpoint), the protection of the *bona fide* acquirer of right:

> "Selbstverständlich konnten Erklärungen wie jene Londoner Deklaration der 18 alliierten Regierungen oder Einzelerlasse wie diejenigen verschiedener Exil-Regierungen unser internes Recht nicht tangieren...
> Aber, hätte es Recht und Billigkeit, hätte es dem Gebot eines gerechten Ausgleiches der widerstreitenden Interessen noch entsprochen, wenn wir schlechthin am Schutz des gutgläubigen Erwerbers, so wie er in unserem allgemeinen Recht verankert ist, festgehalten hätten?"

Beside the political factors these were the viewpoints that, according to the argumentation of Gottfried Weiss, had to induce the neutrals to take appropriate internal legislative measures in the question of the German foreign property and the restitutions, and to sign agreements on this subject with England, France and the United States representing the Allies in these matters.

4. THE SWISS *BUNDESRATSBESCHLUSS* OF DECEMBER 10, 1945

The most complete neutral regulation in the question of restitution is contained in the Swiss *Bundesratsbeschluss* of December 10, 1945, which, although obviously based on political pressure, on an agreement concluded by Switzerland with England, America and France *("Currie-Abkommen")*, preserved the character of sovereign municipal legislation, thereby emphasizing even more the general validity of the new international legal principles developed by the Allies.

The *Bundesratsbeschluss* ordered the restitution of all property removed from the occupied territories to Swiss territory in defiance of International Law. The criteria of restitution were defined nearly literally in the same way as by the London Declaration. According to them, the legal duty of restitution is established if a person who was the owner or possessor of movables or securities in the occupied territories or had such property in his custody, in the period between September 1, 1939, and May 9, 1945,

> "in völkerrechtswidriger Weise beraubt oder durch Gewalt, Beschlagnahme, Requisition oder andere ähnliche Handlungen seitens der militärischen und zivilen Organe oder der bewaffneten Streitkräfte einer Besatzungsmacht um Besitz und Eigentum... gebracht worden ist."

And the duty of restitution is equally established if the person who

[4] Schmoller, Maier, Tobler (1957) § 52 pp. 20 and 22.

was the owner or possessor of the property just mentioned or held such property in his custody

> "sich solcher Sachen zwar selber begeben hat aber unter dem Einfluss einer Täuschung oder gegründeter Furcht, wofür die Besatzungsmacht oder ihre militärischen oder zivilen Organe verantwortlich zu machen sind."

Let us analyse more comprehensively the Swiss *Bundesratsbeschluss:*

1. The *Bundesratsbeschluss* is, as we have pointed out, a municipal provision of law, Switzerland, however, undertook in an international agreement the obligation of enacting it. The obligators and obligees of the legal relation regulated by this provision of law are under the jurisdiction of different States: the obligation is attached to the territory of Switzerland, the claim to the territory of one of the United Nations. This determines the international character of the legal relation, the question is, however, whether the claim the obligee may pursue is a claim of Public or only of Civil Law?

2. According to the words of the *Bundesratsbeschluss*, the legal basis of the restitution claim is explicitly a "*völkerrechtswidrige Handlung*", i.e. an act infringing Public International Law *(Völkerrecht)*, the consequence of this can only be the establishment of a claim of Public International Law. The legal ground of the claim is not the fact that a Swiss subject committed a tort of civil law or that between a subject of the United Nations and a Swiss subject a void or voidable transaction was concluded (from the viewpoint of Civil Law), giving rise to a claim for recovery of property, to a *rei vindicatio.* The legal basis of the claim is an international delinquency determined and defined by the Swiss Law in compliance with the international legislation of the Allies. This international delinquency consisting in the violation of the Hague Convention was not committed by the Swiss person concerned, but by the German who prevented by their conduct the acquisition of a "title" in respect of the object in question by anybody. By having acquired the removed property the Swiss are "*ex quasi delicto*" bound to return the property in question. This is why no difference is made between *bona fide* and *mala fide* acquisition and that in the last resort the responsibility of the "*Bund*" is provided by the Swiss legislation.

3. There is no doubt that the *Bundesratsbeschluss* is, after all, but the execution of an agreement of Public International Law, of an international agreement "in dem die Schweiz zugesichert hatte, dass sie — nötigenfalls unter Änderung der bestehenden Gesetzgebung — die Rückforderung von Vermögenswerten erleichtern würde, die den Besitzern in kriegsbesetzten Ländern in widerrechtlicher Weise oder unter dem Einfluss von Zwang weggenommen worden seien". In contradistinction to the regulations of the Military Governments of Germany and the provisions of the Peace Treaties, by virtue of which the subjective right of restitution is *only due to the State itself*, the *Bundesratsbeschluss* expressly attributes the claim for recovery of property beside the State as *representative* of the injured party also to those natural and juristic persons who were the owners or possessors of the removed property on the occupied territories or kept the removed property in their custody, in other words it gives to the

persons injured on the territories having been under German occupation the right of individually enforcing a claim of the character of Public International Law.

We have discussed above the problem whether the individual may be considered as a subject of International Law. We have pointed out that although some international jurists recognize the individual to a certain extent as a subject of International Law, the socialist jurists reject this unanimously and definitely. The former adopt, as a rule, the standpoint that the individual may only be recognized as a subject of International Law on the ground of being vested with this character by the State in virtue of International Law, under an international treaty. Professor Verdross, in the same way as the Hungarian István Kertész, mentions as an example the possibility of the individual to institute judicial proceedings before a mixed tribunal. The Peace Treaties closing World War I granted the right to private persons to bring, in certain cases determined one by one, an action before the mixed tribunals against a foreign State. The contracting States, as Kertész points out, could also have instituted the proceedings in these cases themselves, on behalf of their nationals, as it happened for instance before the Permanent International Court of the Claims Commissions; with regard, however, to the high number of the cases and their variety, and also in order to relieve the authorities of the State of this charge, it seemed advisable to vest private persons with the right of directly instituting legal proceedings. "The individuals, however, do not do in these cases anything else but are exercising rights precisely defined by international treaties concluded between States." This thesis, corroborated by Kertész with some other examples, confirms the standpoint that in all those cases where private persons individually enforce claims of the character of International Law, they are acting on the authority delegated by the State, in the last resort in place of the State. In other words, *a claim of Public International Law becomes in no way a claim of Private International Law in consequence of the sole fact that it is pursued by a private party.*

Accordingly, if it is true, as we have proved, that the Swiss *Bundesratsbeschluss* wanted to render possible the enforcement of claims of Public International Law character based on *Völkerrechtswidrigkeit* and thus belonging to the State, this fact was not in the least altered by the circumstance that the claims were enforced, quasi on behalf of the State, by private persons. A claim does not become a claim of Civil Law character even if it serves the benefit of the private claimant, too. The State here did not do anything else but consented in advance to deliver the property reacquired on the ground of Public International Law to the "dispossessed owner". The State or the States being parties to the previous international agreement could have equally agreed to deliver the restituted property to somebody else. By virtue of a *Völkerrechtswidrigkeit* the injured is after all the State; primarily the State may lodge a claim against the other State, it is entitled to the restitution, thus *it may dispose of the restituted property at its sovereign discretion.*[5]

[5] Kaufmann (1949) point 19, and the present treatise p. 87.

4. The form of the *Rückforderung* was pursuant to the *Bundesratsbeschluss* the lawsuit before the Swiss courts. This action, however, had not a general Civil-Law character, in spite of the fact that it was instituted by private persons (or by the Government as the representative of private persons) against private parties. The procedure was relegated to the exclusive jurisdiction *(ausschliessliche Zuständigkeit)* of a special chamber of the *Schweizerisches Bundesgericht*. For the enforcement of the specific claims of international legal character enforceable by private persons, the *Bund* enacted quite exceptional substantive and procedural rules and for the exceptional proceedings it fixed a time limit of two years. After the expiration of this time limit the injured persons could enforce their claims through ordinary judicial proceedings pursuant to the ordinary rules of Civil Law and Civil Procedure in the same way as it happened also in the intergovernmental restitution proceedings.[6]

Let us examine now the character of the exceptional substantive and procedural rules of law wich were relevant to the enforcement of the *Rückforderung* (claims for restitution) in pursuance of the *Bundesratsbeschluss*.

A) ABANDONMENT OF THE PROTECTION OF THE *BONA FIDE* ACQUIRER OF RIGHTS IN THE MUNICIPAL LEGISLATION OF THE NEUTRALS

From the point of view of substantive law the Swiss rules of restitution obtained a nearly revolutionary character in consequence of the *lack of the protection of the acquisition in good faith*. The court was obliged to establish the legal duty of restitution irrespective of the mode of acquisition ("irrespective of any subsequent transaction by which the present holder... has secured possession" — cf. Hungarian Peace Treaty, Art. 24, paragraph 2) and irrespective of the fact in whose possession or detention the property removed to Switzerland in violation of International Law had passed. The abandonment of the protection of the acquisition in good faith, as we have already pointed out above, produced the sharpest criticism on the part of the Swiss interested persons against the Government of the *Bund*. To this criticism was Professor Weiss opposed. As a matter of course, the Allies, if they attached any importance to the London Declaration, could in no way abandon their thesis that since on January 5, 1943, eighteen Allied Nations energetically warned the neutrals that "they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war" and that they would declare void and invalid all acquisition (not only those executed by robbery and pillage but also those performed by way of apparently legal transactions, in fact, however, by force or duress[7]) they could not recognize the good faith of the acquisition. The property acquired *völkerrechtswidrig* by the Germans was to be restituted *ex quasi delicto* by the subsequent neutral acquirers, too. Professor Weiss was entirely conscious of this when, for the

[6] See p. 109.
[7] See p. 79.

conflict between the internal and international legal principles, he reproached not the Allies but the Swiss *Bundesrat* by these words:

> "Wäre nicht wenigstens die Londoner Erklärung vom Jahre 1943, jene Erklärung der 18 alliierten Regierungen, Anlass gewesen, die notwendig erscheinende Gesetzesänderung vorzunehmen, oder zum mindesten anzukündigen?"

The new principles of International Law formed by the Allies thus manifested themselves in the absolute character of the legal duty of restitution in relation to the neutrals, too.

The Swiss municipal legislation was forced to establish implicitly the responsibility *ex quasi delicto* of the State, namely in connection with the internal, not international legal protection of the *bona fide* acquirer. Wanting to mitigate the revolutionary effect of the Act, the *Bundesratsbeschluss* granted a counterclaim to the acquirer in good faith against his predecessor up to the amount of the purchase price received. If, however, at the end of the claim there stood a *mala fide* acquirer who was insolvent or was residing outside the scope of the jurisdiction of the Swiss courts, the last *bona fide* acquirer *could lodge a claim against the State* for the equitable reimbursement of the loss incurred. Consequently, in the last resort the State assumed the responsibility on the ground of the principle of territoriality, *ex quasi delicto*, for the acquisition by third persons of the property removed in an internationally illegal way to its territory.

The absolute character of restitution revealed itself in relation to Switzerland also in the fact that the property removed from the territory of the United Nations by force or threat, and found and identified on Swiss territory had to be returned to the claimant (to the Government or the interested person) without any consideration, in the same way as by the defeated States. Nevertheless, in the case of the neutral Switzerland the distinction was made that inasmuch as the Swiss acquirer bound to make restitution proved that the had paid a purchase price directly to the claimant, the court could make the restitution dependent upon the reimbursement of the purchase price.

B) THE SYSTEM OF THE RULES OF PROCEDURE CONCERNING THE SWISS RESTITUTION

In respect of the procedural rules of the restitution proceedings Switzerland succeeded, by referring to her ancient municipal legal system, in obtaining in relation to the Allies that these should abandon their generally applied principle, according to which the existence of "force or duress" was generally to be presumed in respect of rights acquired from the territory of the United Nations during the occupation, and the burden of proving the contrary rested on the person liable to make restitution; this success, however, was only of a formal character. According to the Swiss Act, the fact of the "wrongful removal", the application of "force or duress" had

to be proved by the reclaiming Government or person (thereby the Act satisfied the fundamental requirement of the Swiss law), the Act, however, layed down on the other hand (and here in fact it bowed before the new principles of law of the Allies) that the judge was not allowed to demand evidence in conformity with the requirements of the law of procedure, but "er muss sich vielmehr mit der blossen Glaubhaftmachung dieser Tatbestände begnügen". Thus, the Swiss acquirer was somewhat better protected than if he were bound to prove the contrary against the mere presumption. Professor Weiss mentioned,[8] however, that the procedure, according to which the claimant had only to make the existence of the international wrongfulness probable (what was not difficult in consequence of the general conduct of the German occupants), nevertheless protected the interest of the reclaimant to such an extent that it did not even preclude the adjudgment of the property to such persons „die vielleicht niemals Eigentümer oder Besitzer waren, oder denen Werte nicht in völkerrechtswidriger Weise weggenommen worden sind, oder deren Werte sich gar nicht in den besetzten, sondern in anderen Ländern befanden und auf irgendwelchem Wege in die Schweiz gelangt sind". The Swiss scholar considered that Switzerland had to take this risk rather than to contribute on her part to the pillage of the countries occupied by the Germans. "Man wird allgemein sagen dürfen, dass in einer Zeit der Rechtsverwirrung und Rechtsvernichtung, wie sie die Bevölkerungen unserer Nachbarländer erlebten, dem Erwerber erhöhte Aufmerksamkeit zur Pflicht gemacht werden durfte" — stated Professor Weiss and by that he fully supported, on behalf of jurisprudence, the international legality of the presumption generally applied by the Allies that the property had been removed by "force or duress" from the occupied territory to the territory of the Axis Powers and even of the neutrals, and so it had to be restituted in principle on a territorial basis.

From the foregoing it clearly appears that the principles of law developed by the Allies concerning restitution were confirmed by the legislation of Switzerland as the most interested country among the neutrals, and this, as we have pointed out, supported energetically the general international legal validity of these principles.

5. THE "UMFASSENDERE INTERSTAATLICHE RECHTSIDEE" AS SOURCE OF THE NEW LEGAL PRINCIPLES OF RESTITUTION

Professor Weiss desires to give full moral support to the new international principles of law by concluding his treatise with the following lines:

> "Niemand wird sich der Einsicht verschliessen können, dass Zeiten allgemeiner Erschütterung und Umschichtung ihre tiefen Spuren in den Rechtsordnungen aller unmittelbar und mittelbar davon erfassten Staaten hinterlassen müssen..."

[8] (1946) part 8.

"Wir werden uns dieser Entwicklung nicht entgegenstellen wollen, noch uns ihr entgegenstellen können."

"Der Bundesratsbeschluss vom 10. Dezember 1945 ist eine von vielen Einschränkungen, die sich die schweizerische Rechtsordnung auferlegt hat, eine besonders schwerwiegende angesichts der rückwirkenden Vernichtung erworbener Eigentumsrechte."

"So betrachtet, hilft der Bundesratsbeschluss mit, jene allerschlimmsten Verstösse gegen die Privatrechtsordnung zu beheben, die in jenen Ländern begangen worden sind, die nicht wie wir den Schrecken des Krieges entgehen durften. Der Bundesratsbeschluss hilft mit durch unseren Verzicht auf erworbene Rechte, und zwar ... durch Verzicht auf Rechte, die unserer Gesetzgebungsbefugnis unterstehen, *einer umfassenderen, einer interstaatlichen Rechtsidee zu dienen.*"

This "umfassendere interstaatliche Rechtsidee", of which we have stated above that as a matter of fact it is the basis and starting-point of the whole new law of restitution, revealed itself also in the municipal legislative acts that were framed by the other neutrals concerning the restitution of the property removed from the occupied territories to their territory, and this was the legal title, though not the genuine motive, of the international agreements, too, which were concluded by the Western Allies with Switzerland, Sweden, Spain, and Portugal, among others on the subject of the execution of the interallied "Agreement on Reparations" signed on January 14, 1946.

6. THE SWEDISH MUNICIPAL ACT

Among the Acts enacted by the neutrals concerning restitutions, beside the Swiss municipal Act we have to mention in the first instance the Swedish Act of June 29, 1945, and the Portuguese Act referring to the same subject. These Acts were based essentially on the same principles as the Swiss Act and thereby they accepted and confirmed the international legal force of the principles of the London Declaration and the principles of restitution developed by the Allies. The *ex quasi delicto* responsibility of the State for the property removed from the territory of the United Nations to the territory of Sweden, and declared restitutable irrespective of the good or bad faith of the acquirer, is even more emphasized by the Swedish Act of June 29, 1945, than by the Swiss Act. The Swedish *bona fide* acquirer was not bound (although as a matter of course he was entitled) to turn against his legal predecessor in title but could claim directly from the Swedish Government full compensation for his loss originating from the performance of the international duty of restitution.

7. REQUISITION OF GERMAN PROPERTY ON NEUTRAL TERRITORY FOR THE PURPOSE OF RESTITUTIONS AND REPARATIONS

Apart from satisfying the claim to reparation of the Allies, the Reparation Agreement of Paris was destined to ensure, by means of International Law, and to support economically the legal duty of restitution of the neutrals.

The Powers that signed the Paris Reparation Agreement, among which Albania, Czechoslovakia and Yugoslavia are also enumerated[9] and which were represented by the *Western members* of the Control Council of Germany wanted to assert the following *legal standpoints* against the neutrals: 1. the identifiable German property situated abroad and originating from the territory of the United Nations must be restituted *in natura ;* 2. the German property of a different character must be made available by virtue of reparation to the United Nations entitled thereto; 3. the monetary gold looted by the Germans from the United Nations and removed to their (i.e. the neutrals') territory has to be delivered with a view of being divided between the respective United Nations in proportion to their losses.

As we have alluded thereto, at the beginning the neutrals resolutely opposed the demands of the Allies, in the end, however, they partly yielded to their political pressure, partly bowed before the "ethical" motives of the principles of International Law developed by the Allies, and after having, apparently spontaneously, adopted these principles in respect of certain main questions, primarly of the question of restitution, in their municipal legislation, they concluded international agreements with the Allies with a view of regulating the remaining questions.

In the Agreement signed on May 25, 1946, in Washington by France, England and the United States on the one hand and by Switzerland on the other, *Switzerland* consented to liquidate the German property — i.e. the property belonging to German nationals domiciled in Germany — found on her territory, and to devote half of the proceeds of the liquidation to the purpose of reparations. Another part of the proceeds of the liquidation was applied by Switzerland for the indemnification in German currency of the German nationals who suffered an "injury", expressing thereby that she did not accept the legal standpoint of the Allies in the question of the appropriation without compensation of the German property found abroad. — The Washington Agreement settled, in the scope of the restitutions, the question of the looted gold found in Switzerland. Switzerland undertook to pay 200 millions of gold francs to the Signatories of the Paris Reparation Agreement in place of the "restitution" of the monetary gold looted by the Germans during the war and acquired by Switzerland.[10]

The "Understanding" concluded *with Sweden* on July 18, 1946, equally in Washington expressed essentially the same standpoint of the Allies and the same defensive attitude against it as the Swiss Agreement. In the

[9] See also p. 98.
[10] Concerning this question see also p. 98.

result Sweden met in the same way the claim of the Western Allies for the liquidation of the German property and for the delivery of the proceeds as Switzerland. She placed at the disposal of the Allies 75 p.c. of the German property estimated at 105 million dollars, although not expressly for the purpose of "reparations". The Understanding took into account the legal reservation of Sweden by avoiding the reference both the to standpoint of the Allies and to the Swedish standpoint. Sweden, too, met the claim for the restitution of the looted monetary gold: she undertook to deliver in gold 28 million Swedish Crowns.[11]

Concerning the handing out of the German property, France, England and the United States concluded an agreement on February 21, 1947, *with Portugal* (where on the subject of the property removed to her territory similar municipal legislative measures were taken as in Switzerland and Sweden) and *with Spain* in Madrid on May 10, 1948.

The protestation of the neutral States against the restitution claims of the Allies and particularly against the restitution of the public movable property — in the first instance of the gold — acquired by the Germans according to the words of the Hague Convention „lawfully",[12] did not prevent, as we have seen, the enforcement on their territories of the principles of law developed by the Allies concerning restitution, nor did it hinder the appropriation of the German property.

After all, the "*umfassendere interstaatliche Rechtsidee*" asserted itself also in respect of the neutrals wholly and completely. The direction was given by the London Declarations of January 5, 1943, and February 22, 1944, which were completed by the "Final Act" of July 22, 1944, of the Bretton—Woods Conference; the ethical basis was supplied by the statements of Professor Weiss who opposed the critics of the Swiss Municipal Act on restitution.

Consequently, the municipal legislation of the neutrals and the agreements concluded by them with the Allies had to accept the principle of International Law according to which *no third State or person should profit from such a serious international delinquency* as that committed by the Axis Powers through the pillage of the occupied territories. They accepted the principle that also the neutrals were bound to restitute all corporeal and incorporeal goods having been acquired by open or covert force by the Axis Powers who had misused the situation produced by the occupation. The legal basis of restitution is the injury caused to the collectivity, to the economic life of the occupied country and, consequently, its substance does not consist in the returning of goods to the legitimate owner but in their retransportation to the territory of the injured country and in the restoration of the injured economic life, in other words, in the establishment of the fact that the removed property falls under the sovereignty of the injured State, is located from a legal point of view on its territory even before retransportation, belongs under its custody and

[11] Data given by Schmoller, Maier, Tobler (1957) § 52 p. 14. Concerning this question see also p. 98.

[12] See p. 97.

not under the domination of the rules of that country into the territory of which it was removed. Finally, the most decisive characteristic of the principles of restitution accepted by the neutrals is the absolute nature of restitution, the thesis that restitution has to be effectuated "irrespective of any subsequent transactions", the neglect of the fundamental rights of the *bona fide* acquirer.

Was it possible to give any other grounds for the legal principles of such a revolutionary character than the general international legality being obligatory for everybody and against everybody? Was it possible to base them exclusively on the right of the victors and to restrict them to the Allied and Associated Powers or to the United Nations? In our opinion, in no way, and this is the explanation of the fact that the Allies decreed the restitution, the returning of the removed property (the annulment of the transfer of wrongfully acquired rights) to the benefit of all countries that had been occupied during World War II by the Germans, accordingly in favour of Germany's former allies and *among them for the good of Hungary, too.*

CHAPTER VI

RESTITUTION OF PROPERTY REMOVED FROM HUNGARY

1. "CONVENTIONS" BETWEEN THE HUNGARIAN FASCIST PUPPET GOVERNMENTS AND THE GERMANS CONCERNING THE REMOVAL OF HUNGARIAN PROPERTY TO THE WEST

It is common knowledge that Hungary having been Germany's ally in World War II was occupied on March 19, 1944, by the troops of Hitler. From that time on Hungary lost her sovereignty. In Hungary, as in the majority of the countries occupied by Germany, puppet governments were established that were in all domains, accordingly in civilian and military respects as well, the executors of the will of the German authorities. Since, however, the so-called Sztójay Government was formally appointed by Horthy, this Government was not declared by the Allies a "puppet government" and Hungary was made responsible by them for the events of this period, among other things, for the war losses incurred by them during it. It was recognized, however, by the Allies already before the conclusion of the Peace Treaty that the Szálasi Government had to be qualified as a German puppet government, and although they wanted to draw in the Peace Treaty the conclusions based on the law of war from the fact that the state of armistice had begun only on January 20, 1945, they recognized during the period of the Armistice Agreement that the population of Hungary had stood since October 15, 1944, under the effect of German force and duress. Then began the "evacuation" of Hungary, the removal of the public and private property to or toward Germany. The German fascists carried this out either by means of direct military orders or they concluded "agreements" with their proper satellites, by virtue of which they transferred to Germany the most important branches of production or, in the end, they constrained the civilian inhabitants to remove their movables, stores and animals to the "West".

The agreements concluded between the German Reichsregierung and the puppet government, which usurped the power over Hungary under German occupation, give us a sample of the force used by the Germans, apart from the application of direct force and duress mentioned in the London Declaration, in order to compell the Hungarian nazi government to carry through the complete civilian evacuation, more precisely the removal to the West of the Hungarian property. A part of the goods transported to the West actually went to Germany, partly the goods got stuck by reason of the sudden development of the military situation on the territory of Austria, this, however, did not in the least alter the fact that the property in question had been removed by German force and duress from a territory[1] occupied by the Germans. These conditions of the removal induced the Allied

[1] See pp. 134, 137, 140.

Military Government (with an effect, as we shall point out hereafter, extending to Germany and to the Austrian territory alike) to state (to presume) the existence of German force and duress in respect of the property removed to the West on the ground of the measures taken by the nazi puppet government (Memoranda of the OMGUS No. 4 of May 1, 1947, and No. 6 of May 28, 1947, see below).

2. EXTENSION TO HUNGARY OF THE INTERNATIONAL LEGAL RULES OF RESTITUTION. RECOGNITION OF THE *"KOLLEKTIVZWANG"* IN HUNGARIAN RELATION

The force and duress applied generally and individually alike in criminally occupied Hungary in connection with the removal of property was spontaneously regarded by the Allies, on the ground of the international legal principles established by them, as a delinquency, just as the pillage of any United Nation, and they attached to this delinquency the same legal effect as to the pillage of the United Nations: the duty of restitution under Public International Law. The restitution in favour of Hungary was ordered by the Military Government in Germany *without any contractual obligation, on the ground of the same general international principles of law*, by way of essentially the same dispositions, in the first instance by way of the same MGR No. 19 as in favour of any other country having been under German occupation and at the mercy of nazi fascist terrorism.

As we have quoted above, the *Viermächte-Verfahren (Kontrollrats-direktive* of April 17, 1946) laid down that apart from the United Nations, having signed the London Declaration and having been under German occupation, those other countries, too, had a claim to restitution, the territory of which had been in its entirety or in part under the military occupation of Germany or her allies and which were explicitly designated by the Control Council.

The right to restitution of the ,,ex-enemy countries", among them of Hungary by virtue of these provisions was established by the above-cited Memoranda Nos 4 and 6 of the OMGUS. We quote abridged the Memorandum No. 4 below[2]. As to the completed and final Memorandum No. 6, which essentially corresponds to the Memorandum No. 4, we insert it here in view of its fundamental importance:

"Memorandum No. 6.

Subject: Restitution to Ex-Enemy (Non-United) Nations.

1. Restitution will be made to the following non-united nations: Albania, Austria, Bulgaria, Finland, Hungary, Italy and Roumania.

2. Property will be subject to restitution only if

a) it is identifiable;

b) it has been removed by force or without compensation;

c) it has been removed between the following dates:

Albania 25 July 1943 and 15 May 1945

Austria 12 March 1938 and 15 May 1945

[2] See p. 132.

Bulgaria 2 September 1944 and 15 May 1945
Finland 2 September 1944 and 15 May 1945
Hungary 15 *October* 1944 *and* 15 *May* 1945
Italy 25 July 1943 and 15 May 1945
Roumania 23 August 1944 and 15 May 1945

3. Household goods, valuable art objects, and other personal property owned and removed by refugees who left their country for religious or racial reasons and who choose not to return to their country will not be subject to restitution.

4. Proof of removal by force or without compensation between the dates indicated above must be submitted upon the filing of the claims. *However, in order to prove force, it will be sufficient for the claimant non-united nations to show that the removal was made by general direction of the Nazi puppet government, if any, of the country concerned.*[3]

5. Any property restitutable to a non-united nation pursuant to paragraph 2 above, irrespective of whether or not there was removal by force, may be released to the German economy upon a clear showing that such property is essential to the minimum approved German economy. Requests for such releases will be handled in accordance with the general procedure outlined in our Memorandum No. 3 of 15 February 1947.

6. In cases where restitutable property located in a reparations plant is shown to have been removed by force, as that term is defuned for the purpose of restitution to United Nations, the provisions of our Memorandum No. 1 of 7 January 1947 shall apply. Where restitutability is predicate upon the removal by general direction of a Nazi puppet government or without compensation, restitution of property from reparations plants will be governed by our Memorandum No. 2 of 15 February 1947.

7. In all other respects, the provisions of Title 19 MGR presently in force with regard to United Nations will find analogous application. This applies in particular to form and substance of claims (paragraphs 19—203), protection and release of property subject to restitution (paragraphs 19—252), and physical removal of property (Part 4 of Title 19).

8. Restitution of motor vehicles will remain subject to the special rules laid down in our Memorandum No. 4 of May 1, 1947.

9. Restitution of rolling stock will be governed by the one-for-one rule applicable to all countries.

10. Works of art and cultural works of either religious, artistic, documentary, scholastic, or historic value, including recognized works of art, as well as such objects as rare musical instruments, books and manuscripts, scientific documents of a historic or cultural nature, and all objects usually found in museums, collections, libraries, and historic archives shall be restored to the government of the country from which such property was taken or acquired in any way, whether through commercial transactions or otherwise, provided the requirement of paragraph 2*a* and *c* above are met."[3]

[2] "*Kollektivzwang*".

From the viewpoint of principle the most important provision of the Memorandum of the OMGUS is that in all respects in which the Memorandum does not dispose otherwise, *the rules of the MGR 19* being in force in relation to the United Nations *find application to the ex-enemy countries having been occupied by the Germans, among them to Hungary*, too. Later we shall give a comprehensive analysis of the Memorandum and discuss the application of the general rules of restitution in Hungarian relation.

Here we only want to make it clear that the circumstance that the Allied Military Governments, acting essentially on their own initiative, desired to apply the same legal principles of restitution in respect of the property removed from Hungary as concerning the property removed from the territory of the United Nations, has a very great importance in connection with our statement to be found below that the responsibility for restitution in favour of Hungary, — just as the similar responsibility in favour of the United Nations — lies upon the countries to the territory of which Hungarian property was removed by force or duress not primarily *ex contractu* (by virtue of the Paris Peace Treaty) but on the ground of the International Law of a general validity, having taken shape during and after World War II. The duty of restitution follows both in relation to the United Nations and in relation to Hungary from the crystallized new international legal order. The provisions of the Paris Peace Treaties relating to restitution are, as we have already alluded thereto, rules of International Law not of constitutive but only of declaratory character. In other words, *the duty of restitution would have existed* (on the ground of the general, crystallized international legal principle) *even if these provisions had not been contained in the Peace Treaties*. This principle of law in its general form developed already during the Second World War in consequence of the situation created by the Axis Powers; the Peace Treaties were not necessary for the development of this proposition of law. This is proved, better than by anything else, by the fact that the legal principle in question *was effective towards the neutrals*, too, and also by the fact that on the territory of Germany and Austria the restitution proceedings were ordered by the Allies in favour of the United Nations and of the other countries occupied by the Germans during the war, still before the coming into operation, nay before the conclusion of the Peace Treaties, immediately *as soon as it became physically possible*.

3. ANALYSIS OF THE MEASURES CONCERNING RESTITUTION OF PROPERTY TAKEN BY THE ALLIED GOVERNMENTS IN GERMANY IN FAVOUR OF HUNGARY

As far as our above statement is concerned, i.e. that the Military Governments of Germany applied essentially the same principles of restitution in the Hungarian relation as in the relation of the United Nations, this is confirmed by the following analysis of the provisions concerning the restitution of the property removed from Hungary:

A) DUTY OF DECLARATION AND CONSERVATION

The MGR 19 issued on April 15, 1946, by the American Military Government (and the analogous dispositions of the Military Governments of the other occupying Powers), as far as the duty of declaration and conservation regarding the removed property is concerned, assured from the beginning the similar treatment to the property removed from the territory of the United Nations and to the property removed from the territory of other countries occupied by the Germans, by laying down:

> "the term 'Property' removed from any area occupied by German forces ... shall mean all property, tangible and intangible, movable and immovable, acquired in any way directly or indirectly by Germans or German agents or persons resident in Germany from territory outside of "das Deutsche Reich" as it existed on 31. December 1937, while such territory was occupied, governed or controlled by Germany or German forces" (MGR 19—504, Art. III).

This duty of declaration and conservation and the "property control" connected with it were not identical with the placing under allied "property control" of the property of the ex-enemy nationals located on whatsoever title in Germany (and Austria) and removed not by force or duress, this kind of property control being a pure war (discriminatory) measure withdrawing the right of free disposal. The Allies presumed that, in view of the well-known circumstances (German occupation and puppet government acting under German orders), the removed Hungarian goods had been carried away by force or duress by the Germans themselves, and, therefore, qualified these goods as restitutable in the same way as the property having been removed from the territory of the United Nations. The Allies declared the London Declaration of January 5, 1943, applicable to the ex-enemy countries occupied by the Germans in the same way as to themselves.

Further on, the Powers occupying Germany (and Austria) fixed also the detailed conditions of restitution uniformly (with a few exceptions applied in favour of the United Nations) in respect of all countries. Already before the conclusion of the Peace Treaties, during the state of the armistice, they extended automatically, by virtue of the general international principles of law, the rules of restitution decreed for the United Nations, and later also the MGR 19 and the analogous "regulations" issued by the other occupying Powers, to the ex-enemy countries occupied by Germany (by Italy), among them to Hungary, too. Already at the beginning of 1946, after the resumption of the diplomatic relations all Powers occupying Germany consented in principle to the restitution of the removed Hungarian property and to the delegation of restitution commissions, which began their activity under the same conditions as the missions of the United Nations and the commissions of the other defeated nations.

B) THE EFFECTIVENESS OF THE PUBLIC-INTERNATIONAL-LAW PRINCIPLE AND OF THE PRINCIPLE OF TERRITORIALITY IN THE RESTITUTION OF HUNGARIAN PROPERTY

According to the foregoing, already before the conclusion of the Peace Treaty, all property found on the territory of Germany in the possession of whomsoever had to be restituted to Hungary, that was identifiable and that had been removed by force or duress from the ownership of anybody from the territory of Hungary. The international legal character of restitution and the principle of territoriality was effective also in connection with the restitution of property removed from Hungary. Claims could only be submitted by the Hungarian Government, through the "Restitution Commissions" established beside the military authorities in Germany, and only the accredited agents of the Hungarian Government were authorized to receive and acknowledge receipt of the goods described in the so-called "permits of release" (MGR 19—501—502). The most decisive legal proof of the effectiveness of the clear territorial principle is the Memorandum No. 4 of May 1, 1947, of the OMGUS referred to above which, after having laid down in connection with the motor vehicles removed to Germany that

> "restitution will be made irrespective of *a)* whether the vehicle was brought to Germany by its Hungarian owner and sold by him to a German; or *b)* whether the vehicle was brought to Germany by its Hungarian owner and is now in possession of the same Hungarian owner",

precludes any possibility of misunderstanding in respect of the person entitled to restitution:

> "in cases where restitution is made of vehicles in possesion of their Hungarian owners (*a* and *b* above), it should be made clear to such owners that the claimant country and not the owner is entitled to restitution".

Accordingly, even the owner residing abroad is bound to place at the disposal of the Hungarian Government the property removed by him with a view of its restitution to the Hungarian economic life. In respect of restitution the right of the State is stronger than the right of the owner.[4]

C) THE IDENTIFICATION OF HUNGARIAN PROPERTY. IRRELEVANCE OF THE PERSON OF THE HUNGARIAN OWNER. CO-OPERATION IN THE SEARCH FOR PROPERTY

The identification of the property was the duty of the restitution missions, at least these missions were bound to furnish the particulars on the ground of which the restitution agency of the occupying authority could carry

[4] See the Memorandum No. 4 of May 1, 1947, of the OMGUS on page 92. and also point 2/d of its Memorandum of July 28, 1948, on page 90.

out the identification. The rule was, here too, the same as concerning the property removed from the territory of the United Nations.[5] The claim filed had to contain a detailed description of the claimed property and all those data which proved that the property in question had in fact been originally in Hungarian ownership. As we have already emphatically stressed in connection with the removed property of the United Nations, in accordance with the public-law character of the duty of restitution and the principle of territoriality, it had no importance who the present legitimate owner of the removed object was. In the interest of the establishment of the identity, the authorities dealing with restitution only demanded the indication of the last known inhabitant of the claimant country, in whose ownership, possession or custody the claimed object had been before it passed into the hands of the Germans. The provision of MGR 19—203 pursuant to which all claims had to contain a declaration stating as far as possible the circumstances of the removal of the claimed object from the claimant country, had, as we have pointed out, of course, also to be applied to the objects removed from Hungary. As in the case of the United Nations, the identification was the duty of the Hungarian Government, both the occupying and the German authorities were, however, obliged to assist the restitution missions in the search for property, to provide for the restoration of the "good order" and even for the transportation as far as the frontier, in the same way as in the case of any United Nation. The order of the OMGUS of June 11, 1947, to the "Restitution Branch Bavaria" laid down

> "You are authorized and directed to instruct the Bavarian Minister President that all costs incident to restitution from Bavaria to ex-enemy nations, including Hungary, incurred within repeat within Germany, except the cost of insurance, will be borne by the Government of Bavaria as the Land from which the property is shipped. This includes storage since 1. June 1946, dismantling, crating and loading, repairs to the extent provided for in paragraph 19—404 MGR, and transportation. The procedure is the same as provided for in Part 4 of Title 19 MGR for Allied Nations".[6]

The assistance rendered by the occupying Powers in the performance of the restitution activity went so far that they instructed the "Restitution Control Branches" to invite the Restitution Commissions to examine those declarations made by the German custodians on the ground of the prescriptions which did not figure among the submitted claims and to complete their knowledge with the informations obtained from these declarations (OMGUS Memorandum No. 11 of October 27, 1947). Consequently, the assistance formulated in the Peace Treaty with defeated Hungary in favour of the United Nations in the following way:

> "The Hungarian Government shall co-operate with the United Nations in, and shall provide at its expense all necessary facilities for the search for and restitution of property liable to restitution under this article",

[5] See p. 101.
[6] See Part 4, § 401 of the MGR 19.

was practically defined by the Military Governments of the Allies in Germany, namely *with an effect extended to Hungary*, too, and *already in the period of the armistice*. Thereby they emphasized that everything they did in respect of property removed from any country occupied by the Germans resulted from the new International Law, "von einer umfassenderen interstaatlichen Rechtsidee" (Weiss, 1946).

D) PROOF AND PRESUMPTION OF "FORCE OR DURESS" IN HUNGARIAN RELATION

The preliminary condition of restitution in favour of Hungary (and in favour of the other countries occupied by the Germans), just as the preliminary condition of claims for the restitution of the United Nations was, as a matter of course, that the removal had been carried out "under force or duress". In respect of the property removed from the territory of the United Nations, as we have mentioned above, the existence of "force or duress" was presumed both by the dispositions of the occupying authorities of the Allies in Germany and by the Paris Peace Treaties in all cases where "the goods existed in the claimant nation at the time of occupation",[7] and the burden of proving the contrary fell upon the Germans (and the other vanquished). The application of force, as it appears from the above-cited para. 4 of the Memorandum No. 6 of the OMGUS[8], had to be presumed also in the case of the other countries occupied by the Germans (so in the case of Hungary, too) if the claimant country proved that *the removal had been carried out under the orders of the nazi puppet government*. Consequently, in all those cases where the Hungarian Government could refer to the fact that the removal of a property had been based on the orders of the so-called Szálasi government relevant to the general "*Verlagerung*" or "*Räumung*" or on another disposition of a general character, the use of force had to be regarded forthwith as verified. In any other cases the application of force or duress was to be proved by Hungary in each case separately, as in general by the countries that did not belong to the United Nations. This distinction, however, had hardly any importance in the case of Hungary, since the *general use of force* against the Hungarian authorities, enterprises and private persons was uncontested.

Among the goods removed from the territory of the countries not belonging to the United Nations (among them from Hungary) the goods that had a scientific, historic or artistic value or in general a cultural value were subject to a special treatment. These had to be restituted *in specie* even if they were transported to Germany without the use of force, by way of a recognized commercial transaction (Memorandum No. 6 of May 28, 1947, of the OMGUS).[9]

[7] See p. 105.
[8] See p. 128.
[9] The defeated States, as we have mentioned above, undertook in the Peace Treaties the obligation in favour of the United Nations that if "it is impossible for Hungary to make restitution of objects of artistic, historic or archaeological value belonging

E) DURATION OF THE GERMAN OCCUPATION. OCTOBER 15. 1944, AS THE INITIAL DATE IN RESPECT OF THE DUTY OF RESTITUTION

The determination of the period of occupation by Germany (Italy) has, according to the foregoing, a very great importance in the case of both the claimant United Nations and the other countries. Pursuant to the prescriptions of the Allies, restitution under International Law, that is to say returning to the Government, could only be claimed in respect of property that had been removed during the occupation. As referred to above, these periods were fixed in respect of the various States entitled to restitution and being outside of the sphere of the United Nations by the Memoranda No. 4 and 6 of the OMGUS.[10] For Hungary the period of occupation was fixed in the tract of time lasting from October 15, 1944, to May 15, 1945.

In the case of Hungary the determination of the initial date of occupation had a particular importance as this country passed *stricto iure* till the conclusion of the armistice for an ally of Germany, the removal, however, of the majority of the goods was carried out on the orders and under the occupying German authorities after the accession to power of the so-called Szálasi government on October 15, 1944. At first the Allies (with the exception of France and the USSR) did not recognize the restitution duty for the period between October 15, 1944, and January 20, 1946, later, however, also the United States of America, in the zone of occupation to which the majority of the removed goods had gone, *recognized* in the above-mentioned Memoranda of the OMGUS *the date of October 15, 1944*, as the beginning of the occupation of Hungary.

On the ground of the formal legal conception mentioned above, the Hungarian Paris Peace Treaty finally chose the date of January 20, 1945, the day of the conclusion of the armistice as the opening date of the occupation of Hungary and, accordingly, also of the restitution duty established in favour of Hungary. *The Soviet Union and France*, however, *maintained the date of October 15, 1944*, after the conclusion of the Peace Treaty, too.

Accordingly, in respect of the date of the occupation of Hungary there was no legal unanimity, and it was all the more difficult to decide this question because in the history of International Law there hardly existed any precedent for a belligerent State to occupy and plunder as an enemy the territory of its proper ally, as Germany did it with Hungary and her other allies. But is the legal basis of the restitution duty *in ultima analysi* indeed the occupation in the sense of International Law?

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to the cultural heritage of the United Nation from whose territory such objects were removed by force or duress by Hungarian forces, authorities or nationals, Hungary shall transfer to the United Nation concerned objects of the same kind as, and of substantially equivalent value to the objects removed, in so far as such objects are obtainable in Hungary" (Hungarian Peace Treaty Art. 24, para. 2).

[10] See pp. 128, 132.

Professor Kaufmann[11] correctly alludes to the somewhat uncertain attitude adopted by the MGR 19 and the London Declaration, which is the basis of the whole law of restitution, in respect of the determination of the "countries entitled to restitution".

"Was die Gebiete betrifft" — says Kaufmann — "aus denen die restitutionspflichtigen Objekte entfernt worden sind, so sprechen die Titles 18 und 19 nur von 'Besetzung' durch die Deutschen, während die Deklaration vom 5. 1. 1943 auch von 'Kontrolle' durch Mächte, mit denen die deklarierenden Mächte sich im Kriegszustand befinden, spricht."

This legal vagueness and lack of precision has a particular importance in the case of Hungary. According to the German Professor Kaufmann this country could not be regarded as a State "occupied" by Germany but only as a State "controlled" by it. By virtue of the London Declaration, however, it should be qualified as entitled to restitution even on this ground, in contradistinction to Austria, in respect of which Kaufmann points out interestingly that "jedenfalls kann Österreich ... nicht als 'claimant nation' in Betracht kommen, da es weder zu den 'allied countries' gehört, noch sein Gebiet von Deutschland besetzt war: es war von Deutschland annektiert, und die Annektion war von den anderen Mächten *de jure* anerkannt worden" *(sic!)*.

As we know, the Allies considered the occupation of Austria and hence her right to restitution as indisputable, while in respect of Hungary they hesitated whether they should consider her occupation by Germany as having taken place on October 15, 1944. And yet nobody can challenge that Hungary was occupied or, if we prefer to put it like that, controlled by the Germans, at least "*de facto*", since March 19, 1944. So this country was to be regarded as entitled to restitution by virtue of the fundamental document underlying it (London Declaration), at any rate in consequence of the fact of having come under German control and from its date on. (As also Professor Kaufmann recognized it.)

In other words: jurists like Professor Kaufmann consider the fact of having come under German control (in the case of Germany's former allies) *as having the same legal consequences as occupation*, in conformity with the text of the London Declaration ("property, rights and interests of any description whatsoever which are, or have been, situated in the territories that have come under the occupation or control, direct or indirect, of the governments with which they are at war") and so it was accepted as true by the legislature of the Allies during the state of armistice.[12]

In any case, it is certain that when in respect of Germany's allies the initial date of the German occupation and at the same time of the restitution duty was fixed by the Peace Treaties as being the date of the signature of the Armistice Agreement, the Allies forgot the London Declaration which served as a basis for their proper legal system of restitution, in respect of which they layed down in MGR 19—100.1. that "the question of restitu-

[11] (1949) Part VI para. 22.
[12] See MGR 19—504, p. 129.

tion of property removed by the Germans from Allied countries must, in all cases, be examined in light of the Declaration of January 5, 1943."[13]

The fact, however, that the date of the occupation of Hungary was incorrectly stated by the Peace Treaty did not and does not, in our opinion, preclude Hungary from claiming, in addition to her rights assured to her by the Peace Treaty, the restitution of the property removed by the Germans from her territory by force or duress. *Hungary can thereby rely on the principles of the London Declaration* and on the rules of law enacted by the Allies. Her claim is all the more legitimate because she demands the restitution of the Hungarian property in the first instance not on the ground of the Paris Peace Treaty but in virtue of the whole new law of restitution created by the Allies.

The legal basis of the restitution duty is, according to these principles of law, in any case and in all relations the removal of property by force or duress. The determination of the period of occupation or control was not a purpose in itself but it had only in view to fix the period in which the application of force or duress may be presupposed or, in the given case, presumed. In the case of Hungary the Allies were obliged to concede this for the period from October 15, 1944, on (and during the state of the armistice they actually did so, with the exception of Great Britain). The fact that in the Peace Treaty the Allies fixed the date of the beginning of restitution in the alleged legal initial moment of the German occupation, i.e. in the date of the signing of the Armistice Agreement, does not alter the case in the least. By doing so the Allies turned against their own earlier legal practice exercised until then, and forgot the provision of the London Declaration and of the MGR 19, recognized by Professor Kaufmann too, according to which the "controlling" of a territory by Germany has to be considered for the purpose of restitution as being of an identical character and having the same legal effect as occupation in the sense of International Law.

F) TIME LIMIT FOR THE FILING OF CLAIMS

As far as the time limit for the submission of the restitution claims is concerned, the Powers occupying Germany (and Austria) did not assume a rigid standpoint in the so-called armistice period. The purpose was to terminate the restitution in the interest of the claimant countries as quickly as possible. In this period no final time limit was fixed for the filing of the claims. Only after the coming into operation of the Peace Treaties became the tendency manifest that also the Allies desired from their point of view to close the restitution proceedings as quickly as possible. As to the restitution of the removed property situated in the Soviet and French zones, the occupation authorities did not want at all to fix a time limit.[14]

[13] The MGR 19, as it is well-known, was extended to all States entitled to restitution (Memorandum No. 6 of the OMGUS, see p. 129.).

[14] See also p. 110.

CHAPTER VII

THE HUNGARIAN PEACE TREATY

What change was brought about by the Hungarian Peace Treaty in the question of the restitution of the property removed from Hungary?

According to the original text of the Peace Treaty adopted by the Paris Conference Hungary would have waived, both on her own behalf and on behalf of her nationals, all claims against Germany including all debts outstanding on May 8, 1945. The French text of the Peace Treaty added to this that: "*cette rénonciation n'affectera en rien les dispositions adoptées en faveur de la Hongrie ou des ressortissants Hongrois par les Puissances occupant l'Allemagne*". This text did not speak expressly of the restitution of the property removed to Germany but only wanted to sanction the measures that had been taken or were intended to be taken by the occupation authorities in Germany with regard to the restitution of Hungarian property on the ground of the recently formed general International Law. The Hungarian delegation taking part in the peace negotiations did not, on the one hand, consider that the goods in Hungarian ownership that had originally been located in Germany were covered by this text and wanted, on the other hand, to obtain the confirmation by a treaty of the duty that had been spontaneously undertaken by the Allies on the ground of their own legal principles concerning the restitution of the property removed to Germany by force or duress. The Hungarian delegation, therefore, in order to confirm the new general rules of International Law, continued to insist on the settlement of the question of the Hungarian property removed to Germany and with the help of the French and Soviet delegations succeeded in achieving that the final text of Article 30 of the Peace Treaty was drafted at the last conference of the ministers of foreign affairs in New York as follows:

> "1. From the coming into force of the present Treaty, property in Germany of Hungary and of Hungarian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.
>
> 2. Identifiable property of Hungary and of Hungarian nationals removed by force or duress from Hungarian territory to Germany by German forces or authorities after January 20, 1945, shall be eligible for restitution.
>
> 3. The restoration and restitution of Hungarian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.
>
> 4. Without prejudice to these and to any other dispositions in favour of Hungary and Hungarian nationals by the Powers occupying Germany, Hun-

gary waives on its own behalf and on behalf of Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiwer shall be deemed to include debts, all intergovernmental claims in respect of arrangements entered into in the course of the war and all claims for loss or damage arising during the war."

1. THE ANALYSIS OF ARTICLE 30. THE "DECLARATORY" NATURE

Consequently, para. 1 of Art. 30 expressly refers to the property situated in Germany and being in Hungarian ownership that came, as enemy property, in pursuance of the war discriminatory measures of the Allies under property control on the occasion of the occupation, and could therefore not be disposed of by their owners. Accordingly, in virtue of para. 1 this property shall no longer be treated as enemy property and all restrictions based on such treatment shall be released as from the coming into force of the Peace Treaty, in other words: in respect of such property *the original legal status of the owner shall be restored*. The "restoration" did not mean for the owners more right than they originally had: it meant the restoration of the legal status in which the property had been before it was placed as enemy property, under the control of the Allies. We have to stress here emphatically that this para. of Article 30 of the Peace Treaty was not intended to provide for the property having been removed by force or duress to Germany. In fact, the said property was taken out from the sphere of the enemy property placed under property control and belonged to a separate category of "property control" comprising the property removed by the Germans from the occupied territories.

Paragraph 2 of Article 30, as we have alluded thereto several times, does not constitute new law but only *declares* the principle of law that was applied by the victors for a long time in their zones of occupation, as a rule of general International Law. Accordingly, it *maintains* the obligation undertaken spontaneously and unilaterally by the Allies towards Hungary during the state of armistice, in accordance with their proper principles of law universally proclaimed to the effect that they would restitute any identifiable property having been removed from Hungary. The provision in question does not want, on the whole, to alter *in pejus* this obligation, in spite of the fact that — for incorrectly interpreted theoretical reasons based on International Law — it fixes erroneously and in opposition to the London Declaration the date of the beginning of the German occupation of Hungary. On the contrary, at the request of the Hungarian delegation it wants to confirm *in favour* of Hungary by means of a treaty the above-cited text of the Treaty adopted in Paris; this provides the carrying through of the restitution proceedings on the ground of the general International Law formed by the Allies, under unchanged conditions ("n'affectant en

rien les dispositions adoptées en faveur de la Hongrie...").[1] In the Peace Treaty the Allies desired to assure to Hungary in the field of restitution at least as much as they did spontaneously during the state of armistice. The fact that para. 2 of Article 30 has only a "declarative" and not a "constitutive" character, is proved by the circumstance that the wording of this provision is entirely identical with the wording of the MGR 19 cited often by us, moreover it presupposes the knowledge of the latter by the parties. When Paragraph 2 of Article 30 speaks of "identifiable" property and employs these terms: "removed by force or duress from Hungarian territory by German forces or authorities", it refers to the definition of MGR 19—§ 100.1 and 100.2 well known by the parties.[2] Similarly, in the light of the MGR 19 it may be revealed what the Peace Treaty means by the terms "shall be eligible for restitution". As to the question what the terms "removed by force or duress by German forces or authorities" precisely mean in the case of the occupied "ex-enemy" countries, we may invoke, beside the MGR 19, the help of the OMGUS Memorandum Nr. 6,[3] too, according to which if the claimant nation proves that the removal was made in pursuance of a general disposition of the nazi puppet government, this fact is considered as *bearing all the marks of a removal by force effected by German military and civilian authorities.*

In connection with the notion of "eligibility" we have to recall the fact that the MGR 19 makes a distinction between "absolute right" to restitution and "eligibility". The United Nations have an absolute right to restitution in respect of property concerning which the application of "force or duress" may be presumed. The property removed from the territory of the United Nations in some other way, just as the property removed by force or duress from the other countries occupied by Germany (among these from Hungary) is subject to restitution only insofar as it does not affect the work of the plants allocated in favour of the victor States for reparations (in the case of the United Nations), or for the necessities of the German economic minimum (in the case of the other occupied countries).[4] The official interpretation of the terms "absolute right" and "eligibility" is given by the MGR 19 and by the Memoranda based on it, according to which the difference between the two concepts consists in the fact that in the first case there is no exception to the restitution duty, in the second case, however, certain objects of a definite character are taken out from this duty by the executive authorities on the ground of counterclaims. It is important to stress this repeatedly, because without the knowledge of the usage, the term "eligible" may give rise to misunderstanding: the term itself means something that may be chosen, selected, and so it might allude to the fact that the choice of the restitutable property has a facultative, optional character. It follows without doubt from the generally accepted terminology that in the case of the ex-enemy States it was compulsory to designate for restitution the property in question, with some

[1] See the original draft of the Peace Treaty, p. 138.
[2] See pp. 104. ff.
[3] See p. 128.
[4] Para. 5 of the Memorandum No. 6 of May 28, 1947, of the OMGUS, p. 129.

exceptions justified by the German economic minimum. Consequently, that explanation of Article 30 of the Peace Treaty according to which para. 1 would contain an "imperative" provision, and para. 2 a "facultative", "optional" one, can in no way be considered as correct. Pursuant to para. 1, all Hungarian property situated in Germany and placed under "property control" owing to enemy ownership has to be released from "control" without exception, whereas the Hungarian property removed by force or duress to Germany has to be restituted only in the case, but then by all means, when it cannot be legally claimed for the purpose of the German economic minimum. Accordingly, both the first and the second paragraph contain *imperative* provisions. As a matter of course, our statement that para. 2 of Article 30 is also of a cogent character concerns only the duty of "restitution" in principle, and the deadline of January 20, 1945, as is evident also from a comparison with para. 3, bound the Allies only insofar as "ex" Peace Treaty they could not refuse the restitution of property having been removed after that date. *It did not mean, however,* as we have pointed out above,[5] *that Hungary was not entitled to claim the restitution of the removed property on the ground of the general principles of restitution established by the Allies* (primarily on the ground of the London Declaration), and particularly it did not mean that the Allies would not have been entitled also to restitute, in accordance with their proper former regulations, any property removed "with force or duress" before January 20, 1945.

In our view, para. 2 of Article 30, departing from the new international principles established by the Allies, confirms in the last resort, by the force of an international treaty, the legal duty spontaneously and unilaterally undertaken, more precisely *recognized* already during the period of the armistice, according to which the identifiable property which was removed from Hungarian ownership by force or duress after January 20, 1945, more correctly after October 15, 1944,[6] to Germany, has to be returned to Hungary. In order to understand entirely the wording of the text, we must invoke the help of the rules of law framed by the Allies in Germany, and we must rely on everything set out above in detail concerning the questions: 1. what does the identification of Hungarian property mean,[7] 2. when can the case of force or duress be considered as existent,[8] 3. when is it possible to speak "of the removal by the German forces and authorities"[9] and finally 4. what does "eligibility" mean?[10]

It is a matter of course that beside these definitions the precise interpretation of the term "restitution" is of the greatest importance. It can be stated from a comparison of para. 2 of Art. 30 and of the MGR 19 with the orders issued by the occupation authorities on the basis and on the analogy of the former that the restitution of removed property can, even in the Hungarian Peace Treaty, in no way mean its returning to the

[5] See p. 137.
[6] Regarding the opening data of the German occupation see above, p. 135.
[7] See p. 132.
[8] See p. 134.
[9] See p. 140.
[10] See p. 140.

individuals concerned. "Restitution", in contradistinction to "restoration", in the common technical terminology of the Peace Treaty and of these orders, strictly means the return of the property by Government to Government.[11]

Pursuant to para. 3 of Art. 30 "the restitution and restoration of Hungarian property shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany". Accordingly, the Peace Treaty entrusted the Powers in occupation of Germany with the establishment of the rules of "restoration" (the procedure of the abolishment of restrictions in favour of the owner according to para. 1) and of "restitution" (the general return of property to the Hungarian Government according to para. 2).

The wording of para. 3 of Article 30 would doubtlessly permit the assumption that the Peace Treaty has a new regulation in view to be made by the Allies in the future. In our opinion, however, albeit we, too, emphasize constantly the great importance of the wording of the Peace Treaty, no exclusive importance can be attributed to the terminology, particularly if such provisions are in question that must be interpreted by other means of legal interpretation, primarily on the ground of the *travaux préparatoires* in a different sense. This follows from the basic rule of International Law that the States have to perform *bona fide* their obligations resulting from international treaties. In point of fact, as we have pointed out above in detail, the rules of restitution in the technical sense of the term were established by the Allies also in the Hungarian relation already before the conclusion of the Peace Treaty, and these rules resulted from the same legal principles that had been applied in respect of the restitution of the property wrongfully removed from the territory of the United Nations. Thus, the problem is whether anything can be found either in the Peace Treaty itself or in the *travaux préparatoires* or elsewhere, from which the conclusion could be drawn on good grounds that the Allies which signed the Peace Treaties desired to alter, to the prejudice of Hungary, the rules of International Law concerning restitution decreed by them in the Hungarian relation before the conclusion of the Peace Treaty. As we have exposed above, the whole history of the provisions in question of the Hungarian Peace Treaty proves that the Allies did not want to modify *in pejus* the claim of Hungary to restitution, but on the contrary, in accordance with the Hungarian request, they wanted to confirm by an international treaty those rules which had till then not been expressly codified but generally applied in practice. With full knowledge of the antecedents we may conclude that para. 3 of Art. 30 of the Hungarian Peace Treaty, which provides that "...the restoration and restitution of Hungarian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany", only confirms by this wording — particularly in connection with para. 2 of Art. 30 (the assumption concerning para. 1 see below) — the right of the Allies to determine the rules of the restitution procedure, but it does not mean

[11] See also the comparative analysis of the relevant French and English technical term, p. 48.

that the Allies, abandoning their proper regulations of restitution in general and the rules already enacted and applied concerning the Hungarian restitution in particular, wanted to establish new rules differing from the old ones in respect of the restitution of the Hungarian property removed to Germany. If the Allies had wanted to introduce new rules in place of the old, they would have without doubt referred thereto somehow in para. 3, in view of the fact that in the period of the armistice the whole system of restitution had already developed in its details and had acquired entire legal force, so it could hardly be passed over in silence. Consequently, there is no doubt that the Allies wanted to maintain *unchanged* the international legal regulation made in this respect prior to the conclusion of the Peace Treaty. They recognized its legal validity without any alteration and by para. 3 of Art. 30 they only wanted to express that the occupation authorities of Germany will simply continue, in accordance with their proper rules, the restitution proceedings instituted already in the state of the armistice. Thus, para. 3 of Art. 30 emphasizes, better than anything else, the declarative character of para. 2 of Art. 30. Even if the Peace Treaty had not provided for the question of restitution *ex contractu*, these proceedings should have nevertheless been carried on continuously, in accordance with the international legal principles established by the Allies.[12]

We do not contest, of course, that after the coming into operation of the Hungarian Peace Treaty the Allies were authorized to frame new interpretative rules concerning restitution, or rules improving the existing ones, by reason, however, of the declarative character of these provisions of the Peace Treaty, they were only authorized to do so if the question had not yet been regulated previously, and only under the self-evident condition that the new rules of law could not run counter to the principles of law already developed. Paragraph 3 of Article 30 of the Peace Treaty could by no means authorize the occupying Powers to enact such new rules which would result in the non-performance of restitution. All acts instrumental in the frustration of restitution are illegal from the viewpoint of International Law and we shall draw the attention to such acts below, in connection with the restitution of the Hungarian property from the American zone of Germany, with the restitution duty of Germany based on her proper conduct, and with the Austrian restitution.

The circumstance that the provisions of Art. 30 of the Peace Treaty concerning restitution have no constitutive but only a declarative character is most conspicuously shown by the fact that after the coming into operation of the Hungarian Peace Treaty the Allies *did not enact any new legal provisions* of principle importance in the field of restitution. The restitution proceedings were exclusively based on the rules of law created previously. The term "will be determined" of para. 3 probably concerns in the loose wording of the Hungarian Peace Treaty exclusively the procedural rules of "restoration", the enactment of which the Allies had already begun

[12] Cf. below, the transfer to the Austrian authorities of the restitution of the property removed to Austria, p. 162.

before the coming into force of the Peace Treaty,[13] the majority of these rules, however, were enacted only after the Treaty's coming into operation.

Paragraph 4 of Article 30, in which Hungary waives all claims against Germany and German nationals outstanding on May 8, 1945, on her own behalf and on behalf of Hungarian nationals expressly lays down that the renunciation does not affect either the "restoration" falling under para. 1 of the same Article and the "restitution" falling under para. 2, or the provision by virtue of which these proceedings have to be effected according to the principles established by the Powers occupying Germany. As we have said in the introduction of the present Chapter, the whole Article 30 in its present context was included into the text of the Peace Treaty on the request of the Hungarian delegation (of which the author of the present work was also a member), after the adoption of the final text by the Paris Conference, at the last conference of the ministers of foreign affairs held in New York, and its essential objective was to lay down explicitly that *the renunciation of the claims against Germany* required by the original text covered only the pecuniary debts, but *did not affect the claims for restitution of the property that had originally been situated in Germany or had been wrongfully removed thereto.*

2. THE RESTITUTION OF THE PROPERTY REMOVED TO GERMANY AFTER THE COMING INTO OPERATION OF THE PEACE TREATY. TIME LIMITS. THE FRENCH AGREEMENT

Let us see how these provisions based on the new general International Law, and also the Peace Treaty itself were carried out in the period following the coming into force of the Peace Treaty.

From a legal point of view the coming into effect of the Hungarian Peace Treaty did not in the least alter the restitution proceedings of the Allied Powers occupying Germany (and Austria); these Powers did not introduce new procedural rules. Essential differences between the Hungarian and the restitution authorities, at least at the beginning, only arose concerning the application of the term of January 20, 1945. Considering, however, that the restitution proceedings, especially those instituted in favour of the United Nations, had already lasted for a long time, the occupying Powers desired to get rid of the expenses of the maintenance of the restitution organization and to terminate the whole procedure as quickly as possible. For this reason, as far as the property removed to Germany was concerned, the American authorities had begun already in November 1947 to fix the time limits and, in accordance with the spirit and practice of the whole procedure, made no distinction between United Nations and vanquished States. The OMGUS fixed the term of April 30, 1948, for the admission of restitution claims[14] with the proviso that, after this date, claims concerning goods declared by the German custodians under the orders on "property

[13] See p. 146.

[14] The Bulletins No. 23 and 25 of the OMGUS.

control" would only be permitted to be filed in such cases where the restitution missions concerned obtained the declaration tardily. For ruling on these claims there was no time limit fixed at that time; the OMGUS wanted tot end the restitution proceedings for all claimant nations by December 31, 1948. From this date on the liquidation of the restitution organization commenced in the American zone of Germany and terminated in essence (but not from a legal viewpoint) on June 30, 1949.[15] At the same time the restitution organization functioning in the British zone of Germany also finished its actual activity. *France and the Soviet Union*, as we have said, *did not fix a term for the presentation of the restitution claims* and for the carrying through of the proceedings. Our restitution mission continued its activity undisturbed in the occupation zones of these Powers till the termination of the Statute of Occupation. Concerning the French zone, between France and Hungary a separate agreement was signed: on February 19, 1948, the two Governments agreed on the reciprocal restitution of all identifiable removed property without fixing a time limit. This was, by the way, the only restitution agreement based on reciprocity.[16]

3. THE UNLAWFUL SUSPENSION OF RESTITUTION IN THE USA ZONE. THE "DECONTROL" PROCEEDINGS

In the spring of 1948 the United States, desiring to put political pressure on Hungary, ordered the Hungarian restitution mission to leave the occupation zone, and *thus hindered the realization of restitution in its very important last phase*. It became impossible to file any further claims, no matter how well-founded they were, to supplement occasionally the required "proof of force" and to resort to a legal remedy against the dropping of restitution claims on formal grounds. considering the high number of dropped claims, resulting from the application of the deadline of January 20, 1945, their filing ought to have been rendered even more easy just at that time. Thus,

[15] Regarding the closing terms, see p. 110. too.

[16] The Agreement between Alphand and Vásárhely is as follows:

> "la délégation hongroise en réaffirmant l'obligation lui incombant aux termes de l'article 24 du Traité de Paix, visant la restitution des biens identifiables se trouvant en Hongrie et qui ont été enlevés par force ou la contrainte du territoire français, déclare que les autorités compétentes hongroises sont tout disposées à poursuivre à ce sujet, dans un délai aussi bref que possible et en vue d'aboutir au règlement de la question, des négociations directes avec le service compétent de la Légation de France.
>
> . . .
>
> Le Gouvernement français est disposé à procéder pour sa part à la restitution aussi rapide que possible des biens hongrois se trouvant sur le territoire français ou dans les zones d'occupation française de l'Autriche et de l'Allemagne et notamment de l'or non monétaire trouvé dans la zone française d'occupation en Autriche dès qu'il aura été établi que ce métal est d'origine hongroise."

the participation of Hungary, together with the other nations, in the Investigation Commissions organized in order to search for identifiable property became impossible, nor was it possible to retransport those goods in respect of which the expelled Restitution Commission had already obtained a "release" from the restitution authorities. In short, the whole restitution procedure was rendered quite impossible at a moment when the greatest part of the property removed doubtless from Hungary by force or duress was still stored in the American zone of Germany, and was to a large extent even registered there as such.

The legal consequence of the American measure was that the property in question, which, on the ground of the Act No. 52 of the USA zone was till then registered in the group of "the United Nations and Neutrals" and in the category of "Property removed from the territory occupied by Germany", was transferred to the category "other enemy property, Axis Powers", belonging to the same group as the German property: this category was no longer subject to global restitution effected for the Government but *fell under the release for the individuals entitled thereto, the so-called "decontrol procedure"*.

This decontrol procedure was, by the way, already introduced in the American zone on June 25, 1947, i.e. before the coming into force of the Peace Treaties, though after their signing with a view to releasing from the blocking the ex-enemy property taken under "property control" and not eligible for restitution.

4. WAS THE EXPULSION OF THE RESTITUTION MISSION AND THE APPLICATION OF THE DECONTROL PROCEDURE WITHOUT RESTITUTION PROCEEDINGS LEGITIMATE?

According to the dispositions of the American authorities (OMGUS Property Control Office) the institution of the "decontrol" procedure had to be requested from this office directly by the owner (consequently with the exclusion of his Government) who had to designate an attorney in Germany whose duty was to verify the legal title and to conduct the whole proceedings connected with the release of the property, finally to administer the goods after their release. In the interest of the release the owner had to assume the expenses incurred in connection with the custody and administration of the goods until the release. The "decontrol" did not mean the placing of the goods at the free disposal of the owner; the goods came under the foreign exchange control of the foreign trade authorities of the Allies in Germany (JEIA = Joint Export Import Agency), i.e. without their permission they could not be exported from Germany, and a separate permission was necessary also for their sale in Germany as well as for the investing of the purchase-price received.

By placing the "decontrolled" property under the German foreign exchange control, the American occupation authorities qualified the Hungarian property removed " by force or duress" to the territory of Germany

as if it had been located from the very outset on the territory of Germany and had become part of Germany's economic life.

In our opinion it belongs uncontestedly to the nature of foreign exchange restrictions to serve the protection of the economic substance of the country, and their internationally admissible objective cannot consist in preventing the restitution of property standing outside the economic life of the country and having come incidentally, even unlawfully, to its territory, or in placing the right of disposal over the proceeds of the sale of such property under the same restrictions as that of the goods forming part of the economic life of the country in question. Hypothetically speaking, if the occupying Powers in Germany, and later the German authorities had been authorized to exclude, in one way or another, the property in question from the *intergovernmental* restitution, the fact of the removal itself, disregarding everything else, consequently the existence of the criterion of "force or duress", too, would have prescribed the *unlimited* delivery of the property at least to the persons entitled thereto.

In the American zone of Germany the situation worsened by the fact that after June 30, 1949, the American occupation authorities stopped *on their part* successively the decontrol proceedings and after having dissolved their restitution organization, they placed the administration of the property not released either in the restitution or in the decontrol proceedings in the hands of the German authorities. Afterwards, when the Hungarian owner did not designate a mandatory, the German authorities appointed *ex officio* an *Abwesenheitspfleger* and ordered the sale of the goods within the German economic life. We do not want to discuss here the complications that resulted from the fact that conflicts arose between the Hungarian and German Civil Laws in the question of ownership.[17]

But did para. 3 of Art. 30 of the Peace Treaty, which in its literal sense authorized the Allies to determine, themselves, the measures to be taken in respect of the restoration (according to para.1) and restitution (according to para. 2) of the Hungarian property located in Germany, entitle the Powers in occupation to proceed in the way described above?

We have to answer this question by a definite no.

The question which property is subject to restitution and which to restoration is, doubtless, a question not of adjective but of *substantive law*. Consequently, when, according to the Peace Treaty or to the legal principles developed by the Allies, respectively, restitution proceedings had to be instituted, the Allied Powers in occupation were not authorized to prevent

[17] We have before us the circular of September 29, 1949, of the "Bayerisches Landesamt für Vermögensverwaltung, München" which provides among other things: " . . . 2. Die Amtsstellen werden angewiesen, die Eigentümer der gegenständigen Vermögenswerte sofort wie folgt zu benachrichtigen:

Reference is made to our previous letters regarding the decontrol of your property in Germany.

Since no reply to our request for the appointment of an agent to take custody of your property has been received, arrangements have been made looking forward to the sale of this property in the German economy. Proceeds, if any, after payment of storages, custodian and administration charges, will be deposited in your name in a blocked account in Germany."

arbitrarily the restitution proceedings and to permit only the restoration (decontrol) procedure. (This applies to all claims in respect of which Hungary was not able, because of the conduct of the Americans, to keep the term prescribed for the restitution, moreover to all those claims which were lodged by Hungary concerning property removed from her territory by "force or duress" but *before the date of the armistice* in the legal sense of the term.) Restitution and restoration are concepts having a different basis and quite different legal contents. The International Law of restitution as it was created by the Allies, defines precisely when the duty of restitution and when the duty of restoration is established. *The basis of restitution*, as we have set out in the course of the present study in detail, *is a delinquency of International Law committed by a State by having wrongfully removed property from the temporarily occupied territory of another State to its own territory or to the territory of another country, or by having acquired or admitted such wrongfully removed property.* On the other hand, the legal basis of the restoration duty are the emergency measures taken by a country, recognized as lawful, by which, for the duration of the war, it sequesters or otherwise places under control goods located on its territory and qualified as enemy property. The wrongfully removed property can, according to the definition of these concepts, in no case be drawn into the restoration (decontrol) procedure with the omission of the restitution proceedings. Consequently, as long as a country or Government was not granted the opportunity to enforce its international restitution claim, the question *cannot be decided without the consent of this Government*, by way of some civil action. Only if the country concerned does not avail itself of its collective restitution claim or cannot properly support its public law claim, can the claim be enforced by the directly interested person by the means of Civil Law: the individual *rei vindicatio.*

It is unquestionable that the American authorities in occupation of Germany could not be expected to maintain in Germany an expensive apparatus for the restitution proceedings for an unlimited time. The Americans were evidently entitled to terminate the restitution procedure at a given moment, more correctly to fix a term for the filing of the restitution claims, by laying down that after that date there would be no more room for intergovernmental restitution but only for *rei vindicatio* by the owner. It is, however, manifest that *this time limit could not be fixed in such a way as to render the exercise of an international subjective right* (created by the Allies themselves and recognized by the public opinion of the World) *impossible.* In fixing the time limit, the American authorities were by no means entitled to make discriminations between the United Nations and Hungary to the disadvantage of the latter, considering that the international subjective right of Hungary and of the United Nations was substantially of the same character in all respects. Not a right created by the victors to the charge of the vanquished in favour of the United Nations was here in question, but, as we pointed out several times, *the international legislation of general force of the nations expressing the legal conscience of the world was at issue.* Accordingly, it would have been unlawful to fix for Hungary a different time limit for the termination of the

restitution proceedings than for the other Powers. It was particularly objectionable that whereas the restitution proceedings continued undisturbed in the relation of the other Powers, where an appropriate time limit was fixed, in the relation of Hungary, on the contrary, the restitution proceedings were in consequence of the expulsion of the Hungarian Restitution Commission closed from one day to the other for political reasons, without fixing a time limit at all; thus, as we have already alluded to it, not only the filing of new claims and the presentation of additional proofs was rendered impossible, but the retransport of the property already released for repatriation was stopped, too. The discontinuance of the restitution proceedings under these conditions was without doubt *an internationally wrongful act*. The American Government was by no means exempted from the responsibility by the fact that it instructed the German authorities to carry through the decontrol procedure and to place the property removed to Germany at the disposal of the owner verified under the rules of Civil Law.

As a matter of course, in those cases where the property came back to Hungary in the decontrol procedure, the claim of the Hungarian Government for restitution or compensation essentially ceased (apart from the reparation prescribed by International Law of the losses incurred even in these cases), there remained, however, the responsibility of the American Government for compensation — based on the breach of the restitution duty falling upon the United States on the strength of the Peace Treaty and of the general International Law created partly by the American Government itself — in all cases where the removed property qualified to be eligible for restitution *did not actually come back to Hungary*. In our opinion it is indifferent from this point of view, whether the restitution of the relative property was not effectuated because the restitution proceedings were wrongfully brought to a stop by the American authorities and, therefore, these objects came under the administration of the Germans, or because the objects were delivered by a German court to third persons living abroad who lodged their claim of ownership to the property, and this claim was adjudged by the court and the objects were made available outside of Hungary.

5. THE PROPERTY OF THE NATIONALIZED HUNGARIAN LIMITED COMPANIES SITUATED ABROAD. THE LEGAL DISPUTE BETWEEN PROFESSOR LEWALD AND PROFESSOR SEIDL-HOHENFELDERN

It is impossible not to deal here a little more circumstantially with the scientific dispute between two excellent professors: Dr Hans Lewald, Professor at the University of Basel, and Seidl-Hohenfeldern, at that time Professor at the University of Vienna, published in the *Juristische Blätter* in Vienna[18] based purely on Private International Law and concerning the

[18] See the Nos May 10, 1952, and September 13, 1952, of the *Juristische Blätter*.

"legal destiny" of the property, situated abroad, of the nationalized Hungarian limited companies. The dispute of the two scholars centered on the question whether the property situated abroad of a limited company, in consequence of the taking into public ownership of the shares by the State, passes into the ownership of the State "one man's company" and so, in fact, into the ownership of the State, or whether another State on the territory of which the property is situated has a right to consider the setting up of the State "one man's company" as a disguised nationalization and to refuse its recognition, referring to the principle of territoriality and to the *ordre public*. The question came up for both scholars in the following form: who was the legitimate owner of the property situated abroad: the State or the former share-holders? According to the opinion of Professor Lewald, based on the principle of anonymity, the property, situated abroad, of a limited company remains undivided in the ownership of the company as a juristic person, in spite of any change in the person of the share-holders, whereas Professor Seidl-Hohenfeldern considers, on the ground of the control theory, that the property of the limited company belongs, after all, to the share-holders also during the existence of the limited company. According to Seidl-Hohenfeldern the taking into public ownership of the shares by the State amounts to the nationalization of the property, and as the foreign State, referring to the principle of territoriality and to the *ordre public*, is not obliged to recognize the nationalization of the property, if it has a confiscatory character, the property located abroad belongs, after all, to the former share-holders and may be claimed by them before the courts of justice of the foreign State.

The dispute of the two eminent jurists concerning a question of Private International Law, though it might be suitable to elucidate the question by whom the property of the nationalized Hungarian limited companies situated permanently abroad may be claimed before the tribunals, turns the really existing question of the property removed during the war in an entirely wrong direction. This, as we have made clear repeatedly, must be examined decisively *on the basis of the rules of Public International Law* and by no means of the rules of Private International Law. Whether the ownership of the removed property is on the strength of the norms of private International Law the legal due of the "one man's company" taking the place of the old Hungarian limited company or of the claimant residing abroad, *an absolute priority over this ownership belongs to the Hungarian State* in virtue of the rules of International Law concerning restitution. This means that as long as the international duty concerning the restitution of the relative property (primarily in consequence of the expiration of a reasonable time limit) did not cease, the object must in the first place be retransported to the *territory* of Hungary and the owner must be instructed to make a claim against the Hungarian Government.

6. THE PROVISIONS OF THE BONN TREATY CONCERNING RESTITUTION

The general validity of the legal principles created by the Allies concerning restitution was not weakened, but on the contrary strengthened by the provisions contained in the Chapter "Äussere Restitutionen" of the Part entitled "Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen" of the Bonn Treaties concluded on May 26, 1952, and signed on October 23, 1954, by the German Federal Republic and the three Western Powers (which came into operation on May 5, 1955), in which the German Federal Republic on her part recognized, to the benefit of third beneficiaries, her restitution duty with regard to certain goods removed from the territories occupied by the German armies.[19]

According to the Bonn Treaty there are two kinds of restitution in favour of persons standing outside the Treaty:

1. the restitution of jewellery, silver wares, period furnitures, and cultural goods, on the part of the Government of the German Federal Republic to the benefit of the Government from the territory of which these goods were removed by German or allied troops, authorities or their individual members with the application of force or duress of whatever character;

2. the restitution *in natura* of private property on the part of the present possessor in favour of that natural or juristic person from whose possession the property was stolen or taken away with whatever force or duress during the occupation by German or allied troops, authorities or their individual members.

The intergovernmental *restitution* (i.e. the restitution in the technical sense of the term), which, however, concerns only certain categories of the removed property, is, according to the text of the Bonn Treaty, *the explicit continuation* of the restitution proceedings instituted under the Allied Powers in occupation. This is true to such an extent that if a claim of this nature was submitted at that time to one of the occupying Powers but has not yet been settled, it has to be passed automatically by the Allied Occupying Power to the *Deutsche Dienststelle* established by the Bonn Treaty. Quite new claims, which have not been submitted to the authorities of the Powers in occupation, cannot be presented at the German "Dienststelle". The restitution claim (not quite in the technical sense of the term) which may be lodged by a private person may comprise all categories of removed property and has to be enforced *before a court*. Its preliminary condition is, of course, that the present possessor or detentor shall be known. The court, however, is bound to pronounce the restitution *in specie* of the object, even if it has been acquired in good faith, unless the *bona fide* possession has lasted more than ten years. This kind of restitution is so far not a restitution in the technical sense of the term as it has not a Public International Law but only a Private International Law character. On the other hand, it is not a simple *in integrum restitutio* either

[19] For the Bonn Treaties, see the Beck'sche Textausgaben, Pariser und Bonner Verträge, München—Berlin, 1955.

as it afflicts the *bone fide* acquirer, too. After all, it stands rather near of the neutral legislation concerning the restitution of removed property.

According to the Bonn Treaty, the proceedings connected with the restitution claims lodged by private persons are decisively more favourable than the "decontrol proceedings" referred to above, instituted by the occupying Powers, as

1. they aim at the delivery *in specie* of the object removed, free from any restriction, consequently its delivery does not depend on any licence granted by a foreign exchange or other authority, and is effected in principle free of charge (only the expenditure increasing the value of the object and possibly the purchase-price paid at that time are to be refunded);

2. the claim may be lodged not only by the owner but also by "die Person der oder deren Rechtsvorgängern. . . eine Sache entzogen worden ist".

In principle no restitution claims in the technical sense of the term could, as we have pointed out, be lodged by private persons in the frame of the restitution proceedings initiated by the Powers in occupation.[20] The fact that the Bonn Treaty renders the presentation of claims of such character legally possible proves, in itself, that the mode of stopping the intergovernmental restitution proceedings instituted by the Allies and the so-called decontrol proceedings were not satisfactory for the sense of justice of the Allied Powers, and was not conform to their fundamental attitude, according to which all property removed from any territory under the German occupation, which violated so seriously and continuously the international legal order, had to be retransported to this territory.

The objective of the restitutions provided for by the Bonn Treaty would have been to complete, in a satisfactory way, the restitution proceedings instituted by the Allied Occupying Powers. It is another question, of course, whether the circumstance that the intergovernmental restitution proceedings according to the Bonn Treaty comprised only jewels, silver wares, period furnitures and cultural goods, further that for the filing of the restitution claims of private persons such time limits were fixed and the presentation of the claims was subject to such conditions which could not assure the protection of the interests of every country concerned — whether all this did not prevent the achievement of the desired objective. Among others, the Allies made it a condition that the Government of the country concerned shall join *without reservation*, consequently without being able to try to enforce her proper viewpoints, the Commission denominated "Schiedskommission für Güter, Rechts und Interesse in Deutschland".

Beside the restitution *in natura* of the property removed to Germany, the Bonn Treaty explicitly provides that if the object to be restituted was lost or was destroyed after the identification in Germany, the respective Government or the private person concerned may demand full compensation (*Bonner Verträge*, 7/V Art. 4). This claim to compensation exists in connection with those goods, too, in respect of which the claim to restitution was recognized by the Allied Powers in occupation of Germany, the restitu-

[20] Regarding the character of the restitution to be made by the neutrals see the Chapter "The Neutrals and Restitution".

tion of which, however, could not be effectuated for the reasons exposed above. The measure of compensation was fixed by the Bonn Treaty at the *Wiederbeschaffungswert*.

The German restitution duty is, according to the Bonn Treaty, also a continuation of the restitution procedure initiated by the Occupying Powers in so far as it comprises the same countries occupied by Germany: the United Nations and the former allies of Germany, and, from the point of view of removal, it considers the same dates as deadlines that were fixed by the Allies. By virtue of Article 5 of the 7/V Bonn Treaty, *Hungary*, too, is *an explicitly designated beneficiary* of the restitution duty, namely in respect of the property removed after January 20, 1945. It is comprehensible that the Bonn Treaty did not choose a different deadline from the one in the Peace Treaty concluded with Hungary in Paris, but this date is in relation to Germany even less justified than in relation to the United Nations. The German Federal Republic cannot object that Hungary was Germany's ally before the armistice, and that as such she contributed to a certain extent to the removal of the property from her own territory. *Germany is at any rate responsible, on the ground of her proper duty, for the property removed at any time during the occupation from Hungary*, which country was occupied by her troops and deprived of her sovereignty; anybody else is more entitled to raise the objection in question against Hungary than Germany herself. The term of January 20, 1945, which had, as we say, no legal basis in the German relation, is a further evidence of the fact that the Bonn Treaty had the continuation and the termination of the restitution in view that had been decided by the Allies.

Apart from the elements of the restitution duty laid down in the Bonn Treaty, our above statement is also supported by the provisions of the Appendix of the Treaty No. 7/V relating to the formal requirements of the restitution claims, according to which:

> "Anträge auf Naturalrestitutionen ... müssen enthalten *a)* eine Bezeichnung der Sache deren Restitution begehrt wird; *b)* soweit möglich eine Bezeichnung der Person in deren Händen sich diese Sache zur Zeit der Antragstellung befindet; *c)* eine Schilderung des Sachverhalts der den Restitutionsanspruch begründet,"

and further on:

> "Anträge auf Entschädigung ... müssen enthalten *a)* eine Bezeichnung der Sache für die die Entschädigung begehrt wird; *b)* Angaben über die Identifizierung dieser Sache in Deutschland; *c)* Angaben bezüglich der Verwendung, des Verbrauchs, der Zerstörung, des Diebstahls oder des Abhandkommens dieser Sache; *d)* Angaben des beanspruchten Betrags; *e)* Angaben über alle anderen Umstände, die den Anspruch begründen."

Consequently, in the case of the *Naturalrestitution* effected in favour both of Governments and of private persons, the principle of territoriality is in the same way effective, and the restitution is in the same way based on the facts of the removal and of the identification of the removed object as in the

restitution proceedings conducted by the Allies. The right of ownership *need not be proved* in connection with either the intergovernmental restitution claims or those in favour of private persons. Not even the restitution claim of private persons is based on the ownership but on the dispossession *(Entziehung)*, from what, as we have already said, it decisively follows that *according to the view of the Allies* themselves the right way leading to the restoration of the legal order is as follows: *in the chronological sequence the possibility of intergovernmental global restitution, based solely on the fact of removal, must first be assured, and after the reasonable termination of these proceedings, but still reserving the possibility of intergovernmental restitution for valuable objects,*[21] *the restitution in natura must be rendered possible for private persons, too,* provided they can prove that certain identifiable objects found in Germany were taken away from them by force or duress — not necessarily from their ownership and not necessarily in the legal sense but in fact.

The fact that the Western Allies wanted to render possible by the Bonn Treaty for both the States and the individuals to enforce their compensation claims concerning the property lost or destroyed after identification in the same way as the Allied Occupying Powers did it in the course of the restitution proceedings carried through by them,[22] closes the circle of those proofs which produce evidence to the effect that the restitution duty of the Government of Bonn was so interpreted by the Allies that the property removed to Germany by a delinquency of International Law has, *without the verification of the legal ownership,* to be returned *in specie* to the country from the territory of which, or to the person respectively, from whose possession it was removed, *or compensation has to be paid to the Government or private person entitled thereto.*

According to the foregoing, the Bonn Treaty expresses the intention of the Allies that the restitution proceedings instituted but not completely liquidated by them should be terminated by the German Federal Republic in such a way that the principles of International Law crystallized by the Allies should be wholly enforced in the interest of the restoration of the infringed international legal order. The Bonn Treaty manifestly departed from the assumption that the restitution proceedings had been lawfully terminated by the Allied Occupying Powers to the benefit of all nations concerned, among them of Hungary, too.

If this was not the case, the pure fact that in consequence of a war delinquency (force or duress) goods were removed from Hungarian territory to German territory, affords a doubtless legal basis for the enforcement of a direct restitution claim against the German Federal Republic. As it

[21] In connection with the intergovernmental restitution of objects of greater value a note made by the Austrian Restitution Commission in Karlsruhe on June 22, 1948, contains the following interesting declaration of Mr. Hower who was competent in the question on the part of the USA: "The works of art which (after examination) cannot be judged as doubtless restitutable will be handed over to the German Prime Minister of the various districts with whom the question of reclaiming may still be discussed". Mr. Hower emphasized that a term of 30 years was projected for the reclaiming of these works of art which will probably be granted.

[22] See p. 113.

results from our whole argumentation, the international legal public opinion, and more precisely the United Nations, representing a decisive part thereof, qualified the injury caused by the Axis Powers to the international legal order by the removal of goods as fully justifying the principle of law, systematically applied by them, according to which in all cases where the fact of wrongful removal exists and the removed property is identifiable, the *claim may be enforced*, not or not primarily in accordance with the law in force till then, which gave a right to the owner against the not *bona fide* possessor to the restoration of the ownership, but *by the Government concerned, for the purpose of repairing the injury caused to the national economy infringed by the internationally wrongful acts, with a view to the territorial restitution of the property, irrespective of the good faith of the possessor*. Consequently, the enforcement of the restitution claim against the German Federal Republic is well established on a "proper legal title", that is to say, irrespective of the fact that the Allied Occupying Powers in the Bonn Treaty directly imposed the obligation on the West-German Government to continue and to complete the restitution proceedings instituted by them.

The independent restitution claim of Hungary against the German Federal Republic is not only left untouched by para. 4 of the above-cited Art. 30 of the Hungarian Paris Peace Treaty but the corresponding original obligation of the Germans is confirmed by it in all respects.

If the Hungarian Government wanted to enforce its claim tending to the restitution of the removed property *on a contractual basis*, by virtue of the Bonn Treaty (which, as we have mentioned, contained certain provisions in this respect), it would evidently have every right to require that the Government of the German Federal Republic shall carry through these proceedings under the conditions and in the way established by the Allies and recognized as lawful by the Germans, too, not only regarding jewels, silver goods, periode furnitures and cultural goods, but also in respect of all property removed from Hungary.[23] The provision of the Bonn Treaty, according to which the intergovernmental restitution presupposes that the respective claim was formerly filed with one of the Occupation Powers, can manifestly not be relevant in the case of Hungary.

The Hungarian Government could also demand that the private restitution claims might be enforced by the Hungarian interested persons within a new appropriate time limit, namely by the natural or juristic person who or whose predecessor in title used economically or possessed in Hungary the removed property. As a matter of course, the restitution provisions of the Bonn Treaty modified in this way in favour of Hungary have to be completed in consequence of the progress of time even more energetically by those provisions regarding the claims for pecuniary compensation that may be raised in case of the impossibility of the *Naturalrestitution*.[24]

[23] Art. 6 of the Bonn Treaty No. 7/V *(Meistbegünstigungsklausel)* explicitly refers to the possibility that the German Federal Republic may conclude a separate agreement with an interested Power.

[24] See Chapter X.

CHAPTER VIII

RESTITUTION OF HUNGARIAN PROPERTY REMOVED TO AUSTRIA

1. THE IDENTITY OF THE RESTITUTION PROCEEDINGS INSTITUTED BY THE ALLIES IN AUSTRIA AND IN GERMANY

In Austria, although her international legal status was by virtue of the Moscow Declaration of November 1, 1943, already during the occupation, decisively different from the status of Germany (her limited sovereignty, as we shall point out hereafter,[1] was recognized from the beginning by the Allies), the occupation authorities exercising the supreme power instituted the restitution proceedings in the same way as in Germany and carried them through according to the same principles as applied in Germany. From the viewpoint of restitution the Allies considered Germany and Austria as a unity, as such a territory under their jurisdiction to which a mass of goods had been removed with force or duress by the Germans from the occupied territories, and which at the time of the removal of the goods to Germany had in fact been organic constituent parts of the "German Empire". This procedure, however, derived also from the fact that all measures taken by the Allies were *in ultima analysi* based on the London Declaration of January 5, 1943, and on the "umfassendere interstaatliche Rechtsidee" being founded thereon, and that was equally effective on all territories that recognized the international legislative power of the United Nations, victors in the Second World War. Would it have been conceivable that the Allies should take, as a basis of their proceedings on the territory of Austria an International Law different from that applied in Germany and in the countries of her allies, and which in addition had been proclaimed by them in its entirety towards *the neutrals?* The basic dispositions of the Allied Powers occupying Austria concerning the restitution of the property of the United Nations — quasi as a proof of this thesis — agree (as far as we may control it) even in their wording not only between each other but also with the dispositions of the authorities in occupation of Germany. We can read in the August 7, 1945, documentation of Keesing's *Archiv der Gegenwart* as follows:

> "Die Alliierten Militärregierungen für Deutschland und Österreich haben Gesetz Numero 52 über die Sperre und Beaufsichtigung von Vermögen... bekanntgemacht. Das Gesetz 52 dient im wesentlichen drei Zielen, nämlich die Sperre und Beaufsichtigung
>
> 1. des gesamten Reichs- und Parteivermögens;
>
> 2. des Vermögens abwesender Eigentümer einschliesslich der Regierungen der Vereinigten Nationen und ihrer Staatsangehörigen;

[1] See p. 161.

3. all jener Vermögen die durch Zwang oder unrechtsmässig den berechtigten Eigentümern entzogen worden sind."

(This enumeration is, of course, not accurate.)

Consequently, the Law concerning the sequestration and the control of the goods was promulgated at the same time in Germany and Austria. The text of Law No. 52 published in Germany literally corresponds to the text of *décret No. 3 (Blocage et contrôle des biens)* issued by the Military Government in Austria.[2] The only difference between the German "Military Government Law No. 52" and the Austrian "*Gouvernement militaire décret No. 3*" is that the latter designates among the natural and juristic persons whose property is subject to the control of the Military Government, beside the German Empire, Austria, too. The identity of the basic dispositions goes so far that the "General Disposition No. 1" issued on the subject of the execution of the Law No. 52 of the Military Government in Germany, which provides for the absolute sequestration of the property of the leading institutions and functionaries of the State and the apparatus of the Party, is literally identical with the text of the "*Ordre general No. 1*" (General Order No. 1) issued on the subject of the execution of the *Décret No. 3* Military Government in Austria. (This Order relative to Austria also speaks of the institutions and functionaries of the whole *Reich* and the *NSDAP.)* Last but not least, we have stated that the provisions of the MGR 19 issued on April 15, 1946, concerning the duty of declaration and conservation of the removed property, serving as a basis for the restitution made in Germany, equally agree precisely, for instance, with the *Ordonnance No. 37* issued by the French Military Commander in Austria in Wien on May 25, 1946 (with which, on the other hand, the dispositions issued by the other Austrian commanders are manifestly in accordance). The above-quoted French *Ordonnance No. 37* obliges, just as the German MGR 19, all persons concerned ("les détenteurs de biens et les personnes qui, juridiquement ou matériellement ou par tout autre moyen, à quelque titre que ce soit, détiennent ou ont détenu, géré, administré, protégé, contrôlé, acheté ou servi d'intermédiaire, transporté ou qui simplement connaissent l'existence des biens visés aux articles 1 et 3") to declare (para. 2) and to take in custody unchanged those goods "sous peine de sanctions sévères" (para. 7) which "(qui) ont été pris par les Allemands et amenés en Autriche, en provenance de pays, avec lesquels l'Allemagne était en guerre, *ou de pays autres que l'Autriche, occupés par l'armée allemande aprés le 1er Septembre 1939.*"

The restitution of the property removed to Austria was introduced, in the same way as the restitution of the property removed to Germany, by the MGR 19, with the duty of declaration and conservation and with the "Property Control"[3] connected therewith, what, just as in Germany, was

[2] The French text of the Law Decree was at our disposal, so we cite that. In the foot-note of the French Decree (announcement) the following phrase can be read: "French of decree No 3: to be posted to the left of English."

[3] This Property Control was, also in Austria, an allied war (discriminatory) measure, depriving the right of free disposal.

not of the same character as the taking under Property Control of the property of the ex-enemy nationals located there formerly.

The provisions concerning the restitution of the property removed to Austria, like the MGR 19 issued by the Military Government in Germany, refer, of course, primarily to the property removed from the territory of the United Nations. Hereupon, these provisions were, also here, soon extended to the property removed from ex-enemy countries occupied by Germany, including *Hungary*. We must note that, in the case of the restitution commenced in favour of Hungary, the Occupying Powers did not distinguish between the property removed to Germany and property removed to Austria, just as they did not make any such difference in the case of the United Nations either.

The instructions of the American Government concerning the institution of the *Hungarian restitution* proceedings, which were the basis of the repeatedly quoted Memoranda Nos 4 and 6 of OMGUS,[4] served likewise as a basis for the restitution of Hungarian property removed to the American zone of Austria. Neither the American authorities in occupation of Austria, nor in accordance with them, the other authorities in occupation of Austria did and could see any reason or basis for establishing in any relation whatsoever another regulation in respect of the Hungarian property removed to Austria, having been at that time an organic part of the German Empire, than regarding the Hungarian property removed to Germany. The legal nature of the property removed to the geographical territory of Germany (in the strict sense of the word) did not as a matter of course, differ in the eyes of the Allies from the legal nature of the property removed to the geographical territory of Austria: this legal nature was determined by the same criteria. The natural explanation of the fact that the rules concerning the restitution of property removed, on the one hand, to the territory of Germany and of Austria, and removed, on the other hand, from the territory of the United Nations and of Hungary, as well as of the other ex-enemy countries, were established by the Allies with slight differences in an identical manner, was, disregarding everything else, that the Allies did not desire to give a more favourable or a less favourable treatment to this or to another country, in respect of the property removed to this or to another country. By regulating the restitution of the removed property they wanted to enforce a general principle of law, which is *equally effective to the advantage of every country injured in its rights and to the charge of every country to the territory of which the property of the former countries was unlawfully removed.*

2. GENERALITY OF THE LEGAL PRINCIPLE OF RESTITUTION AS THE BASIS OF THE RESTITUTION CARRIED OUT IN FAVOUR OF HUNGARY

Consequently, the general character of the principle of law was the decisive explanation of the fact that the Occupying Powers decided the restitution

[4] See pp. 128, 132.

of the Hungarian property removed to the territory of Austria in the same way as, on the one hand, of the property removed from the territory of the United Nations and, on the other hand, of the property removed to the territory of Germany. This generality of the restitution principle would, however, have lost its whole penetrating force, for instance, in relation to the neutrals if the scope of its application had been from any point of view limited to certain countries.

The generality of the principle would, of course, not preclude in itself the supposition that the Allies might have wanted to give an *exceptional treatment* to Austria, also from the viewpoint of the removed property, as they did in various other respects. The fact, however, that the Allies wanted to apply unaltered the general legal principles of restitution also in respect of the alien property removed to Austria, is brilliantly proved by the fact that until they carried out the restitution proceedings on the territory of Austria in their own competence, *they did it on the basis of the same criteria that underlay the restitution proceedings in Germany and everywhere else.*

It does not alter our statement in the least that one or another principle underlying the restitution proceedings instituted by the Occupying Powers in Hungarian relation on the territory of both Austria and Germany was applied in a somewhat different way, for instance, in the British zone and in the American, French or Soviet zone of occupation. We have here in mind, for example, the difference in the standpoints assumed by the Allies in respect of the starting date of the German occupation of Hungary. As a matter of course, irrespective of that, some occupation authorities treated the question of restitution in a more liberal way than the others. The most liberal was in that respect the Soviet Union; she was followed by France, then came America, and the most reserved was Great Britain.

3. AMBIGUITY OF THE STATUS OF AUSTRIA AFTER THE LIBERATION. THE MOSCOW DECLARATION. THE SECOND *KONTROLLABKOMMEN*. THE RECOGNITION OF THE LEGISLATION OF THE ALLIES CONCERNING RESTITUTION

The status of Austria, as we have already mentioned, was based primarily on the Moscow Declaration. The Declaration reads as follows:[5]

> "Die Regierungen des Vereinigten Königreichs, der Sowjetunion und der Vereinigten Staaten von Amerika sind darin einer Meinung, dass Österreich, das erste freie Land, das der typischen Angriffspolitik Hitlers zum Opfer fallen sollte, von deutscher Herrschaft befreit werden soll.
>
> Sie betrachten die Besetzung Österreichs durch Deutschland am 15. März (correctly 13. März) als null und nichtig. Sie betrachten sich durch keinerlei Änderungen, die in Österreich seit diesem Zeitpunkt durchgeführt wurden, als irgendwie gebunden. Sie erklären, dass sie wünschen ein freies unabhängiges Österreich wieder hergestellt zu sehen und dadurch ebensosehr den Österreichern selbst wie den Nachbarstaaten, die sich ähnlichen Problemen

[5] German text from the collection of documents of Stephan Verosta.

gegenübergestellt sehen werden, die Bahn zu ebnen, auf der sie die politische und die wirtschaftliche Sicherheit finden können, die die einzige Grundlage für einen dauernden Frieden ist.

Österreich wird aber daran erinnert, dass es für die Teilnahme am Kriege an der Seite Hitler-Deutschlands eine Verantwortung trägt, der es nicht entrinnen kann, und dass anlässlich der endgültigen Abrechnung Bedachtnahme darauf, wieviel es selbst zu seiner Befreiung beigetragen haben wird, unvermeidlich sein wird. Gez.: Roosevelt, Churchill, Stalin (1. Nov. 1943)."

On the ground of this Declaration the Austrian jurists propounded the thesis that Austria had been from 1938 to 1945 "wohl rechtsfähig, aber nicht handlungsfähig",[6] that is to say that, as an international juristic person, she did not cease to exist at all, the legal continuity of her legal personality had existed unchanged since 1918, she had only been deprived of her disposing capacity "da die meisten Mitglieder der österreichischen Regierung vom 1938 von den deutschen Okkupanten verhaftet wurden."

From this Austrian thesis followed the standpoint that after the cessation of the German occupation Austria recovered her disposing capacity, what, on the other hand, would have had as a consequence that on the territory of Austria only the Austrian Government was authorized to give orders on the ground of the Austrian laws.

It is comprehensible that the Austrian experts of Public Law maintained that, on the strength of the passage of the Moscow Declaration according to which the occupation of Austria was "null und nichtig", with the actual cessation of the occupation, Austria should have recovered the whole possession of her former sovereignty. It is, however, uncontested that the Allies declared in para. 3 of the Moscow Declaration that they did not entirely dispense Austria as a people and as a State from the responsibility for the war waged on the side of Hitler's Germany,[7] what in itself justified, from the viewpoint of International Law, that Austria, albeit her "freely elected" Government was recognized by the Allies, was placed under military occupation in the same manner as Germany. On the strength of the two *Kontrollabkommen* concluded between the Allies (with the exclusion of Austria) the supreme power was exercised in Austria, in the same way as in Germany, by the *Alliiertes Kontroll System*, on the competence of which Art. 1 of the "*Zweites Kontrollabkommen*"[8] of June 28, 1946, throws light, defining it as follows:

"Art. 1.

Die Autorität der österreichischen Regierung erstreckt sich uneingeschränkt über ganz Österreich, mit Ausnahme folgender Vorbehalte:

[6] Erklärung des Vorsitzenden des Aussenpolitischen Ausschusses des Österreichischen Nationalrates zur Internationalen Stellung Österreichs von 1938—1945 (Verosta).

[7] The passage of the Moscow Declaration concerning the participation of Austria in the last war was originally inserted in para. 3 of the Introduction of the Austrian *Staatsvertrag*, it was, however, crossed out when the *Staatsvertrag* was signed.

[8] See Verdross (1935).

a) Die österreichische Regierung und alle untergeordneten österreichischen Behörden haben die Anweisungen, die sie von der Alliierten Kommission empfangen, auszuführen;

b) bezüglich der im nachfolgenden Artikel 5 aufgezählten Angelegenheiten *kann weder die österreichische Regierung noch irgendeine untergeordnete österreichische Behörde ohne vorherige schriftliche Zustimmung der Alliierten Kommission Massnahmen ergreifen.*"

Accordingly, the sovereignty of Austria was recognized by the Allies only to a limited extent and they reserved the right for themselves to issue regulations binding on the Government with unanimous decision. It resulted from the provisions concerning the *Kontroll System* that the Allies were also entitled to take measures binding the Austrian Government in respect of the restitution of property removed to Austria, moreover, the second *Kontroll-abkommen* regarded the restitution of property as a subject-matter for which the Allies might directly make provisions, *without interposing the Austrian Government*. In effect, Art. 5 of the second *Kontrollabkommen* (to which also para. *b* of Art. 1 refers) reads as follows:

"Art. 5.

Im folgenden sind die Angelegenheiten angeführt, in denen die Alliierte Kommission direkte Massnahmen ergreifen kann... (3) Schutz, Obsorge und Rückerstattung von Eigentum, das den Regierungen einer der Vereinten Nationen oder deren Staatsbürgern gehört..."

On the basis of all these, the Austrian standpoint, on the one hand, claimed national sovereignty for Austria, on the other hand, the Austrians could not contest that the allied authorities were authorized, particularly in respect of restitution, *to enforce their proper legal principles also in Austria*. This ambiguity caused the confusion, in consequence of which the Austrians followed only *à contre-coeur* the dispositions of the Allies concerning the restitutions. In respect of the restitution of property removed from the territory of the United Nations there was, of course, no escape. By reason of the clear imperative provisions of the *Kontrollabkommen* the Austrians were forced to execute word for word the dispositions of the Allies taken in respect of the restitution of property removed from the territory of the United Nations. Accordingly, in respect of this property the principles of restitution, enforced equally against Germany and the satellite States were wholly effective.

Hungary, however, as we have mentioned above, did not enjoy, in respect of restitution, the complete unanimity as the United Nations did.

In the first period of the restitution, that is to say, in the period when the taking of decisions and resolutions was within the competence of the Allied Occupying Powers, Austria never impugned and in consequence of her situation could not impugn the international legality of the *legal principles* applied by the Allies, in other words, the legal principles themselves were from the viewpoint of International Law recognized by Austria, too, in the first period of the restitution. Consequently, in that period of the

restitution made by Austria in favour of Hungary in which the carrying out of the restitution proceedings was in the hands of the Allies, the returning of the property was without doubt based on the principle of territoriality, the restitution claim was enforced on the strength of International Law by the Hungarian Government against the Allied Military Governments exercising the jurisdiction, the liability for restitution extended to all identifiable property and *in connection with the restitution claim not the individual ownership, but only the fact of the removal by force or duress from the territory of Hungary was to be verified.*

A new period began in the Austrian restitution when the Allies, more precisely some Allied Powers, decided to vest the Austrian Government with the management of the restitution cases.

4. PASSING OF THE RESTITUTION TO THE AUSTRIAN GOVERNMENT

In the spring of 1947 Great Britain and in the spring of 1948 also the United States considered that the time had arrived to liquidate their restitution apparatus in Austria and to vest the Austrian Government with the further management of the Hungarian restitution affairs. There is no doubt that the English and the Americans, acting in their scope of authority under International Law relegated the restitution proceedings to the Austrian authorities with a view to continue them on the basis of the principles applied till then, and not with the purpose of allowing the authorities to establish new rules of restitution. They did not hand over the property to the Austrians but ceded the restitution proceedings so that the Austrians should continue these proceedings in favour of Hungary in accordance with International Law. The negotiations entered upon, as a consequence of the decision taken by the British and American authorities, *had no positive result* as the Austrian authorities assumed the standpoint that Austria, in contrast to her position in respect of the United Nations, was not bound by any written international agreement or rule of law to restitute the Hungarian property, and owing to that the Hungarian Government might not set up any restitution claim, it might at best, within the scope of bilateral negotiations, demand the delivery of the property removed to Austria against special concessions. Furthermore, the Austrian authorities, by referring to the Municipal Legal Order of Austria, did not consider it at all as possible that Austria should renounce the protection of the third, so-called *bona fide* acquirer. Finally, they denied the Public-International-Law character of the restitution duty and assumed the standpoint that the delivery of the removed property can in principle only be claimed by the verified Hungarian owner from the present possessor, according to the general rules of Private International Law.

Against the attitude of the Austrian authorities, which recognized the restitution duty towards the United Nations but refused to meet the restitution claims of Hungary, we think it sufficient to refer to the above-cited provisions of the German *Viermächte-Verfahren*, the MGR 19, and the

Memoranda Nos 4 and 6 of OMGUS, which range Hungary, together with Austria, explicitly among the ex-enemy States occupied by Germany and entitled to restitution, and also fix the initial date and the end of the occupation. We may also refer to the fact that Hungary is equally enumerated in Art. 5 of the 7/V Bonn Treaty among the States occupied by Germany and, in consequence, entitled to restitution. Last but not least it is sufficient to quote the German Professor Kaufmann[9] on the restitution duty existing in favour of Hungary, in contrast to *the restitution duty incorrectly established, according to him, in favour of Austria.*

5. HUNGARIAN—FRENCH AGREEMENT CONCERNING RESTITUTIONS. RESTITUTION FROM THE SOVIET AND FRENCH ZONES OF AUSTRIA

At the same time when Great Britain and the United States, partly by sympathy for the Austrian people, partly with a view to liquidating the expensive apparatus as quickly as possible, passed the whole restitution affair to the Austrians, the restitution of the removed Hungarian property continued in accordance with the legal principles proclaimed by the Allies in the Soviet zone of Austria, and with some jerks in the French zone of Austria. As far as the latter zone is concerned, the author of the present work, as leader of a Hungarian Governmental Delegation, concluded on February 19, 1948, by assuring full reciprocity, the above-mentioned[10] protocol agreement with the French ambassador Alphand, representing the French Government, according to which:

> "Le Gouvernement français est disposé à procéder pour sa part à la restitution aussi rapide que possible des biens hongrois se trouvant *sur le territoire français ou dans les zones d'occupation française de l'Autriche et de l'Allemagne* et notamment de l'or non-monétaire trouvé dans la zone française d'occupation en Autriche dès qu'il aura été établi que ce métal est d'origine hongroise."

It is worth while to abide by this protocol agreement primarily because it brings into relief, better than in any other relations, *the universality of the restitution duty*, by binding the French Government to restitute forthwith any property removed from Hungary even if it is found *on its proper territory*. On the other hand, this agreement proves energetically that the Allies did not want to make any distinction between the occupation zones of Austria and Germany, moreover, they particularly stressed the restitution of the non-monetary gold removed to Austria, and in connection with all this, never required anything else but the verification of the Hungarian origin and of the *force ou contrainte*, without the verification of the individual ownership.

The restitution from the Soviet and French zones of Austria, which lasted until the end of the occupation, is a brilliant evidence of the fact that, according to the Allies, the same legal principles were applicable in respect

[9] See p. 136.
[10] See p. 145.

of the restitution of the Hungarian property from Austria as were relevant to the Hungarian property removed to Germany and to the removed property of the United Nations.

The conduct of the Austrian authorities in respect of the restitution of the property removed from Hungary sharply raises the question of the validity in International Law of the legal principles of restitution developed by the allied Great Powers and other United Nations.

CHAPTER IX

GENERAL INTERNATIONAL LEGAL VALIDITY OF THE PRINCIPLES CONCERNING THE RESTITUTION EVOLVED BY THE ALLIES

The recent international legal evolution, as it is well-known, attributes, beside international treaties and international custom, a growing importance and binding force to "*the general principles of law recognized by the civilized nations.*" The basic importance of the generally recognized international principles of law was originally fixed by the famous Art. 38 of the Statute of the Permanent Court of International Justice which laid down that in addition to the international conventions and the international custom, the Court would apply these principles of law, too. (The old Statute was taken over in its entirety by the new International Court of Justice.) The "general principles" of International Law did not thereby become *stricto iure* sources of International Law, it was evident, however, that the nations could not refuse to recognize their binding force in their mutual relations.

Among the principles of law generally recognized by the civilized nations, beside many other principles, the jurists attribute a great importance to the general principle of law of "restitution", too. Professor Kaufmann (1949) states that it is such an "allgemeine Rechtskategorie, die ihre Ausgestaltung im wesentlichen übereinstimmend in den Landesgesetzen der zivilisierten Nationen gefunden hat und die so grundlegender Bedeutung ist, dass *sie in einer Sphäre über den nationalen Rechtsordnungen ruht und so auch für die Rechtsbeziehungen der Staaten untereinander massgebend ist.*"

From the general principle of restitution Kaufmann draws far-reaching inferences and, relying on these, tries to establish whether the various general rules of law concerning restitution are lawful or not. As we have mentioned, Kaufmann defines the principle of restitution otherwise than the present work. The restitution of the law of war, which is the central subject of our work, does not follow from the general legal principle of "the restoration of the legal situation disturbed by extraordinary events" but from the general principle of "repatriation of displaced persons and goods", according to which *all States are authorized to demand the repatriation of persons and of objects having not the character of a booty*, that came in consequence of war events from their proper territory to a foreign territory.[1] The rules of restitution of property removed during World War II established by the Allies are doubtless in perfect accordance with this principle of law.

A decisive importance in this connection should be attached to the general principle of law developed after World War II, according to which the *agreement between the Great Powers is one of the basic ways of settling inter-*

[1] From the expert opinion of University Professor László Gajzágó.

national questions. If the Great Powers agree on a question of International Law, their attitude creates International Law. This applies, as a matter of course, in an increased degree to thoses cases where an international legal standpoint is expressed by the United Nations, the "overwhelming majority" of the International Community comprising the Great Powers.

As we have pointed out in detail in the course of our whole work, the particular principles of law concerning restitution of property removed by the enemy with force or threat from an occupied territory were, without doubt, proclaimed by the United Nations forming the overwhelming majority of the members of the International Community, either directly or by way of accession. We must emphasize, too, that these principles of law form an organic part of that "umfassendere interstaatliche Rechtsidee", to which Professor Weiss refers as to the starting point of the whole international legal evolution of the period following the Second World War in the field of restitution. Consequently, no European State can withdraw itself from the London Declaration: no nation can refuse the recognition of those legal principles which were expressed in this Declaration and afterwards in the whole legislation of the Allies in Germany and in Austria, based on it. These principles must be complied with, not only because they were expressly recognized by all vanquished States, but also because they were in the end *wholly and completely accepted*, partly through the modification of their municipal legislation and partly in international conventions, *even by the neutral States*, which were affected by these principles in a disadvantageous way. If there has ever existed any international legislation recognized by the overwhelming majority of civilized nations as general International Law even without a formal international treaty, *the legal regulation of restitution after World War II is certainly such a piece of law*. Furthermore, *Austria*, for example, can all the less deny the principles of restitution evolved by the Allies since, apart from everything else, she herself as beneficiary took *wholly and completely advantage of the benefits resulting from the London Declaration and from the rules of law concerning restitution issued in Germany*, that is to say, she, too, comported herself in accordance with these rules. It is very important, too, that the restitution duty, as we have proved it in detail, is not exclusively based on a delinquency committed by the State bound to make restitution but rests *ex quasi delicto on all States to the territory of which unlawfully acquired property was removed* and which did not prevent their authorities or subjects from subsequently acquiring such property, or simply tolerate its storage. On this ground were the rules of the Allies concerning restitution extended to the neutral countries (to Switzerland, Sweden, Spain and Portugal) and on this ground was Italy held responsible for the restitution of the gold that had not been removed by herself from the territories occupied by her, but which the other Axis Power transported to her territory. We refer here to the statement of *Oppenheim—Lauterpacht* which reads as follows:[2]

> "There is little room for doubt that acts of deprivation of property in disregard of International Law are incapable of creating or transferring title. Neutral

[2] See p. 115.

> States which by failing to take the requisite and practicable steps for preventing their subjects from acquiring the property in question connive indirectly in the unlawful measures of the occupant and incur a responsibility whose novelty probably does not preclude it from being enforced by appropriate international remedies."

And finally, we refer here to a decision of principle of the Supreme Court of Austria published in the number of March 11, 1948, of the *Salzburger Nachrichten*, from which it is manifest that, apart from the fact that Austria is *ex quasi delicto* liable to return the property removed from Hungary, also according to the Austrian sense of justice: *those Austrian subjects who further acquire goods obtained by an international delinquency commit the crime of receiving and concealing.*[3]

In order to prove that, in accordance with the principles of law developed by the Allies, the international restitution duty exists without a particular contractual undertaking even if the respective State is not directly responsible for the fact of removal, we quote again Oppenheim—Lauterpacht and the treatise of Martin on the Paris Peace Treaties.

The § 102a of the work of Oppenheim—Lauterpacht[4] reads as follows:

> "As a rule belligerent property in neutral States, being under the impartial protection of the latter, enjoys immunity from seizure by the other belligerent. Yet circumstances may arise in which such immunity might constitute an abuse of neutral territory in violation of the principles of International Law and in which it may accordingly be proper — in fact, obligatory — for the neutral to hand it over to the opposing belligerent. Thus during the Second World War a substantial amount of property — or the proceeds thereof — looted by Germany and her allies in occupied territory was deposited in neutral countries by the German Government and German war leaders and private individuals. The Allied Powers issued repeated statements and warning safeguarding their position on the subject. In a different sphere they served to assert the view that *it is alien to the true purpose of neutrality to permit the use of neutral territory in such a way as to facilitate looting and spoliation* in a manner violative both of International Law and of considerations of humanity."

The lines referred to of Martin (1947) read as follows:

> "In essence these provisions of the Treaty amount to the proposition, that a belligerent may be held fully accountable for property looted by its allies, *even if it should have done no more than harbour the loot for some time during the war.*"

[3] The article of the *Salzburger Nachrichten* contains the following: "Der Oberste Gerichtshof sprach folgende Grundgedanken aus: 'Für den inländischen Staatsbürger ist der Umstand, dass Angehörige der Besatzungsmacht Privat-Eigentum als Beutegut in Anspruch genommen haben, von keiner Bedeutung. Für ihn sind die von Angehörigen der Besatzungsmacht als Beutegut weggenommenen Sachen gestohlene Sachen im Sinne des § 171 Strafgesetz gleich zu halten' (z. B. Besitz solchen Beutegutes kann als 'Hehlerei' bestraft werden)."

[4] (1952—56) Vol. II, § 102a.

It is true that the statements of Oppenheim—Lauterpacht express the general international legal position concerning the attitude of the neutrals, yet it is a matter of course that these statements also apply, for instance, to Austria which was, in respect of the property removed from the territory of the United Nations, *ranged expressis verbis among the States both liable and entitled to restitution.* If International Law qualified the conduct facilitating the looting and spoliation of occupied territories "in a manner violative both of International Law and of considerations of humanity" as unlawful even on the part of the States that had been neutral in World War II, the unlawfulness must so much the more be established in those cases where the removed property had consciously been taken into possession.

Although Martin's statement relates to the attitude of Italy, it is, however, characteristic that Oppenheim—Lauterpacht shares his opinion by affirming the responsibility and restitution duty of the State not only in respect of the property removed by itself or acquired by its subjects from the other Axis Power, but also in respect of the removed property that came to its territory without anybody's intention to acquire the ownership or possession, but *simply with a view to being kept in custody there.*

We think that all this and everything exposed by us several times in this respect proves without any doubt that *the restitution principles proclaimed by the Allies after World War II have created general International Law* in respect of the restitution of all goods removed by the Germans from the territory both of the United Nations and of the ex-enemy countries. This legal regulation was fully recognized by Austria, too, in her character of beneficiary, let alone the fact that this country submitted, of course, also to the rules decreed to its charge by the Occupying Powers within the scope of their authority concerning restitution.

1. FUNDAMENTAL LEGAL PRINCIPLES WHICH MUST IMPERATIVELY BE APPLIED REGARDING RESTITUTION IN THE TECHNICAL SENSE OF THE TERM

Let us now sum up the basic principles of law that are imperatively applicable according to the crystallized new international regulation in respect of restitution in general.

A) THE PUBLIC-INTERNATIONAL-LAW PRINCIPLE

It is a general principle of the restitutions — as we have explained it in detail — that the claims to the returning of the property have to be enforced on the ground of the Public-International-Law principle by the Governments concerned against the State liable to make restitution. This principle is expressed unmistakably both in the rules of law issued by the Allies in Germany and in Austria, and in the Peace Treaties concluded with the satellite States, moreover in the international legislative measures taken by the neutrals which were also based on that principle when the criteria of restitution were established by the latter in agreement with the Allies. The Public-International-Law principle is applied, as we have pointed out, also

in neutral relation, in spite of the fact that in these relations the subjects concerned of the spoliated territories were entitled to enforce their claims directly before the courts. In enforcing the claims the verification of the individual ownership was not required even in the course of the judicial proceedings and the Swiss Municipal Law, too, requires only the verification of the existence of "force or duress" *(Völkerrechtswidrigkeit)* in the sense of Public International Law and the making plausible of the fact of "dispossession".

Above we have quoted the article of the American jurist Covey T. Oliver (1955). In a foot-note to this article the author summarizes the criteria of restitution as follows: "A taking by force or duress was dealt with as illegal. Identification of the property was required. *Return was made to the government of the country from which the removal took place.*"

The restitution of the removed property was in fact made in all relations on the ground of the Public-International-Law principle and, as mentioned in the appropriate place, the vindication of the owner according to civil procedure took and could only take place when the States concerned had previously granted *a reasonable time limit for the enforcement of the intergovernmental restitution claims.* This rule of procedure was drafted in the most pregnant manner in the Paris Peace Treaties and precisely in respect of the restitution claims to be enforced by the United Nations against the vanquished. (Paragraph 7 of Art. 24 of the Hungarian Peace Treaty and the analogous paragraph of the other Peace Treaties.)

B) THE PRINCIPLE OF TERRITORIALITY

In our work we have shown in such detail as is appropriate to the importance of the question that in connection with restitution, both in active and in passive relation, the principle of territoriality is effective as a decisive basic principle. The principle of territoriality means that, as we have said, all property that was removed from any territory occupied by the Germans, from the ownership, possession or custody of any person, was to be restituted if found on the territory of a country *liable to make restitution for any reason whatever*, in the possession (custody) of any person. The right and duty of restitution is established by the fact of the removal. This right and duty respectively of the countries concerned is absolute: The criterion of the restitutions following the Second World War according to which the return has to be made "irrespective of any subsequent transaction" is the principle that most sharply distinguishes the institution of the new restitution from the older one. The absolute restitution duty, as from a legal point of view the most revolutionary principle of the new institution of restitution, produced, as we know it, the greatest reaction in the neutrals since this principle deprived the subsequent acquirers of property removed from the countries spoliated by the Germans, wherever they lived, of the protection due to a possessor in good faith, in contrast to the century-old principle of the municipal legal system of the States liable to restitution. If the new principle of return "irrespective of any subsequent transaction" was not incorporated into their legal system of restitution through an international

treaty, the latter States provided for an appropriate implementation of this principle by way of their particular municipal legislation. We remember that Switzerland, Sweden etc. had to break through their whole municipal legal system in order to make enforceable the absolute principle of restitution even before their courts, and the same situation exists in the case of the Bonn Treaty, which equally deprived the *bona fide* acquirer of the legal protection. The absolute principle of the restitution duty was recognized to such an extent by all countries concerned that as a rule (apart from the exception stipulated by the Swiss law[5]) they ordered the return of the removed property without any conditions, even if the acquisition of the property was carried out against the payment of a purchase price. At best, the State bound *ex quasi delicto* to make restitution provided for the indemnification of the *bona fide* acquirer according to its own discretion.

C) FORCE OR DURESS

The fundamental condition of restitution is, we have expounded in detail, the establishment of the existence of international force or duress. This fact was established in the case of the United Nations and Hungary on the basis of somewhat different criteria. In the case of the United Nations the existence of *force or duress was presumed* until the contrary was proved, i.e. all property, rights and interests were qualified as having been removed by force or duress which came from the territory occupied by the Germans indirectly or directly to the territory of the country liable to restitution *(Kollektivzwang)*. On the contrary, in respect of the ex-enemy States occupied by the Germans, either the individually exercised force or duress *had to be proved* or the fact that the removal was effected on the ground of the dispositions of the German authorities or of a puppet government serving the Germans. The fact of removal carried out unlawfully from the viewpoint of International Law established the restitution duty having effect on all subsequent, whether *mala fide* or *bona fide*, acquirers, as we said, irrespective of the country to the territory of which the property was removed. *The existence of force or duress within the meaning of Civil Law is no condition of restitution under Public International Law.*

D) THE PRINCIPLE OF IDENTIFICATION. THE IRRELEVANCE OF THE OWNERSHIP

It is an essential preliminary condition of restitution that only those goods have to be returned which can be *found and identified* on the territory of the respective country. This follows from the very notion of restitution.[6] The fact that the removed goods could be searched for by the agents of the injured country with the assistance of the authorities of the country liable

[5] See p. 121.

[6] See *Kontrollratsdirektive* of January 21, 1946; MGR—19—101; Hungarian Peace Treaty, Art. 24, para. 2.

to restitution had in this connection a decisive importance. As a rule everybody was obliged to promote the search who entered into the possession (custody) of a property acquired indirectly or directly from a territory occupied by the Germans. This was the purpose (in Austria, too) of the initial dispositions of the allied authorities by which they ordered *the declaration and custody* of such goods with a binding force on all authorities and all persons. The injured State had the natural right to inspect freely, in the country to the territory of which the property was removed, the registers kept of the declarations and the documents serving as a basis thereof, and to inspect the goods themelves. There is no doubt that the country concerned in a passive relation is bound, according to International Law, to provide for the safekeeping of the property removed to its territory as long as it is not returned. This was the purpose of the sanctions under which the allied military authorities ordered the declaration and the custody of the goods and that was the purpose of the procedure, too, by way of which the declared goods were taken under "property control" by the allied authorities.

For the identification, as we have pointed out several times, *the verification of the individual ownership was not necessary*, although, as a matter of course, the designation of the individual owner facilitated the procedure to a considerable extent. It was essential, as we have said by analysing the provisions issued in Germany, that as many data as possible should be made known to the authorities of the country liable to restitution,[7] data which render the identification of the goods possible (data of manufacture, the name of the last known owner, etc.).

All goods that are qualified in the course of the procedure of identification as originating from the territory of the injured State and were removed therefrom unlawfully from the viewpoint of International Law are *eligible for restitution irrespective of the person of the owner.*

[7] See p. 101.

CHAPTER X

THE QUESTION OF COMPENSATION. CONCLUSIONS

There is no room for doubt that the restitution duty in the technical sense of the term is only coming into existence after the establishment of the identity of the removed property. This explains that, pursuant to the dispositions of the allied authorities in Germany, to the provisions of the Paris Peace Treaties and of the Bonn Treaty, the injured State may only claim compensation instead of restitution *in natura* if the goods were used up, consumed, lost or destroyed after the identification. But what is the situation if, as it has happened *in concreto* to Hungary, no possibility is afforded at the proper time to one of the injured States for searching after the property unlawfully removed from its territory and subject to restitution obligation, and for establishing its identity?

It is evident that in that case we are concerned with a *general international delinquency committed by a State which did not meet its liabilities based on International Law and thereby injured another State in its interests.*

We have quoted above the definition of some eminent scholars of International Law (Liszt, Oppenheim, Fauchille) concerning the international delinquency and we have analysed the standpoint of the science of International Law regarding some fundamental questions connected with internationnal delinquency. We have stated that the unlawfulness and the damage are absolute conditions of the international delinquency, and from the theoretical analysis of various eminent jurists we have drawn the conclusion that, albeit the standpoint of the science of law is far from being uniform, the conception seems to predominate according to which there is, as a rule, no international delinquency without culpability, particularly there can be no international delinquency committed by omission. Finally, we have particularly emphasized that *the violation of the Hague Convention IV* by the belligerents and the persons belonging to the armed forces *constitutes an international delinquency irrespective of the culpability.*

Proceeding from the rules of International Law relating to international delinquency and to the international responsibility of the State, so much seems at any rate settled from the viewpoint of restitution that all States — whether they were belligerents or neutrals, — commit an international delinquency, respectively become accomplices in a delinquency committed by another State ("... connive indirectly in the unlawful measure"), when they distribute among their own inhabitants the property removed to their territory contrary to International Law, or when they use it for their proper needs and refuse its delivery, required by Public International Law, to the State injured according to International Law. As we have pointed out, it is a matter of course that the restitution

duty concerns only, in accordance with the original concept and the legal contents of the term, the property existing *in natura*, discovered and identifiable. If, however, by reason of the unlawful conduct of a State the goods themselves cannot be restituted *in natura*, in other words, if "a State violates unlawfully the interests protected by law of another State" (Liszt) or, as Oppenheim—Lauterpacht say, "by violating its international duty causes a loss to another State", the State is, according to International Law, responsible for the damage done, as for a general delinquency of International Law.

We have defined above the legal consequences of delinquency in International Law with the words of Liszt, Anzilotti, Kozhevnikov and Oppenheim—Lauterpacht as follows:[1] "The principal legal consequences of an international delinquency are reparation of the moral and material wrong done." *(Ersatz für materielle und immaterialle Schäden.)*

Accordingly, the State which violates the internationally protected right of another State, owes full material and moral reparation for its act.

The reparation of international wrongs, as we have pointed out in the appropriate passage,[2] is effected primarily as a rule by an *in natura restitutio*. The pecuniary compensation, however, if it comes to that, is not absolutely restricted to the pecuniary compensation of the damage done *(damnum emergens*, possibly *lucrum cessans)*. Oppenheim—Lauterpacht (1952—56) say in § 156/a Vol. I.: "International tribunals in numerous cases awarded damages which must — upon analysis — be regarded as penal" — and further on: "The practice shows other instances of reparation. . . in the form of pecuniary redress unrelated to the damage."

We have to mention here the standpoint assumed by Kelsen, a leading scholar of the Vienna school, regarding the reparation of the international delinquency, according to which International Law establishes only an obligation of principle for the reparation of the international delinquency, its substance and measure, however, are to be determined in a special treaty concluded between the injuring and injured State.[3] This standpoint of Kelsen (1932) produced an energetic reaction and received the most definite criticism from the other "great man" of the Vienna school, Professor Verdross[4] in his 1955 edition in connection with the standpoint of Kelsen as follows:

> "Diese Behauptung vermag jedoch der Kritik nicht standzuhalten. Eine Analyse einschlägiger Staatenpraxis zeigt nur vielmehr, dass der verletzende Staat verpflichtet ist den vollen von ihm verschuldeten Schaden wieder gutzumachen. Dieser Völkerrechtsatz kommt mit aller Klarheit im Endurteil des St. I. G. im Falle Chorzow zum Ausdruck, wo ausgeführt wird, dass die Gutmachung soweit als möglich alle Folgen des Unrechtstatbestandes zu

[1] See pp. 67. ff.

[2] See p. 74.

[3] Kelsen says in this respect as follows: "Eine Pflicht ohne Inhalt gibt es nicht; erst mit ihrem Inhalt wird sie existent ... die *Gutmachungspflicht kann nicht anders als durch Vertrag konstituitert werden.*"

[4] (1955) pp. 318 ff.

tilgen hat. Es ist also grundsätzlich der frühere Zustand wieder herzustellen, — an derer Stelle hat im Falle der Unmöglichkeit eine Ersatzleistung zu treten, die in einem angemessenen Verhältnis zum Schaden steht."

Anzilotti analyses in a very interesting way the question of pecuniary compensation in the part of his book relating to the consequences of the international delinquency. In the case of an injury of a pecuniary character — says Anzilotti — which is suffered by a State in consequence of the fact that private individuals incurred a loss by reason of *völkerrechtswidrige Handlungen* which can be financially measured, the reparation generally and principally consists in pecuniary damages, unless it can be effected through restitution *in natura*. By reason of their theoretical importance and of their practical significance from the viewpoint of our subject we insert here Anzilotti's statements concerning the reparation through pecuniary damages of the wrong suffered by the States in connection with the loss incurred by private persons:

"Der am häufigsten vorkommende Fall, der den verletzten Staat ermächtigt Schadenersatz in Geld zu verlangen, ist der Fall, wo Privatleute infolge von völkerrechtswidrigen Handlungen einen wirtschaftlich abschätzbaren Schaden erlitten haben. Die Staaten pflegen dann zu fordern — und dieser Anspruch wird ... nie bestritten —, dass die Wiedergutmachung des Unrechts... gerade darin bestehen soll, dass Ersatz für den Schaden geleistet wird. Die Leistung des Ersatzes für den wirtschaftlichen Schaden, den die einzelnen Individuen erlitten haben, stellt hier nur eine der Arten der Wiedergutmachung für das von dem Staat erlittene Unrecht dar: der Staat handelt hier ja nicht als Vertreter der einzelnen Individuen, sondern macht ein eigenes Recht geltend... Daher kommt es, dass die Einzelperson irgend ein Recht auf den ausgesetzten Betrag nicht erwirbt, es sei denn, dass er ihr angewiesen wird. Es kann so geschehen, dass der verantwortliche Staat sich verpflichtet selbst einen jeden der geschädigten Personen die vorher vereinbarte oder auf vereinbarte Weise... zu bestimmende Entschädigung auszuzahlen, oder so dass der verantwortliche Staat ... dem geschädigten Staat eine Pauschalsumme bezahlt, welche dieser in vereinbarter Weise oder auch nach eigenem Gutdünken unter die Geschädigten verteilt."

In another part of Anzilotti's work the following passages can be read:

"Rechtsfolgen der unerlaubten Handlung: ...Aus der unerlaubten Handlung entsteht ein Rechtsverhältnis, das ... in der Verpflichtung besteht, das begangene Unrecht wieder gutzumachen, und in dem dieser Verpflichtung entsprechenden Recht, seine Wiedergutmachung zu fordern. Die Verpflichtung trifft den Staat oder die Staaten denen die unerlaubte Handlung zuzurechnen ist; das Recht steht dem Staat oder den Staaten zu, welche ein Recht auf Erfüllung der Verpflichtung, deren Unterlassung die unerlaubte Handlung darstellt, hatten. ...Die Rechtssätze, nach denen die Wiedergutmachung zu bestimmen ist, sind die zwischen den Staaten geltenden Normen des Völkerrechts, — nicht die Sätze des Landrechts, durch welches die Beziehungen zwischen dem Staat der ein Unrecht begangen und dem Individuum, das den

> Schaden erlitten hat, geregelt werden. . . . Der von einem privaten Individuum erlittene Schaden ist also seinem Wesen nach niemals identisch mit dem Schaden welcher dem Staate erwachsen ist: er kann jedoch einen geeigneten Massstab für die dem Staat geschuldete Wiedergutmachung abgeben."

The essence of Anzilotti's statement, which, in our opinion, expresses in the most pregnant way the standpoint of the science of International Law concerning the reparation of the losses of Public-International-Law character incurred by private individuals (cf. also the respective parts of the works of Strupp, 1920 and Verdross, 1955) is accordingly that: 1. in the case of an international wrong the compensation is of Public-International-Law character even if the reparation of damage done to private persons is in question; 2. in accordance with the Public-International-Law principle, the right to receive damages belongs primarly to the State even in the case of an international wrong done to private persons; the individual does not obtain a direct right of disposal regarding the amount of damages fixed for the State; 3. the amount of the compensation is to be fixed not on the basis of the rules of Civil Law but on the ground of the norms of International Law; 4. in spite of this legal situation, the most appropriate practical mode for establishing the extent of the international pecuniary loss is the summing up of the losses incurred by private persons: the measure of the damages to be paid to the injured State by the State responsible for the international wrong is the loss suffered by private persons.

In connection with this question of fundamental importance the authors of International Law often quote the judgment passed by the Permanent Court of International Justice in the lawsuite between Germany and Poland concerning the internationally illegal expropriation of the factory of Chorzow, which essentially served as the basis of Anzilotti's argumentation. This part of the judgment bearing the number ANB Serie A, No 17 reads as follows:

> "Il est un principe de droit international que la réparation d'un tort peut consister en une indemnité correspondant au dommage que les ressortissants de l'État lésé ont subi par suite de l'acte contraire au droit international. C'est même la forme de réparation la plus usitée; l'Allemagne l'a choisie en l'espèce, et son admissibilité n'est pas contestée. Mais la réparation due à un État par un autre État ne change pas de nature par le fait qu'elle prend la forme d'une indemnité pour le montant de laquelle le dommage subi par un particulier fournira la mesure. Les règles de droit qui déterminent la réparation sont les règles de droit international en vigueur entre les deux États en question, et non pas le droit qui régit les rapports entre l'État qui aurait commis un tort et le particulier qui aurait subi le dommage. Les droits ou intérêts dont la violation cause un dommage à un particulier se trouvent toujours sur un autre plan que les droits de l'État auxquels le même acte peut également porter atteinte. Le dommage subi par le particulier n'est donc jamais identique en substance avec celui que l'État subira; il ne peut que fournir une mesure convenable de la réparation due à l'État". (Série A., No 17, pp. 27—28.)

Consequently, the reparation of the wrongs committed by the refusal of fulfilling the restitution duty in those cases where the property eligible for restitution disappeared before identification and cannot be discovered today any more, may in principle be effectuated in the most practical way by means of a pecuniary compensation, the amount of which can be arrived at through summarizing the losses of private persons; but the parties may agree in any other way. In order to fix the amount of the losses suffered individually, *ex aequo et bono* all evidences suitable for the verification of the facts bearing on the case and of the numerical data may be used.

In conclusion, if we consider it as proved, what on the ground of all the foregoing can evidently not be contested, that the principles of law concerning restitution established by the Allies — as the Powers representing the overwhelming majority of the civilized world — are part of general International Law, from the application of which neither the countries directly responsible for the removal of the property, nor those that were their allies can withdraw themselves, nor can those to whose territory such property was removed, possibly without their direct unlawful act but still as a result of an international delinquency, then indeed we must establish the existence in the case of Hungary of an international wrong and of the reparation duty in all those relations in which the responsible country did not comply with its restitution duty.

The further lot of the compensation and of the restitution *in natura*, primarily the question how the sum received by virtue of compensation is to be distributed by the State among the injured private persons, depend on the sovereign decision of the State, in other words, on its municipal rules of law. As Anzilotti says, the individual has no direct right whatever to the sum of the international damages, such a right may only be granted to him by the State, possibly in the respective international agreement itself, but at any rate according to the proper legislation of the State. The State injured in its interests protected by International Law in consequence of the removal of property disposes primarily of both the restituted goods and the accidental damages, so it appertains to the State to provide for the elimination and reparation of the individual injuries. It is a matter of course that the State will in principle return the restituted property to those and distribute the damages among those (or their successors in title), who, as the Swiss *Bundesbeschluss* lays down, were looted by the fascists in an internationally unlawful way at the time of the German occupation or were deprived by force, threat, by semblance of a legal act or by any other way of goods being in their ownership or possession, consequently who, unless otherwise provided by Municipal Law, are or have been the legitimate owners or possessors of the removed property. *The international reparation, however, of the removal of property is by no means a claim of Civil Law but in any case a claim of Public International Law.*

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