to be seen. The Bogotá Conference recommended in its Resolution XXXI [18] that the Inter-American Juridical Committee prepare a draft statute providing for the creation and functioning of an Inter-American Court to guarantee the rights of man. Such a draft, after examination and comment by the governments of all the American states, shall be transmitted to the Tenth Inter-American Conference "for study," as the resolution cautiously says, and even that only, as the resolution still more cautiously adds, "if it is felt that the moment has arrived for a decision thereon."

JOSEF L. KUNZ

LEGAL BASES AND CHARACTER OF MILITARY OCCUPATION IN GERMANY AND JAPAN *

Both by their prolonged duration and by their special objectives, or the activities undertaken with these objectives in view, the cases of military occupation in Germany and Japan raise interesting and important questions concerning their legal bases and character. Other cases of military occupation following World War II—as in Italy and Austria—have not exhibited these same characteristics to the same degree and do not call for consideration here. Likewise we may confine our attention to the American share of the occupation in Germany and Japan inasmuch as the situation is substantially the same for all the Powers involved therein.

The law of military occupation as it stood in 1939 was largely based upon practice and usage, of course, supplemented to some degree by convention. And, as in other branches of the law of war, while the activities of the belligerents in World War I had raised serious questions concerning the rules of military occupation, virtually nothing had been done between 1919 and 1939 to revise the law or to give it greater clarity and firmness.

Nevertheless it may be asserted without hesitation that still in 1939 the two most salient characteristics of the law of military occupation were its assumptions that such occupation was a temporary phenomenon, and the holding that it did not and must not interfere with the constitutional and permanent aspects of the life of the country. If the latter aspects of the situation were to be dealt with, this must follow upon a disposition of matters whereby juridical authority over the territory in question would be confirmed and perfected by transfer of sovereignty or something closely approaching thereto, and the law was very uncertain in regard to any conversion of the one type of situation into the second by any step less explicit and formal than an international agreement.

It may still be assumed, probably, that the occupations in Germany and Japan are intended to be temporary, or not to be permanent, not to merge

[18] Final Act, p. 48.

* See review of work by von Turegg below, p. 397, which came to the writer's attention after this comment was completed.

into annexation, but the duration of the occupation already justifies some comment apart from anything else. Continued references to future peace treaties with Germany and Japan and even actual efforts in that direction rather stand in the way of any application of the idea of *de facto* termination of war or application of the principle of *uti possidetis,* but two features of the situation are so acute and potentially so serious as to demand ample attention well in advance of their possible fruition. It is by no means certain that it is ever going to be possible for the Russians and the Western Powers to agree upon treaties of peace for Germany and Japan; indeed it would already appear to many observers that it is now certain that they never will reach such agreements. And the consequences would be almost incalculable: *de facto* termination of war and either annexation or voluntary evacuation of German and Japanese territory with enormous attending confusion and doubt, especially if Soviet Russia should opt for annexation. In all of this there is nothing necessarily in conflict with the international law of military occupation; but the failure of the occupying Powers to follow the assumptions of that law, while it may conceivably still please those who had the bright idea that we should not hold a peace conference after World War II, has created a very serious situation indeed.

Actually the behavior of the occupying Powers, or their programs of action, in Germany and Japan, also suggest something very different from the temporary and external character of military occupation in its orthodox form. One objective, at least, in these programs, has been that of modifying the economic, political, and social set-up of the country in view of considerations deemed important to themselves by the occupying Powers, namely, preventing recurrence of military imperialism on the part of the occupied countries. This, or any similar action, had no place in accepted law on the subject and was strictly forbidden. Indeed the only way in which this innovation can be justified legally is to hold that by unconditional surrender Germany and Japan gave their conquerors authority to do anything at all, including, presumably, annexing territory. As bare legal logic, again, this might satisfy requirements of the law, but it would obviously imply a modification of the assumptions of the law to a revolutionary degree, raising military occupation from a subordinate incident of war to a special form of international control and administration, particularly if prolonged for any extended time.

The conclusions to be drawn from this analysis are several. It does not appear that what has been done and is still being done necessarily constitutes any very flagrant violation of the rules of traditional international law, however far removed it may be from the premises upon which those rules rested. Such an accusation comes with scant grace from those largely responsible for the program in question. It may also be hazarded, although this is no question of law and is clearly open to much difference of opinion, that the occupying Powers (or the majority of them) have acted with a

maximum of restraint and good will or international public spirit, however limited their intelligence and skillfulness may have been. In spite of everything the military occupations in Germany and Japan are so reminiscent of Belgium in the years 1914–1918, the Hague Conferences, and the Brussels Code as to be positively quaint. This is largely the result—it cannot be repeated too often—of the almost inexplicable, extremely culpable, and very dangerous neglect of this section (among others) of international law by the governments and peoples of the world since 1919.

On the other hand, the resulting pattern of international organization and administration in the occupied countries is fraught with greatest uncertainty and peril, if also with considerable promise. It will be recalled that at a certain point in the period 1919–1939 the question of transferring to the League of Nations various tasks assumed by the victorious Allied and Associated Powers of World War I arose and that such transfer was both resisted for different reasons by different Powers and proved rather difficult from a purely practical and mechanical viewpoint. The bar to any such transfer to the United Nations of contemporary problems of international pacification and reorganization, in Article 107 of the Charter, is even clearer and stronger. Yet it is perfectly certain that continued prolongation of the deadlock over the peace treaties, of the super-normal military occupation, and the conduct of international territorial administration in disguise, will elicit insistent demands for adequate attention to this problem. It may soon appear that the conclusive argument in favor of world government, which most internationalists regard as objectionably radical, lies in the simple inability of internationalism to carry the load.

PITMAN B. POTTER

PREPARATION FOR THE INTERNATIONAL LAW COMMISSION

At the Third Regular Session of the General Assembly of the United Nations the members of the International Law Commission [1] were elected, and the Commission was summoned to meet on April 11, 1949. In accordance with Resolution 175 (III) of the Second General Assembly, the Secretariat has (with the aid of various consultants from the outside) been engaged in the preparation of necessary materials for the work of the Commission. Previously, documents had been prepared for the Committee which met in 1947, among them a Historical Survey of Development of International Law and its Codification by International Conferences,[2] and the Codification of International Law in the Inter-American System with Special Reference to

[1] For the background of this development, see articles by Yuen-li Liang in this JOURNAL, Vol. 42 (1948), pp. 66–97, and in the Year Book of World Affairs (London, 1948), pp. 237–271.

[2] U. N. Doc. A/AC.10/5, Apr. 29, 1947; this JOURNAL, Supp., Vol. 41 (1947), p. 29.