those who supported the European Defense Community that the example of closer federal ties among the members of the Community, with resulting material progress accompanied by respect for human rights and greater liberty of action, might influence the ring of satellite states and, it might be, even the separate races and peoples that constitute the Soviet Union. Perhaps the advance towards European Union may go forward more steadily now that the first step has been taken, even though it is a shorter step than was first contemplated.

C. G. Fenwick

ENEMY PROPERTY

It is a sound general proposition that the confiscation of private property of aliens is a breach of international law. The assertion of the generalization does not foreclose argument on the definition of "confiscation" or on the existence of conditions which justify an exception to the rule. The purpose of this comment is to discuss the question whether the presence of the condition that the alien owner of the property is an "enemy alien" justifies an exception, that is, makes confiscation lawful, and if lawful, whether confiscation is a wise policy.

The literature on the general issue of lawfulness of confiscating enemy alien property is abundant and generally familiar.[1] It is the writer's view that those who maintain that such confiscation is unlawful have the better of the argument, although recent decisions of the courts of the United States do not lend support to this view as did the opinion of Chief Justice Marshall.[2] Since customary international law reflects the practice of states and since that practice in the 20th century has been ambiguous, the issue deserves determination by an internationally authoritative judicial body.

In explaining the submission of applications to the International Court of Justice on March 3, 1954, instituting proceedings against the Soviet and Hungarian Governments on account of their conduct in connection with American airmen who came down on Hungarian soil in 1951, the Department of State declared that "in determining to bring this matter before the International Court of Justice," it had been "moved by the

[1] See the classic discussion by John Bassett Moore, International Law and Some Current Illusions (1924), pp. 13 ff.; O. C. Sommerich, "A Brief Against Confiscation," Law and Contemporary Problems, Vol. 11 (1945–1946), p. 152; and the numerous discussions, particularly by Professor Edwin Borchard, in this Journal.

[2] "Unquestionably to wage war successfully the United States may confiscate enemy property." Silesian-American Corporation *v.* Clark (1947), 332 U. S. 429, 475, digested in this Journal, Vol. 42 (1948), p. 473. Compare Chief Justice Marshall's views in U. S. *v.* Percheman (1833), 7 Peters 51, 86. Compare also the position of the American Bar Association in 1943: "Confiscation is contrary to the principles of law. It is contrary to our constitutional law principles and to the principles of international law." Annual Report of the American Bar Association (1943), p. 454. See also the conclusions in the Final Report of the Subcommittee to Examine and Review the Administration of the Trading with the Enemy Act of the Committee on the Judiciary, U. S. Senate (1954), p. 68: "The Committee feels that the record set forth in this report clearly indicates that the policy of confiscating the individual enemy's property located in the United States has been an unsound deviation from international law and the historic policy of the Government."

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desirability of promoting the establishment and maintenance of the rule of international law and order."[3] A signal demonstration of our devotion to the international rule of law would be provided by taking steps to secure a pronouncement by the International Court of Justice on the question of the lawfulness of the confiscation of enemy alien property. Such a pronouncement could be obtained either through raising the question in the General Assembly of the United Nations and securing the adoption of a resolution requesting an advisory opinion, or through the submission of a contested case in a friendly suit.[4] It is suggested that it would be in the national interest of the United States to seek such an authoritative pronouncement. This suggestion requires an exposition of the present situation concerning the policy and practice of the United States with reference to enemy alien property during and after World War II.

Decisions concerning enemy alien property in World War II were naturally taken in the light of our practice and experience in World War I. It seems fair to say that the net result of United States practice in World War I supports at least the policy of non-confiscation, although 20% of the properties were actually not returned. It cannot yet be said that United States practice for the World War II period has been brought to an end. We have used the familiar device of an Alien Property Custodian. We made an agreement with our Allies at Paris in 1945 to the effect that enemy property shall be applied to reparation account.[5] Secretary of State Dulles testified before a Senate subcommittee that this "Paris Agreement" could be interpreted as "not intended to operate in perpetuity but was designed as a temporary measure perhaps to assure against a revival of German militarism and the use of German important commercial assets possibly as an instrument of German militarism. I think that danger has passed. . . ."[6] Congress has not yet acted on the Dirksen Bill (S. 3423) or other proposals which would provide for the return of the property to its owners, seeking elsewhere funds to satisfy American claimants.

So far as policy is concerned, we may fortunately at this time recognize that cyclical movement of policy toward an enemy which history has made familiar and to which Secretary Dulles called attention. During a war,

[3] Department of State Bulletin, Vol. 30 (1954), p. 449.

[4] For an indication that the general problem is already being considered by the governments of the United States and the Federal Republic of Germany in a friendly spirit, see the exchange of letters between President Eisenhower and Chancellor Adenauer, *ibid.*, Vol. 31 (1954), p. 269.

[5] See John B. Howard, "The Paris Agreement on Reparations from Germany," *ibid.*, Vol. 14 (1946), pp. 1023 ff.

[6] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 83rd Cong., 2nd Sess., on S. 3423 to Amend the Trading with the Enemy Act [the Dirksen Bill] (1954), p. 161. The Secretary of State also testified that as an executive agreement, the Paris Agreement "was without authority whatever to bind the Congress of the United States in this matter." It is not clear whether the Secretary intended to say that in the light of international law the United States assumed no legal obligation under this agreement.

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a state seeks to prevent its enemy from utilizing economic resources. This is proper.[7] A belligerent state also naturally seeks to utilize to its own advantage enemy enterprises (including patents and going concerns) which are under its physical control. At the moment of victory, there is usually a determination that the enemy shall not be allowed to re-establish a military potential which includes its economic capabilities. However, the experience after 1920 showed the futility of attempts to exact excessive reparations. Passing from the general to the particular, we find that due principally to the outbreak of the "cold war" with the Soviet Union, the policy is to associate ex-enemy states in the common defense against the new enemy. Hence the "peace of reconciliation" with Japan and the current policy toward Germany. In a remarkably short span of time, ex-enemies become our avowed allies. In the interest of peace it is fortunate that this is true. With the new policies, former ideas about military potential or vengeance are outdated.[8] Policies about utilizing enemy property are more slowly adjusted because of the theory that the interests of American claimants for damage suffered at the hands of the Nazi government (to take but one example) should have precedence. However, in the case of Italy, the United States, realizing the necessity of contributing to the rebuilding of the Italian economy, renounced reparation payments and decided not to utilize all of the Italian assets in the United States available under Article 79 of the Peace Treaty in satisfaction of claims.[9] Not having made that preliminary decision in regard to Germany, the United States now provides generous aid to the rehabilitation of the German economy. This aid between 1948 and 1954 amounted to $1,472,000,000.[10] The theory that private (even though enemy) property is not being confiscated is supported by the so-called Bonn Agreement of the German Federal Republic in 1952 to compensate its nationals for properties held by us to provide a general fund for the satisfaction of American claims.[11] Under current conditions this arrangement is not the subterfuge it was in 1920 when it was clear the German Government could not foot the bill.[12] But since it is clear that the broad national interest

[7] On changed conditions in economic warfare and their impact on the policy of dealing with enemy property, see J. Stone, Legal Controls of International Conflict (1954), pp. 435–436. *Cf.* S. A. Lourie, "The Trading With the Enemy Act," Michigan Law Review, Vol. 42 (1943), p. 205, at pp. 232–234.

[8] "After hostilities have ceased there is always, and should be, a period of recapitulation and reappraisement. The harsh and total methods of seizure during the war are weighed in light of the new atmosphere. Inequities are always found to have been done, so that a balancing of interest must be made. We in the United States today are in that national adjusting period." U. S. Senate Report No. 572, 82nd Cong., 1st Sess. (1951), p. 3.

[9] Jack B. Tate, "International Reclamations and the Peace Settlements," Proceedings, American Society of International Law, 1949, p. 27.

[10] Monthly Operations Report of the Foreign Operations Agency, June 30 (1954), p. 42.

[11] Statement of Dallas S. Townsend, Assistant Attorney General, Director, Office of Alien Property, Department of Justice, Hearings (cited above, note 6), p. 17.

[12] See testimony of James Riddleberger, Director, Bureau of German Affairs, Department of State, Hearings of the Committee on Foreign Relations, U. S. Senate, 83rd

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of the United States now requires support for the economies (and actual military potentials) of ex-enemy states, the ear-marking of private ex-enemy property for a particular fund in the total balance sheet is essentially a bookkeeping item and cannot be supported by broad generalizations.[13]

"Candor and Common Sense" (to borrow a title of a pungent essay by John Bassett Moore) require us to recognize that ex-enemy properties will not be physically surrendered as such because of the interest of American business in retaining advantages accruing to it from the operations of the office of the Alien Property Custodian.[14] This is recognized by the provision in the Brussels Agreement of 1947 which permits the retention of property when the "national interest" so requires.[15] The same consideration operates under the Trading with the Enemy Act in suits for recovery of properties under Section 32, which "initiated the requirement that a return of vested property be 'in the interest of the United States.'"[16] It is notable that in these cases the Alien Property Custodian may act upon an unexplained conclusion by an executive department of the United States Government that a return of the property would be contrary to the "national interest" or "inconsistent with United States foreign policy."[17] *It may be true that a wise affirmation of the "national interest"* involves a certain ambivalence, building up the German economy with one hand while checking it and supporting American business interests with the other. If this be true, it may at least be said that the rationale has not been candidly expounded. At any rate if the property itself be retained in the "national interest," the United States properly insisted that compensation must be paid. We have maintained that sound position as being in accord with international law, as, for example, in the 1952 debate

Cong., 2nd Sess., on Executives Q & R (1952), p. 145. *Cf.* Margaret Woodward, "Germany Makes Amends," Department of State Bulletin, Vol. 31 (1954), p. 126.

13 Statement of Assistant Attorney General Townsend (see note 11, above): "The effect of this [Dirksen] bill, therefore, is to shift the burden of war claims payments from the German taxpayer to the American taxpayer."

14 See comments by Assistant Attorney General Townsend especially on the case of General Aniline and Film Corporation (cited note 6 above), at p. 19. *Cf.* M. S. Mason, Conflicting Claims to German External Assets (published by International Reparation Agency, Brussels, 1949), pp. 8–9.

15 Annex, Pt. III, Art. 13A(iii). See also Pt. IV, Art. 24 (iii). "In signing the agreement the United States stipulated that the agreement shall not apply to the interest of the United States in General Aniline and Film Corporation, New York, N. Y. . . . The question whether the national security of a country requires retention of property is not subject to the procedure of conciliation (article 38)." E. Maurer and J. Simsarian, "Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets," Department of State Bulletin, Vol. 18 (1948), pp. 3, 4 (note 4), and 6. The text of the Agreement is printed *ibid*, at pp. 6 ff. The provision that the decision of a "conciliator" is binding and final is novel and of general interest.

16 Editorial comment, "Return of Property Seized During World War II: Judicial and Administrative Proceedings Under the Trading with the Enemy Act," Yale Law Journal, Vol. 62 (1953), p. 1210, at p. 1222.

17 *Ibid.*, p. 1223.

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in the General Assembly of the United Nations on the "Right to Exploit Freely National Wealth and Resources." [18]

The modern practice of custodial control of enemy alien property leads to further difficulties. It is no novelty that human ingenuity should evolve a variety of subtle devices to cloak enemy interest in various corporate and other enterprises. Such devices have long been familiar to practitioners and judges in the prize courts not only in the twentieth, but at least as far back as the sixteenth century.[19] The doctrine of "taint" invoked in the *Uebersee* case in a suit for return of vested property under Section 9 (a) of the Trading with the Enemy Act therefore raises familiar problems.[20]

The Brussels Agreement of IARA sought to lay down certain rules to disentangle Allied, neutral and enemy interests in securities, negotiable instruments, bank deposits, decedents' estates, etc., but the proviso about litigations [21] reflected the difficulties in our courts of determining what the true interest is, a difficulty enhanced by the artificial, though usual, statutory definition of "enemy." [22]

It does not seem to have been emphasized that United States administrative action disposing of "enemy" property, even when blessed by our courts as having been taken in conformity with the Acts of Congress, does not necessarily have international validity. In the anti-trust field, we have seen a sharp indication that a decree of a United States court may be mere *brutum fulmen*.[23] Despite the sanctity of the "acts of state" doctrine, one has observed that a letter from the Department of State can relieve the American courts of their usual inhibitions against questioning the validity of property titles deriving from wartime acts of a foreign governmental authority of which the United States disapproves.[24] If the

[18] U. S. Participation in the United Nations: Report by the President to the Congress for the Year 1952 (Department of State Publication 5034, 1953), p. 110. The proponents of this resolution took a short-sighted view of their "national interest," since they all need investment of private capital which will not be attracted if it risks confiscation without compensation.

[19] See Neutrality: Its History, Economics and Law: Vol. I (1935), Deák and Jessup, The Origins, Ch. 5; Jessup, Vol. IV (1936), Today and Tomorrow, pp. 66 ff.

[20] Clark *v.* Uebersee Finanz-Korp., A. G. (1947), 332 U. S. 480, digested in this JOURNAL, Vol. 42 (1948), p. 470, and discussed in Yale Law Journal, cited in note 16 above, at pp. 1226 ff. For discussion of various means of "cloaking" enemy interest, see J. W. Bishop, Jr., "Judicial Construction of the Trading with the Enemy Act," Harvard Law Review, Vol. 62 (1949), pp. 751 ff.

[21] Annex, Pt. V, Art. 26 B and H (ii) (a) and (b). *Cf.* A. W. Ford, "Protection of Non-Enemy Interests in Enemy Corporations," California Law Review, Vol. 40 (1952), p. 558.

[22] See *ibid.*

[23] See G. W. Haight "International Law and Extraterritorial Application of the Antitrust Laws," Yale Law Journal, Vol. 63 (1954), p. 639. *Cf.* report of the Swiss Government's objections to United States' anti-trust suits against the Swiss watch industry. It is reported that the Swiss Government will "examine the legitimacy of these prosecutions from the viewpoint of international law." New York Times, Oct. 21, 1954, p. 41, col. 4.

[24] Letter of April 13, 1949, from the Acting Legal Adviser of the Department of State to the attorneys for Bernstein in the case of Bernstein *v.* N.V. Nederlandsche-Ameri-

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act of the foreign government is deemed by the forum to be contrary to international law, title deriving from that act may be held null and void.[25] If an action of the Alien Property Custodian were considered by a foreign forum to be confiscatory and in violation of international law, one claiming title by virtue of that action might find himself unable to enjoy the full fruits of the property which he thought he had acquired.

It is a commonplace that the United States is interested in the protection of foreign investments. Our general policy encourages private investment of United States capital abroad and seeks to protect it. The "national interest" of the United States therefore dictates consistent application in practice of the rule of respect for private property under all circumstances including postwar settlements.[26] One cannot dismiss all situations arising in time of war on the basis of the maxim, *Inter arma leges silent.* John Bassett Moore has pointed out the misuse of the maxim[27] and our courts acknowledge that international law operates to restrict the power of a belligerent occupant to confiscate private property.[28] Our first "freezing orders" in World War II were designed to protect properties in occupied countries against Nazi confiscations.[29] Resort to the International Court of Justice in the matter of alien enemy property would be helpful to the rule of law, although equity may be satisfied by legislation providing for the return of property *ex gratia.* If necessary, United States diplomacy should not be incapable of negotiating settlements of war claims for ourselves and for our Allies in such a way that: (i) equitable results will be obtained; (ii) reliance need not be placed on the dubious doctrine of the lawfulness of the confiscation of enemy alien property, or (iii) on the also dubious doctrine that there is no confiscation if the enemy state is required to assume an obligation to compensate its nationals whose property is held for the satisfaction of claims.

PHILIP C. JESSUP

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kaansche Stoomvaart-Maatschappij, 117 F. Supp. (S.D.N.Y., 1953); same case, 210 F. (2d) 375 (2nd Cir., 1954); Department of State Bulletin, Vol. 20 (1949), p. 592, this JOURNAL, Vol. 44 (1950), p. 183, note 1. See digests of case *ibid.,* Vol. 42 (1948), p. 726, Vol. 43 (1949), p. 180, Vol. 44 (1950), p. 182, and Vol. 48 (1954), p. 499.

25 Rosenberg *v.* Fischer, Swiss Bundesgericht, June 3, 1948, *Annuaire Suisse de Droit International,* Vol. VI (1949), p. 139; Confiscation of Property of Sudeten Germans Case, Germany, Amtsgericht of Dingolfing (1948), 1948 Annual Digest, Case No. 12; Anglo-Iranian Oil Company *v.* Jaffrate *et al.,* Supreme Court of the Colony of Aden (1953), this JOURNAL, Vol. 47 (1953), p. 325.

26 It is possible that the Nottebohm Case (Liechtenstein *v.* Guatemala, I.C.J. Reports, 1953, p. 111; this JOURNAL, Vol. 48 (1954), p. 327), may reveal the linkage between enemy alien property cases and other confiscatory measures as was envisaged by a Council on Foreign Relations Study Group in 1945; The Postwar Settlement of Property Rights (1945), p. 39.

27 Work cited (note 1 above), p. vii.

28 See State of the Netherlands *v.* Federal Reserve Bank of New York *et al.,* 201 F. (2d) 455, (2nd Cir., 1953), digested in this JOURNAL, Vol. 47 (1953), p. 496.

29 Statement by W. H. Reeves, in Hearings (cited above, note 6), p. 180, at p. 185.

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