

LAW OF BELLIGERENT OCCUPATION



J. A. G. S. TEXT No. 11

The Judge Advocate General's School

ANN ARBOR, MICHIGAN

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FOREWORD

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This text is intended as an aid to students in The Judge Advocate General's School in the study of the Law of Belligerent Occupation. It is used in conjunction with the following materials: FM 27-10, The Rules of Land Warfare; FM 27-5, Military Government and Civil Affairs; TM 27-250, Cases on Military Government; and M 353-2, Supplement Allied Military Government Manual of Proclamations and Instructions Used in Sicily.

The scope of the text is limited to legal problems arising from belligerent occupation. An attempt has been made to present the most representative view although divergences of practice and interpretation are indicated and discussed.

This text was prepared in the Civil Affairs Department of The Judge Advocate General's School.

REGINALD C. MILLER
Colonel, J.A.G.D.
Commandant

The Judge Advocate General's School
United States Army
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CHAPTER I

TYPES OF MILITARY OCCUPATION.

Definition of Military Gov- ernment.

The term "military government" is used * * * to describe the supreme authority exercised by an armed force over the lands, property, and the inhabitants of enemy territory, or allied, or domestic territory recovered from enemy occupation, or from rebels treated as belligerents. It is exercised when an armed force has occupied such territory, whether by force or by agreement, and has substituted its authority for that of the sovereign or a previous government. Sovereignty is not transferred by reason of occupation, but the right of control passes to the occupying force, limited only by international law and custom. The theatre commander bears full responsibility for military government. He is, therefore, usually designated as military governor, but may delegate both his authority and title to a subordinate commander.¹

The term "occupied territory" is used to mean any area in which military government is exercised by an armed force. It does not include territory in which an armed force is located but has not assumed supreme authority.²

Application of Section III of Hague Regulations (Hague Conven- tion No. IV of 1907).

Section III of the Hague Regulations³ is entitled "Military Authority Over the Territory of the Hostile State",⁴ and by its express terms governs only occupation of enemy territory by a belligerent.

1. FM 27-5, par. 1a.

2. FM 27-5, par. 1b.

3. FM 27-10, par. 271, et seq.

4. Scott, II, p. 395.

It presupposes that a state of war exists and that one belligerent is occupying the territory of the enemy.⁵

Generally the Hague Regulations are applicable to a belligerent who has invaded enemy territory though the invasion has as yet not ripened into occupation.⁶ Section III of the Hague Regulations is in substance a codification of customary law and its principles are binding on signatories and nonsignatories alike.⁷

Occupation of
Neutral Terri-
tory in Course
of War.

It is beyond the scope of this text to discuss in detail the problem of when neutral territory may be occupied without the consent of its government. It must not be supposed, however, that the occupation of neutral territory is necessarily improper under international law. Lauterpacht has stated the following with respect to the belligerent occupation of neutral territory:

5. The term "belligerent occupation" is frequently used to describe the establishment of military government in enemy territory. Hyde, Vol. II, p. 361. See FM 27-5, par. 7, which states that "while the Hague rules apply legally only to enemy territory, as a matter of policy they are generally applied to other territories occupied by United States forces."

6. See p. 27, *infra*, for exceptions. Rolin, par. 419; Air Power, p. 368.

7. Kohler, p. 2.

In contradistinction to the practice of the eighteenth century, the duty of impartiality must nowadays prevent a neutral from permitting belligerents to occupy a neutral fortress, or any other part of neutral territory. Even if a treaty previously entered into stipulates such occupation, it cannot be granted without violation of neutrality. On the contrary, the neutral must even use force to prevent belligerents from occupying any part of his neutral territory. The question whether such occupation on the part of a belligerent would be excusable in case of extreme necessity, in self-defence, on account of the neutral's inability to prevent the other belligerent from making use of the neutral territory as a base for his military operations, must, it is believed, be answered in the affirmative, since an extreme case of necessity in the interest of self-defence must be considered as an excuse. But necessity of this kind and degree exists only when the use of the territory by the enemy is imminent; it is not sufficient that a belligerent should merely fear that his enemy might perhaps attempt so to use it.⁸

In the Russo-Japanese War, Manchuria, a province of neutral China, was the object of war and Japan established military government therein.⁹ Takahashi, in discussing the Japanese occupation of Manchuria, states:

* * * it might be said that the occupation of Manchuria was an unique case, different from what is called military occupation of hostile territories in International Law. But the fact that China recognised a portion of her territory as the area of fighting implies that her consent to military operations by belligerents in her own territory was given. And as a form of military operation, the act of occupation is naturally included in this recognition. * * * But as the Manchuria provinces were neutral, not every article of The Hague Convention can be applied to the occupation of Manchuria. The heading of Sect.

8. Lauterpacht, p. 559.

9. Lauterpacht, p. 190.

III. of the Convention is "Military Authority in the Territory of the Enemy". It is needless to say that those who drafted this Convention did not conceive of such a case as the occupation of Manchuria. But when China is understood to have consented to military operations being pursued in her territory, the occupation of Manchuria is understood as a form of military operations, as above referred to, and it will be seen at once that such an occupation must come under the rules of International Law and of The Hague Convention, and that Japan was bound to observe the whole of Sect. III., except such articles as from the nature of the case were inapplicable.

The following article of The Hague Convention can be applied to the occupation of Manchuria: Art. XLII. on the elements and the sphere of military occupation, Art. XLIII. on the duty of the occupant to respect the laws in force in the country, Art. XLVI. concerning family honour and rights, the lives of individuals and their private property as well as their religious convictions and the right of public worship, Art. XLVII. on prohibiting pillage, Art. XLIX. on collecting the taxes, Art. L. on collective penalty, pecuniary or otherwise, Art. LI. on collecting contributions, Art. LIII. concerning properties belonging to the state or private individuals which may be useful in military operations, Art. LIV. on railway material coming from neutral states, and Art. LVI. on the protection of establishments consecrated to religious worship, charity, etc.

The articles inapplicable to the occupation of Manchuria are Art. XLIV., "It is forbidden to compel the population of an occupied territory to take part in military operations against their own country," and Art. XLV., "It is forbidden to constrain the population of an occupied territory to recognise, by the taking of an oath, the power of the enemy." Now the legal spirit of these two articles is, that it is illegal to force the enemy to oppose their own country. But as the provinces of Manchuria were neutral, these articles did not need to be applied to the case of the natives there. So some Japanese scholars insisted that the Manchurian Chinese could be employed as guides, or spies, in the places where they live, and should their national laws permit it, they may

be constrained to recognise, by the taking of an oath, the power of their enemy.¹⁰

That part of Art. LII., on requisitions, which says, "And shall be of such nature as not to imply an obligation on the part of the population to take part in military operations against their own country," is a condition which for the same reason does not apply to the subject of the occupation at Manchuria.

There may be some differences of opinion on the question whether Art. LV. may be applied to Manchuria, and whether Japan may enjoy the usufruct of the immovable properties belonging to the Chinese state. But this must be understood as justifiable for the same reason which allows requisitions and contributions for the needs of the army.¹¹

It has been stated that the occupation of neutral territory without the consent of the neutral is an act of war or may be regarded as such by the government of the country if it so elects; and, in such case, the occupant may exercise the same powers as in enemy territory.¹² The United States Manual of Military Government recognizes that military necessity may require the establishment of military government in neutral territory and in such a situation the Hague rules on belligerent occupation will be

10. Cf. Ariga, p. 429, who states that "the occupying army not being, with respect to the local officials, an enemy army, it could not be said that it was contrary to their patriotism for them to perform their duties under the authority of the Japanese army."

11. Takahashi, pp. 250-252.

12. SPJGW 1943/10353, 17 July.

applied as a matter of policy.¹³ However, according to some authorities, an occupant of neutral territory undoubtedly has the power to use all measures necessary to safeguard his armed forces, but, may not exact contributions, appropriate cash, funds or securities belonging to the neutral state.¹⁴

Occupation of
Neutral in
Course of War
by Agreement.

Where neutral territory is occupied by the armed forces of another nation with the consent of the neutral government, no powers are conferred on the armed

13. FM 27-5, par. 7, states: Military government is not confined to belligerent occupation. Military necessity may require its establishment in such areas as the following, with or without the consent of the existing or a prior government:

(1) * * * neutral territory which has been dominated or occupied by the enemy.

(2) Technically neutral * * * actually unfriendly or hostile.

(3) * * * neutral territory, the occupation of which is essential to a military operation.

Military government is exercised by virtue of and in accordance with rules of international law. Authority for the exercise of such control is derived from the mere fact of occupation or from some form of agreement such as an armistice, a convention, or a treaty. The more important of these rules are set forth in the military manuals of the leading civilized countries and in international treaties, such as the Hague Convention No. IV, 1907 (Annex, Section III). The rules which govern the armed forces of the United States are set forth in the War Department's Basic Field Manual 27-10. Rules of Land Warfare. While the Hague rules apply legally only to enemy territory, as a matter of policy they are generally applied to other territories occupied by United States forces.

14. Lauterpacht, p. 191.

forces except such as the neutral may allow; the agreement is the law of the parties.¹⁵ According to the United States Manual of Military Government, if the agreement gives the visiting armed forces less than supreme control over civilians, the territory would not be considered occupied and the exercise of limited powers would not be military government.¹⁶

When a neutral or friendly ally has been occupied, either as a result of an agreement or without agreement, in order to protect it against its internal or external enemies, the occupant may take all measures necessary for the security of its own forces and the accomplishment of its mission. Thus, if the armed forces of State A entered State Y, at the latter's invitation and under an agreement by which State Y would continue to administer its government and A would undertake to defend Y against a common enemy, the commander of the armed forces of State A could lawfully establish military government, i.e., assume supreme authority, if the safety of its forces

15. SPJGW 1943/10353, 17 July; see FM 27-5, par. 2.

16. FM 27-5, par. 2; FM 27-5, par. 1.

or the accomplishment of its mission would be endangered by failure to assume control.¹⁷

Occupation
Under Armis-
tice Agree-
ments.

An armistice occupation which is a continuation of a precedent belligerent occupation is subject to rules of the Hague Regulations¹⁸ as modified by the terms of the armistice. Similarly territory newly occupied by a belligerent pursuant to an armistice agreement is governed by the same rule.¹⁹ According to Feilchenfeld,²⁰ "The Hague Regulations are of relevance in interpreting dubious provisions in armistice agreements and in supplementing points not covered by the armistice agreement".

Spaight expresses his view on the subject as follows:

Article XXXIX lays down that the parties must settle what relations are to exist with and between the populations during an armistice. This provision is rendered necessary by the principle that an armistice suspends fighting but does not affect the state of war. * * * In the absence of a special provision, the invading belligerent's war rights as against the population continue unchanged. He can raise requisitions, billet his soldiers, demand services in kind and even levy contributions, and his general martial law regulations remain in full force. And war conditions still hold good as regards the mutual relations of the inhabitants of the district held by the two

17. See Robin, p. 228, et seq.; cf. FM 27-5, par. 2.

18. FM 27-10, par. 271, et seq.

19. Hunt Report, pp. 221, 358; Keith, Vol. II, p. 771; Spaight, pp. 245, 246.

20. Feilchenfeld, p. 113.

belligerents. In the absence of special conditions in the Protocol, the conclusion of the armistice does not free the inhabitants of the occupied territory from their obligation of holding no intercourse with the people in the other belligerent's zone of authority. They may be treated as spies or war-traitors if they offend, just as if hostilities continued. * * *

The Report of the Second Sub-Commission of the Hague Conference of 1899 states that "in default of special clauses in the armistice these matters /i.e., the relations with and between the populations/ are necessarily governed by the ordinary rules of war law, especially by the rules applicable to the occupation of hostile territory.²¹

The Hunt Report, dealing with the American occupation of Germany in 1918-1920 during the Armistice, states the following:

The Armistice of November 11, 1918, provided for the occupation of the left bank of the Rhine and the administration by the armies of occupation of the areas or bridgeheads to which they were separately assigned. It was provided in substance in Article 5 of the Armistice that no person should be prosecuted for his participation in military measures previous to the signing of the Armistice.

International law places upon the Commanding General the responsibility broadly speaking of preserving order, punishing crime and protecting lives and property within the territorial limits of his command. His power in the premises is as great as his responsibility. The Armistice in no sense checked, or refused to the military forces, any of the powers usually and ordinarily exercised by an invading army, except as above noted. A reading of the Armistice clearly shows that each army of occupation was to act as the representative of its respective government in the conduct of the military operations with which it was charged. There was nothing in the Armistice removing from the Commanding General (with the

21. Spaight, pp. 245-247.

exceptions noted) any of the authority expressly or by inference vested in him by international law or usage.²²

French-German
Armistice
Agreement of
1940.

The Armistice agreement signed on 22 June 1940 by the Chief of the High Command of the German armed forces and "the plenipotentiaries of the French Government holding adequate powers" provided for a cessation of fighting against the German Reich in France as well as in the French possessions, colonies, protectorates, and mandates, and at sea, and for the immediate surrender of the French forces surrounded by the German troops (art. 1). Provision was made for the occupation by German troops of certain designated territory in France (art. 2). It was stated that the German Reich would "exercise all rights of the occupying power" in the occupied portions of France (art. 3).²³

Special Cases
of Armistice
Occupation.

Decisions by several national courts after World War I treated armistice occupations as the equivalent of annexation. These cases proceeded on the assumption that there is a difference between ordinary occupation of war and one made with the purpose of

22. Hunt Report, p. 358. The German Supreme Court held that the occupation of the Rhineland by virtue of the Armistice agreement was not a warlike occupation in the sense of The Hague Convention. Fontes Juris Gentium, Series A, Sec. II, Book I, p. 214, No. 253.

23. Hackworth, Vol. VI, p. 426.

annexation. However justifiable these decisions are from the viewpoint of domestic law and the special circumstances involved, they do not reflect the traditional view.²⁴ Thus, the Court of Cassation of Rome²⁵ held that for the purposes of a civil action for damages for failure to deliver merchandise, Trieste, in the period between the Armistice and the law annexing it to the Kingdom of Italy, could not be regarded as foreign territory. The court said:

* * * Trieste could not for the purposes of the present action be regarded as foreign territory. After the constitution of the Kingdom of Italy, the recovery of the Italian Provinces, still under foreign domination, was considered to be in the nature of a restitutio in integrum. Many of our laws have accorded to non-native Italians a virtual Italian citizenship that had only to await the reunion of those provinces with the mother country to become effective. * * * With the complete dissolution of the enemy army and the simultaneous dismemberment of the Austro-Hungarian Empire, the national integration has been accomplished almost automatically and pari passu with the military occupation of the provinces. The Treaty of St. Germain and the law of annexation did not add anything to the rights of sovereignty over these provinces, irrevocably acquired by the Kingdom of Italy by reason of the

24. See Feilchenfeld, p. 119, et seq., who states:

"While certain states adopted special practices for quasi-final occupation after 1918, it can hardly be said that there are as yet more than isolated instances, which would not seem to have been in accordance with international law when they occurred."

25. Galatiolo v. Senes, Annual Digest 1919-22, Case No. 319; see contra., Del Vecchio v. Connio, Court of Appeal of Milan, Annual Digest 1919-22, Case No. 320; Boliotti v. Masse, the Court of Rhodes, Annual Digest 1919-22, Case No. 318.

victory of our arms, which has given effect to the immanent right of the nation to the lordship over the entire Italian territory. Treaty and statutes will bring the present situation into accord with the exigencies of international law. But it is absurd to think that in the interval between the armistice and the coming into force of the law of annexation, at a time when not only the sovereignty of Austria-Hungary over these provinces, but that very State, had disappeared, the two provinces disiecta membra of a now destroyed organism have been able to live a separate political life outside the sovereignty of the Italian State which had become responsible for all its administration, justice, army and finance.

Occupation of
Allied Ter-
ritory in
Course of War.

Military necessity may require the establishment of military government in allied territory and in such case the Hague rules on belligerent occupation are applied as a matter of policy.²⁶ Spaight states the following with respect to the occupation of allied territory:

The right of an army, says Professor Ariga, to promulgate martial law [military government] and to establish military tribunals applies not only to an army operating in a hostile country, but also to one operating in a neutral or an allied country which circumstances have made the theatre of war; for two reasons. First, an army must be in a position to safeguard itself by having suitable laws for that end in force; secondly, even if the existing laws are sufficient, the local tribunals may not wish, or may be unable, to apply them for the protection of the occupying troops. It was for this reason that Japan established and enforced martial law [military

26. FM 27-5, par. 7, provides that military necessity may require the establishment of military government, with or without the consent of the existing or prior government in allied territory which has been dominated or occupied by the enemy, allied territory actually unfriendly or hostile, and genuinely allied territory.

government⁷ in Manchuria (a province of a neutral country, China) and in Korea (an allied country.)²⁷

Occupation
Apart From
War (Pacific
Occupation).

Broadly speaking military occupations apart from war are those in which a state not at war with another maintains a military force on the latter's territory. Occupation of neutral or allied territory in the course of a war partakes more of the character of belligerent occupation than pacific occupation.²⁸ Robin classifies military occupations apart from war into two types: (1) occupation by virtue and in execution of an agreement with the sovereign (conventional); (2) coercive occupation or policing occupations apart from agreement (de facto occupation).²⁹ Conventional occupations in time of peace vary greatly. Thus peaceful occupation may be intended to serve as a guarantee for the performance of a treaty. After the Peace Treaty between France and the German Empire on 26 February 1871, Germany occupied France for more than thirty months as a guarantee for the payment of a war indemnity of five billion francs.³⁰ The occupation

27. Spaight, p. 343.

28. See Robin, pp. 33-34, 118.

29. Robin, p. 9.

30. Robin, p. 42, et seq.

of German territory west of the Rhine by the Allied powers after the Peace Treaty in 1920 was a peacetime occupation for the fulfillment of the terms of the peace treaty.³¹ Peacetime occupation may also be used to safeguard the evacuation of the armed forces in the occupied territory after the peace treaty has been signed. This is called an evacuation occupation.³² In addition to post-war occupation of former enemy territory by virtue of a treaty of peace, there are other consensual occupations such as: occupation of territory for the purpose of protecting it against internal upheavals;³³ occupation of territory for protection against foreign dangers.³⁴ Occupation may occur as a result of a grant, lease, or other agreement for establishing military or naval bases, or for general purposes. There are a number of illustrations of occupations by lease, e.g., the Chinese

31. Arts. 428-431, Treaty of Versailles. The United States did not ratify this treaty. See Hunt, p. 347, for anomalous situation of American forces in Germany after Treaty of Peace.

32. Cybichowski, Zeitschrift fur Volkerrecht, Vol. 18, p. 295.

33. The French occupation of Mexico after the Convention of Miramar, 10 April 1864, was of this type. Robin, p. 33.

34. Occupation of Iceland, Greenland and Dutch Guiana by United States in 1941. Akzin, p. 18. See Robin, p. 116.

leased Weihaiwei to the British in 1898 for as long a period as Russia remained in possession of Port Arthur, and more recently the United States occupation of British possessions under the exchange of notes 2 September 1940 and the agreement of 27 March 1941.³⁵ These are not an exhaustive list of consensual occupations but merely illustrate the diversity of purposes for which territory is occupied.³⁶

Pacific Occupation --
Intervention.

There are many instances of de facto occupation;³⁷ however, the discussion will be confined to intervention as illustrating de facto occupation.³⁸ Intervention in its extreme form may result in the military occupation of another nation although no state of war exists. The circumstances and reasons for such de facto occupations vary greatly.³⁹ Akzin states⁴⁰ that the most important reasons for

35. Akzin, p. 18.

36. Akzin, p. 20, et seq., lists the principal instances of United States military occupation.

37. See Robin, p. 87, et seq., for historical examples.

38. The term intervention, used in a limited sense, describes the interference by a state in the domestic or foreign affairs of another in opposition to its will and serving by design or implication to impair its political independence. Such action may or may not be lawful. Hyde, Vol. I, p. 117.

39. Hyde, Vol. I, p. 116, et seq.

40. Akzin, p. 13.

intervention are: protection of the lives and property of citizens of the intervening state; protection of its domestic or of international interests; prevention of anarchy; desire to prevent domination of an area by an undesirable regime or by an unfriendly foreign power; reprisal for wrongs committed or alleged; enforcement of demands; and humanitarian motives.

An Illustration of Peacetime Occupation -- Vera Cruz, 1914.

On 9 April 1914, a paymaster and two seamen of the U.S.S. Dolphin were arrested without just cause at Tampico, Mexico, by an officer and men in the army of General Huerta, head of the Mexican provisional government. Shortly thereafter the men were released. On 22 April 1914, President Wilson secured congressional authority for the use of the armed forces of the United States "to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States." On 20 April 1914, Admiral Fletcher, commanding a large naval force landed marines at Vera Cruz. Shortly thereafter a military force under Major General Funston relieved the naval forces at Vera Cruz. General Funston issued an order establishing a military government and occupied the city for a period of months. No state of war existed between the United States and

Mexico. The occupant collected Mexican customs and taxes.⁴¹

The Difference
Between Bel-
ligerent Occu-
pation and
Peacetime Oc-
cupation.

The principal difference between peacetime occupation and belligerent occupation is that the former is subject to the laws of peace and not the laws of war.⁴² Belligerent occupation is governed by a well defined body of customary and conventional international law (i.e., the Hague Regulations), whereas in peacetime occupation no general body of law exists.⁴³ In consensual peacetime occupation, the agreement is the law for the parties.⁴⁴ In the absence of an agreement (i.e., de facto occupation), the rights of the occupant in peacetime are limited by the purpose of the occupation.⁴⁵ Peacetime occupations by way of intervention or reprisal most closely correspond to belligerent occupation.⁴⁶ Peacetime occupations as well as belligerent occupation are essentially provisional in character, i.e.,

41. See Hackworth, Vol. I, p. 151.

42. Robin, p. 13.

43. Cybichowski, supra.

44. Robin, p. 243; Cybichowski, supra.

45. Cybichowski, supra; Robin, p. 217.

46. Cybichowski, supra.

no change in sovereignty occurs.⁴⁷ Robin's analysis of conventional and de facto peacetime occupations leads him to the observation that generally the powers of the occupant are limited to the rights of establishing garrisons of troops and of insuring the security of these troops in the occupied area.⁴⁸ The nature of the occupation may in fact broaden these powers as, for example, where the agreement out of which the occupation arose grants the occupant greater powers. Similarly, the conditions facing the occupying forces and the object of the occupation may require the employment of powers as broad as those exercised during belligerent occupation.⁴⁹ In the absence of an agreement to the contrary, the rules of belligerent occupation fix the maximum powers which a pacific occupant may exercise.⁵⁰

Legal Powers
of Pacific
Occupant.

The occupation of the Ruhr valley in 1923 by the French and Belgian governments gave rise to

47. Robin, p. 13. It should be noted that there are instances of peacetime occupation which were merely disguised annexations. See Robin, p. 236, for historical examples.

48. Robin, p. 13.

49. Robin, pp. 14, 256; Akzin, p. 14. In the case of occupation by way of intervention, the so-called peaceful occupation may in fact be as belligerent as wartime occupation, Robin, p. 237.

50. Strupp, p. 560.

considerable dispute as to its legality.⁵¹ The occupation, whether considered conventional or de facto, was a peacetime occupation. The Department of State in an instruction to the Ambassador in France discussed the powers of the occupants as follows:

The entrance by France into the Ruhr regions is believed to be a matter that should be dealt with purely as a question of fact irrespective of any consideration as to the legality or the propriety of the action taken by France, and without manifesting any criticism or approval of such action. The position taken by neutral powers towards the belligerent occupation of foreign territory furnishes a counterpart to the conduct suggested. Sovereignty over foreign territory is not transferred by such occupation, which is essentially provisional, notwithstanding the fact that during the time of such occupation the lawful sovereign is deprived of the power to exercise its rights as such sovereign. The relinquishment of power to the occupant and the act of depriving the lawful sovereign of power result directly from the action of the occupying power in obtaining actual control of the occupied territory. Neutral States are permitted by international law to accept this result and irrespective of the merits of the occupant's cause to deal with it accordingly. Neutral States are not to be considered as taking sides in the conflict if they act in accordance with this principle of international law.

* * * * *

France must, as the power occupying the Ruhr, be considered to be able to exercise, without objection by foreign neutral States, the fullest administrative powers, and must as an incident of such occupation, be deemed to be able to fix the conditions under which foreign trade may be conducted. If neutral States and their citizens are not discriminated against and there is no abuse of power, it is

51. See B.Y.B., 1924, p. 24.

difficult to find any basis upon which objection could be made to the right of the occupying power to make collection of duties or to license exports or to establish embargoes.

* * * * *

Notwithstanding the fact that the region of the Ruhr is not French territory, but German, the rights of the occupying power in this region are vast. The rights of the occupying State as tested by the powers of a belligerent occupant of hostile territory enable the occupying power to be the judge in the last analysis of the existence of its own emergency and the extent to which such emergency may exist. The quasi-neutral State is not to be considered as occupying the position of spokesman of the inhabitants (inhabitants of German nationality in this case) of the region concerned; and the quasi-neutral power is not in a position to make complaint of ruthless treatment of such inhabitants except to the extent that it may generally in cases of barbarities which shock the sensibilities of civilization, raise its voice in protest against such barbarities. Thus with a view to seeing whether the exact conduct complained of is a violation of the solid rights of its own, the quasi-neutral State must ever be on the alert.⁵²

After the Republic of Cuba had been established, the United States occupied a limited area on the Cuban seacoast under a lease from Cuba.⁵³ The question arose whether a court-martial of the United States could subpoena a civilian resident of the island outside of the army post. Judge Advocate General Davis advised the Secretary of War as follows:

It appears from a communication which recently passed through this office that a formal summons was

52. Hackworth, Vol. I, pp. 146-148.

53. Malloy's Treaties, Vol. I, pp. 358, 360.

served upon a civilian in the Island of Cuba to attend as a witness before a general court-martial convened by General Brooke, at one of the places which is still garrisoned by troops of the United States Coast Artillery.

The right to serve process was not one of the matters stipulated for in the arrangement recently made with the Government of Cuba for the concession of certain extraterritorial privileges to the United States troops remaining on the island as garrisons for the seacoast defenses. This was not done as the subpoena is, in substance, a mandate from the President of the United States to the witness which has, of course, no obligatory effect beyond the territorial limits of the United States.

It is suggested that the Commanding Officer be advised to discontinue the service of such process in future. Should it become necessary to obtain the services of a resident of Cuba as a witness application should be made through the United States Minister who will present the request to the Government in the diplomatic way.⁵⁴

Legal Powers
of Pacific
Occupant
Summarized.

Robin, the author of the leading treatise on military occupation apart from war,⁵⁵ summarized the powers of a pacific occupant, as follows:

To sum up, we see how much the powers of the occupant vary in time of peace according to the circumstances and purposes characterizing the occupation; and by "purposes" we mean not only the openly admitted and officially declared aims of the occupant, but also his secret designs, which are at times of an entirely different nature. In this varying of the powers exercised we note again how these cases differ from belligerent occupation, wherein the rights of the occupant are always the same juridically, the decision as to their more or less complete use being reserved to him.

54. C. 13046.

55. Des Occupations Militaires en Dehors Des Occupations De Guerre (1913).

These powers in the case of pacific occupation are, in the first place, extremely variable in law; we have just seen, in fact, that they differ from treaty to treaty, that they are made extensive by one treaty and limited by another. And in that sense it may be said that there is no right which is common to such occupation, for everything depends on the convention on which it is based. The powers are, moreover, decidedly variable in fact; for we have seen that often they are in reality very different from those granted by the treaty of occupation. Frequently, and almost inevitably, as a result of ambition and the spirit of conquest, or of the necessities of its policy, the occupying state will take advantage of its situation to extend its powers and to interfere - even in defiance of a formal clause of the occupation convention forbidding such interference - in the internal affairs of the occupied country, in its government and its administration; they are extensions of power here, encroachments there, and these range through an infinite number of graduations, from mere advice to complete subordination. * * *

Does such diversity necessarily imply the absence of all rules, of all juridical principles which determine the respective powers, in the territory occupied, of the occupant and of the sovereign subjected to the occupation? We do not believe so. It should not be forgotten, however, that we are here dealing with situations which are governed more often than not by conventions, and that the contracting parties may always regulate their relations in accordance with their own wishes. The convention is the law of the parties. It is, therefore, only in the absence of a treaty, in case of de facto occupation, or in case the convention is silent on this question that, in order to meet the issues for which (intentionally or otherwise) the convention has not provided, there will be occasion to appeal to the principles of law. It is in connection with such situations that it has seemed to us worth while to try to deduce those legal principles which concern pacific military occupation.

Hence we shall be especially concerned with the object of the occupation, its avowed purpose, since, as we have shown, the characteristics and limitations of the occupation vary with its purpose. But we must not forget two important points: first, that in dealing with a pacific occupation, it is the law of nations in time of peace, and not the regime of the

state of war, which is to govern the relations of the occupant with the local authorities and with the inhabitants as well; secondly, that a military occupation, being an essentially temporary situation, should infringe as little as possible on the sovereignty of the legal government, which government retains not only the enjoyment but also the exercise of its sovereignty. Under these circumstances all acts of the occupant which are not prompted by the two-fold idea that an occupation of this nature is a status at once temporary and pacific, and which are not indispensable to the attainment of the end pursued by the occupation, are violations of the law and constitute veritable abuses of power.⁵⁶

Occupation
After Cession
by Treaty of
Peace.

If territory held by an occupant is ceded to him by a treaty of peace, the continued administration of its affairs by the military is no longer belligerent occupation.⁵⁷ The war is over and the occupant becomes the de jure sovereign.⁵⁸ Military rule may continue in the ceded territory on the ground of necessity, i.e., until such time as the sovereign establishes a civil government.⁵⁹

56. Robin, pp. 243-246.

57. De Lima v. Bidwell, 182 U.S. 1.

58. Phillipson, p. 279.

59. See Cross v. Harrison, 16 How. 164, TM 27-250, p. 7; Santiago v. Nogueras, 214 U.S. 260, TM 27-250, p. 89. This was the case in Puerto Rico resulting from the exchange of the ratifications of the treaty of peace between the United States and Spain. See Magoon, p. 19.

CHAPTER II

OCCUPATION OF ENEMY TERRITORY

When Territory
is Occupied.

If territory be occupied, the inhabitants owe certain duties to the occupant and he, in turn, has rights and duties with respect to such territory and its population.¹ Hence it is important to determine whether a given area is occupied. Occupation is a question of fact.² Territory is occupied if the enemy is in fact exercising authority to the exclusion of the legal government.³ This presupposes that organized resistance has been overcome⁴ and the occupant actually establishes an administration, i.e., measures have been taken to establish law and order.⁵ The radius of occupation is determined by the effectiveness of the occupant's control over the area, i.e., the elimination of the authority of the legal government and the maintenance of his own authority. How the occupant maintains control is immaterial if

1. Westlake, Part II, p. 93.

2. FM 27-10, par. 272.

3. Spaight, p. 328.

4. The continuance of organized resistance in a locality indicates that the authority of the occupant has not been established. Rolin, par. 443.

5. FM 27-10, par. 276; Lauterpacht, p. 340.

the control in fact exists.⁶ Occupation has no necessary relation to the geographical boundaries of former political subdivisions. Thus, where the occupant actually occupies only the capital of a large province and has not established his authority in the rest of the province, a proclamation that he occupies all of the province is insufficient to establish occupation over the uncontrolled area.

P, in business in Manila, sent a ship to Indo-China; loaded it with rice and carried the rice to Cebu, P.I., then in possession of the Philippine republican government, where duties were exacted and paid. Upon arrival thereafter of the ship at Manila, the United States customs authorities demanded payment of customs on the rice landed at Cebu. United States maintained military government over the Philippine Islands. Held: that the military government of the United States did not extend to places which were not in its actual possession and payment demanded from P was an illegal exaction.⁸

Occupation
Distinguished
from Invasion.

Invasion is not occupation; it is the mere penetration into enemy territory.⁹ Invasion is essentially a military operation and does not involve the

6. Lauterpacht, p. 340; FM 27-10, par. 276, for additional discussion.

7. Where no control has been established, a belligerent's attempt to enlarge the area of his control by proclamation only is called a "paper occupation" or "constructive occupation". Spaight, p. 327; Lauterpacht, p. 340.

8. MacLeod v. United States, 229 U.S. 416, TM 27-250, p. 16.

9. Rolin, par. 443; Lauterpacht, p. 339.

establishment of an administration over the country by the invader.¹⁰ In occupation, on the other hand, the belligerent intends to remain in the occupied territory and govern. If a sufficient force is not present, capable of maintaining the assumed exercise of authority, the locality is not occupied but only invaded.¹¹ The occupant, says Cybichowski, intends to remain in occupied territory but intention alone is not sufficient unless the intention is carried out and the act of carrying out the intention must consist in taking over administration of the country.¹² Occupation does not necessarily follow invasion, although the latter precedes it and may frequently coincide with it.¹³ Thus an invader may be repulsed and driven out before he has established an administration. Roughly stated, the difference is that an occupant governs and an invader fights.¹⁴

Subject to the exceptions hereafter noted, the rights and duties of an invader with respect to

10. Lauterpacht, p. 340; FM 27-10, par. 274; Cybichowski.

11. Keith, Vol. II, p. 779.

12. Cybichowski.

13. FM 27-10, par. 274.

14. Cybichowski.

persons and property within the presence of the troops are the same as those of an occupant.¹⁵ Article 42 of the Hague Regulations¹⁶ defines occupation and has no application to invasion. Article 43¹⁷ which prescribes the duty of an occupant with respect to the laws in force in the occupied country is inapplicable to invasion since an invader does not set up any administration.¹⁸ Taxes imposed for the benefit of the occupied state may not be collected by an invader as distinguished from an occupant since the collection of taxes imposes a duty of administering the enemy country and discharging the expenses of administration out of the taxes.¹⁹

Occupation
Distinguished
from Subjugation or Conquest.

Formerly a belligerent temporarily occupying enemy territory was considered as acquiring sovereignty over it.²⁰ Sovereignty carried with it unlimited power over the inhabitants and property, public and private. Thus, an occupant could cede the territory to a third state, compel inhabitants

15. Air Power, p. 368.

16. FM 27-10, par. 271.

17. FM 27-10, par. 282.

18. Rolin, par. 432.

19. Art. 48, FM 27-10, par. 293; Huber, p. 672.

20. Hall, p. 553.

to serve in his army against the former sovereign, or make the inhabitants take an oath of allegiance to him.²¹

Modern international law considers belligerent occupation as a phase of military operations²²--an incident and method of warfare founded on force and maintained by force.²³ Belligerent occupation is essentially provisional and does not vest sovereignty in the occupying power.²⁴ Sovereignty is not acquired by an occupant until subjugation or cession by a treaty of peace.²⁵ Subjugation²⁶ takes place when the armed contention ceases as a result of a belligerent acquiring effective possession of enemy territory, annihilating the forces of the enemy, and manifesting an intention to annex the territory, i.e., hold it permanently.²⁷ According to Baty, it is not

21. Lauterpacht, p. 337.

22. 33 Law Quart. Rev. 363 at 364.

23. 25 Colum. Law Rev. 904, 915.

24. FM 27-10, par. 275. The pre-existing sovereignty is not abolished but only suspended. Kohler, p. 8.

25. FM 27-10, par. 275; Lauterpacht, p. 466.

26. The word "conquest" is used as synonymous with "subjugation" in FM 27-10, par. 275. Cf. Lauterpacht, p. 466; Phillipson, p. 9.

27. Lauterpacht, p. 467; Westlake, part II, p. 95.

sufficient that the invaded sovereign should be reduced to the extremest straits. So long as he is in the field, however poor his prospects of ever expelling the invader, occupation persists.²⁸

Briefly, the difference between occupation and subjugation is the difference in concept between temporary possession and permanent acquisition.

The occupation by a belligerent of the whole enemy territory does not necessarily involve subjugation if an armed contention continues. This may occur in a war between more than two belligerents where the allies of the occupied power continue hostilities with the aid of some troops of the occupied state.²⁹ This conclusion presupposes that no separate peace has been made by the occupant with the lawful government.

On 5 November 1916 the Emperors of Germany and Austria-Hungary proclaimed Poland, which to that time was part of Russia, an independent state with an hereditary monarchy and constitution, the exact boundaries of the kingdom to be decided later. Subsequently, on 18 November 1916 the Allied powers issued a declaration in part as follows:

28. Baty, *The Canons of International Law*, p. 476.

29. Lauterpacht, p. 467.

By a proclamation published on November 6, 1916, at Warsaw and at Lublin, the German Emperor and the Austrian Emperor, King of Hungary, announced that they had agreed to the creation "in the Polish regions" occupied by their troops of an autonomous state under the form of an hereditary and a constitutional monarchy and to the organization, instruction, and direction of any army belonging to that state.

It is universally admitted principle of the modern right of nations that, by reason of its precarious and de facto character of possession, a military occupation resulting from the operations of war may not imply a transfer of sovereignty over the territory occupied and consequently does not involve any right of disposing of this territory to the profit of any one.

In disposing without right of the territory occupied by their troops, the German Emperor and the Austrian Emperor, King of Hungary, have not only committed an action which is null and void, but have once more shown contempt for one of the fundamental principles upon which the constitution and the existence of civilized states repose.³⁰

National or
Neutral Ter-
ritory Occu-
pied by Enemy
is "Enemy"
Territory.

Although it is well established that sovereignty is not altered by military occupation, the occupation of national or neutral territory by an enemy will cause it to be treated as enemy territory for commercial and belligerent purposes.³¹ This practical approach recognizes that trade with territory which is actually under the control of the enemy contributes to his resources. Thus, the Supreme Court of the

30. Hackworth, Vol. I, p. 146. See contra Cybichowski.

31. Thirty Hogsheads of Sugar v. Boyle, et al., 9 Cranch 191.

United States³² held that the Island of Santa Cruz, which was Danish territory then occupied by Great Britain, was to be considered as British, and hence enemy territory for all purposes of war then existing between Great Britain and the United States. Similarly, in United States v. Rice,³³ the Supreme Court held that Castine, Maine, occupied by the British during the War of 1812, was to be regarded as British territory in respect to the revenue laws of the United States.

CHAPTER III

LAW-MAKING POWER OF OCCUPANT

The Character of the Occu- pant's Power.

Although modern authorities are in substantial agreement that occupation does not transfer sovereignty,¹ they differ on the exact status of the occupant. It is unnecessary and, in fact, impossible

32. Thirty Hogsheads of Sugar v. Boyle, et al., 9 Cranch 191. Drewry v. Onassis, 179 Misc. 578, 39 N.Y.S. (2d) 688 (1942), the court held that all occupied France is enemy territory within the meaning of Trading with the Enemy Act and First War Powers Act of 1941.

33. 4 Wheat, 246; TM 27-250, p. 13.

1. See Rolin, pars. 439-440; FM 27-10, par. 273.

to reconcile the views expressed.² Belligerent occupation is merely a phase in military operations,³ conferring on the occupant a temporary status.⁴ The mere fact of occupation eliminates the government of the occupied territory and suspends its authority to act in the occupied area.⁵ The authority acquired

2. Hyde, Vol. II, p. 363, states that the question of an occupant's abuse of power "is of more frequent occurrence than any inquiry as to the precise effect of belligerent occupation as such". Robin, p. 6; 25 Colum. Law Rev., p. 904, et seq. Oppenheim, 33 Law Quart. Rev., p. 363, says an occupant exercises military authority and that there is not an atom of sovereignty in his authority. In *United States v. Rice*, 4 Wheat. 246, Justice Story stated that the occupant had the right to exercise "the fullest rights of sovereignty" and that the inhabitants of the occupied territory "passed under the temporary allegiance" of the occupant. Birkhimer, p. 69, states that the exception taken to the use of the term "temporary allegiance" seems "to indicate only disagreement regarding the correct use of words descriptive of that relation". The theory of the Belgian courts is discussed on p. 34, infra. The view held by some writers that the occupant acquires quasi-sovereignty has been criticized by Hall, p. 555. Baty, 36 Yale L. Journ. 966 at 973, states that it makes little difference whether the occupant's power is called "quasi-sovereignty" or if the limits of his powers be characterized as "the military exigencies of an occupying force".

3. Hall, p. 558; FM 27-10, par. 273.

4. Hall, p. 559.

5. Westlake, part II, p. 96; Robin, p. 5, states: "First, as regards the sovereignty of the occupied country: It is impossible, because of the fact of occupation, for that sovereignty to be publicly manifested, but it does not disappear on that account. Though paralyzed in fact, at least within the limits of the necessities of war, in law it continues to exist."

by the occupant is a new authority finding its sources in the necessities of war and in the absence, i.e., the suspension, of the authority of the legitimate government.⁶ The occupant has supreme authority, i.e., the fullest measure of control, necessary to accomplish his military objective⁷ and to restore public order and safety.⁸ His authority may be exercised in every field of governmental activity, executive, administrative, legislative and judicial.⁹ His acts, when within the permissible limits of international law, have the force of law.¹⁰ Since the occupant's authority arises from the fact of occupation and the laws of war, and not through the expelled sovereign, constitutional and statutory restrictions on the powers of the legitimate sovereign do not affect the occupant.¹¹

6. Westlake, part II, p. 96; Rolin, par. 437.

7. Hall, p. 560, FM 27-5, par. 1.

8. Hall, p. 560; Hyde, Vol. II, p. 361, et seq.; Magoon, p. 11, et seq. Of course, customary and conventional international law limit the powers of the occupant.

9. Kohler, p. 8; Hyde, Vol. II, p. 366; *New Orleans v. Steamship Co.*, 20 Wall. 387, 394; TM 27-250, p. 43.

10. Hyde, Vol. II, p. 367; Westlake, part II, p. 97; *Cronin v. Patrick County*, 4 Hughes 524, 89 Fed. 79; TM 27-250, p. 43; cf. FM 27-10, par. 288.

11. Kohler, p. 5; Westlake, part II, p. 96.

Power of
Absent Sover-
eign Suspended
in Occupied
Area.

The order of Governor General Baron von Bissing issued in occupied Belgium on 4 January 1915, reads as follows:

Attention is again called to the fact that in the Belgian territories which have passed into the hands of the German administration, only orders of the Governor General and of his agents are in force from the time of the establishment of this administration. Orders of the King of the Belgians and the former Belgian ministers, given after this date (or any future orders) have no validity whatever in Belgian territory under German administration. I shall see to it with all the means at my disposal that governmental power will be exclusively exercised by the German authorities set up in Belgium * * *¹²

Some authorities have argued that new laws and decrees promulgated by the absent sovereign are valid in the occupied territory on the assumption that the occupant has no law-making power whatsoever; that the law-making power is one and indivisible and remains in the legitimate sovereign only.¹³ McNair who believes that the absent sovereign may legislate for the occupied territory states:

The question arises whether the sovereign of enemy-occupied territory can effectively make during the occupation changes in that large portion of his law which remains in force therein notwithstanding the occupation. For instance, can the Norwegian Government to-day make a decree (valid in other respects) changing the law of succession, by will or an intestacy, to movables or immovables in Norway? Supposing

12. Kohler, p. 5.

13. International Law Notes, Sept.-Dec., 1917, pp. 169-171; Annual Digest, 1919-22, Case No. 310; see discussion Rolin, pars. 449-454.

during 1914-1918 the Belgian Government had changed the law relating to sale of goods, bankruptcy, or wills, would that change only operate in non-occupied Belgium or also in occupied Belgium? Principle seems to demand that, assuming the new law to fall within the category of that large portion of national law which persists during the occupation and which the enemy occupant cannot lawfully change or annul, it ought to operate in occupied territory.¹⁴

It is believed that the better view is that the legitimate sovereign is deprived of the power to legislate for the occupied territory by the promulgation of new laws or decrees. According to the American view, the sovereignty of the legitimate government is suspended during occupation and the power to create new laws for the government of occupied country is in the occupant.¹⁵ It is out of the question, says Robin, that the inhabitants of the territory should be subjected to two masters at one and the same time.¹⁶

Limitations
on Power of
Occupant

The principal object of occupation is military, i.e., to provide for the security of the occupant's army and to contribute to the success of his operations.¹⁷

14. Municipal Effects of Belligerent Occupation, McNair, 57 Law Quart. Rev., p. 33.

15. United States v. Rice, 4 Wheat. 246; TM 27-250, p. 13; Order of President McKinley of 18 July 1898; TM 27-250, p. 7; Rolin, par. 454.

16. Robin, p. 212.

17. FM 27-10, par. 285; FM 27-5, par. 3.

On the other hand, the occupant's principal duty under international law is to take "all measures in his power to restore and insure, as far as possible, public order and safety".¹⁸ These two considerations are the legal bases upon which the supreme authority of the occupant rests.¹⁹ Spaight says:²⁰

Thus the occupant's rights are double-based, resting on the necessity for providing some established government in a country which is shut off from its ordinary fountain of justice and spring of administration, and secondly, on the military interests of the occupying belligerent himself. He assumes the reins of government because, otherwise, government there would be none, and such a condition of things would be an evil both for himself and for the population.

The occupant's laws and regulations which find justification in military necessity or in his duty to maintain law and safety are legitimate under international law.²¹ Conversely, the acts of the occupant which have no reasonable relation to military necessity or the maintenance of order and safety are illegitimate.²² Other limitations on the power of the occupant are imposed by the express provisions

18. Art. 43, H.R.; FM 27-10, par. 282.

19. Rolin, par. 459-461; Westlake, part II, p. 96, et seq.; Kohler, p. 6.

20. Spaight, p. 322.

21. Garner, Vol. II, p. 77, et seq.; Rolin, par. 445.

22. Feilchenfeld, p. 87; Garner, Vol. II, p. 77.

of the Hague Regulations, such as respect for the laws in force in the occupied country unless absolutely prevented,²³ respect for family honor, persons, and religious practice, etc.²⁴ The supreme authority of the occupant is not sovereignty and, therefore, he has no right to make changes in institutions, laws, or administration other than those which are demanded by military necessity or public order and safety.²⁵

Military
Necessity
Defined.

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.²⁶ Military necessity sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations.²⁷ It would seem comprehensive enough to embrace the elimination of the source or cause of war although rooted in the enemy's traditional

23. FM 27-10, par. 282.

24. FM 27-10, par. 299.

25. Garner, Vol. II, p. 77; Lauterpacht, p. 342.

26. FM 27-10, par. 4a.

27. FM 27-10, par. 285; FM 27-5, par. 3.

institutions.²⁸ Similarly a change in the law of the occupied country may in a particular instance be an actual instrument of warfare.²⁹ Thus De Louter has stated:

The exception "unless absolutely prevented" [of Article 43], however rigidly formulated, nevertheless permits the occupant to take legislative measures which it deems necessary for its military or political interests * * * In the war of Secession, the victorious Northern armies, penetrating into the revolted States, immediately promulgated the law of June 1, 1863, on the abolition of slavery. Before, emancipation had been applied by the English in their American wars as an instrument of war * * *³⁰

Definition of
Public Order
and Safety.

Article 43 of the Hague Regulations³¹ imposes a duty on the occupant to "take all measures in his power to restore, and insure, as far as possible, public order and safety". The word "safety" used in the English translation does not adequately represent the meaning of the original "vie publique", which describes the entire social and commercial life of the country.³² Kohler expresses this idea as follows:

28. See view of H. Martens cited by Korowin, p. 42, *infra*.

29. Lauterpacht, p. 342, states that the occupant may make changes in the laws or administration which are temporarily necessitated by his interest in the maintenance and safety of his army and the "realization of the purpose of war".

30. De Louter, p. 290.

31. FM 27-10, par. 282.

32. Westlake, part II, p. 95.

The transfer of the legitimate power has negative as well as positive effects. The life of the occupied state is not to cease or stand still but is to find continued fulfillment even under the changed conditions resulting from occupation. Therefore the occupant "shall take all measures in his power to restore and insure, as far as possible, public order and safety".³³

Generally, the maintenance of public order and safety in occupied territory can be best accomplished by respecting the law in force in the occupied territory.³⁴ Thus, the Brussels Conference adopted the following Article with respect to the occupant:

(x) With this object [i.e., to maintain public order] he will maintain the laws which were in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity obliges him to do so.³⁵

Respect for
Existing Laws
--General.

Article 43 of the Hague Regulations³⁶ places a duty on the occupant to respect the laws in force in the occupied country at the time of occupation "unless absolutely prevented". This Article prohibits departures from the existing law unless justified by military necessity or the need for maintaining public order and safety.³⁷ McNair has stated:

33. Kohler, p. 6.

34. Rolin, par. 445; Westlake, part II, p. 96; cf. FM 27-5, 9h.

35. Spaight, p. 354.

36. FM 27-10, par. 282.

37. Rolin, par. 445; Garner, Vol. 2, p. 77.

The occupant's right and duty of administering the occupied territory are governed by international law. It is definitely a military administration and he has no right to make even temporary changes in the law and the administration of the country except insofar as it may be necessary for the maintenance of order, the safety of his forces and the realization of the legitimate purpose³⁸ of his occupation.³⁹

The necessity in the particular case can be determined only by reference to the facts of the case.

It is consequently impossible, says Hall, formally to exclude any of the subjects of legislative or administrative action from the sphere of the control which is exercised in virtue of it.⁴⁰ In the City of Malines v. Societe Centrale Pour L'Exploitation du Gaz, the Brussels court of appeal sustained measures taken by German occupying authorities in Belgium which resulted in the increase in the cost of supplying gas. The court said:

That the circumstances of war-time, and particularly the increase in the cost of raw materials and the necessity for providing for the needs of the population, in fact justified the measures taken by the occupying authorities; that on this ground these measures come within the scope of the administrative acts permitted to the occupying Power by Hague Convention No. IV⁴¹ with a view to the maintenance or re-establishment of order and safety * * *⁴²

38. See FM 27-5, par. 4, "Object of Control".

39. McNair, Municipal Effects of Belligerent Occupation, 57 Law Quart. Rev. 33 at 35.

40. Hall, p. 559.

41. Art. 43 of the annexed regulations.

42. Annual Digest, 1925-26, Case No. 362.

Similarly, the German-Belgian Mixed Arbitral Tribunal in 1925⁴³ held that a modification of law by the German Governor-General of Antwerp relating to the liability of municipalities⁴⁴ was contrary to Article 43 of The Hague Convention in that "there had been no occasion for the decree of the Governor-General either from the point of view of military necessity or of maintaining public order".

Regard for
Existing Law
-- A Novel
Conclusion.

The Russian writer, Professor Korowin, takes the following view of Article 43 of the Hague Regulations. He states:

Paragraph 43 of the Hague Regulations provides that the occupant must respect the laws in force in occupied territory unless there are insurmountable obstacles. The "Rules of Land Warfare" (edition of the French General Staff of 1913) elaborates on this provision and states that the occupant does not acquire any right of sovereignty, that local courts continue to function and to render justice in the name of the legal power.

This is the traditional doctrine of the provisional character of occupation of war which has been sanctioned by the authority of the Hague Regulations.

In the most recent literature of international law the provisional character of occupation of war is well recognized. As is well known, at the Hague Conference of 1899 the big and small powers debated the question as to whether even this provisional regime may be too much of an interference with the

43. Annual Digest, 1925-26, Case No. 361.

44. A special tribunal was substituted for the ordinary courts; rules of evidence were disregarded; damages were awarded in excess of what ordinary Belgian courts would have awarded.

rights of the local sovereign power to the benefit of the occupant.

As is always the case the historic facts are very different from theory.

Although Russia had initiated the Brussels Conference of 1874 and although her delegate, Martens, was the author of the Declaration adopted in Brussels, the acts of the Russian troops when they occupied Turkish territory in 1877 were not at all in conformity with the classic conception of occupation as a provisional substitution of one power for another. On the contrary the Russian authorities of occupation regarded it as impossible in those parts of the Balkan Peninsula that had been freed from the Turks to keep in existence the archaic institutions and laws which had characterized Turkish domination. Immediately after the retreat of the Turkish troops they began to reorganize public administration, the administration of justice and the tax system in a very fundamental manner in order to adapt those systems to the usual level of the European legal customs of that time. Official Russian doctrine (the same H. Martens mentioned above being the Russian spokesman) justified the attitude of the occupation authorities as follows: Since the war had been caused by the archaic and intolerable forms of Turkish domination of the Christian peoples of the Balkan Peninsula and had been waged to free that Peninsula it would be nonsensical, artificially to postpone the hour of Slavic liberation and with Russian force of arms to keep in existence those legal institutions the elimination of which had been one of the main war aims.

In 1900 in the midst of the English Boer war the British government decreed the annexation of Transvaal and the Republic of Orange.

The system of occupation established by the Japanese army in the war of 1904 on the territory of Manchuria was very different from the system they adopted on the isle of Sakhalin.

On November 5, 1911, the Italian government decreed that Tripolitania was to pass under Italian sovereignty although peace with Turkey had not yet been made. This was the basis of a new doctrine (Anzilotti and his school) which justified the Italian measures on the ground that there was a difference between an ordinary occupation of war and one made with the purpose of annexation.

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In all these cases departures from the provisional type of occupation were justified more or less convincingly on the ground of particular conditions of this particular war and the war aims.

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The Hague Regulation which provides for the maintenance of the local legal system and which is based on the idea of a community or even identity of the social and legal organization of the warring powers seems obsolete. A new norm, namely to safeguard the maximum of social justice for the inhabitants of occupied territory, is in the process of taking shape.

In conclusion it may be interesting to note that this departure from the customary system of occupation of war, if we scrutinize the Hague Convention closely, has been recognized by the same acting upon a proposal of Beernaert. It was recognized that in all cases not provided for in the Hague Regulation the local population should remain under the protection of the fundamental principles of international law such as would follow from the customs recognized among civilized people, the laws of humanity and the requisites of social conscience. From the debate preceding the adoption of this resolution it is apparent that as regards the system of occupation the most liberal system, the one most favorable to the local population, was regarded as desirable.⁴⁵

Respect for
Existing Law
-- Public Officials of
Occupied Territory.

The United States Rules of Land Warfare⁴⁶ follows substantially the wording of Lieber's Instructions⁴⁷ in stating that "all functions of the hostile government--legislative, executive, or

⁴⁵. E. A. Korowin, *Internationalrechtliche Abhandlungen*, Vol. III, p. 134.

⁴⁶. FM 27-10, par. 283. See FM 27-10, par. 311, for removal of public officials.

⁴⁷. G.O. 100, sec. 1, par. 6.

administrative, whether of a general, provincial, or local character cease under military occupation, or continue only with the sanction * * * of the occupier or invader".⁴⁸ Although existing laws of the occupied territory continue in force until changed, the authority of the officials who administered the laws under the legitimate sovereign ceases, as of course, upon the assumption of control by the occupant. The further exercise of power by such officials is dependent upon the consent of the occupant, express or implied.⁴⁹ The rationale is stated by Hyde who says: "Possessed of exclusive power to enact laws and administer them, the occupant must regard the exercise by the hostile government of legislative or judicial functions (as well as those of an executive or administrative character) as in defiance of his authority, except insofar as it is undertaken with his sanction or cooperation."⁵⁰ Contrary to

48. The British rule is substantially the same. British Manual of Military Law, par. 359.

49. Magoon, p. 14. Cf. Ketchum v. Buckley, 99 U.S. 188, TM 27-250, p. 52, where a general administrator of a county continued to act during the remainder of his term notwithstanding occupation and the Military Governor did not remove him from office, the court said in a dictum: "The appointment by the President of a military governor for the State at the close of hostilities did not of itself change the general laws in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf."

50. Hyde, Vol. II, p. 366.

the American and British view,⁵¹ some authorities, although recognizing this rule generally, contend that there is a duty on the occupant to permit judges who sit in civil and commercial matters to continue their duties.⁵² Such authorities assimilate the position of judges to the laws of the occupied territory which latter are protected by Article 43 of the Hague Regulations from alteration except in the case of necessity.⁵³ Magoon has summarized the United States' position as follows:⁵⁴

It seems plain, to the writer, that the complainants have overlooked the real instrument of their undoing. Their individual or personal right to exercise the authority pertaining to the office of high sheriff of Habana and to enjoy the emoluments of said office was placed in jeopardy by the war between Spain and the United States and abrogated when the city of Habana became subject to military occupation by the forces of the United States.

The general rule deducible from the laws of war is that the authority of the local, civil, and judicial administration is suspended, as of course, so soon as military occupation takes place, although in actual practice it is not usual for the invader to take entire administration into his own hands; but the omission is an act of grace on the part of the invader.

51. See Lauterpacht, p. 349, which states: "There is no doubt that an occupant may suspend judges as well as other officials." FM 27-10, par. 311, states: "By virtue of his powers of control the occupant is duly empowered to remove officials of every character."

52. Rolin, par. 449.

53. Fauchille, p. 233, et seq.

54. Magoon, p. 198.

Lieber's Instructions for the Government of Armies of the United States in the Field, section, paragraph 6, lays down the rule as follows:

All civil and penal law shall continue to take its usual course in the enemies' places and territories under martial law /military government/, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government--legislative, executive, or administrative--whether of a general, provincial, or local character, cease under martial law /military government/, or continue only with the sanction or, if deemed necessary, the participation of the occupier or invader.

I understand this instruction to mean that it requires an affirmative act of the invader to abrogate the civil or penal laws, but the authority of legislation, execution, and administration of all laws passes to the military occupant as a result of the occupation and without further affirmative act or declaration. Should he thereafter desire to confer the right to exercise any or all of said powers upon the persons previously exercising them, or other persons, an affirmative act is necessary.

If this is the correct view, it follows that upon the military occupation of Habana by the forces of the United States being established, the authority theretofore possessed by these claimants by virtue of said office passed, ipso facto, to the military occupier and will remain there so long as the occupation continues, to be exercised or not, as the occupier shall determine.

I take this to be the rule even when it is conceded that the office does not become functus officio as a result of military occupation.

I see no reason why an exception should be made to this general rule in the instance under consideration. The fact that the term of office was perpetual does not give exemption, for the principle is the same as is involved where the term is for life, a series of years, during good behavior, or at the royal pleasure. If the former incumbents of this office may rightfully demand restitution and indemnity, why may not any other Spanish officer demand similar treatment at the hands

of the military government?⁵⁵

The United States Manual of Military Government indicates that generally it will be necessary to remove high ranking political officials from office;⁵⁶ so far as practicable, subordinate officials and employees should be retained.⁵⁷ Where public officials are removed from office, the occupant is under no duty to pay accrued salaries earned in the employ of the legitimate sovereign. Even where the occupant leaves officials of the legitimate government in office there is no rule of customary or conventional international law which requires him to pay their current salaries. Only in case the occupant collects taxes under Article 48 of the Hague Regulations⁵⁸

55. In *Alvarez y Sanchez v. United States*, 216 U.S. 167, TM 27-250, p. 48, the plaintiff was granted the office of Solicitor of the Courts of First Instance of Porto Rico by the King of Spain, the office was transferable in perpetuity, the court held that the act of the Military Governor, ratified by the Foraker Act, in abolishing the office did not violate the provision of the peace treaty between Spain and the United States protecting private property and rights of the inhabitants of Porto Rico. This treaty provision had no reference to public or quasi-public offices connected with the administration of justice.

56. FM 27-5, par. 9i(3).

57. FM 27-5, par. 9h, i.

58. FM 27-10, par. 293. Generally the occupant will pay current salaries as a matter of policy even where no legal obligation to do so exists.

must retained officials be paid by him.⁵⁹ In Kotra and Others v. Czechoslovak State⁶⁰ dismissed public officials claimed salaries from the occupant from the time of occupation (also dismissal) to the treaty of peace on the ground that the occupant had collected taxes under Article 48 of the Hague Regulations. The claims were dismissed for lack of jurisdiction, the court stating that the retention of public officials in office by an occupant is for the purpose of insuring the normal community life and not to guarantee to officials themselves the right to continued employment and receipt of salaries.

It follows as a corollary from the occupant's power to remove public officials that he may appoint necessary officers and clothe them with the powers and duties of their respective positions.⁶¹ He may require officials, whether newly appointed by him or continued in their offices to take an oath to perform their duties conscientiously and not to act to his prejudice.⁶²

59. British Manual of Military Law, par. 402; Lauterpacht, p. 348. FM 27-10, par. 310.

60. Hungaro-Czechoslovak Mixed Arbitral Tribunal, Annual Digest, 1933-1934, Case No. 221.

61. Cronin v. Patrick County, 89 Fed. 79; New Orleans Steamship Co., 20 Wall. 387; TM 27-250, p. 43.

62. FM 27-10, par. 309.

Respect for
Existing Law
-- Criminal
Law.

In considering the power of the occupant to change existing criminal law, a distinction must be made between crimes and offenses directed against the army of occupation, its security or its proclamations, etc., and violations of criminal law committed by one inhabitant against another, i.e., crimes not involving the security of the occupant.⁶³ This distinction is recognized in practice as well as theory. Thus, the United States Rules of Land Warfare⁶⁴ provides that the occupant will promulgate new laws and regulations as military necessity demands, particularly with respect to new crimes and offenses incident to a state of war and "necessary for the control of the country and protection of the army".⁶⁵ Westlake, after pointing out that changes in the criminal law of the occupied country will be greatest "in what concerns the relation of the communities and individuals * * * to the invading army", says:

Indeed the entire relation between the invaders and the invaded, so far as it may fall within the criminal department whether by the intrinsic nature of the acts done or in consequence of the regulations

63. Westlake, part II, p. 96.

64. FM 27-10, par. 288.

65. See to same effect British Manual of Military Law, par. 364.

made by the invaders, may be considered as taken out of the territorial law and referred to what is called martial law.⁶⁶

Despagnet states:⁶⁷

The jurisdiction of the army of occupation is very justifiably substituted for that of the occupied country, in regard to all acts affecting the security of the occupying troops * * * even when provision for dealing with such acts has not been included in the military law.

The United States Manual of Military Government specifically excludes from the jurisdiction of the local courts crimes or offenses "involving the rights, interests, or property of the United States, or property of the United States or other person serving with the occupying forces and subject to military or naval law of the United States or of countries allied with the United States."⁶⁸ The American military government in Germany in 1918-1920 deprived the ordinary courts in the occupied territory of jurisdiction to try German citizens for treason.⁶⁹ Substantially the same action was taken by the Germans with respect to the Belgian courts in 1918, where the German Governor-General held that, "it was nonsensical that in an

66. Westlake, part II, p. 96.

67. Quoted by Robin, p. 170.

68. FM 27-5, par. 42d. The position of members of the occupying army will be dealt with later. See p. 234, infra.

69. Hunt Report, p. 288.

occupied territory courts * * * should be allowed to assume jurisdiction over offenses against the suppressed authority of a state with which that occupant was at war".⁷⁰

Generally, the criminal law of the occupied territory not related to the occupant's military security or his forces is to be respected and is not to be altered except as demanded by military necessity or the maintenance of order and safety.⁷¹ The British occupation of Palestine in 1917 furnishes several examples of changes in the local criminal law in the interest of order and safety. Bentwich describes these changes as follows:

Something, too, has been done to make punishments more human, (1) by abolishing minimum penalties that are prescribed by the Ottoman code, and (2) by increasing the discretion which a judge may exercise in the case of a juvenile offender in order to keep him out of prison.

* * *

While the substantive law has been little affected, greater latitude has been taken with the amendment of the procedure. The Ottoman codes of procedure are rather slavish imitations of the French codes, and are not calculated to secure expeditious justice. In criminal matters certain features of English practice have been introduced. Witnesses at the investigation are examined in the presence of the accused, and a confession, in order

70. Kohler, p. 68.

71. Garner, Vol. 2, p. 85; cf. Holland, p. 53.

to be admissible as evidence, must be proved to have been made voluntarily.⁷²

Existing courts are not to be deprived of their jurisdiction over violations of local criminal law.⁷³ The occupant may substitute his own tribunals to administer local criminal law only when military necessity or the maintenance of public order and safety demand such action.⁷⁴ Spaight states:

Delicts and crimes against common law can usually be adequately dealt with by the local courts * * * But if the machinery of justice has been so dislocated by the events of the war as to be out of gear or inoperative--if, for instance, the courts have been closed and the judges have fled or if the judges decline to sit, then the occupant is fully entitled, and indeed called upon, to establish special tribunals for trying offenses against common law. In 1900, Lord Roberts found it necessary to erect such courts in the Transvaal, to deal with "offences under the common or Statute Law of the Transvaal" and magistrates were appointed to preside over such courts.⁷⁵

The law previously existing in the occupied territory, unless suspended or changed by the occupant, will be applied by the occupant's military

72. B.Y.B., 1920-21, p. 145.

73. Spaight, p. 358; Garner, Vol. 2, p. 85.

74. Garner, Vol. 2, p. 87. Courts created by a military governor to administer the local criminal law depend for their existence on the laws of war and not on the constitution or legislation of the legitimate sovereign. United States v. Reiter, Fed. Cas. No. 16, 146; TM 27-250, p. 1.

75. Spaight, p. 358.

tribunals when they are acting in place of the local criminal courts.⁷⁶ If the penalties of the ordinary criminal law have been made more severe by the occupant, such modification should be applied only to offenses subsequently committed.⁷⁷ The occupant may suspend proceedings in the local criminal court and direct that any case or class of cases be tried by a military tribunal where the prosecution is inimical to the interests of the occupant.⁷⁸ Where the competency of the local court to accord a fair trial to subjects of neutral powers is in doubt, the occupant would be justified in referring such cases to tribunals created by him. During the British occupation of Palestine in World War I, the local criminal courts regularly tried all persons without regard to nationality. However, for serious offenses, foreign subjects were tried either by a British magistrate or by a court with a majority of British judges.⁷⁹

76. Cybichowski says: "If the judges of occupied territory have left the territory or refused to serve the occupant must establish new courts * * * These new courts render judgment according to the laws of occupied territory and should be regarded as foreign courts in relation to the courts of the occupant."

77. Fairman, p. 275.

78. FM 27-5, par. 42d.

79. Bentwich, B.Y.B., 1920-21, p. 143.

In a case before the Court of Appeal of Nancy, France, 8 January 1920, the defendant pleaded a former acquittal on the charge of infanticide by a court established in occupied France in the name of the German Empire. She contended that the German judgment ought to rank as a final decision and that she could not be tried a second time. The French judges of the occupied area were at their post at the beginning of the German occupation, and, according to the Nancy Court, the German Court was established for the purpose of suppressing the legally constituted court. The court in holding that the decision of the German Court could produce no legal effect in France said:

Article 43 of the Hague Convention in no way authorised the occupying authorities to suppress in the occupied regions French courts which, so far from disturbing public order, safeguarded it. Moreover, the crime of infanticide is not among those reserved in principle by the law of war to the cognisance of the enemy as being likely to jeopardise the security of his army.⁸⁰

The military occupant in discharge of his duty to maintain order and safety may supervise the administration of justice by the local courts, although he must respect their independence according to the laws of the

80. Annual Digest, 1919-22, Case No. 334. See also Annual Digest, 1919-22, Case No. 335 the plea of double jeopardy was dismissed where the crime was of a mixed nature, violating both the security of the occupant and the local criminal law.

country.⁸¹ Of course, the occupant may suspend local judges, but if he does, he must temporarily appoint others in their place.⁸²

Respect for
Existing Law
-- Civil and
Commercial
Law.

To the extent that Article 43 of the Hague Regulations permits, the occupant may legislate for the period of occupation.⁸³ Normally he will not make changes in the rules of private law such as those relating to property, contracts, or domestic relations.⁸⁴ Thus, in the Spanish-American War of 1898, President McKinley issued an order to the Secretary of War with respect to the occupation of Cuba by the American forces, that the "municipal laws of the conquered territory, such as affect private rights of person and property * * * are considered as continuing in force, so far as they are compatible with the new order of things".⁸⁵ Changes in existing law may be made only when absolutely necessary. The orthodox grounds on which this

81. Cf. Lauterpacht, p. 349.

82. Lauterpacht, p. 349.

83. Westlake, part II, p. 97; Rolin, par. 446.

84. Holland, p. 53; Hall, p. 560; Garner, Vol. 2, p. 85; FM 27-5, par. 9h.

85. Moore, Vol. VII, p. 261; TM 27-250, p. 9.

necessity is based are military necessity and the maintenance of law and safety.⁸⁶

The United States Manual of Military Government recognizes that the practice of customs or the observance of traditions which outrage civilized concepts may be annulled.⁸⁷ Presumably, civil or commercial laws which violate civilized concepts may be annulled. The occupant is sole judge of the necessity to change or amend existing laws and such determination is not subject to judicial review by the ordinary courts of the occupied territory during the occupation.⁸⁸ Rolin summarizes the power of the occupant to change civil laws as follows:

One may say that as a rule it is not only unnecessary to modify the civil legislation of the occupied country--and we would say the same is true of commercial legislation--but it would also be very inconvenient to do so. First of all, these modifications, as a rule, will have only an ephemeral duration. In the second place, there would result a grave disturbance in the relation between inhabitants. Nevertheless, such a modification may be indispensable. It suffices to reflect that some persons may find it impossible to pay their debts, to pay their rent, to pay letters of exchange accepted by them; persons who are otherwise honorable and solvent and who find themselves in their predicament only as a result of the war and the occupation. From this there may result the necessity for a

86. Annual Digest, 1925-26, Case No. 362; Rolin, par. 445; Stauffenberg; Garner, Vol. 2, p. 77.

87. FM 27-5, par. 9n.

88. Rolin, par. 449; Kohler, p. 8.

moratorium, the initiative for which is often taken by the national government but which the occupying power can renew and extend in case of necessity. The same is true of tariff laws. As a matter of principle enemy occupation does not suspend such tariff laws but it may well be that the absolute necessity of the occupying army to provide for its subsistence makes it imperative that the frontiers be opened without restriction to the importation of foreign foodstuffs. This has not been prohibited by Article 43 of the 1907 regulation nor, incidentally, is it prohibited by customary international law and in this respect the regulation adopted at the Hague has not changed customary law.⁸⁹

Fauchille has stated with respect to commercial laws:

What is true of civil laws is also true, with the same reservations, for commercial laws. Such was the principle followed by France during the great war in Alsace and Lorraine, before and after the armistice * * *⁹⁰

Changes in
Existing Law
-- Procedure
in Accomplish-
ing Changes:
Regulations,
etc.

The occupant's right of administration is an original right based on the laws of war and not derived from the legitimate sovereign. He is not obliged to comply with the constitutional procedure of the occupied territory in making changes in law.⁹¹

89. Rolin, par. 447.

90. Fauchille, p. 226. A decree of March 15, 1919 * * * subjected to the conditions of French law the protection of the rights of Alsatian and Lorrainian merchants and industrialists in the matter of trademarks, inventions, patents, etc.

91. Stauffenberg. See *Kain v. Hall*, 6 Baxter (Tenn.) 3, 17 IM 27-250, p. 41 at p. 42, where the court said: "In case of a country acquired by conquest no formal act of legislation is necessary to change the law; the mere will of the conqueror is enough."

Thus, a constitutional requirement that laws be concurred in by parliament, would not be met by an occupant.⁹² The occupant exercises legislative power by the issuance of proclamations and ordinances.⁹³ It is not necessary that a change in existing law be made by special decree; it may be accomplished by the introduction of different principles of jurisprudence as administered by the courts of the occupant or even by the introduction of a different usage and custom.⁹⁴ According to Halleck the United States forces in military occupation of California introduced the custom of transferring real estate by deeds commonly used in the United States and not in accordance with the Spanish form of conveyancing. He states that the local law was suspended by the introduction of this different usage.⁹⁵ In order to avoid misunderstandings on the part of the population and injustices to them, an occupant should so far as possible give public notice of his enactments or regulations changing the local law.⁹⁶

92. Kohler, p. 9; Bisschop, p. 121.

93. Kohler, p. 9; cf. FM 27-5, par. 36.

94. Halleck, Vol. II, p. 482.

95. Halleck, Vol. II, p. 484.

96. Westlake, part II, p. 97; FM 27-5, par. 35c (4).

In strict law an occupant may punish offenses against the security of his forces without previously publishing a proclamation or defining the offenses.⁹⁷ The better practice is to inform the people of the occupied territory "what they are required to do, what acts are forbidden, and in what courts they may be tried if they are charged with offenses."⁹⁸ Offenses should be clearly and simply defined and the penalties for disobedience made known. General prohibitions against hostile and subversive acts to cover offenses not specifically mentioned should be avoided if possible.⁹⁹ In the Russo-Japanese war, the Japanese Headquarters Staff of the Army of Manchuria considered it undesirable to formulate any penal regulations. They reasoned that "if regulations are established, it will be necessary to apply them strictly". They favored the policy of punishing each infraction according to circumstances.¹⁰⁰ Ariga strongly disapproved of

97. Travers, p. 415, et seq.; cf. British Manual Military Law, par. 347; FM 27-10, par. 278.

98. FM 27-5, par. 36b.

99. See Hunt Report, pp. 99-101, reprinted in TM 27-250, p. 54, for injustices caused by couching offenses in general language. See also FM 27-5, par. 36b, for instructions in drafting proclamations and ordinances.

100. Ariga, pp. 379-381.

this position and stated that it was contrary to the principles of repressive legislation not to make known in advance the acts which are or are not punishable.¹⁰¹

Respect for Existing Law
-- Civil Rights and Civil Courts.

Article 23(h) of the Hague Regulations¹⁰² forbids the occupant from declaring extinguished, suspended, or unenforceable in a court of law the rights of action of the inhabitants. This probably means that the occupant ought not to interfere in matters affecting the civil rights of the inhabitants in relation to each other.¹⁰³ In Ochoa v. Hernandez y Morales,¹⁰⁴ the defendants claimed title to real estate under an order of the Military Governor of Porto Rico, dated 4 April 1899. By that order, which was declared to have retroactive effect, the period of adverse possession necessary to acquire ownership was reduced from twenty years to six years. The Supreme Court stated that the order of the military governor, judicial in its nature, depriving any person of his property without due process of law, was not only without executive sanction, but

101. Ariga, p. 380.

102. FM 27-10, par. 289.

103. Higgins, p. 263; Walker, Vol. II, p. 168.

104. 230 U.S. 139.

also contrary to limitations arising from general rules of international law.

This article, according to the British view, is strictly limited to the territory under military occupation, and only forbids the commander of the occupying army from making any declaration preventing the inhabitants from using their courts to assert their civil rights.¹⁰⁵ In Porter v. Freudenberg,¹⁰⁶ Lord Reading said:

Our view is that article 23(h), read with the governing article I of the convention, has a very different and a very important effect, and that the paragraph if so understood is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights. For example, if the commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have the right to sue in the courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article. If such a declaration were made, it would be doing that which this paragraph was intended to make particularly forbidden by the solemn contract of all the States which ratified the Hague convention of 1907. According to eminent jurists, the occupying military power is forbidden, as a general rule, to vary or suspend laws affecting property and private personal relations. This article 23(h) has now enacted that, whatever else the occupying

105. Hall, p. 562.

106. [1915], 1 K.B. 857.

military power may order in the territory of the enemy which it domiciles, it shall not henceforth declare that the right of the subjects of the enemy to institute legal proceedings in the courts of that territory is abolished, suspended, or inadmissible. If this be its true force, the enactment as an international compact is not only of high value, but it has been inserted quite naturally and appositively in the position in the section and chapter of the Annex to the convention which it occupies.

In the case of *Raymond v. Thomas*,¹⁰⁷ the officer in command of the forces of the United States in South Carolina issued a special order wholly annulling a decree rendered by a competent court of chancery in that state in litigation between private persons involving real estate. The court in holding the special order void said:

It was not an order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored, and business should resume its wonted channels. It wholly annulled a decree in equity regularly made by a competent judicial officer in a plain case clearly within his jurisdiction, and where there was no pretence of any unfairness, of any purpose to wrong or oppress, or of any indirection whatsoever * * * It was an arbitrary stretch of authority, needful to no good end that can be imagined * * *¹⁰⁸

It must not be supposed, however, that the local courts may not be closed temporarily if military necessity requires such action.¹⁰⁹ Further,

¹⁰⁷. 91 U.S. 712.

¹⁰⁸. Of course, the local courts may be subject to the supervision of the occupant. FM 27-5, par. 12c.

¹⁰⁹. FM 27-5, par. 12c.

the occupant may substitute his own tribunals to administer the local law when military necessity or the maintenance of public order and safety so demand.¹¹⁰ Local courts that continue to function may pronounce verdicts in the name of the legitimate sovereign, although the occupant may prohibit the use of such a formula.¹¹¹ Where the occupant prohibits the exercise of justice in the name of the legitimate sovereign, he cannot compel the local courts to render judgment in his name since he is not the sovereign.¹¹² A neutral formula "in the name of the law" is the logical solution to such a difficulty.¹¹³ Cybichowski stated:

In addition to the powers of the foreign state which the occupant exercises, he exercises his own powers. For instance he will establish courts for his soldiers, officers and officials and these courts may also be entrusted with the task of punishing offenses against the army, the administration, the military installation, etc., of the

110. Garner, Vol. 2, p. 87; The Grapeshot, 9 Wall.

129; TM 27-250, p. 68. See Annual Digest, 1925-26, Case No. 361, where the German-Belgian Mixed Arbitral Tribunal held that the creation of a special tribunal by the German forces of occupation to pass on responsibility of municipalities in Belgium was violative of the Hague Regulations there being no necessity for such act.

111. Lauterpacht, p. 349; Rolin, par. 448.

112. Lauterpacht, p. 349; De Louter, p. 292; Rolin, par. 448.

113. Lauterpacht, p. 349; Cybichowski.

occupant. As a result of the jurisdiction conferred on these courts, the jurisdiction of the courts of the occupied territory may be limited * * * If the judges of occupied territory have left the territory or refused to serve the occupant must establish new courts. These courts should be distinguished from the courts which the occupant establishes by virtue of his own sovereign power. The former render judgment according to the laws of the occupied territory and should be regarded as foreign courts in relation to the courts of the occupant * * * The courts of the occupant render judgment in the name of the occupant while the local courts render judgment in the name of the legitimate state or they use a neutral formula.¹¹⁴

Respect for
Existing Law
-- Fundamental
Institutions.

Basically, the legitimacy of an occupant's act with relation to the occupied territory is dependent on two underlying principles: (1) The occupant's rule is provisional only and does not imply a change of sovereignty; and (2) his act must have a reasonable connection to legitimate objectives, i.e., they must be justified either by military necessity or the need for maintaining order and safety. An occupant may not make changes in the fundamental institutions of the occupied state since, ordinarily, such changes bear no direct relation to the occupant's legitimate war objectives and are an unjustifiable assumption of sovereignty.¹¹⁵ Conversely, if such a reasonable connection exists between the act of the occupant and the legitimate objectives of the

114. Cybichowski.

115. Garner, Vol. II, p. 77; Rolin, par. 454.

occupant, the change is proper. Thus, the Germans in occupying Belgium in World War I transformed the University of Ghent into a Flemish institution, one of the steps in carrying out a policy of detaching Flanders from Belgium and making it a separate province under German protection.¹¹⁶ Garner has stated that "neither considerations of public order nor military security required the transformation of the University of Ghent into a Flemish institution. It belonged to the Belgian people, it was established for their benefit, and it was supported by their contributions. Its courses of instruction, the language in which they were given, and the selection of its professors were matters of no legitimate concern of the military occupant so long as the conduct of the university and the character of its teaching were not such as to endanger the military interests of the occupant or threaten public order. The pretext that the measure was in the interest of an oppressed race ceased to have any weight as soon as the leaders, as well as the great majority of those in whose interest it was alleged to have been undertaken, united in protest against

116. Garner, Vol. II, p. 74.

it."¹¹⁷ Germany also separated Belgium into two administrative districts, one Flemish and the other Walloon. This was denounced as an attempt to divide the Belgium people and beyond the lawful rights of the occupant since it was not founded on considerations of public order or military necessity.¹¹⁸

Laws which discriminate on the basis of race, color, creed, or political opinion may be annulled.¹¹⁹ The annulment of such laws is justified on considerations of public order and safety. It must also be remembered that the abrogation of discriminatory laws may be an instrument of actual warfare.¹²⁰

Respect for
Existing Law
-- Education.

Schools and educational establishments, according to the British Manual of Military Law,¹²¹ must be permitted to continue their ordinary activity, provided that the teachers refrain from reference to politics and submit to inspection and control by the authorities appointed. Schools may be closed.

117. Garner, Vol. II, p. 77; see Hatschek, p. 331, for the German view justifying the act on the need for conciliating the Flemish population; Kohler, p. 45, et seq.

118. Garner, Vol. II, p. 78; see Bisschop, p. 131, for detailed account.

119. FM 27-5, par. 9n.

120. Cf. De Louter, p. 290.

121. British Manual of Military Law, par. 379.

temporarily if military necessity requires, especially during the operational phase of the war.

Further, schools may be closed if the teachers engage in politics or refuse to submit to inspection.¹²² Garner states the rights of the occupant with respect to education as follows:

It would seem to be within the lawful rights of a military occupant to exercise supervision over the schools within the territory occupied, so far as it may be necessary to prevent seditious teaching calculated to provoke and incite hostility to his authority, but it may be doubted whether he has any lawful right to forbid such exercises, as the singing of national anthems,¹²³ or whether he may justly abrogate the laws of the country which prescribe the language to be employed in the schools, except on the inadmissible assumption that the temporary right of occupation is assimilable to the right of sovereignty. In the present case no considerations of public order or security required the forcing of the Flemish or German languages into the schools; its evident purpose was to "Flemishize" or Germanize a portion of the country occupied by the enemy. It is very doubtful whether a reasonable interpretation of the temporary and limited rights of a military occupant, as they are set forth in the Hague convention, authorizes him to interfere in any such manner with the elementary and secondary schools in the territory under his occupation. It was a species of petty tyranny more calculated to provoke the hatred and opposition of the inhabitants than to strengthen the hold of the occupant or to subserve any considerations of public

122. British Manual of Military Law, par. 379. In 1870-71, the Germans closed three lycees in France, the heads of which refused to permit inspection.

123. The public singing of the national anthem of the occupied country or the display of the national flag could be prohibited by the occupant on the ground of military necessity or in the interest of public order and safety. See M 353-2, p. 67.

order or national defence. It was, therefore, as
inexpedient as it was arbitrary and unjustified.¹²⁴

Respect for
Existing Law
-- Political
and Admini-
strative Laws.

Political laws and constitutional privileges
are as a matter of course suspended upon occupation
although it is a better practice for the occupant
to make the suspension of such laws known to the
population.¹²⁵ Such laws are as a general rule in-
consistent with the factual situation created by
occupation and endanger the occupant's safety.¹²⁶
The United States Rules of Land Warfare¹²⁷ provides
that the occupant will naturally alter or suspend
laws of a political nature as well as political
privileges. According to Fauchille,¹²⁸ administra-
tive and political laws will be most frequently sub-
jected to suspension for their provisions are often
contrary to the interests of the occupant. Thus,
the occupant will suspend the application of the
conscription laws,¹²⁹ right of assembly, the right
to bear arms, the right of suffrage, freedom of the

124. Garner, Vol. II, p. 73.

125. British Manual of Military Law, par. 362.

126. Hall, p. 561; Robin, par. 444-445.

127. FM 27-10, par. 287.

128. Fauchille, p. 226.

129. The Germans abrogated the Belgian laws relating
to the militia and the garde civique in World
War I. Garner, Vol. II, p. 64.

press, and the right of travelling freely in the occupied territory.¹³⁰ He may, says Bordwell, even go so far as to establish provisional governments, based on new rules of suffrage, if such a measure will aid him in the settlement of the war.¹³¹

Generally, the occupant may suspend the operation of any law under which the inhabitants owe obedience to the sovereign since obedience to the latter is inconsistent with his own safety.¹³² In World War I, all salaries paid to Belgian civil servants by the Belgian Government after the occupation and accepted by them could be confiscated.¹³³ This measure, according to Bisschop, was in accordance with the continuity of responsibility, however temporary, which the occupant has to undertake and which cannot be disturbed by outside influences, if peace and order within the country are to be kept.¹³⁴ Legislative bodies are usually suspended

130. FM 27-10, par. 287; Fauchille, p. 226.

131. He must not attempt to change the constitution nor do any act implying a change in nationality. Bordwell, p. 301.

132. Hall, p. 561.

133. Proclamation, 31 Dec. 1914, cited in Bisschop, p. 124.

134. Bisschop, p. 124.

since supreme legislative power is vested in the occupant.¹³⁵ Germany in the occupation of Belgium in World War I suspended all legislative bodies. However during the period of occupation the Provincial Councils met on the summons of the German Governor General who convened these bodies to consult them with respect to the levying of war contributions.¹³⁶

The existence of an unfriendly partisan political party or organization endangers the occupant's safety and may, therefore, be suppressed. This is especially true if one of the declared purposes of the war is to deliver the enemy populations from the control of a political regime whose conduct caused the war.¹³⁷ Thus, the Allied military government in occupying Sicily in 1943 dissolved and declared illegal the Fascist party.¹³⁸

Respect for
Law -- War
Legislation.

It has been stated by the District Court of Rotterdam¹³⁹ that Article 43 of the Hague Regulations

135. FM 27-5, par. 91.

136. Bisschop, p. 125. For further details see Garner, Vol. II, p. 63.

137. See Lauterpacht, p. 342; Korowin, quoted p. 42, *supra*.

138. M 353-2, p. 56.

139. Cillekens v. De Haas, Annual Digest, 1919-22, Case No. 336.

according to which the occupant is bound to respect the laws in force in the country unless absolutely prevented applies to laws which were in force before the war and not legal measures of a special character (such as a moratorium) taken by the sovereign during the war and in connection with it. The court sustained the legality of an order made by the German Governor General in Belgium providing for the gradual abrogation of a moratorium, which had been approved by the Belgian King after the outbreak of war.¹⁴⁰

Respect for
Treaty Rights.

The question here is whether the occupant is bound to recognize treaty rights of neutral powers with the sovereign whose territory is occupied. The occupant's supreme authority over the occupied territory is derived from the laws of war and not as successor to the legitimate sovereign.¹⁴¹ Thus, he may regulate, restrict or prohibit trade in the occupied territory unrestrained by treaty stipulations of the legitimate sovereign.¹⁴² Woolsey analyzes the problem as follows:

140. The court also stated that the order of the Governor General might be sustained on the separate ground that it was in the interest of public order and safety.

141. See p. 33, *supra*.

142. Cf. FM 27-10, par. 290; Magoon, p. 333.

Can alien residents claim from the occupant the same rights and privileges that they claim from the legitimate government? Can consular courts * * * continue to function? Do treaty tariffs and trade privileges continue? Do treaty rights of navigation subsist? It would seem in principle, on the theory that the military occupant is supreme, that they do not, without his consent and approval, particularly the rights as to residence, travel, trade, tariffs and the like. It is true that certain other treaty rights, such as extraterritoriality, may be claimed on the ground that they are derived from a special grant of a portion of the sovereignty * * * and that therefore the military occupant takes subject to them. But it is doubtful whether he can be thus circumscribed by prior contracts. The precedents on this point are few and not very clear. In the case of the military occupation of Madagascar by the French in 1883 it appears that consular jurisdiction was superseded, but in the case of the military occupation of Samoa in 1889 by Germany, consular jurisdiction was permitted to continue as a matter of grace. In a later case in Madagascar in 1895 the jurisdiction of the French authorities under martial law was apparently admitted. In the case of the German deserters from the French Army in Morocco, the Hague Arbitration Court appeared to hold that the jurisdiction of the military had the preference over that of the consul clothed with extraterritorial jurisdiction * * *¹⁴³

Presumably, a treaty fixing boundaries--a right in rem--would be binding on the occupant, since such a treaty diminishes the territory of the legitimate sovereign.¹⁴⁴

¹⁴³. 32 Am. J. Int. L. 314, at p. 319.

¹⁴⁴. 32 Am. J. Int. L. 314, at p. 319.

Concessions,¹⁴⁵
Trade Marks,
Etc.

In the case of Societe Anonyme du Canal de Blaton a Ath v. Etat Allemand,¹⁴⁶ a claim was made by a Belgian company operating a canal in Belgium for tolls claimed to be due from Germany for using the canal during its occupation of Belgium. The Belgian company had a concession to operate the canal from the Belgian Government, under which the latter was required to pay certain rates for the use of the canal. The occupant paid the canal company 40% of the rate which the Belgian Government was required to pay. The German-Belgian Mixed Arbitral Tribunal dismissed the claim of the company for the remaining 60% on the ground that there was no contractual relation between the occupant and the Belgian company. It stated that the occupant could not be considered as having been substituted to the contractual obligations created by the concession entered into between the Belgian Government and the company before the war.¹⁴⁷ Although the occupant is not a

145. A concession is a grant made by a central or local public authority to a private person for the utilization or working of lands, industry, railway, waterworks, etc. Latifi, p. 72.

146. VI Recueil des decisions des Tribunaux Arbitraux Mixtes, 111; Hackworth, Vol. VI, p. 398.

147. The court also stated, by way of dictum, that the enterprise of the Belgian company could have been seized by the occupant under Art. 53 (see FM 27-10, par. 331).

successor state, there may be situations in which he may, at his option, be substituted to the contract relations of the sovereign by virtue of his position as de facto ruler. In 1867 a French company obtained a concession to operate the docks of Smyrna, under which the Ottoman Government was exempt from the payment of dues to the company on "munitions of war" and the "luggage of soldiers" coming into or leaving the docks. During the occupation of Smyrna by the Greek army from May 1919 to September 1922, the Greek authorities made extensive use of the docks for the loading and unloading of all kinds of merchandise but refused to pay the company any dues. The Greek Government contended that it should benefit from the exemption of the payment of dues on merchandise intended for use of the army enjoyed by the Ottoman Government. A special Franco-Greek Arbitral Tribunal held that the Greek Government was entitled to exemption to the same extent as was the Ottoman Government. The tribunal said:

During the occupation of Smyrna the Greek Government exercised there the political and military power and assumed the supreme administration of the town and its surroundings. In these circumstances it must be admitted that the occupation created by the Greek Government a situation which was essentially similar to that of the legitimate government of the country.

The Tribunal further stated that the Greek Government, while entitled to the exemption, was bound to respect the stipulations and tariffs established in the same concession.¹⁴⁸

There is little discussion by writers on the rights of an occupant with regard to concessions.¹⁴⁹

The paucity of authority may be partially accounted for by the fact that some concessions such as railways, wharves, etc., are property susceptible of direct military use and may be seized by the occupant under Article 53 of the Hague Regulations.¹⁵⁰

It is clear that the occupant is not ipso facto substituted to the contract relations of the legitimate sovereign with regard to concessions, nor is he bound by the latter's obligations arising therefrom.¹⁵¹ However, concessions granted by the

148. *Societe des Quais de Smyrna v. Greek Government*, Annual Digest, 1929-30, Case No. 291.

149. Concessions as defined by Latifi, p. 72, may be of three kinds: those involving the permanent alienation of the public domain such as concessions to work mines; those involving the use of the public domain on payment or otherwise such as concessions to use a river for generating electric power; concessions for public works whereby an individual undertakes to execute works of public utility.

150. FM 27-10, par. 331.

151. See *Societe Anonyme du Canal de Blaton a Ath v. Etat Allemand*, p. 73, supra; cf. Moore, Vol. I, p. 395.

legitimate sovereign are property rights and as such must be respected.¹⁵²

Questions concerning concessions, trade-marks and patents arose during the British occupation of Palestine. Bentwich states that these problems were handled in the following manner:

The existing Ottoman law has been followed in regard to the conditions of admitting companies and granting exclusive privileges; and it has been laid down that no new trade-marks or patents can be granted, because that would amount to an exercise of sovereign power which is beyond the competence of the temporary military administration. For the same reason the administration has refused to grant any concessions or to complete any which had been applied for from the Ottoman regime, but not actually granted.¹⁵³

Although the granting of new concessions should be left to the legitimate sovereign, there may be situations where the needs of the community necessitate immediate action by the occupant and a concession granted by him in such circumstances would seem a proper exercise of his duty to maintain law

152. "Any complete and vested right which a person had at the time the Treaty of Paris took effect, to the use of the water of the River Plata, should be respected by the United States." This statement was made by Attorney General Griggs with respect to concessions granted by Spain in Porto Rico. 22 Op. Atty. Gen, p. 546; cf. Alvarez y Sanchez v. United States, 216 U.S. 167, TM 27-250, p. 48.

153. B.Y.B., 1920-21, 139, at p. 147.

and safety.¹⁵⁴ According to Fauchille, the Austro-Hungarian administration in Serbia in 1914-18 suspended state monopolies for matches and cigarette papers and granted these to Hungarian and Austrian business houses.¹⁵⁵

Consular and
Diplomatic
Representa-
tives.

The occupant is entitled to control the exercise of neutral consular functions in the occupied territory.¹⁵⁶ Germany in occupying Belgium in November 1914, informed neutrals that "the exequatur¹⁵⁷ of consuls formerly permitted to act in such district" had expired. The communication stated that the German Government would be disposed to consider favorably any wishes of allied or neutral countries respecting the establishment of consular offices except in those in which military operations were in progress; and that the issuance of new exequaturs was not deemed advisable, but temporary recognition

154. See *New Orleans v. Steamship Co.*, 20 Wall. 387, TM 27-250, p. 43; Bordwell, p. 329. See 23 Op. Atty. Gen. 222, at p. 226 for discussion of the policy of the United States Military Government in Cuba on granting concessions.

155. Fauchille, p. 254.

156. Hyde, Vol. I, p. 790.

157. This is a document by which the territorial sovereign expresses formal recognition of the individual as consul. Hyde, Vol. I, p. 790.

of consuls would be granted.¹⁵⁸ The American Government replied that it was not inclined at that time to question the right of the Imperial Government to suspend the exequaturs of American consuls in the occupied territory, in view of the fact that consular officers are commercial and not political representatives, and that permission for them to act within the occupied territory was dependent on the authority actually in control thereof "irrespective of the question of legal right".¹⁵⁹ In peacetime, consular officers who commit a crime are subject to the laws of the territorial sovereign unless otherwise provided by treaty.¹⁶⁰ The Instructions for the Government of Armies of the United States¹⁶¹ provided that "consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempt. Any delinquency they commit against the established military rule may be punished as in the case of any

158. Hyde, Vol. II, p. 386; Garner, Vol. II, p. 60.

159. Hyde, Vol. II, p. 386; Garner, Vol. II, p. 61.

160. For details, see Hackworth, Vol. IV, p. 699.

161. G.O. 100 /18637, art. 8.

other inhabitant, and such punishment furnishes no reasonable ground for international complaint."

The Instructions for the Government of Armies of the United States,¹⁶² state that "the functions of ambassadors, ministers, and other diplomatic agents accredited by neutral powers to the hostile government, cease, so far as regards the displaced government. But the conquering or occupying power usually recognizes them as temporarily accredited to itself." Practice indicates that diplomatic representatives of neutral states may be required to withdraw,¹⁶³ unless permitted to remain by the consent of the occupant. If a diplomatic agent of a neutral power is found on occupied territory, he must be regarded as inviolable as long as his actions are harmless.¹⁶⁴ If the diplomatist continues to reside in the occupied territory, he cannot expect to enjoy all his immunities and privileges to

162. G.O. 100 [1863], art. 9.

163. See Hackworth, Vol. VI, p. 391, Germany's note to American Embassy in Berlin, 1 July 1940, requesting withdrawal of United States diplomatic missions in occupied territory.

164. Satow, Vol. I, sec. 362. See FM 27-10, par. 398, which provides that diplomatic agents of neutral countries in occupied territory must be treated with all courtesy and be permitted such freedom of action as is possible to allow with due regard to the necessities of war.

their full extent. These will be limited by the military necessities of the occupant.¹⁶⁵ For example, the occupant may refuse to allow secret communication between the diplomat and his government.¹⁶⁶ In November 1914 the United States, then a neutral, secured the acquiescence of the Austro-Hungarian Government to uniform regulations for the transmission of correspondence by United States diplomatic and consular officers in occupied territory.¹⁶⁷ A neutral envoy who identifies himself with one of the belligerents is liable to arrest by the occupant. This was the case of the Marquis de Monti who sided with Stanislaw of Poland against Augustus III and Russia in 1734 and was made a prisoner of war by the Russians.¹⁶⁸

Censorship
and Freedom
of Communi-
cation.

Censorship of mail, telephone and telegraph communication, radio broadcasting, newspapers, motion pictures, plays, books, and magazines is permissible in the interest of military security.¹⁶⁹

165. Satow, Vol. I, sec. 364(b); see FM 27-10, par. 398.

166. Satow, Vol. I, sec. 365, 366.

167. Hyde, Vol. I, p. 800.

168. Satow, Vol. I, sec. 360; cf. FM 27-5, par. 42b.

169. Cf. M 353-2, p. 12; FM 27-5, par. 12g; FM 27-10, par. 291.

The occupant may limit or prohibit telegraphic, postal correspondence and other means of communication and need not make available facilities in these matters to the inhabitants unless the exigencies of war allow it.¹⁷⁰

The press, although privately owned, may be subject to the complete control of the occupant.¹⁷¹ He may censor newspapers or suppress their publication entirely. Fauchille stated the rights of the occupant with respect to the press as follows:

Present war usages leave to the occupant a complete freedom of action. If he is intelligent, he will not abuse it; but the necessity of looking out for the safety of the invading army and the secrecy of its operations must be its sole guide. In 1870-1871, the Germans in France required * * * that two signed copies of newspapers be submitted before publication, that no news concerning operations be published, unless communicated by the military authority; and that official German notes be inserted gratuitously; the publication of articles having hostile tendencies or criticising acts of the authorities was forbidden * * *¹⁷² In 1914, in occupied Belgium, the Germans suppressed all Belgian newspapers, the latter having refused to submit themselves to their censorship. But afterwards they compelled certain ones, at least in the provinces, to appear under their control, and forced certain articles on them * * * In German countries on the left bank of the Rhine, which the Allies occupied in virtue of the armistice of

170. British Manual of Military Law, par. 374; cf. FM 27-10, pars. 290, 291.

171. Merignhac-Lemonon, p. 481; Fauchille, p. 247.

172. Cf. FM 27-5, par. 90, where it is stated: "To the extent that military interests are not prejudiced, freedom of speech and press should be maintained or instituted."

November 11, 1918, the press was subjected to censorship and the peddling of loose sheets or pamphlets was forbidden * * *¹⁷³

In the Rhineland occupation in 1918, the United States authorities pursued a policy of moderation with respect to the press. Free discussion of political and domestic issues was permitted without interference. "Not once did the American authorities instigate the publication in a German paper of an article of a propagandist nature."¹⁷⁴

CHAPTER IV

RELATION OF THE OCCUPANT TO THE INHABITANTS

The Duty of
Obédience of
Inhabitants.

The fact of occupation, as has been shown, invests the occupant with supreme authority over the inhabitants of the occupied territory.¹ This authority carries with it a corresponding duty on the part of the inhabitants to obey the occupant's commands.² The duty of the inhabitants, according to Oppenheim, does not arise from their own municipal law, nor

¹⁷³. Fauchille, p. 247.

¹⁷⁴. Hunt, p. 115.

1. FM 27-5, par. 1; Hyde, Vol. II, p. 363.

2. Lauterpacht, p. 343; Hyde, Vol. II, p. 363; FM 27-10, par. 297.

from international law, but from the power of the occupant and his supremacy.³ The power of the occupant is not unrestricted; it is limited by the laws and usages of war.⁴ A Belgian Court of Cassation during the occupation of Belgium by Germany in World War I held that the inhabitants owed obedience to the occupant even if his commands were illegal.⁵ Garner, in commenting on this decision, states that this is the view of the authorities generally.⁶ If the occupant resorts to internationally illegal conduct in his treatment of the population, he may subject himself to reprisal and the legitimate sovereign would possess a right to demand full reparation upon the restoration of peace.⁷

3. Lauterpacht, p. 343; Hyde, Vol. II, p. 388. Bordwell, p. 300, recognizes a duty of obedience on the part of inhabitants only while the occupant is trying to preserve order and safety; he argues that when the occupant goes further and takes measures for his own belligerent purposes, the inhabitants may disregard them as far as they can reasonably do so.

4. Lauterpacht, p. 343; FM 27-5, par. 1.

5. International Law Notes, 1916, p. 136.

6. Garner, Vol. II, p. 89; see also Walker, Vol. II, p. 168.

7. Hyde, Vol. II, p. 364.

The duty of the inhabitants, as stated in the United States Rules of Land Warfare,⁸ is to carry on their ordinary peaceful pursuits; to behave in an absolutely peaceful manner; to take no part whatever in the hostilities carried on; to refrain from all injurious acts toward the troops or in respect to their operations; and to render strict obedience to the officials of the occupant. Spaight has summarized this idea as follows: "If the inhabitants of an occupied territory do not owe allegiance to the occupying belligerent,⁹ they do owe him the duty of quiescence and of abstention from every action which might endanger his safety or success."¹⁰

War Treason.

The term "war crime" is a technical expression for such acts of a soldier, which are violations of the laws of war and cause him to lose his status as a lawful member of the armed forces and for which he may be punished by the enemy on his capture.¹¹ In the case of an individual other than a soldier,

8. FM 27-10, par. 301. The British Manual of Military Law, par. 384, contains a similar provision.

9. Oppenheim says: "Inhabitants do not owe an atom of allegiance to the occupying power."
33 Law Quart. Rev. 266, at 273.

10. Spaight, p. 333.

11. Lauterpacht, p. 451; British Manual of Military Law, par. 441; Dig. Op. JAG, 1912, p. 1071. See

the term refers to violations of the laws of war for which he may be punished on his capture by the enemy.¹² The use of the term "war crime" does not necessarily imply a moral wrong, for there are some war crimes which are praiseworthy and patriotic, such as taking part in a levee en masse on territory occupied by the enemy.¹³ War crimes have been classified by Oppenheim and the British Manual of Military Law into four categories:

(1) Violations of recognized rules of warfare by members of the armed forces.¹⁴

11. (Contd.) 60 Law Quart. Rev. 63, at p. 66, where

Sack, whose definition of a war crime is more limited than stated herein, says: "A soldier who commits, as an individual, the crime of murder, robbery, rape, etc., is a common law criminal and not, property speaking, a 'war criminal', even though he is a soldier and his victim is an enemy, and even though he may be punished by the enemy on capture." An attempt to punish all violations of the laws of war (including minor infractions) would be impracticable. In view of this consideration a war crime may be defined as those violations of the laws and customs of war which constitute offenses against person or property, committed in connection with military operations or occupation, which outrage common justice or involve moral turpitude.

12. Lauterpacht, p. 451.

13. Lauterpacht, p. 451; British Manual of Military Law, 1936, par. 441.

14. See for example, FM 27-10, par. 347. The following examples may be added: (a) assassination, see FM 27-10, pars. 30, 31; JAGS Text No. 7, p. 31; (b) killing and attacking harmless private individuals, FM 27-10, par. 19; JAGS Text No. 7, p. 13; compelling the population of occupied territory to furnish information about the army of the other belligerent, or about his means of defense, FM 27-10, par. 306; Lauterpacht, p. 452; (c) violations of cartels, capitulations, and armistices, Lauterpacht, p. 453.

(2) All hostilities in arms committed by individuals who are not members of the armed forces.¹⁵

(3) Espionage¹⁶ and war treason.¹⁷

(4) Marauding.¹⁸

War treason¹⁹ is not real treason, that is, it is not the same as the treason recognized by constitutional and statutory law of the United States or England.²⁰ Real treason can only be committed by a person owing allegiance, although temporary, to the

15. See for example, FM 27-10, pars. 349, 351, 352; JAGS Text No. 7, p. 13, et seq.

16. Cf. FM 27-10, par. 203, with *Ex parte Quirin*, U.S. Sup. Ct., 87 L. ed. 1, where the court said: "The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or any enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." Hyde, 37 Am. J. Int. L. 88, says with respect to this case: "it is thus apparent that because, in the mind of the court, the spy is an offender against the law of war he is subject to trial and punishment by military tribunals."

17. FM 27-10, par. 350.

18. FM 27-10, par. 353.

19. The term "war treason" has been the subject of dispute. See Garner, Vol. II, p. 93.

20. Lauterpacht, p. 331.

territorial sovereign.²¹ McKinney summarized real treason under the United States Constitution and statute as follows:

In treason the breach of allegiance is the crime. It is therefore usually that of a citizen of the United States. But since allegiance is the obligation of fidelity and obedience which the individual owes to the government or to the sovereign under which he lives, in return for the protection he receives, an alien domiciled in this country owes a temporary allegiance in return for the protection which he may claim from the United States while so resident here and for the fact of his being permitted to be here at all. So he, too, may commit treason * * * If therefore enemy aliens chose to remain in this country and profit by the attitude of the government in allowing them comparative freedom, they have thereby bound themselves to a temporary allegiance, for the breach of which a prosecution for treason may be made.²²

According to Oppenheim, "war treason consists of all such acts (except hostilities in arms on the part of the civilian population²³ * * * and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. War treason may be committed, not only in occupied enemy country, or in the zone of military operations, but anywhere within the lines of a belligerent."²⁴ Enemy soldiers, as distinguished from

21. Lauterpacht, p. 331.

22. 12 Ill. Law Rev. 591, at p. 612.

23. Hostilities in arms by inhabitants of occupied territory is called war rebellion, FM 27-10, par. 349.

24. Lauterpacht, p. 457.

private enemy individuals, are guilty of war treason only when they have committed the act of treason within a belligerent's lines under disguise.²⁵ The essential characteristics of war treason, according to Oppenheim are: (1) the act must be committed within the lines of the belligerent who punishes it; (2) the act must be harmful to him; (3) the act must be favorable to the enemy; (4) the perpetrator must have the intention of favoring the enemy by his act.²⁶ When inhabitants of occupied territory commit such acts as giving information to the enemy, harboring enemy soldiers, damaging railroads or other acts containing the four essential characteristics, they are guilty of war treason.²⁷ Thus, during World War I, Germany tried Edith Cavell in occupied Belgium for assisting allied soldiers to escape.²⁸ All war

25. Spaight, p. 110, cites a case in the Russo-Japanese War in 1904 of two Japanese officers captured, disguised as Chinamen, trying to dynamite a railway bridge in Manchuria in the rear of the Russian lines and states that this was a case of war treason as well as of illegitimate belligerency. See also Lauterpacht, p. 331. See also Ex parte Quirin, U.S. Sup. Ct., 87 L. ed. 1.

26. Oppenheim, 33 Law Quart. Rev. 266, at p. 283.

27. See FM 27-10, par. 350, for an extensive, although not exclusive, listing of acts of war treason.

28. Garner, Vol. II, p. 97, et seq. The execution of Edith Cavell has been severely criticized on the grounds that the trial was unfair and that the execution of a woman, who nursed German as well as Allied soldiers, was barbaric.

crimes, including war treason, are liable to be punished by death but a more lenient penalty may be pronounced.²⁹ Article of War 81 substantially embodies the doctrine of war treason into the statutory law of the United States.³⁰ However, this Article of War technically applies only within the territory of the United States insofar as persons who are not members of the armed forces or not subject to military law³¹ are concerned.³² War treason under the laws of war covers not only those persons offending contrary to Article of War 81, but it also covers offenses which are not mentioned therein.³³

It must not be supposed that every offense committed by inhabitants in occupied territory in violation of the occupant's proclamations or ordinances are war crimes or, more specifically, war treason. There are many acts which an occupant may forbid in exercising his supreme authority which,

29. British Manual of Military Law, par. 450; FM 27-10, par. 357.

30. FM 27-10, par. 205.

31. AW 2.

32. FM 27-10, par. 205.

33. McKinney, 12 Ill. Law Rev. 591, at p. 626.
Compare AW 81 and FM 27-10, par. 350, listing examples of war treason by inhabitants of occupied territory.

when violated by the inhabitants, are not war treason or any other war crime,³⁴ for example: violating censorship regulations; making false claims for damages; failing to extinguish or exhibit lights at fixed hours; failing to secure a pass; disobeying sanitary regulations and other similar acts.³⁵ Of course, such violations are crimes or offenses against the occupant and may be punished.³⁶

Spying and
War Treason.

Under the Hague Regulations³⁷ spying has a technical meaning. The constituent elements of spying are: (1) the obtaining or seeking to obtain military information for the belligerent employing him;³⁸ (2) doing so clandestinely or under false pretences;³⁹ and (3) doing so in the zone of operations of the

34. British Manual of Military Law, par. 446.

35. See FM 27-10, par. 354, for a more detailed listing.

36. FM 27-10, par. 354.

37. FM 27-10, par. 202.

38. If the mission is for some other purpose than seeking information it is not spying. Spaight, p. 208.

39. The essence of spying is false pretence. Thus an inhabitant of occupied territory, who without dissimulation, merely reports what he sees or hears to the enemy, is not a spy. MCM, par. 142. Similarly, soldiers not in disguise who penetrate into the enemy lines for information are not spies. Lauterpacht, p. 330.

other belligerent.⁴⁰ Presumptively a soldier apprehended behind enemy lines in disguise is there to seek military information and the burden is on him to show that he has no such intention. Similarly a civilian who came from enemy lines and attempted to return there, evading the outposts, might equally be presumed to be a spy unless he has no intention of obtaining military information.⁴¹ A spy who is not captured in the act but succeeds in rejoining the army to which he belongs and is subsequently captured by the enemy is treated as a prisoner of war and may not be punished for his previous act of espionage.⁴² This immunity for previous acts of spying applies only to such acts and does not extend to other violations of the laws of war committed at the same time.⁴³ The Hague Regulations do not specifically refer to situations in which inhabitants of invaded or occupied territory

40. See *United States v. McDonald*, 265 Fed. 754, where court held that part of New York was within the zone of operations under World War I conditions.

41. *British Manual of Military Law*, par. 164. Dig. Op. JAG, 1912, pp. 1057, 1058.

42. Art. 31 of Hague Regulations; FM 27-10, par. 212.

43. Taylor, p. 536; *British Manual of Military Law*, par. 170, citing the Hague Conference, 1899, p. 146.

furnish or attempt to furnish information to the enemy.⁴⁴ Such persons may be technically outside the zone of operations, they may be reporting simply what they see without disguise. Similarly, such persons may not be spies under the Hague Regulations because they are not seeking information but doing other acts to aid the enemy. In these cases, according to the British Manual of Military Law, such persons should be charged with war treason.⁴⁵ The immunity accorded spies for completed acts does not extend to persons guilty of war treason, who may be arrested at any place or time, and they need not be caught in the act in order that they be punished.⁴⁶

It is clear that a resident of occupied territory who transmits military information is a war traitor, this irrespective of his status as a spy,⁴⁷ and his escape to unoccupied territory will not afford him the immunity given a member of the armed forces of the enemy who, after spying, has rejoined

44. See FM 27-10, par. 207.

45. British Manual of Military Law, par. 167; see also FM 27-10, par. 207, which states, "If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army or to the army of his government, he is a war traitor."

46. FM 27-10, par. 213.

47. Spaight, p. 211; Hyde, Vol. II, p. 350.

his army. However, a case discussed at the Brussels Conference of 1874 is subject to some doubt. The facts are as follows: an inhabitant of a district not yet occupied by the enemy enters the military lines of the enemy, in a zone of occupation, for the purpose of collecting information, which he transmits to his government or to the national army. Having fulfilled his mission, he returns home. He subsequently falls with his district into the hands of the enemy. Has the latter the right to punish him?⁴⁸ Spaight answers in the negative, stating: "In the case mentioned * * * the man is an ordinary civilian spy and does not, like the resident in an occupied district, owe the duty of quiescence to the hostile belligerent. Once he has completed his mission, he is free from liability, under Article 31 [of the Hague Regulations]."⁴⁹ Other authorities assert that Article 31 of the Hague Regulations by its terms is restricted to spies who belong to the armed forces of the enemy and that civilians who act as spies, and are captured later, may be punished.⁵⁰

48. Spaight, p. 211.

49. The British Manual of Military Law, par. 171, footnote, seemingly takes the same view.

50. Lauterpacht, p. 331; Phillipson, International Law and The Great War, p. 210; Keith, Vol. II, p. 766.

War Rebel-
lion.⁵¹

Inhabitants of occupied territory who take up arms against the occupant are war rebels and may be punished by death.⁵² According to Oppenheim, a levee en masse is sanctioned only in territory not yet invaded by the enemy; once territory is invaded,⁵³ although it has not ripened into occupation, a levee en masse is no longer legitimate.⁵⁴ A fortiori, if territory is occupied, a levee en masse is no longer legitimate. Inhabitants who rise in an occupied territory, says Spaight, have no rights under international agreement. Conventional war law deals with them, as it deals with spies, on the broad principle that he who tries and fails is entitled to no consideration.⁵⁵ Occupation does not cease by the existence of an armed uprising on the part of the population unless the legitimate government is re-established or the occupant fails to suppress such rebellion promptly.⁵⁶

51. Civilians, except as part of a levee en masse, who participate in hostilities, are war criminals. See JAGS Text No. 7, pp. 14, 19.

52. FM 27-10, par. 349.

53. Invasion has various shades of meaning. Seemingly Oppenheim uses the term invasion in this connection as differing from occupation only in that in the former, no administration has been established. See Lauterpacht, p. 340. To the same effect, Cybichowski.

54. Lauterpacht, p. 205.

55. Spaight, p. 53.

56. FM 27-10, par. 280.

Bordwell discusses uprisings which are successful as follows:

Attempts made to overturn a sovereign can alone be justified by success, and so it is of attempts made against an occupant. If the success in the displacing of the occupant's authority is final, no question can arise as to the punishment of the population which has participated in the uprising.⁵⁷

A question was posed at the Brussels Conference, though not decided, in which the uprising was successful, but the occupant ultimately regained his authority.⁵⁸ According to the Anglo-American view, a momentary triumphant rebellion is not sufficient to destroy occupation if the authority of the legitimate sovereign is not re-established or if the rebellion is promptly suppressed.⁵⁹ If the power of the occupant is effectively displaced any length of time, though reoccupation later occurs, the fact that the uprising was successful, according to Bordwell, shows "that the self-styled occupant, being such in name and not in fact, has no right to resort to repressive measures available to a real occupant."⁶⁰ Bordwell's view on successful uprisings

57. Bordwell, p. 234; cf. Halleck, Vol. II, p. 487.

58. Bordwell, p. 234.

59. British Manual of Military Law, par. 352; FM 27-10, par. 280.

60. Bordwell, p. 234; cf. Baker and Crocker, p. 302, citing Lawrence, The Principles of International Law, 5th ed., pp. 435, 436; cf. Hall, p. 562.

in occupied territory is seemingly controverted by Oppenheim, although the latter does not expressly deal with such a situation. Thus, Oppenheim states:

It is usual to make a distinction between hostilities in arms by private individuals against an invading or retiring enemy, and hostilities in arms committed by the inhabitants against an enemy in occupation of territory. In the latter case one speaks of war rebellion, whether inhabitants take up arms singly or rise in a so-called *levy en masse*. Article 1 and 2 of the Hague Regulations⁶¹ make the greatest possible concession regarding hostilities committed by irregulars. Beyond the limits of these concessions belligerents will never be able to go without the greatest danger to their troops.⁶²

The Legitimacy
of Employing
Spies, Fo-
menting Re-
bellion and
Treason.

A belligerent making use of war treason or encouraging war rebellion acts lawfully,⁶³ although persons committing acts of war treason or war rebellion are considered war criminals. Similarly, Article 24 of the Hague Regulations permits a belligerent to employ spies,⁶⁴ although the person acting as a spy, when captured in delicto, is punished.⁶⁵ Thus it is seen that, in some cases, an act may be legitimate for a belligerent state, although a war

61. FM 27-10, par. 9.

62. Lauterpacht, p. 456.

63. Lauterpacht, p. 332.

64. FM 27-10, par. 37.

65. Opinion is divided on the question whether spies are war criminals or simply punished to render that method of obtaining information as difficult as possible. See footnote, p. 86, supra.

crime on the part of the person executing the command of the state. Hyde discusses this incongruity in the case of spying as follows:

* * * it may be asked how is it possible to reconcile statements which acknowledge the propriety of a State conduct or practice in employing spies with the conclusion that the spy is violative of the law of war and hence internationally illegal. It may not be possible to do so in point of logic. It seems indeed grotesque for a State to say to its soldier: "We authorize and want you to do a thing which the law of war forbids and which, if you violate its prohibition, will subject you, if captured to summary treatment." Yet this is just what in fact happens; and because it happens there may be reason to modify the law of war * * *⁶⁶

The practice of nations recognizes that it is legitimate for a belligerent to incite political revolution in the enemy population, induce enemy soldiers to desert, surrender, or rebel.⁶⁷ Such acts when done openly by combatants in uniform are legitimate, e.g., aviators dropping pamphlets inciting desertion, etc. If a person in disguise engaged in such acts, he is liable to be put to death as a war traitor.⁶⁸

Limits on
Power of Oc-
cupant with
Respect to
Inhabitants.

The Hague Regulations do not purport to be a complete code of the restrictions imposed on an occupant. The preamble of the Fourth Hague Convention,

66. Hyde, 37 Am. J. Int. L. 88, 90.

67. Air Power, p. 308.

68. SPJGW 1943/12516; Air Power, pp. 292, 308.

to which are annexed the Hague Regulations, says:

Until a more complete code of the laws of war can be issued, the High Contracting Powers think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.⁶⁹

The power of the occupant to demand such obedience from the inhabitants of occupied territory as is "necessary for the security of his forces, for the maintenance of law and order, and the proper administration of the country" is unquestioned.⁷⁰

A fundamental restriction on the occupant is that he must not take measures with respect to the population which would assert or imply a change in sovereignty.⁷¹ Of this nature are Articles 44 and 45 of the Hague Regulations.⁷² Other restrictions concern the protection of family honor, persons and religious convictions⁷³ and prohibit compulsory service of the inhabitants in military operations

69. Scott, Vol. II, p. 369.

70. FM 27-10, par. 297.

71. Westlake, Part II, p. 102; Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 Law Quart. Rev. 363.

72. FM 27-10, pars. 298, 306.

73. FM 27-10, par. 299.

against their own country.⁷⁴

Change of
Allegiance.

Article 45 of the Hague Regulations⁷⁵ provides that the occupant is forbidden to compel the inhabitants of occupied territory to swear allegiance to the occupant, i.e., the hostile power. The principle of this article prohibits every act which would assert or imply a change made by the occupant in the legitimate sovereignty. An oath of "neutrality" is not forbidden by this article. Thus in the Boer War such an oath was administered by both of the belligerents.⁷⁶ The Boers expelled the inhabitants of Cape Colony, who were loyal to the English and the English made noncombatant Boers prisoners of war, for refusing to take the oath.⁷⁷ The oath in substance required the inhabitants not to resist the occupant's authority or render assistance to the legitimate sovereign.⁷⁸ This did not impose any new obligations on the inhabitants.⁷⁹ The operation of such an oath should be confined to the

74. FM 27-10, pars. 302 and 36.

75. FM 27-10, par. 298.

76. Spaight, p. 372.

77. Spaight, p. 372.

78. Spaight, p. 372.

79. Hyde, Vol. II, p. 380.

period of occupation, otherwise, according to Spaight, it may result in an attempt to substitute "the restrictive force of the inhabitant's conscience for that of an effective garrison".⁸⁰ It is alleged that in November of 1940 the German Governor General of occupied Poland required all persons in the public service to take an oath which read in part, "I do not consider myself bound by the oath of loyalty, nor any other service obligation I have contracted in relation to the former Polish State and its organs".⁸¹ This is a clear violation of the Hague Regulations.

Baty poses this problem: May an occupant inspire and foment a revolution in the occupied territory against the legitimate sovereign? He suggests the following solution:

Here, it would seem, there can exist no doubt. It is not open to an occupying enemy to do indirectly what he cannot do directly, and force the local population into active hostility to their sovereign under color of insurrection * * * The allegiance of the people * * * would not have been affected in the least degree.⁸²

If during the occupation, the form of the legitimate government should be changed by a revolution in the unoccupied territory, Westlake says, it is no

80. Spaight, p. 373.

81. See Black Book of Poland, p. 534.

82. 36 Yale Law Journal 966, at p. 981.

part of the occupant's duty to allow that change to take effect in the occupied district.⁸³

Respect for
Family Honor
and Rights,
Lives of
Persons and
Religious
Convictions.

Article 46 of the Hague Regulations, which applies both to the regulations which an occupant may issue as well as to the conduct of his troops,⁸⁴ enjoins respect for family honor and rights, religious convictions and practice, and the lives of persons.⁸⁵ Respect for family honor and the lives of private persons would prohibit the imprisonment of the peaceable inhabitants in order to influence their government to submit.⁸⁶ For the same reasons, peaceful inhabitants may not be made prisoners of war⁸⁷ unless military necessity or the maintenance of public order and safety so requires.⁸⁸ Thus, the whole population of an occupied province may be imprisoned if a levee en masse is threatening.⁸⁹ Persons who are important to the enemy state, such as higher civil

83. Westlake, Part II, p. 102.

84. Westlake, Part II, p. 103.

85. FM 27-10, par. 299.

86. Spaight, p. 375.

87. In 1914 the Germans made all men of military age in occupied France and Belgium prisoners of war. This was regarded by the Allied Powers as illegitimate. Lauterpacht, p. 278.

88. Lauterpacht, p. 277.

89. Lauterpacht, p. 278.

officials or diplomatic agents,⁹⁰ may be made prisoners of war because their freedom may be dangerous to the occupant.⁹¹

The practice by Germany in World War I and in the present war of deporting citizens from occupied territories requires that clear distinctions be made between various types of deportation. An occupant has an undoubted right to expel a person convicted of an offense from the occupied area as part of the penalty.⁹² Influential citizens who attempt to incite the people to resist the occupant may be made prisoners of war and deported into captivity and it would seem that no prosecution is necessary.⁹³ Similarly, it has been held that the military governor of occupied territory may, upon proper cause, deport persons "as a menace to the military situation".⁹⁴

90. FM 27-10, par. 76e, f, g.

91. Hall, p. 484.

92. See FM 27-5, par. 45d; cf. Rolin, par. 478.

93. FM 27-10, par. 76g; Lauterpacht, p. 278. Contra Rolin, par. 478, who condemned the German practice in World War I of making leading citizens prisoners of war and deporting them to Germany for internment, said: "What was their crime? They were undesirables. Their presence, their speeches undoubtedly were calculated to maintain the flame of patriotism which inspired the hearts of their fellow citizens. They had to be removed."

94. Dig. Op. JAG, 1912, p. 1066, C 10002, 18 March 1901.

In the present war, as well as in World War I, Germany has made wholesale deportations of peaceful inhabitants in occupied territory either to Germany or other occupied countries in order to supply the need for workers.⁹⁵ This has been considered as contrary to Article 43, which enjoins that the occupant "respect family honor and rights".⁹⁶ German authorities have sought to justify this policy on the ground that it was necessary in the interest of public safety and order.⁹⁷ Garner has stated with respect to the German contention:

Article 43 of the Hague Convention * * * imposes upon military occupants the duty of taking measures for the maintenance of public order and security in the territory occupied. Unquestionably, if the presence of large numbers of idle and unemployed persons really constitutes imminent danger to the public order or gravely threatens the security of the occupying forces, the occupying belligerent would be fully warranted in taking reasonable measures to remove the danger, even if it necessitated the deportation of the idle population * * * In the present case there is no reason to believe such a danger actually existed.⁹⁸

Respect for family rights would, as a general rule, prohibit the occupant from placing peaceful

95. Garner, Vol. II, p. 163; Black Book of Poland, pp. 190, 525.

96. Hyde, Vol. II, p. 382.

97. Kohler, p. 189, et seq.

98. Garner, Vol. II, p. 182.

inhabitants in concentration camps.⁹⁹ It is conceivable, says Hyde, that in aid of a military operation of an army in the field, the concentration of the inhabitants of the territory for the time being under military control, might be reasonably effected, provided adequate steps were taken to safeguard the non-combatants involved from hunger and pestilence.¹⁰⁰

In the South African War, the British devastated a portion of the Boer Republics on the ground of military necessity. The peaceful population of the devastated areas were placed in concentration camps as a measure of humanity to prevent starvation.¹⁰¹ According to Rolin, the occupant is under a duty to respect the personal liberties of the inhabitants, except to the extent that the necessities of war dictate restrictions.¹⁰²

Freedom of religious conviction and practice is expressly protected by Article 43. The word "religion" covers all beliefs.¹⁰³ Freedom of worship may not be used as a guise to encourage opposition

99. Rolin, par. 475; Spaight, p. 307.

100. Hyde, Vol. II, p. 310.

101. Spaight, p. 306; Bordwell, p. 152; Lauterpacht, p. 324.

102. Rolin, par. 465.

103. Spaight, p. 375.

to the occupant.¹⁰⁴ Places of religious worship should not be closed unless necessary as a security or sanitary measure.¹⁰⁵

The United States Manual on Military Government provides that freedom of speech and press should be maintained or instituted to the extent that military interests are not prejudiced.¹⁰⁶ Individual freedom of movement is frequently restricted on the ground of military necessity. Thus, identification cards, passes for travel, and curfews may be established.¹⁰⁷ The freedom of an individual to pursue a given occupation or to quit it may be restricted by the occupant on the ground of military necessity or the need for maintaining public order and safety.¹⁰⁸ Thus, the occupant may requisition services of the inhabitants for the needs of the army of occupation or the restoration of public works.¹⁰⁹ Bisschop, in condemning the German policy of compulsory transfer of inhabitants of

104. Spaight, p. 375.

105. FM 27-5, par. 9m.

106. FM 27-5, par. 9o.

107. See Hunt Report, p. 215, et seq.

108. Cf. Hyde, Vol. II, p. 383.

109. FM 27-10, pars. 303, 304; Hunt Report, p. 197.
For Requisitions of Personal Services, see p. 153, infra.

occupied territory to labor in Germany in World War I, stated the following with respect to some of the German ordinances relating to labor:

The ordinances of the 14th and 15th August, 1915, which deal with this matter are in their wording innocent enough. The former deals with the requisitioning of human labour for public purposes; the latter contains regulations to counteract unemployment and idleness.

Each measure possesses a distinct and different character, the former being obviously for purely military purposes, the latter apparently for purposes of administration and maintenance of law and order.

There can be little objection on the part of an international jurist to these ordinances, if literally construed and applied, unless one is of the opinion that the Rules of The Hague Convention specially do and should exclude any form of forced labour.

It may very well be that an occupying army--especially when the occupation is continued for years--needs the labour of the population for carrying out works in the occupied territory of a non-military character in the public interest * * *¹¹⁰

Inhabitant:
Joining His
National
Army.

There is general agreement on the proposition that the occupant may forbid the inhabitants from leaving the occupied territory and joining their national forces, and punish them for an attempt to do so.¹¹¹ Such a measure by the occupant is

110. Bisschop, p. 165. See FM 27-5, par. 35c(4) and (6), the latter states: "Inhabitants should be instructed that they must continue or resume their usual occupations, unless specifically directed to the contrary."

111. Spaight, p. 350; Rolin, par. 466; Lauterpacht, p. 278.

justifiable on the ground of necessity, i.e., to prevent the inhabitants from increasing the ranks of the enemy. If the inhabitants are successful in leaving the occupied territory, they have breached one of the occupant's regulations but they have committed no act of hostility in the occupied territory itself. If later they fight as soldiers in their national army against the occupant, they are entitled to be treated as prisoners of war if captured, since they have not violated the laws of war.¹¹² Most authorities admit that such persons may be punished for violating the occupant's regulations,¹¹³ but some doubt exists as to the propriety of the confiscation of the goods and property remaining in the occupied territory as punishment.¹¹⁴ When the Germans occupied Alsace-Lorraine in 1870-71 they decreed that every inhabitant who left the province to join the French should be punished by "the confiscation of his fortune, present and future, and a

112. Rolin, par. 466.

113. Rolin, par. 466. See, however, Bordwell, p. 95, who quotes Rolin Jaequemyns as saying that those who have succeeded in rejoining their national army have wiped out their offense by its successful consummation on the analogy to spying:

114. Rolin, par. 466, and Bordwell, p. 95, both condemn decrees of confiscation on the general ground of odiousness.

banishment of ten years."¹¹⁵ Confiscation was used in the Russo-Japanese War against inhabitants who had been guilty of war treason and had fled from the occupied territory before the Japanese could apprehend them.¹¹⁶ It would seem that the most logical view is that property may be confiscated or destroyed as a punishment for breach of the laws of war or for violation of the occupant's regulations.¹¹⁷ The authorities afford no light on the question whether an ex parte hearing or investigation is necessary to confiscate property as punishment for a violation of the laws of war or the occupant's regulations, where the defendant has fled the jurisdiction. It is interesting to note that the Japanese (in an incident arising in the Russo-Japanese War) confiscated the property of absent war-traitors pursuant to a court-martial sentence. The sentence read in part: "You [the defendant] would have been condemned to decapitation if you were present; but as you have

¹¹⁵. Spaight, p. 350.

¹¹⁶. Spaight, p. 350.

¹¹⁷. Spaight, p. 353; cf. FM 27-5, par. 45d(2), which states: "Military courts may be authorized in cases involving the unlawful purchase, sale, possession, or use of property, to order forfeiture of such property to the military government."

fled I order that all your property and goods be confiscated."¹¹⁸

Information
About Enemy
by Inhabi-
tants.

Article 44 of the Hague Regulations,¹¹⁹ which prohibits a belligerent from forcing the inhabitants of occupied territory to furnish information about their army or its means of defense, is really a special application of Article 23^h of the Hague Regulations.¹²⁰ The purpose of these two articles is to prevent the occupant from forcing inhabitants to cooperate in the defeat of their own army.¹²¹ It would be unlawful to compel an inhabitant to spy or to reveal the military plans or projects of his national army.¹²² Thus, if the inhabitants of occupied territory knew of a projected plan of invasion of the occupied territory by their national

118. Ariga, p. 398. Cf. Garner, Vol. II, p. 482, who believes that offenders against the laws of war may not be tried and condemned in absentia. However, the fact that after arraignment the offender escapes will not prevent the court from proceeding with the trial in the absence of the offender. Cf. MCM, par. 10.

119. FM 27-10, par. 306.

120. British Manual of Military Law, par. 382, footnote 3. Article 23^h; FM 27-10, par. 36, provides in part: "A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country * * *". See JAGS Text No. 7, p. 36, for further discussion.

121. Spaight, p. 370.

122. Rolin, par. 462.

forces, they would not be under a duty to reveal it and the occupant is prohibited from compelling its disclosure.¹²³ The only duty owed to the occupant by the inhabitants is to refrain from aiding such a project.

The British and the United States view Article 44 of the Hague Regulations as forbidding the occupant from forcing enemy civilians to act as guides.¹²⁴ A minority of authorities doubt that the provision has this effect, and they reason that an express provision forbidding the impressment of guides was defeated by the conference.¹²⁵ According to the majority view, Article 44 was intended to forbid impressment of guides.¹²⁶ Such nations as reserved Article 44¹²⁷ nonetheless accepted Article 23h.¹²⁸ This latter article which forbids compulsory service of inhabitants in "operations of war" is broad

123. Rolin, par. 464.

124. British Manual of Military Law, par. 382; FM 27-10, par. 308.

125. Holland, p. 53.

126. See Garner, Vol. II, p. 135, citing Spaight, Westlake, Hershey, and Lawrence..

127. Germany, Austria, Japan, Montenegro, and Russia, FM 27-10, par. 307.

128. FM 27-10, par. 36.

enough to outlaw impressment of guides.¹²⁹

Even if the occupant compels an inhabitant to serve as a guide, customary law permits his punishment by death if he deliberately misleads the occupant's forces.¹³⁰

Collective
Punishment

Article 50 of the Hague Regulations provides that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible."¹³¹

This provision is not confined to pecuniary fines or levies, it applies to all kinds of collective punishment imposed on the population.¹³²

The occupant has the right of receiving strict obedience from the inhabitants of the occupied territory.¹³³ This article permits collective punishment to be imposed for such offenses as the community has either committed or allowed to be

129. Higgins, p. 269; Garner, Vol. II, p. 136; Rolin, par. 462.

130. Spaight, p. 371, says: "The evil the man has suffered in his own person is no justification for his endangering the lives of a whole army, at any rate in the eyes of that army."

131. FM 27-10, par. 343.

132. Spaight, p. 408.

133. FM 27-10, par. 301.

committed.¹³⁴ In other words, the occupant may hold the population responsible for acts committed against his authority if community responsibility can be shown.¹³⁵ Conversely, it prohibits collective punishment when community responsibility does not exist.¹³⁶ In the Franco-German War of 1870, Germany used a system of collective punishment which not only imposed punishment on the community in which the offense was committed, but also on the community from which the offender came. It was this practice of punishing a community for an individual act, requiring no assistance or connivance from the community, which Article 50 of the Hague Regulations sought to prohibit.¹³⁷ Collective punishment may be imposed, under the conditions named, not only for violations of the laws of war by the population, but for violations of the occupant's regulations not constituting breaches of the laws of war, as well as for failure to supply legitimate contributions and requisitions.¹³⁸ Garner interprets Article 50 of

134. Spaight, p. 408; Hyde, Vol. II, p. 372.

135. Lawrence, p. 427.

136. Lawrence, p. 427.

137. Spaight, p. 408.

138. Spaight, p. 408; Hyde, Vol. II, p. 372; Keith, Vol. II, p. 810.

the Hague Regulations as follows:

Unfortunately the convention does not define the elements of responsibility, and military commanders, therefore, are left to judge for themselves in each specific case whether the act is or is not one for which the community can properly be held responsible. But the determination of the fact of responsibility is obviously governed by certain well-established principles, one of which, it would seem, is that the community is not really responsible unless the population as a whole is a party to the offence, either actively or passively * * * If the offence has been committed by isolated individuals in the remote parts of the community, without the knowledge or approval of the public authorities or of the population, and which therefore the authorities could not have prevented, it would seem unreasonable and contrary to one of the oldest rules of criminal law to impute guilt or responsibility to the whole population. Likewise, if the authorities have exercised themselves to discover and punish the actual perpetrators, it hardly seems reasonable or just to say that the community is really responsible.¹³⁹

Destruction committed in occupied territory by legitimate combatants, e.g., the armed forces of the enemy, is not in itself a legitimate ground for inflicting punishment on the population.¹⁴⁰ The lack of a uniform method for determining the circumstances under which the community shall be deemed collectively responsible creates great difficulty in applying the rule of Article 50.¹⁴¹ Thus, Spaight says, there is nothing unfair in holding a town or village

139. Garner, Vol. II, p. 157.

140. Rolin, par. 483; Garner, Vol. II, p. 154.

141. See Hyde, Vol. II, p. 372.

collectively responsible for damages done to railways, telegraphs, roads and bridges in the vicinity; it is the practice in all wars.¹⁴² He argues that the solidarity which exists in a modern community places it in a position to prevent such acts although it may not have the power to do so in a particular case.¹⁴³ In principle, collective punishment of the population should not be imposed unless "an active or passive responsibility can really be imputed to the mass of the population, or where the civil authorities have failed to exercise reasonable diligence to prevent infractions or to discover and punish the actual offender in case they have been unable to prevent the offences."¹⁴⁴

The United States Manual of Military Government states that the imposition of collective fines should only be taken as an unavoidable last resort to induce the population to desist from unlawful practices.¹⁴⁵ Although there is no express limitation on the amount of collective fine that an occupant may impose, certain general principles are

142. Spaight, p. 408.

143. Spaight, p. 409.

144. Garner, Vol. II, p. 161.

145. FM 27-5, par. 9g(2)(b).

applicable. Fines on the population are a method of redress, that is, they are for the purpose of enforcing obedience on the part of the population.¹⁴⁶ Hence fines which are out of proportion to the offense committed or are so large as to indicate a fixed purpose to impoverish the population, are illegitimate.¹⁴⁷ Latifi, in dealing with exorbitant contributions, has stated. that such exactions "do not differ from general pillage except in name, and are not allowed by international law".¹⁴⁸

Reprisals.

Reprisals are not precluded by Article 50 of the Hague Regulations.¹⁴⁹ Reprisals may be inflicted on the population for acts of individuals for which the community is not responsible.¹⁵⁰ The relation of reprisals to Article 50 of the Hague Regulations is appreciated only if a clear conception of the nature of reprisals is had. Reprisal in the law of warfare signifies the commission by one belligerent of what would otherwise be illegitimate acts of warfare in retaliation for illegal acts of warfare

146. Lawrence, p. 430; Garner, Vol. II, p. 159.

147. Garner, Vol. II, p. 159.

148. Latifi, p. 34.

149. FM 27-10, par. 344; Lauterpacht, p. 346; Spaight, p. 408; contra, Lawrence, p. 429.

150. Lauterpacht, p. 449.

committed by the other, in order to compel the latter to refrain from future breaches of the laws of war.¹⁵¹ As has already been stated, Article 50 of the Hague Regulations¹⁵² prohibits collective punishment for individual acts for which the community is not responsible and, inversely, permits collective punishment where community responsibility is shown. Such collective punishment may be imposed not only for violations of the laws of war but for violations of the occupant's regulations not constituting breaches of the laws of war.¹⁵³ Reprisals, on the other hand, may be taken for one cause only, namely, violations of the laws of war.¹⁵⁴

Reprisals by an occupant in case acts of illegitimate warfare are committed by enemy individuals not belonging to the armed forces are permissible, "although in practice innocent individuals are thereby punished for illegal acts for which they are neither legally nor morally responsible".¹⁵⁵

151. Lawrence, p. 543; FM 27-10, par. 358; Lauterpacht, p. 446.

152. See p. 112, *supra*.

153. See p. 112, *supra*.

154. See U.S. Naval War College Discussions, 1903, pp. 42-43; Air Power, p. 42.

155. Lauterpacht, p. 346; see FM 27-10, par. 358e.

According to Spaight, every war has seen reprisals inflicted upon peaceable citizens, whether by way of the destruction of property, the exaction of fines, or the seizure of their persons.¹⁵⁶ To illustrate, a village may be burned in reprisal for a treacherous attack committed there on the occupant's soldiers by unknown individuals.¹⁵⁷

Reprisals are not mentioned in the Hague Regulations.¹⁵⁸ According to Spaight, the rules drawn by the Institute of International Law and given in the Oxford Manual¹⁵⁹ may be regarded as the most authoritative expression of the law of reprisals.¹⁶⁰

The articles of the Institute read as follows:

Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy. This necessary rigor, however, is modified to some extent by the following restrictions:

156. Spaight, p. 465.

157. Lauterpacht, p. 346; Spaight, p. 465.

158. Lauterpacht, p. 449.

159. Arts. 85, 86.

160. Spaight, p. 464.

Article 85. Reprisals are formally prohibited in case the injury complained of has been repaired.¹⁶¹

Article 86. In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy.¹⁶²

They can only be resorted to with the authorization of the commander in chief.¹⁶³ They must conform in all cases to the laws of humanity and morality.¹⁶⁴

Reprisals need not resemble in character the act complained of by the injured party.¹⁶⁵ They may be exercised against enemy individuals, combatant or peaceful citizens, or against property.¹⁶⁶

161. See 38 Am. J. Int. L. 20, at p. 29, where Germany is charged with having taken reprisals in this war against innocent inhabitants of occupied territory after the actual perpetrators of an illegitimate act have been identified and killed.

162. See FM 27-10, par. 358e, which states that "reprisals * * * should not be excessive or exceed the degree of violence committed by the enemy".

163. See FM 27-10, par. 358b, which states that "the highest accessible military authority should be consulted unless immediate action is demanded as a matter of military necessity, but in the latter event a subordinate commander may order appropriate reprisals upon his own initiative".

164. Baker and McKernan, p. 491. FM 27-10, par. 358b, states: "Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices."

165. FM 27-10, par. 358e; Spaight, p. 464.

166. Holland, p. 60; Spaight, p. 464; FM 27-10, par. 358.

Reprisals against prisoners of war are expressly prohibited by the Geneva Convention of 1929 relating to the treatment of prisoners of war.¹⁶⁷ It would seem that insofar as reprisals are used by an occupant in retaliation for illegitimate acts committed by individuals in occupied territory, the measures of reprisal should be directed against the community in which the acts were committed.¹⁶⁸ Unless this was so, the reprisal would be an act of revenge and not an act to induce the enemy population to desist from future illegitimate acts.¹⁶⁹

Reprisals can be inflicted only for violations of the laws of war and they must not be used to prevent the enemy from engaging in proper acts of hostilities.¹⁷⁰ The Germans in the present war have been charged with taking reprisals against the peaceful population of occupied territory for legitimate acts of war committed by legally constituted armed forces of the United Nations.¹⁷¹ Similarly,

167. FM 27-10, par. 73; see also JAGS Text No. 7, p. 53, et seq.

168. Cf. FM 27-10, par. 358c.

169. FM 27-10, par. 358b; cf. 38 Am. J. Int. L. 20, 30.

170. Spaight, p. 469.

171. 38 Am. J. Int. L. 20, at p. 31.

it is reported that 460 prominent Dutchmen were taken as hostages and threatened by the Germans unless the Netherlands government-in-exile stopped its broadcasts.¹⁷²

Hostages and
Reprisals.

The practice of taking hostages was used in early times as a means of insuring observance of treaties, armistices, and other agreements, the execution of which depended on good faith.¹⁷³ In view of this practice, the Instructions for the Government of the Armies of the United States in the Field, 1863,¹⁷⁴ defined a hostage as a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Prominent persons were taken as hostages, and could be executed for any bad faith on the part of the enemy.¹⁷⁵ This practice is now obsolete.¹⁷⁶ If hostages should, nonetheless, be

172. 38 Am. J. Int. L. 20, at p. 31.

173. British Manual of Military Law, par. 461; Lauterpacht, p. 460; Garner, Vol. I, p. 305.

174. Art. 54, G.O. 100.

175. Lauterpacht, p. 460; cf. Garner, Vol. I, p. 305.

176. Lauterpacht, p. 460; Hall, p. 403. If measures are necessary to insure compliance with agreements marking the end of war, territorial guarantees are now used. British Manual of Military Law, par. 461, footnote 3.

taken for the purpose of insuring the performance of an agreement, they are not executed but are treated as prisoners of war.¹⁷⁷

Hostages, under the modern practice of nations, are taken for the following general purposes:

- (a) to protect individuals held by the enemy;
- (b) to force the payment of requisitions, contributions, and the like; (c) to insure against unlawful acts by enemy forces or people.¹⁷⁸ It must be emphasized that the taking of hostages is lawful.

The British Manual of Military Law authorizes the taking of hostages to secure proper treatment of sick and wounded left in hostile territory, to secure proper treatment of prisoners of war in the hands of irregular troops or of inhabitants, and if necessary to insure compliance with requisitions, contributions and the like.¹⁷⁹ The United States Rules of Land Warfare does not define the purposes for which hostages may be taken beyond stating by implication that hostages may be taken to insure

177. G.O. 100 [1863], art. 55, states: "If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit." See British Manual of Military Law, par. 461, to the same effect.

178. Cf. 38 Am. J. Int. L. 20, at p. 21.

179. British Manual of Military Law, par. 464, and footnote 1.

against unlawful acts by enemy forces or people,¹⁸⁰
and listing illustrations of known practices.¹⁸¹

The Hague Regulations do not expressly deal either with the taking of hostages or the treatment of hostages after they are taken. Considerable disagreement exists on the latter problem.¹⁸² It is claimed by some authorities that hostages are entitled to be treated as prisoners of war.¹⁸³ The practice of nations indicates, however, that under certain circumstances hostages may be punished or executed.¹⁸⁴

The whole question of hostages, says Spaight, is bound up with the question of reprisals.¹⁸⁵ This approach to the problem of hostages is believed to be sound and in accordance with practice. A reprisal,

180. FM 27-10, par. 358d.

181. FM 27-10, par. 359, which states: "Hostages have been taken in war for the following purposes: To insure proper treatment of wounded and sick when left behind in hostile localities; to protect the lives of prisoners who have fallen into the hands of irregular troops or whose lives have been threatened; to protect lines of communication by placing them on engines of trains in occupied territory; and to insure compliance with requisitions, contributions, etc."

182. See 38 Am. J. Int. L. 20.

183. Hall, p. 565; Garner, Vol. I, p. 309; 36 Am. J. Int. L. 271.

184. 38 Am. J. Int. L. 20, at p. 22.

185. Spaight, p. 469.

as has already been shown, is a response to an enemy's violation of the laws of war by a violation on one's own side.¹⁸⁶ Reprisals may be inflicted upon enemy forces or the civil population.¹⁸⁷ If innocent individuals are seized and punished for a breach of the laws of war which has already occurred, no question of hostages is involved; this is simply a case of reprisal.¹⁸⁸ A new practice arose in the Franco-German War, where persons were seized as hostages to prevent future illegitimate acts of warfare. In this case, attempts to wreck trains in parts of France occupied by the Germans were frequent, and in order to stop the practice, the Germans seized prominent enemy citizens and placed them on the engines.¹⁸⁹ The same practice was used for a brief period by the British in the South African War.¹⁹⁰ Train wrecking by civilians in occupied territory is war treason and exposing the lives of hostages in order to prevent future illegitimate warfare

186. Air Power, p. 42; FM 27-10, par. 358a.

187. Spaight, p. 469; Lauterpacht, p. 449; FM 27-10, pars. 344, 358d.

188. Lauterpacht, p. 460.

189. Spaight, p. 466.

190. Spaight, p. 467.

is a legitimate reprisal--although a preventive reprisal or reprisal in advance.¹⁹¹ Of course, if the acts of train-wrecking were committed by regular armed forces of the enemy, the placing of hostages on engines would be illegitimate since regular forces are acting lawfully in destroying railways and bridges.¹⁹²

Hostages are sometimes taken by an occupant who declares that if the population of the occupied territory commits illegitimate acts (for example, acts of sabotage as the destruction of bridges, telephone lines, etc.), the hostages will be punished.¹⁹³ Hostages in such a case are punished in reprisal for the illegitimate acts of war¹⁹⁴ and cannot be considered prisoners of war.¹⁹⁵ Thus, the United States Rules of Land Warfare provides that hostages

191. Spaight, p. 469; Lauterpacht, p. 460. Spaight calls such preventive reprisals "prophylactic reprisals".

192. Spaight, p. 469. The British Manual of Military Law, par. 463, does not consider such a practice commendable since it exposes innocent inhabitants not only to illegitimate acts of train-wrecking by private individuals, but also to the lawful operations of raiding parties of the armed forces of a belligerent.

193. See for illustrations in present war 38 Am. J. Int. L. 20, at p. 28.

194. FM 27-10, par. 344.

195. Cf. 38 Am. J. Int. L. 20, at p. 29.

taken for the declared purpose of insuring against illegitimate acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed.¹⁹⁶ It would seem that the Rules of Land Warfare¹⁹⁷ which states that "when a hostage is accepted he is treated as a prisoner of war" and that "reprisals against prisoners of war are expressly forbidden by the Geneva Convention of 1929",¹⁹⁸ does not militate against the conclusions stated. It is believed that the statement "when a hostage is accepted he is treated as a prisoner of war" refers to those accepted for the purpose of insuring the performance of an agreement.¹⁹⁹

196. FM 27-10, par. 358d. See statement by President Roosevelt, 25 October 1941, condemning the execution of innocent hostages by the Germans in reprisal for isolated attacks on Germans in occupied territory. He stated in part: "Civilised peoples long ago adopted the basic principle that no man should be punished for the deed of another." (Punishment For War Crimes, p. 17, United Nations Information Office.)

197. FM 27-10, par. 359.

198. FM 27-10, par. 358d.

199. The use of the word "accepted" instead of "taken" is significant. In addition, this sentence appeared substantially in the same form in G.O. 100 /18637, art. 55, at a time when a hostage was defined as a person accepted as a pledge for the fulfillment of an agreement. G.O. 100, art. 54. The British Manual of Military Law, par. 461, in connection with hostages given or accepted to insure the observance of an agreement, states: "If hostages

There are cases in which hostages are taken for reasons other than illegitimate warfare and the mere taking is considered as a sufficient reprisal. It must be remembered that reprisals should not be excessive or exceed the degree of violence committed by the enemy.²⁰⁰ Such a case, according to the weight of authority, occurs when hostages are taken to insure compliance with requisitions, contributions and the like; such hostages would be treated as prisoners of war and could not be executed.²⁰¹

CHAPTER V

PRIVATE PROPERTY

Imperative Military Necessity Limits Respect for Private Property.

Article 46 of the Hague Regulations provides that private property must be respected.¹ This article appears in the chapter of the Hague

199. (Contd.) are nowadays taken at all they have to suffer in captivity, and not death, in case the enemy violates the agreement in question."

200. FM 27-10, par. 358e.

201. British Manual of Military Law, par. 464, footnote 1; Lauterpacht, p. 347, footnote 1. See also Spaight, p. 406.

1. FM 27-10, par. 323.

Regulations relating to restrictions imposed on an occupant.² Article 23g of the Hague Regulations, which forbids the destruction or seizure of enemy property (either public or private) unless imperatively demanded by the necessities of war,³ is part of a chapter limiting belligerents in the conduct of hostilities proper.⁴

Article 46 must be read in connection with Article 23g, and when so read a distinction appears between the right of a belligerent to seize and destroy enemy property as an incident to hostilities (if imperatively demanded by the necessities of war) and the limited right of an occupant to make use of enemy property as an incident to the administration of enemy territory.⁵ This difference is expressed by Hyde in the following language:

A belligerent occupant by reason of his very achievement in having gained mastery over the district under his control, finds himself in a somewhat different relation to property within his grasp than does the commander of an army in the field. The common demands of the latter chargeable to military necessity and for the purpose of

2. It also applies to an invasion that has not ripened into occupation. Spaight, p. 111.

3. FM 27-10, par. 313.

4. Spaight, p. 111.

5. FM 27-10, pars. 324, 325; Spaight, p. 111; Fenwick, p. 483.

protecting a force against attack, or to enable it to engage in offensive operations, are not likely to be felt to the same degree by the invader who has once established himself in hostile territory. He has much less frequent occasion to resort to the destruction of enemy property. Nor is he likely to have just grounds for its devastation.⁶

All destruction to or seizure of enemy property, public or private, for the purpose of offense or defense is legitimate.⁷ In all cases, the destruction or seizure must be imperatively demanded by the necessities of war. Destruction as an end in itself is clearly unlawful.⁸ There must be some reasonably close connection between the seizure or destruction of property and overcoming the enemy forces.⁹ Damage resulting to private property from the operations, movements, or combats of the army is lawful.¹⁰ It is lawful to destroy war material, railways, telegraphs, barracks, factories, army supplies, or private property located in the anticipated field of battle or the zone of actual combat whenever such property may be utilized by the enemy for military purposes as for shelter or defense. Fences, woods,

6. Hyde, Vol. II, p. 375.

7. Lauterpacht, p. 321.

8. FM 27-10, par. 324; Spaight, p. 111, et seq.

9. Spaight, p. 112; FM 27-10, par. 324. See JAGS Text No. 7, p. 43, for discussion of devastation.

10. Lauterpacht, p. 322.

crops, buildings, etc., may be demolished to clear a field of fire, to construct bridges, to furnish fuel needed for the operations or movements of the army.¹¹ Similarly, private homes, or even churches, may be seized or destroyed if necessary for military operations.¹² Public or private lands or buildings may be temporarily used for all kinds of purposes demanded by the imperative necessities of war. It must be emphasized that no compensation for damage to or use of property can be claimed for acts which are the direct result of or incident to the proper conduct of hostilities,¹³ since military necessity demands and justifies such acts.¹⁴ Borchard, who has listed many of the claims for compensation made before arbitral commissions and courts with respect to damage sustained during hostilities or connected with the immediate necessities of armed conflict and serving proper military ends, gives the following examples of rejected claims: cases of bombardment; destruction or damage to enemy property for offense or defense; soldiers passing over land in

11. FM 27-10, par. 324.

12. Lawrence, p. 535.

13. Borchard, p. 256; British Manual of Military Law, par. 411.

14. Lauterpacht, p. 313.

belligerent area and injuring crops, cutting timber to clear away obstructions, erections of fortifications, etc., in enemy country; destruction of buildings as a sanitary measure; seizure and detention of private enemy vessels in an enemy port; destruction of property useful to the enemy for military purposes; burning of buildings as a ruse to deceive the enemy; and, accidental destruction of innocent property by misdirected shots.¹⁵ It should be noted that property belonging to a neutral or even to a loyal citizen situated in enemy territory is considered as enemy property.¹⁶ The character of property is determined by its situs and not the nationality or loyalty of the owner.¹⁷ Thus such property would be subject to the same rules and risks of war as property of enemy nationals similarly located.¹⁸ In practice, property belonging to the nationals of

15. Borchard, p. 256, et seq.

16. *Juragua Iron Co. v. United States*, 212 U.S. 297. See FM 27-10, par. 402, for an exception with respect to neutral railway material. A neutral merchant vessel voluntarily entering a port occupied by a belligerent, subjects itself to the regulations of military government. *United States v. Diekelman*, 92 U.S. 520, TM 27-250, p. 33.

17. 11 Op. Atty. Gen. 405.

18. Borchard, p. 251.

an occupant or his allies may be treated differently than other property in occupied territory.¹⁹

Respect for
Private Prop-
erty -- Rule
Against Con-
fiscation.

Article 46 of the Hague Regulations demands respect for private property of the inhabitants of occupied territory and affirmatively provides that private property cannot be confiscated.²⁰ According to Westlake, the prohibition against confiscation means only that private property cannot be taken by the occupant from its owner for no other reason than that he is an enemy.²¹ As has already been seen, this Article does not prohibit the seizure and destruction of enemy property, public or private, during or incidental to the conduct of hostilities proper. Nor does it prohibit the occupant from requisitioning property for the needs of the army, billeting soldiers, levying contributions, levying forced loans, seizure of private property susceptible of direct military use, confiscation by way of penalty, imposing fines for community delinquencies.²²

19. See M 353-2, p. 11, for treatment of allied property in occupied Italy by AMG.

20. FM 27-10, par. 326.

21. Westlake, Part II, p. 103.

22. See FM 27-10, par. 325; Spaight, p. 374, et seq.; Lauterpacht, p. 316, et seq.; Rolin, pars. 492, 493; Oetjen v Central Leather Co., 246 U.S. 297, at p. 301.

Apart from the exceptional cases heretofore stated, private property in land warfare is inviolable and may not be confiscated. In October 1917, Austro-Hungarian troops occupied Venetian territory. The sisters Mazzoni, Italian subjects, had to leave the occupied territory and in doing so abandoned bonds and shares of stock in local companies which were deposited with a bank. The occupant seized the stocks and bonds and removed them from Italy. By the treaty of peace the Austrian Government restored these securities to the Italian Government. A dispute arose between the sisters Mazzoni and the Italian Ministry of Finance with regard to the restitution of some of the bonds. The Ministry of Finance contended that the title of the sisters Mazzoni was extinguished by the seizure and removal of the bonds by the occupant. This argument was rejected by the court of Venice which held:

The argument that the property of citizens absent from occupied territory is to be considered *res nullius* or war booty cannot be admitted. On the contrary, such private property must be treated according to the rules of the Hague Regulations of 1907, which lay down that movable or immovable private property must be respected in land warfare. Exceptions to these rules are only admitted as to money contributions, requisitions in kind and services, and sequestration for the needs of the army * * *. The objects involved in the present case are private property which had not been requisitioned

or sequestrated * * * Their seizure must therefore be considered as having been effected by pillage * * *²³

The United States Supreme Court in deciding cases arising from the Civil War created an additional exception to the rule of the inviolability of private property. It was declared that private property which was substantially the only means which the insurgents had of securing credit abroad, such as cotton, was subject to seizure and confiscation. The court reasoned that "to a very large extent it furnished the munitions of war, and kept the forces in the field".²⁴ It is believed that these decisions do not reflect modern international law on the subject. Hyde has stated with respect to these cases:

The courts were also necessarily bound by such acts of Congress as were applicable. These were based partly upon the theory that the conflict was an insurrection against the lawful Government of the United States, and that property belonging to persons giving aid or comfort to the rebellion or used in aid of it, was justly subject to seizure and confiscation. It may be doubted whether the decisions interpreting the acts of Congress serve as useful precedents respecting the extent of the rights of a belligerent occupant under the law of nations.²⁵

23. Annual Digest, 1927-28, Case No. 384.

24. Lamar, Executor v. Browne, 92 U.S. 187; Mrs. Alexander's Cotton, 2 Wall. 404; TM 27-250, p. 28.

25. Hyde, Vol. II, p. 376. See to the same effect Keith, Vol. II, p. 796.

Pillage.

The Hague Regulations expressly prohibit pillage.²⁶ The ordinary meaning of pillage is plundering for private purposes. As a term of modern law, says Westlake, it may be defined as the unauthorized taking away of property, public or private.²⁷ In order to understand pillage, one must know what taking or appropriation of property is authorized by international law.²⁸ According to Renault, most acts of war, if they are considered apart from the intent which inspires them, contain all the elements of criminal acts. What deprives such acts of the element of criminality is their conformity to the rules of international law.²⁹ Thus the taking of private property in occupied territory is a lawful act of war only when done in the manner prescribed by international law; otherwise it is a theft.³⁰ Nast states that, "acts committed in the course of a war are in themselves and apart from war, criminal acts. Their criminality disappears only if they are in conformity with the principles of the

26. FM 27-10, par. 329.

27. Westlake, Part II, p. 104.

28. Westlake, Part II, p. 104.

29. Quoted by Nast, p. 114.

30. Nast, p. 114.

international law of war; if not, they remain criminal acts, and as such, are punishable. This is especially so of all acts which infringe the property of inhabitants of occupied territories."³¹ Thus, the French and Belgian authorities, while occupying the Rhine in 1918 after the armistice, instituted criminal proceedings against German manufacturers who had bought machines and plants carried away from the occupied territory by the German military authorities. According to Nast, the seizures by the military authorities were not justified by military necessity³² and amounted to pillage; that all persons participating in the seizure and transportation to Germany of the machinery were punishable under French or Belgian criminal law.³³ The Judge Advocate of the Third United States Army rendered an opinion in a case against a German General, who had removed

31. Nast, p. 115. See to same effect, Davis, p. 323.

32. The Germans claimed that Article 23g of the Hague Regulations sanctioned the appropriation of the property on the ground of military necessity; that such necessity was created by the Allied blockade which threatened the existence of Germany. According to Nast, Art. 23g was intended merely to authorize seizure or destruction of private property in exceptional cases when it was an imperative necessity in the conduct of military operations in the territory under occupation. Nast, p. 111, et seq.

33. Nast, p. 111, et seq. See p. 234, infra, for discussion of the jurisdiction of local courts over the members of the occupant's army.

valuable personal property belonging to a French citizen during the occupation of a part of France by Germany. The question involved was whether the General had committed a crime in the occupied territory. The Judge Advocate said in part:

The seizure in question, therefore, not being justified by any law of war, must have been simple larceny * * * Larceny conveys no title * * * Plunder and pillage are military crimes contrary to the Hague Convention and the Laws of War * * *³⁴

It is also pillage if the individual soldier appropriates to himself what properly belongs to his government.³⁵

Acts of Regulation; Supervision, and Control Over Private Property.

The requirement of the Hague Regulations that private property be respected does not prevent the occupant from regulating or supervising private business.³⁶ Such acts may be justified by military necessity or the need for maintaining public order and safety. It must be remembered that the principal objective of an army of occupation is to facilitate its military operations and at the same time provide as far as possible for the wants of the

34. 4 Am. Mil. Govt. 360.

35. Westlake, Part II, p. 104.

36. Such property is seldom completely exempt from interference. Donaldson, International Economic Relations, p. 100.

civilian population.³⁷ It will often be necessary to enforce controls over various aspects of economic life;³⁸ industry may need supervision,³⁹ and scarce materials may have to be allocated on the basis of priorities.⁴⁰ Bisschop comments on the German measures of regulations and supervision in occupied Belgium in World War I as follows:

Had the Germans faithfully adhered to the original ideas of husbanding resources, then in these Ordinances which bring the output, industries and trades of Belgium under centralised control, no attempt could be detected to evade or go beyond the requirements and limitations imposed on military occupants under international law * * *⁴¹

It seems clear that military necessity or the need for maintaining public order and safety will justify the occupant in compelling private business to operate.⁴² Seemingly an occupant may close commercial or industrial enterprises whose continued

37. FM 27-5, pars. 4, 9k; Bisschop, p. 150.

38. FM 27-5, par. 9k(1).

39. FM 27-5, par. 9k(3).

40. FM 27-5, par. 9k(3).

41. Bisschop, p. 164, condemns the German practice as intended to serve the interests of the German empire at home. See also Garner, Vol. II, p. 63, for summary of German legislation in occupied Belgium.

42. See Hunt Report, p. 170; Feilchenfeld, p. 105.

operation is contrary to his military interests or the urgent needs of the population.⁴³ The occupant is not limited to mere supervision over private business. Any property which is vital to the needs of the civilian population or the needs of the occupant and the civil population may be placed under the direct control and management of the occupant.⁴⁴ This is not confiscation but a temporary possession of property which is returned to the owner when the need which prompted the action no longer exists.⁴⁵ The United States forces of occupation in the Rhineland, according to the Hunt Report, had a choice of two distinct methods of administering public utilities such as gas plants, power and light plants, water works and coal (some of them privately owned), either by direct control or by administration through

43. In the German occupation of Belgium in World War I, the German authorities licensed all industrial enterprises and prohibited the continuance of business without such license. Garner, Vol. II, p. 65; Kohler, p. 166.

44. See M 353-2, pp. 138, 145.

45. Donaldson, International Economic Relations, p. 100; cf. Lauterpacht, p. 313, footnote 3, which states: "Nor may the occupant liquidate the businesses of enemy subjects in occupied territory, although he can control them, and must certainly not sell their real estate, even if the proceeds are to be handed over to them after the war."

German authorities already in charge.⁴⁶ According to Kohler, compulsory administration of private enterprise was widely used by the Germans in occupied Belgium in World War I.⁴⁷ He states that "this development of compulsory administration gradually pushed supervision into the background".⁴⁸ In principle it would seem that the injunction of the Hague Regulations against confiscation would require that the owner be compensated to the extent of the net profits earned by the occupant, if any.⁴⁹

Private property susceptible of direct military use may be seized by the occupant under paragraph 2 of Article 53 of the Hague Regulations.⁵⁰ Other property necessary for the needs of the army of occupation is requisitioned.⁵¹

46. Hunt Report, p. 170. The latter method, however, was actually used.

47. Kohler, p. 179.

48. Kohler, p. 179. A total of 220 enterprises were under supervision as compared to 337 compulsory administrations for the first half-year of 1917 in occupied Belgium. Kohler, p. 180.

49. Cf. M 353-2, p. 148, which authorizes payments to be made out of assets in control of occupant to any dependents of the owner when it appears that such dependents are without adequate support. Cf. German War Book, p. 141, on sequestration of profits; Spaight, p. 413.

50. See p. 164, *supra*, for discussion.

51. See p. 141, *supra*, for discussion.

Requisitions.

Requisition is the name for the demand of all kinds of articles necessary for an army.⁵² Requisition of services will be dealt with later. Deliveries in kind are the object of requisitions.⁵³ Customary international law recognized the right of a belligerent to requisition supplies in enemy territory.⁵⁴ Article 52 of the Hague Regulations does not confer any right on the occupant with respect to requisitions--that right is founded on usage--but limits or restricts this customary right.⁵⁵ A requisition is not a contract; it is an order by the occupant in exercise of his supreme authority which the inhabitants of the occupied territory must obey.⁵⁶ The difference between a contract and requisition is that in the former "the transfer of property

52. Lauterpacht, p. 317.

53. Rolin, par. 506.

54. Latifi, p. 30; Lauterpacht, p. 316.

55. Spaight, p. 383; Hyde, Vol. II, p. 373.

56. See Stauffenberg; Lauterpacht, p. 317. In *Polyxenus Plessa v. Turkish Government*, Annual Digest, 1927-28, Case No. 362, the court in rejecting the contention that a requisition was a contract said: "Requisitions are manifestations of the unilateral will of the authorities fulfilling the function of mobilising the resources of the country for the purpose of military defence * * * The latter requisition undoubtedly created a right in favour of the individual concerned, but that right was not of a contractual nature."

is effected by the free consent of the interested parties", whereas a requisition is an order by which authority requires the performance of a duty.⁵⁷

A Germano-Rumanian Mixed Arbitral Tribunal⁵⁸ stated that a requisition might be preceded or followed by an agreement concerning the price, which agreement may have a contractual character. Stauffenberg disputes the conclusion of the arbitral tribunal and states:

If, as the court points out, we are dealing here with a requisition then the stipulation of the indemnity was also a public act and an agreement in regard to such indemnity does not change the situation. It is impossible to say that the State while it imposes a requisition is in exercise of public power but that it acts as a private person when it fixes the indemnity. By agreeing on the amount of the indemnity a requisition can not be transformed into a contract of sale. We have no contract here because the plaintiff as regards the delivery of the requisitioned machinery was in duress and could not make such delivery dependent upon the amount of the price. On the other hand, the German government was free in regard to fixing the indemnity. It was merely an act of courtesy when the German State agreed on the amount of indemnity.⁵⁹

Restrictions
on Requisitions.

Article 52 of the Hague Regulations⁶⁰ confines requisitions to the "needs of the army of occupation".

57. Loy and Markus v. German State, quoted in footnote, Annual Digest, 1929-30, Case No. 295.

58. Leon v. German State, Annual Digest, 1929-30, Case No. 295.

59. Stauffenberg. Conversely, a mixed arbitral tribunal has held a lease to be a "disguised requisition". Annual Digest, 1929-30, Case No. 297.

60. FM 27-10, par. 335.

The words, says Spaight, indicate the sole legitimate object, as well as the quantitative limit, of the levy.⁶¹ What articles or things belong within the descriptive words "needs of the army" cannot be defined precisely or determined in advance; these will depend on the actual need.⁶² By way of example, requisitions would be permissible for materials necessary for sheltering troops, subsistence for the army in the field, means of transportation and communication, care of the sick and wounded, articles of clothing and camp equipment, and all materials, tools, apparatus, etc., suitable for the use of the army.⁶³ Some writers contend that the objects requisitioned must be absolutely indispensable to the maintenance of the army.⁶⁴ Seemingly this does not represent the Anglo-American view which permits the requisitioning of articles which add to the comfort and efficiency of soldiers such as wine and tobacco.⁶⁵

61. Spaight, p. 383. Requisitions are limited to the "needs of the army of occupation" not necessarily to the needs of the troops on the spot. Spaight, p. 405; FM 27-10, par. 338. It would seem that future needs of the army of occupation may be anticipated.

62. Lauterpacht, p. 318; German War Book, p. 133.

63. Ferrand, p. 84.

64. Ferrand, p. 50; Rolin, par. 511.

65. Hyde, Vol. II, p. 373; British Manual of Military Law, par. 416, footnote 9.

Snow states that in the Franco-German War beer for the men and tobacco and wine for the officers were requisitioned.⁶⁶ Generally, luxuries such as watches, jewelry, etc., would not be proper objects of requisition.⁶⁷ The requisitioning of rifles, revolvers and other arms of war in the possession of the inhabitants is permissible.⁶⁸ Ferrand's view that this would involve the population in taking part in operations of war against their own country is difficult to appreciate.⁶⁹ Such articles, as is true of all material susceptible of direct military use, may be seized by the occupant under Article 53 of the Hague Regulations.⁷⁰ Although such a seizure is not properly a requisition,⁷¹ in both instances the inhabitants are merely yielding to the supreme

66. Snow, p. 105.

67. British Manual of Military Law, par. 416, footnote 9; Rolin, par. 511; Ferrand, p. 50. The United States authorities in occupied Germany never permitted the requisitioning of pianos, which were considered by them as luxuries. American Representation in Occupied Germany, Vol. II, p. 133.

68. Bluntschli quoted in Rolin, par. 501. The services of inhabitants could not be requisitioned for work on such articles. See p. 153, *infra*.

69. Ferrand, p. 51.

70. FM 27-10, par. 331.

71. See p. 164, *infra*.

authority of the occupant in surrendering the possession of the articles. In allowing requisitions in such cases the inhabitants are being benefited by receiving from the occupant payment in cash or a receipt implying a promise to pay. In practice the occupant will not requisition such articles but seize them since the latter procedure is more advantageous to him.⁷²

The German practice in World War I of requisitioning all kinds of material, machines, live stock and agricultural products in occupied territories to support German industry at home or feed the German population is contrary to international law.⁷³ Similarly, the requisitioning of articles to support troops located in other occupied countries is improper.⁷⁴ In neither of these cases can the requisitions be considered as being for the "needs of the army of occupation".⁷⁵ An occupant may not requisition articles for the purpose of speculation, i.e.,

72. The British Manual of Military Law, par. 416, defines property subject to requisition as "all such articles as are not susceptible of direct military use, but are necessary for the maintenance of the army".

73. Garner, 11 Am. J. Int. L. 74, at p. 91, et seq.

74. Hyde, Vol. II, p. 374; Rolin, par. 512.

75. Lauterpacht, p. 318; Garner, Vol. II, p. 117, et seq.; Rolin, par. 512.

sale and profit, since this is not for the needs of the army of occupation.⁷⁶ The German Supreme Court in a case involving the requisitioning of a motor car in occupied Belgium for the purpose of transferring it to Germany admitted that the requisition was contrary to the Hague Regulations, but sought to justify the act by reasoning that a state's right of self-preservation was superior to the Hague Convention and that the necessity arising from the Allied "hunger-blockade" justified such measures.⁷⁷ In Gros Roman et cie v. German State, goods were requisitioned in Antwerp by the German occupation authorities for disposition in Germany proper. The Franco-German Mixed Arbitral Tribunal held that the requisition was contrary to the Hague Regulations.⁷⁸ The court also ruled that the requisition being in violation of international law did not transfer

76. Rolin, par. 512; Siuta v. Guzkowski, Annual Digest, 1919-22, Case No. 342.

77. Annual Digest, 1919-22, Case No. 296; Hackworth, Vol. VI, p. 409.

78. Annual Digest, 1923-24, Case No. 245. To the same effect, see Ralli Brothers v. German Government, Annual Digest, 1923-24, Case No. 344, where the court expressed the opinion that the requisition was contrary to the Hague Regulations, but held that it had no jurisdiction over the claim.

property in the requisitioned goods.⁷⁹ However, in Tesdorpf v. German State, an Anglo-German Mixed Arbitral Tribunal held that coffee originally requisitioned for the needs of the army of occupation and then diverted to Germany was a "misuse of the right of requisition by making the coffee available for parts of the German army other than in the occupied territory", but not void in international law.⁸⁰

Money may not be requisitioned.⁸¹ Money is raised by contributions.⁸² Coins, bullion, etc., as commodities or personal property would, on principle, be subject to requisition if required for the needs of the army.⁸³ Feilchenfeld argues that intangible property such as patent rights and contracts would be subject to requisition.⁸⁴ Although no authority or practice is cited in support of this

79. To the same effect, Siuta v. Guzowski, Polish Supreme Court, Annual Digest, 1919-22, Case No. 342, where the goods were requisitioned for the purpose of resale in the occupied territory. Contra, Ralli Brothers v. German Government, Anglo-German Mixed Arbitral Tribunal, Annual Digest, 1923-24, Case No. 244.

80. Annual Digest, 1919-22, Case No. 339; see also editor's note, Annual Digest, 1923-24, Case No. 244.

81. British Manual of Military Law, par. 417, footnote 1; Rolin, par. 507.

82. British Manual of Military Law, par. 423; Lauterpacht, p. 319; Bentwich, p. 36.

83. Cf. Nussbaum, Money in the Law, p. 53; Feilchenfeld, p. 38.

84. Feilchenfeld, p. 38.

view, it seems sound. Spaight has stated that practically everything under the sun may be requisitioned.⁸⁵

Requisitions
-- in Proportion to Resources of the Country.

Requisitions, according to Article 52, shall be in proportion to the resources of the country. This limitation means, according to Higgins, "that the inhabitants are not to be left in a starving condition".⁸⁶ Whether the requisition must be in proportion to the resources of the individual is extremely doubtful. It has been stated that "the levies must be reasonable and proportioned to the resources of the district or person assessed, both by the better authorities prior to 1907, and since then by the Hague Regulations".⁸⁷ Feilchenfeld suggests that the words "resources of the country" do not refer to the assets of a particular individual and that an occupant "may take a farmer's last cow and piece of bread as long as by doing so he does not unduly exhaust the cattle and bread supply of the whole country".⁸⁸

85. Spaight, p. 402.

86. Higgins, War and the Private Citizen, p. 61.

87. Gregory, 15 Colum. Law Rev. 207, at p. 221.

General Washington in 1777 directed Hamilton to procure from the inhabitants of Philadelphia requisitions of blankets and clothing in proportion to the ability of each. Taylor, p. 550.

88. Feilchenfeld, p. 37. See p. 153, *infra*, for parallel situation arising in billeting.

Requisitions
-- to Whom
Addressed.

When the requisition is local it is usually addressed to the officials of the municipality,⁸⁹ who are made responsible for the collection or procurement of the materials requisitioned.⁹⁰ This procedure has the advantage of permitting a more equitable distribution of the burdens of requisitions among the inhabitants.⁹¹ In addition, it simplifies the procedure of payment in that settlement of the amount due may be determined with the local officials rather than individuals.⁹² Where the requisition is general, it is addressed to the official in charge of the administrative division, such as the provincial governor, etc., upon whom the responsibility rests for procuring the materials.⁹³ Requisitions may be made directly on individual inhabitants by detachments of soldiers. This is done if the local authorities have fled or fail to act for any reason.⁹⁴

89. Ferrand, p. 188, states that requisitions may be addressed to leading citizens in default of officials.

90. Ferrand, p. 188; Hunt Report, p. 224.

91. Ferrand, p. 188; Spaight, p. 404.

92. Ferrand, p. 188.

93. Ferrand, p. 188.

94. This procedure of using detachments of soldiers to make domiciliary visits or searches to secure materials is sometimes called "military" requisition or execution. Ferrand, p. 203; FM 27-10, par. 337.

Requisitions may be made of goods belonging to owners who are absent from the occupied area.⁹⁵

Requisitions
-- on Whose
Authority.

The Hague Regulations provide that requisitions shall be demanded only on the authority of the commander in the locality occupied.⁹⁶ In other words, individual officers or soldiers may not order requisitions.⁹⁷ Individual soldiers, however, may be authorized by the commanding officer to requisition materials and the authorization may be oral.⁹⁸ Except in emergency, only commissioned officers are permitted to requisition.⁹⁹ The German War Book states the same rule with the additional explanation that "it cannot, however, be denied that this is not always possible in war, that on the contrary the leader of a small detachment and in some circumstances even a man by himself may be under the necessity to requisition what is indispensable to him".¹⁰⁰

95. The receipt may be left with an agent or representative, if any, or public notice may be given that payment will be made or receipts will be issued through the local authorities. Ferrand, p. 209. The British Manual of Military Law, par. 413, states that the absence of the owner does not authorize pillage or damage. A note should be left if anything is taken.

96. FM 27-10, par. 335.

97. Borchard, p. 268.

98. Supreme Court of Austria, 8 Feb. 1916, Zeitschrift fur Volkerrecht, Vol. 10, p. 389.

99. British Manual of Military Law, par. 418.

100. German War Book, p. 134.

Requisitions
-- Payment or
Receipt.

Materials requisitioned must as far as possible be paid for in cash.¹⁰¹ The duty of payment rests on the state making the requisition, i.e., the occupant.¹⁰² If this is impossible requisitions must be acknowledged by receipt and payment of the amount due shall be made as soon as possible.¹⁰³ Thus, the Belgian Court of Cassation has held that a requisition of a horse unaccompanied by payment or a receipt could no more transfer property in the horse than a theft.¹⁰⁴ Mixed arbitral tribunals have ruled that although a requisition be made in accordance with international law, it becomes unlawful if the owner is not compensated within a reasonable time.¹⁰⁵ If

101. FM 27-10, par. 335.

102. See authorities cited in Garner, Vol. II, p. 122; Rolin, par. 515; Ferrand, p. 212.

103. FM 27-10, par. 335; Lauterpacht, p. 318.

104. Laurent v. Le Jeune, Annual Digest, 1919-22, Case No. 343.

105. Karmatzucas v. Germany, Germano-Greek Arbitral Tribunal, Annual Digest, 1925-26, Case No. 365; Portugal v. Germany, Annual Digest, 1929-30, Case No. 92; Goldenberg Sons v. Germany, Special Arbitral Tribunal, Annual Digest, 1927-28, Case No. 369. The editors of the Annual Digest (McNair and Lauterpacht) have stated in a footnote to Karmatzucas v. Germany, that "The reasoning of the Tribunal is open to objection as it is difficult to see how subsequent failure to pay rendered the requisition unlawful ab initio. It would have sufficed to hold that the subsequent failure to pay was illegal."

the occupant does not have cash to pay for requisitions, he may raise it by imposing contributions on the population.¹⁰⁶

It is clear that the occupant may fix the price for the requisitioned articles.¹⁰⁷ Spaight states the standard to be a "fair price" or a "strictly reasonable price".¹⁰⁸ He cites the British instructions for requisitioning in the Anglo-Boer War which provided that no increase in value by reason of the existence of military operations should be allowed.¹⁰⁹ In Roumania v. Germany, a special arbitral tribunal held that the compensation paid to the owner by Germany for requisitioned supplies was one-sixth of the value of the property and the court stated that "it became an act contrary to international law when, after a reasonable time, the plaintiff did not obtain full compensation".¹¹⁰ Rolin states that the price for requisitioned supplies should be fixed in

106. Hyde, Vol. II, p. 370; Lauterpacht, p. 318; Bentwich, p. 36.

107. FM 27-10, par. 339; British Manual of Military Law, par. 421.

108. Spaight, p. 407.

109. Spaight, p. 407; see Lauterpacht, p. 319, who says that the occupant may fix the price himself, "although it is expected that they shall be fair".

110. Annual Digest, 1927-28, Case No. 369.

accordance with the true value "unless requisition is to degenerate into a theft".¹¹¹

The occupant may, in discharging his duty of maintaining law and safety, determine the currency in which payment for requisitions may be made and fix the relative value between various types of currency circulating in the occupied territory.¹¹² The occupant's right to fix prices would not, according to Hyde, give him the right to place an artificial and excessive valuation on the currency of his country circulated in the occupied territory.¹¹³

In the case of movable property, the occupant generally takes title to property lawfully requisitioned, although he may, if he desires, requisition its use only.¹¹⁴ In the case of immovable property such as real estate, the use is requisitioned and not the ownership since the needs of the army require

111. Rolin, par. 514.

112. Nussbaum, *Money in the Law*, p. 159; Feilchenfeld, p. 70, et seq. Thus allied military lira, printed in the United States, were used as legal tender by the Allied forces in Sicily in order to provide an adequate circulating medium. See Proclamations Nos. 3 and 12 used in Sicily, M 353-2, pp. 39, 69.

113. Hyde, Vol. II, p. 374.

114. Hall, p. 509; cf. Annual Digest, Czechoslovakia, Supreme Court, 1919-22, Case No. 340.

the use of the premises only.¹¹⁵

Billeting.

Billeting or quartering is a form of requisition for housing soldiers in homes of private persons in enemy territory, who may be required to supply food, lodging, stabling and forage.¹¹⁶ The provision of the Hague Regulations relating to requisitions applies to billeting, that is, payment must be made if possible, otherwise a receipt must be given.¹¹⁷ Generally, requisitioning of quarters for the occupant's soldiers should not go so far as to expel the inhabitants from their homes,¹¹⁸ unless other accommodations can be provided for the inhabitants.¹¹⁹

**Requisition of
Personal Services Involving
War Operations.**

Article 52 of the Hague Regulations¹²⁰ permits the occupant to requisition the services of inhabitants

115. Cf. Annual Digest, 1919-22, Case No. 340; see American Representation in Occupied Germany, Vol. II, p. 128.

116. Lauterpacht, p. 319; FM 27-10, par. 336.

117. Lauterpacht, p. 319.

118. Rolin, par. 520.

119. American Representation in Occupied Germany, Vol. II, p. 133. The Hunt Report, p. 225, states that at one time 250,000 American soldiers were billeted on less than 800,000 inhabitants and that the Commanding General directed that every male German between the ages of 15 and 60, not in ill-health, should give up his bed if American soldiers billeted in his house lacked them.

120. FM 27-10, par. 302.

of occupied territory for the "needs of the army of occupation", subject to the limitation that these shall not be of such a nature as to involve the inhabitants in the "obligation of taking part in military operations against their own country".¹²¹ The difficulty in drawing a clear line between permitted and forbidden work arises from the fact that services of the inhabitants for the needs of the occupying army may be requisitioned but those services must not constitute operations of war against their own country. All services furnished to the army of occupation may, to some extent, aid the operations of war though indirectly.

It must be admitted that the Hague Regulations and the practice of nations permits forced labor.¹²² However, certain measures of compulsion on the part of the occupant are clearly prohibited as being in violation of Article 52. Thus, individuals whose services are requisitioned may not be exposed to the dangers of combat, that is, they must not be compelled

121. This article is substantially the same as Article 23h of the Hague Regulations. No special significance is attached to the use of "military operations" instead of "operations of war". See Holland, pp. 44, 56; FM 27-10, par. 36.

122. Rolin, par. 472, citing Nys; Bisschop, p. 165; British Manual of Military Law, par. 388; FM 27-10, par. 303; The German War Book, p. 118.

to perform labor in a place where they are exposed to bodily harm by the fire of the combatants.¹²³

Similarly, since the occupant is not the sovereign he may not compel the doing of acts by the inhabitants which are traitorous to their sovereign.¹²⁴

Inhabitants cannot be compelled to take part in military operations of any kind and Article 52 of the Hague Regulations is much broader than a mere prohibition against their use as combatants.¹²⁵

The boundaries between permitted and forbidden work may be difficult to define. In principle, however, the distinction is between services which directly and distinctly serve war operations¹²⁶ and such as amount to an indirect participation in war operations.¹²⁷ The majority view is that the digging of trenches, the construction of fortifications, even at a distance from the front, the

123. Ferrand, p. 15.

124. Ferrand, p. 15; see p. 110, *supra*, on impressment of guides. See also Merignhac-Lemonon, p. 481, who state that although the occupant may requisition printing presses, he may not compel the printers to print documents in opposition to their government.

125. Rolin, par. 468; Ferrand, p. 60; Holland, p. 44.

126. Spaight, p. 152; Phillipson, *International Law and The Great War*, p. 197. See also Garner for citations of authority, 11 *Am. J. Int. L.* 74, at p. 110.

127. Rolin, par. 469, citing Bonfils; Garner, 11 *Am. J. Int. L.* 74, at p. 110, citing Pillet.

repairing of arms, the making of munitions, and the construction of gun emplacements are prohibited.¹²⁸

Ferrand states that there can be no question of forcing the heads of factories or their workers to manufacture for the enemy arms, cannons, rifles, machine guns, swords, fortification baskets, sacks of earth for trench revetments, munitions, etc., or to repair damaged arms, and he adds that the manufacturing of clothing and harness equipment for use by enemy troops would be prohibited.¹²⁹

Certain services may clearly be demanded by the occupant. The occupant may compel the performance of humanitarian services such as the care of sick and wounded soldiers, collecting and removing the wounded, and burying the dead.¹³⁰ Inhabitants whose

128. Ferrand, p. 60; Rolin, par. 469; Garner, 11 Am. J. Int. L. 74, at p. 111; Spaight, p. 152. See, however, Lauterpacht, p. 345, who states that the practice of belligerents has been to distinguish between military operations and military preparations and that such work as the construction of fortifications and the like behind the front is not forbidden in preparation for military operations. The British Manual of Military Law, par. 391, and FM 27-10, par. 305, seemingly make no such distinction. Both state that the compulsory construction of fortifications and entrenchments is forbidden work.

129. Ferrand, p. 62. To same effect see Pillet, cited in Garner, 11 Am. J. Int. L. 74, at p. 110. See P.W. Cir. 5, WD, 1944, where it is stated that prisoners of war may be used to manufacture cloth and leather and the like although worn by soldiers.

130. Ferrand, p. 59; FM 27-10, par. 304. According to Ferrand, p. 59, the population may not be called on to treat men who are stricken with contagious diseases.

services furnish the normal and necessary needs of human beings are, generally, not participating directly in war operations although the recipients of their services are the occupant's soldiers. Thus an occupant may requisition inhabitants for preparing quarters for troops, for harvesting growing crops and grain, baking bread, and slaughtering cattle for his troops in the occupied territory.¹³¹

Services performed by inhabitants which are necessary for the proper administration of the occupied territory are not prohibited although incidentally military operations may be facilitated.¹³² The services of inhabitants may be requisitioned to construct or repair roads of general utility, bridges, railroad, telegraph lines, etc., although the military also uses such facilities since such work is in the interest of the community itself as an act of good administration.¹³³ Conversely, inhabitants could not be compelled to work on purely strategic roads leading to fortified positions nor could they be compelled to create means of access to a battlefield.¹³⁴

¹³¹. Ferrand, p. 59.

¹³². Ferrand, p. 62.

¹³³. Phillipson, *International Law and The Great War*, p. 197; Ferrand, p. 62; Rolin, par. 470.

¹³⁴. Ferrand, p. 62.

An occupant may seize both public and private railroads and operate them not only for his military purposes but also commercially.¹³⁵ He may requisition the services of the officials and employees of the railroad so long as they do not amount to a direct service in war operations.¹³⁶ What acts by railway employees would constitute direct participation in war operations is doubtful. According to many continental authorities, the transportation of the necessities of life, foodstuff, gasoline, rifles, powder and ammunition, and even enemy troops, would not be illegitimate.¹³⁷ Bonfils states that although such services are of great use to the enemy they do not constitute a direct and immediate participation in the operations of war.¹³⁸ The only limitation recognized by such writers is that the compulsory

135. See FM 27-10, par. 331; Spaight, pp. 413, 414.

136. FM 27-10, par. 303; British Manual of Military Law, par. 388.

137. Rolin, par. 469, though disagreeing with this view, states: "Most text writers consider such requisitions of service legitimate, even the French authors." See Garner, 11 Am. J. Int. L. 74, at p. 109, citing authorities.

138. Rolin, par. 469; Garner, 11 Am. J. Int. L. 74, at p. 109. See Ferrand, p. 65, who would prohibit all requisitioning of railroad workers because railroads are important strategically and participate closely in the operations of war although indirectly.

transportation of arms, munitions of war, and food-stuffs should not be required in the face of imminent or actual battle.¹³⁹ Garner's view is stated as follows:

It may also be doubted whether forced labor in railway shops and in the operation of railway trains which are used by the enemy for the transportation of troops and military supplies is permissible. The line of demarcation between such services and work on fortifications is at best very shadowy, and there is no principle of logic or reason why a belligerent should be allowed to require the one and forbidden to exact the other * * * The services of Belgian railway employees, in particular, was of immense military value to the Germans, not only because it released large numbers of Germans and left them available for services in the army, but because owing to the different construction of Belgian railway locomotives and railway machinery as compared with those in use in Germany, the operation of the Belgian lines by Germans was carried on with difficulty and resulted in numerous accidents. The services of Belgian engineers, machinists and trainmen were, therefore, as necessary to the Germans as soldiers in the field * * *¹⁴⁰

Article 52 of the Hague Regulations is directed against compulsory labor of inhabitants in the prohibited activities; the acceptance of voluntary service is not prohibited.¹⁴¹

Occupant as
Administrator
of Occupied

As has been shown, military necessity and the need for maintaining public order and safety are

139. Rolin, par. 469. Of course, the lives of the peaceful inhabitants should not be exposed to the risks of combat. Ferrand, p. 15; Rolin, par. 469.

140. 11 Am. J. Int. L. 74, at p. 111.

141. Spaight, p. 144.

Territory -- the twin pillars on which the occupant's authority
Work and Con- rests.¹⁴² In requisitioning services or materials
tracts for
Benefit of
Occupied State, for the "needs of the army of occupation", the occu-
Expropriation.

pant's acts find justification in military neces-
sity.¹⁴³ In such case Article 52 of the Hague Regu-
lations requires that payment shall be made by the
occupant in cash but if this be not possible a re-
ceipt must be given and payment made as soon as pos-
sible.¹⁴⁴ When the occupant acts in the role of ad-
ministrator of the occupied territory he is discharg-
ing his duty of maintaining law and order.¹⁴⁵ An
occupant, who orders work done for the benefit of
the community and not inuring to his own advantage,
acts in his capacity as administrator of the occu-
pied territory.¹⁴⁶ The burden of the cost of such
work properly falls on the community benefited.¹⁴⁷
Although the authorities are silent on this problem,
it is believed that Article 52 of the Hague Regula-
tions requiring payment or a receipt by the occupant,

¹⁴². See p. 36, *supra*.

¹⁴³. Spaight, p. 384; Hall, p. 513.

¹⁴⁴. See p. 150, *supra*.

¹⁴⁵. See p. 38, *supra*.

¹⁴⁶. Cf. Bordwell, p. 329.

¹⁴⁷. Cf. *New Orleans v. Steamship Co.*, 20 Wall. 387,
TM 27-250, p. 43.

relates only to requisitions for the "needs of the army of occupation".¹⁴⁸ Ariga states that in the Russo-Japanese War, "the commissioner of the 1st Army ordered the inhabitants residing along the army's line of communication to have the roads repaired without any remuneration. This is evident from a report of the commissioner of Mukden, dated June 15, 1905; the action it reports is severe but irreproachable in law."¹⁴⁹ It must be remembered that the Japanese policy in the Russo-Japanese War was to pay for all requisitions.¹⁵⁰

During the military occupation of New Orleans by the Army of the United States from 1862 to 1866, it became necessary to build a new wharf on the water front involving the expenditure of a large sum of money. The occupant contracted with a steamship company which undertook the erection of the wharf in consideration of a lease of the wharf for 10 years. In addition, the company agreed to pay a rental and keep the wharf in repair. The improvements were important to the welfare and prosperity of the city.

148. See FM 27-10, par. 335. The related problems of the payment of the expenses of administration of the occupied territory from tax collections and contributions will be discussed later. Page 184, *infra*.

149. Ariga, p. 463; see also Rolin, par. 539.

150. See Spaight, p. 397; Ariga, p. 450, et seq.

The court held that this lease was valid as "a fair and reasonable exercise of the power" vested in the military governor, although the war ended a year after the lease was made. The majority opinion expressly stated that it did not intend to impugn the general principle that contracts of an occupant relating to things in the occupied territory lose their efficacy when occupation ceases.¹⁵¹ Bordwell has said with respect to this problem that:

A distinction must be made between contracts of exploitation which the occupant makes for his own advantage, and those which he makes in his capacity of administrator for the benefit of the community. Measures for the permanent benefit of the community should be left, when it is possible, to the legitimate power, but there may be cases where the needs of the community are so pressing as to admit of no delay, and if in such a case a contract is let for work which extends beyond the period of occupation, such contract is valid even then, if it was reasonably within the scope of the occupant's essentially provisional power.¹⁵²

The occupant's duty to maintain public order and safety will justify necessary measures taken for the benefit of the occupied state. In taking such measures, the occupant may avail himself of the law of the occupied state. During the United States naval occupation of Haiti in 1915, the naval government decided that the interests of Haiti and of the occupation

151. *New Orleans v. Steamship Co.*, 20 Wall. 387; TM 27-250, p. 43.

152. Bordwell, p. 329.

demanded the establishment of roads through the interior. The revenue of the country did not permit the hiring of labor. The naval government fell back upon an old Haitian law and custom that required the peasant to give a limited amount of time to work on the roads in his locality.¹⁵³ In 1918 the German Governor-General in Poland authorized a communal district to carry out the expropriation¹⁵⁴ of certain property in order to extend the district hospital. The commissioner of the communal district made an order for expropriation against payment of a certain sum as compensation. The expropriation followed the substantive law of the occupied territory. The Governor-General departed from the law of the occupied territory in changing the procedure, that is, publishing a decree authorizing the Governor-General to order such expropriation where formerly it could be ordered only by the Russian Emperor. The Polish Supreme Court ruled that the decree of the German Governor-General was valid.¹⁵⁵

153. R. H. Gabriel, unpublished lecture, 21 June 1943.

154. Expropriation of private property on the payment of compensation is a measure for the benefit of the occupied country and thus differs from a requisition under the Hague Regulations. Feilchenfeld, p. 50.

155. Marjamoff and Others v. Wloclawek (Communal District of), Annual Digest, 1923-24, Case No. 243. The court based its decision on the power of the Governor-General to change rules of procedure.

Seizure of
Private Prop-
erty Suscep-
tible of Direct
Military Use.

The second paragraph of Article 53 of the Hague Regulations provides for the seizure of 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; and, depots of arms, and, generally, all kinds of war material,¹⁵⁶ even if they belong to private individuals, but they must be restored and compensation fixed when peace is declared.¹⁵⁷ The Convention purposely refrained from giving a detailed list of the various things subject to seizure owing to the dangers of incompleteness and instead adopted a general formula.¹⁵⁸ The seizure of property under Article 53 is not based, as in the case of requisitions, on the needs of the army of occupation but on the broader ground of military necessity; more specifically, it is not only the need of the occupant that justifies the seizure but the danger of permitting property susceptible of direct military use to remain at the disposal of private individuals.¹⁵⁹

156. The original French "munitions de guerre" has been translated in Edmonds and Oppenheim, p. 141, and by Holland, p. 5, as "war matériel"; FM 27-10, par. 331, translates the words as "ammunition of war"; Scott, Hague Conventions and Declarations of 1899 and 1907, p. 125, uses the words "munitions of war".

157. FM 27-10, par. 331.

158. Westlake, Part II, p. 115; Higgins, p. 270.

159. Ferrand, pp. 137, 138; cf. Art. 6, Declaration of Brussels cited in Baker and Crocker, p. 394.

"Seizure" is not mere supervision, it is the actual taking of possession and exercise of control.¹⁶⁰ It is not a taking of possession with a view to ownership¹⁶¹ as there is a duty of restoring the property at the conclusion of the peace.¹⁶² The weight of opinion indicates that this possession need not be purely conservatory in nature,¹⁶³ and that the occupant may use the property for military purposes.¹⁶⁴

This article assimilates depots of arms and ammunition of war with means of transportation and communication and requires restoration in both cases.¹⁶⁵ Generally, arms and ammunition of war, unlike means of transportation and communication, would be consumed by use or be deteriorated to such an extent as to lose all value at the end of the war.¹⁶⁶ In such cases, since restitution is either impossible or

160. Ferrand, p. 138.

161. Cf. Huber, p. 662.

162. Rolin, pars. 492, 522.

163. See Merignhac-Lemonon, p. 569, who argues that it is of a conservatory character and if the occupant makes use of such property he should proceed by requisition.

164. Lauterpacht, p. 312; Ferrand, p. 136, et seq;; Latifi, p. 30; Garner, Vol. II, p. 125; Westlake, Part II, p. 115.

165. Bordwell, p. 326.

166. Westlake, Part II, p. 115.

illusory, compensation will be substituted in the place of restitution.¹⁶⁷ Article 53, paragraph 2, of the Hague Regulations acknowledges that there is liability somewhere to make compensation,¹⁶⁸ but leaves the settlement of that question for the treaty of peace.¹⁶⁹ Holland says: "The treaty of peace must settle upon whom the burden of making compensation is ultimately to fall."¹⁷⁰ According to Bordwell, "The idea was not so much that the owners should not be fully compensated, as that it was not a matter of international right * * *"¹⁷¹

The Hague Regulations make no provision for the giving of a receipt, although the drafting committee at the 1899 Conference stated that the fact of seizure should be noted in one way or another, if it were only to furnish the owner an opportunity of claiming compensation contemplated in Article 53.¹⁷² It is

167. Rolin, par. 532.

168. Westlake, Part II, p. 115.

169. Lauterpacht, p. 313.

170. Holland, p. 57. The British Manual of Military Law, par. 415, footnote 1, says: "By which party such indemnities are to be paid should be settled in the peace treaty."

171. Bordwell, p. 326.

172. The remarks by M. Rolin quoted by Ferrand, p. 150. The British Manual of Military Law, par. 415, states: "The fact of seizure should obviously be established in some way, if only to give the owner an opportunity of claiming the compensation expressly provided for."

apparent that some writing whether termed a receipt or otherwise must be given the owner acknowledging the seizure of the material so that it may be the basis for his securing restitution of the material and compensation after the war.¹⁷³

The distinction between the rights of a belligerent engaged in actual hostilities and his rights with respect to property in occupied territory must be kept in mind.¹⁷⁴ Thus, privately owned material falling within the description of "arms, horses, military equipment and military papers" and actually used by the enemy forces in military operations or actively participating in his operations are liable to confiscation.¹⁷⁵ For example, in the area of actual combat, trains carrying ammunition or troops, or carts and the vehicles loaded with food or supplies can be seized as booty of war.¹⁷⁶ Lauterpacht says:

Private enemy property on the battlefield is no longer in every case an object of booty. Arms, horses and military papers may indeed be appropriated, even if they are private property, as may also private

173. Lauterpacht, p. 313; Ferrand, p. 151.

174. See p. 126, *supra*.

175. Latifi, p. 30; see JAGS Text No. 7, p. 127, et seq., for detailed discussion.

176. Latifi, p. 30.

means of transport, such as carts and other vehicles which an enemy has made use of.¹⁷⁷

Private property susceptible of direct military use seized by the occupant may be damaged or destroyed in the actual conduct of hostilities under imperative military necessity and there is no duty of compensation for the damage or loss.¹⁷⁸

Kind of Private
War Material
Subject to
Seizure.

Article 53, paragraph 2, of the Hague Regulations clearly includes cables, telephone and telegraph plants, radio stations,¹⁷⁹ automobiles,¹⁸⁰ horses and other draft and riding animals, motors, bicycles, motorcycles, carts, wagons, carriages, railways, railway plants, tramways, ships in port (ships at sea are subject to maritime law), all manner of craft in canals and rivers, balloons, airships, airplanes, and depots of arms, whether military or sporting.¹⁸¹ The general language of this article would permit the seizure of real property used in connection with appliances adapted for the transmission

177. Lauterpacht, p. 314.

178. FM 27-10, par. 333; Spaight, p. 114; cf. Ferrand, p. 150; Rivier, p. 323; Merignhac-Lemonon, p. 612.

179. Rolin, par. 530.

180. Rolin, par. 528.

181. FM 27-10, par. 332.

of news, transport of persons or things.¹⁸² Thus, not only could the occupant seize the cars, engines, etc., of a railroad, but the tracks, station buildings, stations, roundhouses, warehouses, and all property connected with its operations.¹⁸³ The right of seizure extends to the whole enterprise as an operating business including its real estate.¹⁸⁴ The same is true of the postal system, telephone and telegraph communications, and transit by air. In the latter case, for example, the occupant could seize not only the airplanes, but the hangars, shops, aviation fields, and the offices.¹⁸⁵ Ships at sea are subject to maritime law. However, the facilities located on land and used in connection with such ships, e.g., coal, stores, wharves, etc., may be seized as part of the transportation system.¹⁸⁶

This article also permits the seizure of "depots of arms, and, generally, all kinds of material of war".¹⁸⁷ The generality of the words "all kinds of

182. Rolin, par. 523.

183. Rolin, par. 529.

184. Rolin, pars. 529-530.

185. Rolin, par. 530.

186. Rolin, par. 529.

187. FM 27-10, par. 331.

material of war" prevents an explicit enumeration of things subject to seizure. The British Manual of Military Law defines war material as anything that can be made use of for the purpose of offense and defense including the necessary means of transport.¹⁸⁸ The German War Book recognizes the seizure of private property which may be "regarded as of use in war", including "articles likely to be of use with advantage to the army, as telescopes, etc."¹⁸⁹ According to Bentwich, the German rules of war would permit the seizure of printing presses,¹⁹⁰ and, he adds, "that the effects of an invasion upon the usufruct of private property in this way may be very considerable".¹⁹¹ This article permits, according to some authorities, the seizure of arms and munitions factories and other establishments manufacturing war material for the army.¹⁹² The Allied Military

188. British Manual of Military Law, par. 415, footnote 7.

189. German War Book, p. 131.

190. Merignhac-Lemonon, p. 481, seemingly approves of the seizure of printing presses.

191. Bentwich, p. 39.

192. Ferrand, p. 176; Merignhac-Lemonon, p. 608, states: "What is to be decided with respect to the case in which war material * * * is the property of private companies? * * * The great establishments of Creusot, Essen, and Birmingham constitute important

Government proclamations in Sicily permitted the control by the occupants of any private business and industry furnishing war material useful to the military, e.g., cement and asphalt plants.¹⁹³

Cases assimilated to seizure under paragraph 2 of Article 53, although not within its terms, arise where property is seized by the occupant in order to prevent its use to the detriment of the occupant or to prevent it from falling into the hands of the enemy state. Thus, Merignhac-Lemonon recognize that private funds may be placed under sequestration to avoid their being loaned to the enemy state.¹⁹⁴ Similarly, an occupant may assume control of private property belonging to persons whose activities are prejudicial to the safety of the occupant and who may use such property in furtherance of their activities.¹⁹⁵

Private Rail-
roads.

An occupant who has seized a private railroad may exploit it for commercial purposes as well as

192. (Contd.) centers of arms and munitions manufacture * * * confiscation must be acknowledged if it is considered necessary by the occupant who could hardly be obliged to leave resources as important as these to its adversary, and who must as a consequence be authorized to sequester them * * *

193. M 353-2, pp. 19, 53.

194. Merignhac-Lemonon, p. 609.

195. See M 353-2, p. 52.

for his military needs.¹⁹⁶ He may, if he so desires, grant the right of exploitation to a third party for the period of occupation.¹⁹⁷ It is evident that the occupant is not obliged to pay fares or charges for the transportation of soldiers or supplies on a railroad which is under his complete management.¹⁹⁸ In the present war, railroads under German control in occupied territories carry German troops, war material and equipment free of charge.¹⁹⁹ According to some authorities, the occupant may not take possession of funds or securities found in the treasury of the private railroad and belonging to it.²⁰⁰ The tearing up of railroad tracks and carrying them off for use outside the occupied country is considered as beyond the power of an occupant who has seized a private railroad.²⁰¹ The reason given for this conclusion is that it is only the use or exploitation

196. Spaight, p. 413.

197. Ferrand, p. 146.

198. Cf. Fiore, par. 1566.

199. See European Transportation Under German Rule, Block, 11 Social Research 216, at p. 225.

200. Rolin, par. 530; Merignhac-Lemonon, p. 612; Fiore, par. 1566.

201. The same would be true of a railroad publicly owned. Garner, Vol. II, p. 128. The occupant may damage or destroy railroad tracks if demanded by the necessities of military operations.

of the railroad that is given an occupant.²⁰² The right of the occupant to remove rolling stock from a privately owned railroad for use elsewhere than in the occupied territory is a matter of dispute among writers. Ferrand and other French writers deny the right of the occupant to do so on the ground that it would interfere with the private commerce of the occupied territory and inflict damage on it which could not be justified by the necessities of war.²⁰³ Garner suggests that perhaps rolling stock unlike railroad tracks may be easily removed and returned at the end of the war without unnecessary injury to the plant.²⁰⁴

Writers have debated the question of the measure of compensation or indemnity that must be paid for seized property such as railroads.²⁰⁵ It is believed that this discussion is without practical value since the side upon whom the burden of indemnities will fall and the extent thereof are regulated by the treaty of peace.²⁰⁶ Bordwell has stated

202. Garner, Vol. II, p. 127.

203. Ferrand, p. 147; Merignhac-Lemonon, p. 614.

204. Garner, Vol. II, p. 127; German writers support the right of removal. See citations in Feilchenfeld, p. 95.

205. See Rolin, par. 527; Ferrand, p. 148.

206. Westlake, Part II, pp. 115, 116.

with respect to Article 53, paragraph 2, that:

It was desired, especially at The Hague, that the seizure of these instruments should be regarded as a mere sequestration. This would have entitled the owners to an accounting of rents and profits, when their property was handed back at the conclusion of peace; but violent opposition to this view manifested itself, and it was agreed that the compensation be arranged at the peace. The idea was not so much that the owners should not be fully compensated, as that it was not a matter of international right * * * it was thought best to leave the matter of compensating its citizens for losses sustained in the war to the unsuccessful party,²⁰⁷ and not to compel her to pay part of them in full, when she might feel that she could distribute the burdens of the war more equitably on some other basis.²⁰⁸

Where the occupant operates a private railroad for his own purposes as well as commercially, to whom does the profit, if any (the excess of revenue over expenditures), belong? Spaight says: "Evidently to the proprietors of the lines; it is a case not of public but of private funds."²⁰⁹ After the Franco-German War of 1870, the peace treaty provided for a mixed commission to determine the amount

207. Cf. Baty, *The Canons on International Law*, who says, p. 465: "* * * if you lose you will be forced to restore, and if you win you can stipulate that you shall not be forced to restore * * *"

208. Bordwell, p. 326. See also Rivier, p. 323, who states: "The question of the indemnity which owners may obtain after the war for damage caused to them by loss of use, interruption of operation, destruction and damage, depends on internal law. In the absence of agreements to the contrary, the obligation of indemnifying falls not upon the occupying State but upon the invaded State."

209. Spaight, p. 414; Ferrand, p. 148. *The German War Book*, p. 141.

of profit earned by Germany in operating privately owned French railways.²¹⁰

Contributions. Exactions of money payments by the occupant from the population in excess of taxes are called contributions.²¹¹ The Hague Regulations make a distinction between pecuniary fines and contributions; the latter are dealt with in Articles 49 and 51 and the former in Article 50.²¹² Fines or penalties, unlike contributions, are imposed as punishment for offenses committed against the occupant.²¹³ Requisitions, as has been shown, are demands by the occupant for things or services and contributions are demands for money.²¹⁴

The right to contributions is not granted by the Hague Regulations. The latter simply restrict or limit the exercise of the occupant's right which

210. Spaight, p. 414.

211. Hyde, Vol. II, p. 370, quoting Hall, says, "contributions have been defined as such payments in money as exceed the produce of the taxes"; Latifi, p. 32, describes the "system of levying contributions, consisting in payments in money taken by the invader over and above the produce of usual taxes". See Lauterpacht, p. 319; Spaight, p. 382; Hall, p. 509; British Manual of Military Law, par. 423.

212. Rolin, par. 497; FM 27-10, pars. 341, 342, deal with contributions and par. 343 with pecuniary fines and other penalties.

213. Westlake, Part II, p. 106.

214. Westlake, Part II, p. 107.

is founded on custom.²¹⁵ The Hague Regulations limit the objects as well as the amount of the levy to two purposes only, "the needs of the army or of the administration of the territory in question".²¹⁶

The occupant may find that the existing taxes and duties are insufficient to meet the expenses of the civil administration. In such case he may impose additional money levies to cover the cost of administration.²¹⁷ Apart from levies imposed for the administration of the occupied country, contributions are placed by the Hague Regulations on the same level with requisitions, that is, both are permitted only for the needs of the army of occupation.²¹⁸ The majority of authorities consider contributions to be veritable requisitions relating to money instead of

215. Spaight, p. 383; Westlake, Part II, p. 107.

216. Art. 49, FM 27-10, par. 341.

217. Wehberg, p. 42; Spaight, p. 382. Latifi, p. 32, gives the following example of an occupant who may impose contributions where the existing taxes are insufficient: "He may, for example, find it necessary to repair hospitals and dispensaries damaged in the course of hostilities. Under such circumstances he may impose additional taxes [contributions] on the population to be benefited by the works."

218. Spaight, p. 383; Westlake, Part II, p. 111; Wehberg, p. 44; Ferrand, p. 232.

things or services.²¹⁹ Consequently the restrictions with respect to requisitions apply equally to contributions.²²⁰ Contributions may not be imposed to raise money which is to be spent in the occupant's own country in supplying the needs of his army.²²¹ They may not be imposed for the purpose of enriching the occupant²²² or for impoverishing the population and thus exerting pressure on it to sue for peace.²²³ Nor may they be exacted for the purpose of paying the expenses of the war or to meet expenses of operations outside the occupied territory.²²⁴ Article 49 of the Hague Regulations relating to contributions²²⁵ contains no provision that levies shall be in proportion to the resources of the country. It has been cogently argued by many

219. Ferrand, p. 232; Westlake, Part II, p. 111; Rolin, par. 499; Spaight, p. 388; cf. British Manual of Military Law, par. 423.

220. Spaight, p. 383; Westlake, Part II, p. 111; Rolin, par. 499.

221. Westlake, Part II, p. 111, states: "The provision made at home must be borne by him [the occupant] out of his general resources * * *"

222. Rolin, par. 499.

223. Ferrand, p. 222.

224. Rolin, par. 499; Garner, Vol. II, p. 114; Hyde, Vol. II, p. 371.

225. FM 27-10, par. 341.

writers that the provision in Article 52 of the Hague Regulations²²⁶ requiring requisitions to be in proportion to the resources of the country applies also to contributions.²²⁷ The basis for this view, which seems sound, is that contributions are on the same level with requisitions.²²⁸ The phrase "needs of the army" is indefinite and vague.²²⁹ An army of occupation may require many things: food, clothing, billets, transportation, arms and munitions, and money for pay of its soldiers and officers. May contributions be exacted and expended for all of these items? No doubt exists that contributions may be exacted for food for men and animals, clothing, billets, means of transportation, and other similar items.²³⁰ Rolin denies that pay of soldiers and officers and arms and munitions are proper items. He argues that contributions are imposed as an equivalent.

226. FM 27-10, par. 335.

227. Rolin, par. 499; Ferrand, p. 238; Hall, p. 510.

228. Rolin, par. 499; Westlake, Part II, p. 112.

See Garner, Vol. II, p. 113, for protest of Belgian Government in World War I to contributions imposed by Germans based on the ground that they were excessive, being two-thirds and three-fourths of the total budget of the state, and that the country was impoverished.

229. See Lawrence, p. 426; Garner, Vol. II, p. 114.

230. Rolin, par. 501.

for requisitions and that since neither money nor arms and munitions may be requisitioned,²³¹ levying contributions for these purposes is improper.²³²

Literally interpreted the phrase "needs of the army" is broad enough to cover all of these items.²³³ Although the authorities furnish no direct answer to the problem raised by Rolin, the related and cognate question of what items are included when an occupied country agrees to maintain the army of occupation has been discussed. Robin, after reviewing many treaties containing "maintenance" clauses, states:

Therefore in our opinion the obligation, pure and simple of "maintenance" imposed upon an occupied country will include at most lodging, food, and the treatment of the sick and wounded, but not equipment, arms or pay.²³⁴

The question of pay for officers and men was considered in the Armistice agreement between Germany and the Allied powers in 1918. Article IX of the Armistice states that "the upkeep of troops of occupation of the countries of the Rhine

231. See p. 143, *supra*, for view that arms, etc., may be requisitioned.

232. Rolin, par. 501. Rolin's argument is hardly decisive since the requisitioning of money is improper in any case, whether for food of the army or any other purpose. See p. 146, *supra*.

233. Cf. Lawrence, p. 426.

234. Robin, p. 294.

* * * will be charged to the German government".

The Hunt Report states:

From this it is clear that the German government was under obligation to pay for the maintenance of the American Army of Occupation * * *

*

*

*

The cost of occupation included far more than the pay of troops, for the cost of food, clothing, supplies, billets and requisitions had to be settled * * * It was equally clear that as far as the troops were paid in cash, Germany would have to fulfill this obligation at once * * * The Army of Occupation was certain to need many millions of marks, not only for the troops, but also for the payment of requisitions, claims, etc.²³⁵

Article 51 of the Hague Regulations requires that the occupant in levying contributions follow the existing law as far as possible with respect to rules of assessment and incidence of taxes.²³⁶ The Germans in occupying Belgium in World War I levied a contribution of 1,000,000 francs on Baron Lambert de Rothschild and a contribution of 30,000,000 francs on M. Solvay.²³⁷ Garner says that such a procedure is nothing but a form of confiscation; he states that "the regulations of the Hague Convention as well as the discussions of the subject by the text writers assume that communities and not individuals

235. Hunt Report, p. 219.

236. FM 27-10, par. 342.

237. Garner, Vol. II, p. 115.

may be made the object of contributions".²³⁸ It is also to be observed that the rules of assessment and incidence of taxes of Belgian law were not followed.

The United States forces of occupation levied contributions on imports and certain exports in the form of customs duties in the Phillipines in 1898.²³⁹ In the Mexican War of 1846 the United States military governor in occupied Mexico imposed levies on imports, neutral and even American.²⁴⁰

Contributions may be levied only on a written order and on the responsibility of the commander in chief.²⁴¹ Levies of contributions by commanders of small units or detachments are prohibited.²⁴²

238. Garner, Vol. II, p. 116.

239. Magoon, p. 217.

240. Taylor, p. 551; Moore; Vol. VII, p. 282, et seq.

Cf. Cross v. Harrison, 16 How. 164; TM 27-250, p. 7, in which the court sustained the power of the military governor to impose import and tonnage duties during the belligerent occupation of California, the court said: "The President, as constitutional commander-in-chief of the Army and Navy, authorized the military and naval commander to exercise * * * belligerent rights * * * and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession * * * No one can doubt that these orders of the President * * * was were according to the law of arms * * *"

241. Art. 51, FM 27-10, par. 342.

242. Ferrand, p. 240. Cf. FM 27-10, par. 335, with respect to requisitions which permit the "commander in the locality" to make them.

Seemingly the term "commander in chief" refers to the highest military officer charged with the administration of the occupied territory.²⁴³ Ferrand doubts whether a general delegation of the right to levy contributions may be made by the "commander in chief" to anyone.²⁴⁴

Contributions, as has been shown, are money demands²⁴⁵ and, therefore, commodities as such may not be exacted as contributions.²⁴⁶ In 1942 Germany introduced a metal tax in occupied France requiring certain types of taxpayers to pay fixed percentages of their taxes in metals, the supply of which was short and needed for the German war industry.²⁴⁷ If this be considered as a contribution it is improper as an exaction in kind. It is objectionable on the separate ground that it is not for the needs of the army of occupation.²⁴⁸ In primitive communities

243. Cf. Rolin, par. 500; Ferrand, p. 240, et seq.

244. Ferrand, p. 240.

245. FM 27-10, par. 341; Westlake, Part II, p. 107; British Manual of Military Law, par. 423.

246. See Nussbaum, Money in the Law, pp. 37, 42, 49, for distinction between money as a medium of exchange, legal tender, and receivability for payments to government.

247. Bloch, p. 79.

248. Its invalidity as a tax measure is apparent on several grounds; however, mention of one will

some commodities may be the medium of exchange and receivable in payment of tax obligations.²⁴⁹ In such circumstances contributions in kind limited to such commodities would seemingly be permissible as being contributions in money.²⁵⁰ An occupant who finds it difficult to secure prompt money payments may accept securities and bills of exchange from the contributors in lieu of money. This practice was used by the Germans in the Franco-German War of 1870.²⁵¹

There is no obligation imposed by the Hague Regulations for the reimbursement of contributions.²⁵² The receipt required to be given the contributors²⁵³ is evidence that money has been exacted but implies no promise to pay by the occupant.²⁵⁴ The receipt is intended to secure to the contributors "the

248. (Contd.) suffice. It was not imposed for the administration of the occupied territory but for the needs of Germany home industry.

249. It is reported that in the Shensi province of China wheat and flour are used to pay taxes, wages and rents. Bloch, p. 79.

250. Cf. Feilchenfeld, p. 45.

251. Ferrand, p. 243.

252. Ferrand, p. 245.

253. Art. 51, FM 27-10, par. 342.

254. Holland, p. 55.

possibility of being indemnified afterwards by their own government".²⁵⁵

Forced Loans.

A forced loan is an involuntary exaction of money imposed on the inhabitants by the occupant which the latter is bound to repay.²⁵⁶ It is a form of contribution and differs from the latter only in that there is a duty of returning the money exacted. The same rules that govern contributions apply to forced loans.²⁵⁷

Taxation.

Article 48 of the Hague Regulations provides that if the occupant collects taxes 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 be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was so bound.²⁵⁸

This article neither confers nor denies the right to the occupant to collect taxes; it simply

255. Lauterpacht, p. 320.

256. See Whiteman, Vol. III, p. 1609.

257. See opinion of Sir Edward Thornton, as umpire, in the case of Francis Rose (United States v. Mexico), where he stated: "A forced loan equitably proportioned amongst all the inhabitants, is a very different thing from the seizure of property from a particular individual." Quoted Whiteman, Vol. III, p. 1611.

258. FM 27-10, par. 293.

provides that if he does collect the taxes he shall be subject to the two conditions stated in the article.²⁵⁹ The words "for the benefit of the state" exclude local dues or taxes collected by local authorities.²⁶⁰ For example, under the English tax system local "rates" are levied by local bodies such as parishes, municipalities, and counties²⁶¹ for local purposes as distinguished from taxes raised for general state purposes. Taxes raised by local authorities for local purposes may not be diverted by the occupant from the purpose for which they were raised²⁶² although the occupant may supervise their collection.²⁶³ It would seem that state taxes collected by local bodies and not used for local purposes but transmitted to the state treasury are taxes "imposed for the benefit of the state".²⁶⁴

259. Westlake, Part II, p. 105.

260. FM 27-10, par. 296.

261. See Wright and Hobhouse on Local Government and Local Taxation in England and Wales, 7th ed., for complete lists of local authorities.

262. British Manual of Military Law, par. 369.

263. Spaight, p. 378; Holland, p. 54.

264. Cf. Huber, p. 686; Bordwell, p. 312.

The occupant in collecting taxes must follow the rules of procedure²⁶⁵ as well as the law of the country with regard to the distribution of the tax burden.²⁶⁶ This is an instance of the general rule that the occupant shall respect the laws in force in the occupied territory unless absolutely prevented.²⁶⁷ The words "as far as is possible" in Article 48 indicate that the tax laws of the country need not be followed if it is impracticable to so do, as for example, the flight or unwillingness of the local officials to serve.²⁶⁸ In such a case the occupant may make such changes in the method of recovering the tax as will permit him to bring in the same amount of the tax.²⁶⁹ It is a good practice to allot the total amount of the taxes to be paid among the districts, towns, etc., and make the local authorities responsible for its collection as a

265. Art. 5, Declaration of Brussels, quoted in Baker and Crocker, p. 351, provides that such taxes shall, as far as is possible, be collected "in accordance with the existing forms and practice".

266. See Fiore, par. 1567, who states that the occupant shall have the right to collect taxes already established by law in the manner and conformable to the usages in force in the occupied country. British Manual of Military Law, par. 369.

267. Bordwell, p. 312.

268. FM 27-10, par. 294; Bordwell, p. 312.

269. British Manual of Military Law, par. 371.

capitation tax.²⁷⁰ The occupant may suspend an existing tax or increase the rate if the revenue be insufficient to pay the expenses of government. In 1847 General Scott in Mexico ordered the payment of the usual taxes due to the Mexican Government except the rent derived from lotteries which he prohibited. A tax increase imposed by the occupant to furnish adequate revenue for the administration of the occupied territory is considered by many writers as a contribution,²⁷¹ although it may be justified as a change in law necessitated in the interest of public order and safety.²⁷² The British Manual of Military Law states that the occupant must not create new taxes as that is a right inherent in the legitimate sovereign.²⁷³ If the occupant cannot create new taxes,²⁷⁴ he may levy contributions which serve the same end.²⁷⁵

270. FM 27-10, par. 294; see Spaight, p. 379.

271. Latifi, p. 32; Hyde, Vol. II, p. 370; Spaight, p. 382; German War Book, p. 141.

272. Feilchenfeld, p. 49.

273. British Manual of Military Law, par. 372. A similar paragraph appearing in the United States Rules of Land Warfare, 1917 ed., was deleted in FM 27-10; see also Rolin, par. 495.

274. It would seem that new taxes could in a proper case be justified in the interest of public order and safety. See Fiore, par. 1567.

275. Spaight, p. 379; British Manual of Military Law, par. 372. Cf. Magoon, p. 227, who stated: "It

The duty of the occupant to defray the expenses of administration of the occupied territory is dependent upon his collecting taxes imposed for the benefit of the state.²⁷⁶ In other words, the duty of defraying expenses of administration and the collection of taxes are interdependent and bilateral obligations.²⁷⁷ Seemingly the extent of the occupant's duty to defray such administrative expenses is limited to the extent of his tax collections.²⁷⁸ Administrative expenses of the occupied territory are a first charge against the tax collections. The occupant may use the surplus only for his own purposes.²⁷⁹

Article 48 of the Hague Regulations requires the occupant who collects taxes to "defray the

275. would therefore seem that the payment of customs duties, if considered as taxes levied by a Government resulting from military occupation of hostile territory; or as military contributions required from hostile territory; or as a condition imposed upon the right of trade with hostile territory, are each and all legitimate and lawful requirements imposed by exercise of belligerent rights."

276. Lauterpacht, p. 348, footnote 1; British Manual of Military Law, par. 402. Contra, Rolin, par. 495, who states that the occupant's duty to pay the expenses of administration results not only from the collection of taxes but from the fact of occupation.

277. See Spaight, p. 378; cf. Huber, p. 672.

278. Cf. Westlake, Part II, p. 105.

279. Rolin, par. 495; FM 27-10, par. 295.

expenses of administration of the occupied territory to the same extent as the legitimate government was so bound". The legitimate government is rarely under any legal obligation to maintain any fixed scale of spending and, therefore, according to Westlake, the extent of the occupant's duty in defraying expenses refers to the scale existing at the date of invasion.²⁸⁰ Fiore states that the occupant must "devote the moneys collected by means of taxes to their natural and proper purposes, namely, that of providing for the needs of the occupied country and especially for public services, education, and public works".²⁸¹

The provision of Article 48 requiring the occupant to defray the expenses of administration of the occupied country is directly linked to his duty to respect existing law under Article 43 of the Hague Regulations.²⁸² Generally speaking, and subject to the exceptions hereafter noted, the character of government activities to which the occupant must devote the tax moneys is determined by the government activities he allows to function or is obliged to

280. Westlake, Part II, p. 105.

281. Fiore, par. 1568.

282. See Bordwell, p. 312.

maintain in respecting existing law.²⁸³ The occupant, on the other hand, need not expend taxes for the support of an agency or activity contrary to his military interest or detrimental to order and safety although a part of the legitimate government's administrative expense. Thus payments of a political nature to Fascist officials or institutions need not be made in the occupation of Fascist countries.²⁸⁴

Similarly, government agencies or officials suspended by the occupant need not be supported by tax collections.²⁸⁵ The Germans in occupying Belgium in World War I made no outlays from tax moneys to the civil list of the King of Belgium, for the maintenance of Parliament, the army, absent ministers and suspended ministries,²⁸⁶ although generally they met the expenses of administration.²⁸⁷

283. Cf. The Instructions for the Government of Armies of the United States in the Field of 1863, G.O. 100, par. 39, provides that the salaries of civil officers of the hostile government who continue the work of their offices such as judges, administrative or police officers are paid from the public revenue of the invaded territory until the military government has reason wholly or partially to discontinue it.

284. M 353-2, p. 89.

285. Lauterpacht, p. 348; Kohler, p. 71.

286. Kohler, p. 71.

287. Garner, Vol. II, p. 66.

It is clear that not all expenditures made by a government are expenses of administration. The difficulty of the problem is underlined by a brief examination of the nature of expenditures made by governments during peacetime. Thus a recent writer on public finance analyzed the United States peacetime expenditures as follows:²⁸⁸ (1) Government Cost Payments, and (2) Non-Governmental Cost Payments. The latter term embraces those disbursements which cannot, by even the broadest interpretation, be treated as part of the cost of maintaining and operating the government or of rendering service in the way of payment of pensions, grants-in-aid, etc. These Non-Governmental Costs include disbursements for the purpose of retiring the public debt²⁸⁹ and other expenditures not pertinent here. Willoughby classifies Government Cost Payments according to character by distinguishing between that part of general governmental costs due to the cost of operating the government proper,²⁹⁰ that is, that which

288. Willoughby, Financial Condition and Operation of the National Government, 1921-30, p. 111; see also Howard, Principles of Public Finance, p. 30 (1940).

289. Willoughby, op. cit., p. 167.

290. Howard, op. cit., p. 30, classifies the expenditures for the operation and maintenance of government departments as being distributed among general

is entailed in operating the government as an administrative mechanism and in performing its varied activities other than the conduct of special business enterprises, and that part that represents Other Government Costs, i.e., those expenditures that do not have anything to do with the cost of operating the government proper. The Other Government Costs are such costs as the payment of interest on the public debt, the payment of pensions, the payment of moneys to other public bodies to aid them in meeting their obligations, and the like.²⁹¹

Does the term "expenses of administration" under Article 48 of the Hague Regulations include payment of the public debt of the sovereign, interest on that debt, or pension payments? It is submitted that those expenditures by government classified by Willoughby as Non-Governmental Cost Payments, such as the payment of the public debt or any obligation of the legitimate government comparable to it,²⁹² are not administrative expenses. It can hardly be said that there is any rule of

290. (Contd.) government, protection to life and property, health, sanitation, highways, charities, hospitals and correction, education, recreation, development and conservation of natural resources and miscellaneous.

291. Willoughby, op. cit., pp. 111, 142.

292. M 353-2, p. 220.

international law requiring payment of pensions or interest on the public debt.²⁹³ Whether pension or interest payments are made by an occupant is a matter of policy. It would seem from Kohler's account of the German occupation of Belgium in World War I that interest payments were made out of tax collections except payments to enemy countries.²⁹⁴ On the other hand, no expenditure was authorized for the purpose of paying interest on the national debt or on any obligation comparable to the national debt in the Allied occupation of Sicily.²⁹⁵ AMG in Sicily authorized as a matter of policy the continued operations of all social insurance and social welfare institutions.²⁹⁶

Kohler states that the costs of the German civil administration of the country "which could not be taken out of contributions like those of the army of occupation, were charged to the Belgian budget", i.e., paid out of taxes.²⁹⁷

293. These services were classified by Willoughby as Other Costs of Government.

294. Kohler, p. 71; cf. Garner, Vol. II, p. 66.

295. M 353-2, p. 220, cf. M 353-2, p. 88, where communes and other local authorities in Sicily were permitted to pay from their budgets current expenses such as wages, salaries and lighting, but not service of the funded or unfunded debt.

296. M 353-2, p. 274.

297. Kohler, p. 70

Article 48 of the Hague Regulations, which requires the occupant to maintain the existing rules of assessment and incidence of taxes so far as possible, prohibits him from collecting taxes before they are due.²⁹⁸ Conversely, the occupant would not be bound to recognize the validity of a premature payment of taxes made to the legitimate sovereign,²⁹⁹ nor would the occupant be bound to recognize a lump sum payment made by a taxpayer to the legitimate government in lieu of future taxes.³⁰⁰

Taxation --
Jurisdiction.

A question of some importance relates to the right of the occupant to collect tax claims under the following circumstances: the debtor's property is in the occupied territory but he is resident elsewhere or he is within the occupied territory and his property is located outside, or, it may be that although the debtor and his property are within the occupied territory the taxing authorities of the legitimate sovereign are in a district not subject to the occupant's control. Huber briefly discusses these questions and states his conclusions as follows:

Claims under public law, such as tax claims, may be collected by the occupant for personal taxes

298. Spaight, p. 379.

299. Spaight, p. 380.

300. Cf. Spaight, p. 380.

where the taxpayer has his domicile, and for real property taxes where the taxed object is situated even though it might not occupy the locality in which is located the authority competent to make collection.³⁰¹

The power of an occupant to tax absentees was raised by an order issued by the German Governor-General in 1915 in occupied Belgium. The order declared that all Belgians who were subject to the regular personal tax for the year 1914 and who since the outbreak of the war had voluntarily left the country and had remained abroad for more than two months and who should not return before 1 March 1915, should be subject to an additional tax equal in amount to ten times the usual personal tax. The tax was due not later than 15 April and was recoverable by execution on property in the occupied territory owned by those liable thereto. This order has been condemned by some writers as punishment in the guise of a tax.³⁰² It has also been attacked by Meurer as a personal tax on absentees and therefore beyond the power of the occupant. He reasons that "occupation of a territory gives birth only to an exclusively territorial power, and produces no effect outside of the territories occupied. Hence, nationals

301. Huber, p. 676.

302. Bisschop, p. 141; Garner, Vol. II, p. 116; Fer-
rand, p. 201.

of those territories who reside outside of them are not subject to the power of the occupant".³⁰³ Feilchenfeld states that if this was a contribution for the needs of the army as distinguished from a tax for the benefit of the state it may have been justified insofar as it affected assets situated in Belgium.³⁰⁴

It is suggested that an occupant in collecting existing taxes imposed for the benefit of the state should, as far as is possible, follow the local law as to the situs of property and persons for tax purposes. This conclusion seems to follow from Article 48 of the Hague Regulations which provides that the occupant shall collect such taxes, so far as possible, in accordance with the rules of assessment and incidence in force.³⁰⁵ The occupant, however, would not seem to be under any similar restraint in imposing new taxes or changing existing taxes. In such case, he may formulate his own rules as to the situs of property or persons for tax purposes³⁰⁶ provided he does not attempt to tax persons or

303. Quoted with approval by Merignhac, p. 84.

304. Feilchenfeld, p. 50.

305. FM 27-10, par. 293.

306. See Beale, Vol. I, p. 51.

property outside of his control. It must be remembered that the power of the occupant to collect taxes is purely de facto and territorial, i.e., it extends only to persons or property under his actual control.³⁰⁷ The principles of conflict of laws relating to the situs of persons and property for tax purposes furnish a reasonable guide in dealing with parallel problems in belligerent occupation. In conflict of laws jurisdiction to levy a tax on a person is based upon jurisdiction over the person. Jurisdiction to tax a thing depends upon jurisdiction over the thing. Jurisdiction to tax a privilege depends upon the fact that the law of the state grants or permits the exercise of the privilege.³⁰⁸

Property of
Local Gov-
ernments.

Article 56 of the Hague Regulations provides that the property of municipalities and institutions dedicated to religion, charity, and education, the arts and sciences, even when state property, shall be treated as private property.³⁰⁹ All property of municipalities--real or personal as well as their securities and funds--are expressly placed on the

307. MacLeod v. United States, 229 U.S. 416; Oppenheim, 33 Law Quart. Rev. 363; Bordwell, p. 325.

308. Beale, Vol. I, p. 519.

309. FM 27-10, par. 318.

same basis as private property.³¹⁰ The fact that a municipality performs state as well as local functions will not deprive its property of its status as private property.³¹¹ In Pre-Fascist Italy the commune was an incorporated governmental body, semi-self-governing, performing local as well as state functions. Under the Fascist regime the self-government of the commune was substantially limited.³¹² In the occupation of Sicily by AMG the property of the commune was, nonetheless, treated as private property.³¹³ Some writers state that all local bodies must be considered on the same level with the municipality.³¹⁴ The British Manual of Military Law provides that the property of all local authorities, such as provincial, county, municipal and parochial authorities, is private property.³¹⁵ It should be noted, however, that the Hague Regulation confines the exemption to municipalities and does not name any higher body of local administration. The tests to be applied in

310. Huber, p. 680.

311. Huber, p. 686.

312. Unpublished Lectures, Sept. 1943, Paul Rava.

313. M 353-2, p. 142.

314. Westlake, Part II, p. 121; Rolin, par. 539; Fauchille, p. 274.

315. British Manual of Military Law, par. 429.

determining whether such higher body is to be assimilated to a municipality are not clear. It is suggested, however, that at least two essential conditions must be met before such body is entitled to the same treatment with respect to its property as the municipality: (1) It must have an independent economy, that is, it must have its own assets and finances³¹⁶ and, (2) its property and yield must be used to satisfy local needs.³¹⁷ If, however, the higher administrative body is merely a subdivision of the state administration and its financial structure is not independent of the state,³¹⁸ its property is treated as state property.³¹⁹ The property of a

316. Huber, p. 686.

317. Rolin, par. 539, says: "Community property merely satisfies local needs * * * There may be some hesitation in regard to provincial property but it seems evident to us that the same considerations which have led to treating community property as private property are equally applicable to provincial property. Although the needs served by the yield from provincial property are a bit more extended than those in reference to community property, nevertheless, we are still dealing here with local needs. They do not contribute to the general functions of the state, particularly the defense of the state." A caveat must be entered here to Rolin's assumption that provinces in all countries are such as he describes. See Huber, p. 686.

318. Huber says: "if they have a dependent financial organization and not one separate from that of the state it is state property." Huber, p. 686.

319. Huber, p. 686.

member state in a federal state is treated as state property and not private property.³²⁰ The property of a municipality is subject to requisitions and contributions.³²¹

Roads belonging to local authorities are under the control of the occupant; they are important means of communications. The fact of occupation places the occupant in possession of all the arteries of communication on land and water and no formal seizure is necessary.³²²

Property of
Religious,
Charitable,
etc., Insti-
tutions.

The property of institutions dedicated to religion, charity, education, and the arts and sciences, even when state property, are treated as private property.³²³ All seizure of, destruction, or willful damage done to institutions of this character, historic monuments, works of art, science, is forbidden and should be made the subject of legal proceedings.³²⁴ Article 27 of the Hague Regulations provides that in sieges and bombardments, buildings dedicated to religion, art, etc., must be spared as

320. Huber, p. 692.

321. Spaight, p. 416, footnote 4; Lauterpacht, p. 317.

322. Rolin, par. 539.

323. Art. 56, FM 27-10, par. 318.

324. Art. 56, FM 27-10, par. 318.

far as possible.³²⁵ Buildings dedicated to religion, art, etc., must be secured against all avoidable damage or destruction even during actual hostilities.³²⁶ Imperative military necessity will permit destruction or damage to such edifices during the conduct of hostilities.³²⁷

The use of edifices of this character by the military is justified only by the imperative necessities of war under Article 23g of the Hague Regulations.³²⁸ Where such necessity exists troops, sick and wounded, horses, and stores may be housed in such buildings.³²⁹ Subject to the exception noted hereafter, such property is subject to requisitions and contributions.³³⁰ There is a special category of property that is completely exempt from appropriation or requisition for military use. Works of art, science and historic monuments may not under any circumstances be appropriated or requisitioned for military use.³³¹ Article 56 of the Hague

³²⁵. FM 27-10, par. 58.

³²⁶. FM 27-10, par. 319; Garner, Vol. I, p. 453.

³²⁷. Spaight, p. 132; FM 27-10, par. 313.

³²⁸. Hyde, Vol. II, p. 379.

³²⁹. FM 27-10, par. 319.

³³⁰. Spaight, p. 416, footnote 4.

³³¹. Lauterpacht, p. 313.

Regulations which states that all seizure of such works and monuments is prohibited is in conformity with customary law.³³² Therefore, says Oppenheim, although the metal of which a statue is cast may be of the greatest value for cannons, it must not be touched.³³³ Customary and conventional international law prohibit the transportation of works of art and science into the occupant's own country.³³⁴ The Allied forces in occupying Italy took measures to preserve local archives, historical and classical monuments and objects of art and specifically ordered that steps be taken to prohibit completely the purchase and export of classical objects of art by members of the armed forces or others.³³⁵ Historic monuments will be respected even when these may recall to the occupant his past defeats.³³⁶ Fascist mural or monumental symbols are primarily political in character and can hardly be classified as works

332. Lauterpacht, p. 313; Rolin, par. 535.

333. Lauterpacht, p. 313.

334. Garner, Vol. I, p. 455, attacks the German claim that they removed works of art from France in World War I for the purpose of protecting them. See Rolin, par. 538.

335. M 353-2, p. 17.

336. Merignhac-Lemonon, p. 606.

of art, etc.³³⁷ Spaight summarizes Article 56 as follows:

Roughly, one may give the gist of the Article as this: first, a commander may, if necessary, turn a church into a hospital, but he may not auction the vestments or other church property to raise money. Secondly, he must not carry off or damage that class of property which may be generically described as "starred by Baedeker".³³⁸

Archives and records, both current and historical, are of immediate and continuing use to the occupant and he may seize such records although he must make every effort to preserve them.³³⁹

CHAPTER VI

PUBLIC PROPERTY

General.

The Hague Regulations classify property owned by the state as movable and immovable.¹ The treatment the occupant must accord each of these is substantially different.

What will be said with regard to public property is subject to the rule of paramount military

337. Cf. M 353-2, p. 87.

338. Spaight, p. 416.

339. FM 27-5, par. 9, p; M 353-2, p. 17.

1. See FM 27-10, pars. 315, 320.

necessity. All property, public and private, may be seized or destroyed if imperatively demanded by the exigencies of war.² Movable state property found on the battlefield is legitimate booty and may be confiscated.³ The property of sanitary formations and establishments is dealt with elsewhere and is excluded from the discussion.⁴

Movable State
Property.

Article 53, paragraph 1, of the Hague Regulations is a limitation on the occupant's right to appropriate as booty movable property owned by the state.⁵ It modifies the ancient law that all property, public and private, may be appropriated by the occupant as booty.⁶ Under Article 53 an occupant may appropriate "all movable property belonging to the State which may be used for military operations".⁷ Such property need not be directly usable for military operations as in the case of ammunition but includes property

2. FM 27-10, par. 313.

3. See p. 167, *supra*, with respect to private property used by the enemy in connection with actual hostilities. Lauterpacht, p. 310.

4. See JAGS Text No. 7, p. 130, et seq., for detailed discussion.

5. Rolin, par. 543.

6. De Louter, p. 298; Lauterpacht, p. 307.

7. Rolin, par. 546.

indirectly serving the same purpose.⁸ State movable property which may not be used for military operations, directly or indirectly, is not subject to appropriation as booty but must be respected.⁹ Thus pictures, books, collections of all kinds, etc., belonging to the state are not susceptible of military use and may not be appropriated as booty.¹⁰ As has been shown, the Hague Regulations lay down two essential requirements in order that movable property may be appropriated by the occupant:

- (1) the property must belong to the state and,
- (2) must be capable of use in military operations.¹¹

Article 53 expressly recognizes the occupant's right to appropriate cash, funds and realizable securities which are strictly the property of the state, depots of arms, means of transport, and stores and supplies.¹²

Where the occupant appropriates proper movable property as booty, he is under no duty to restore or

8. Huber, p. 683; Rolin, par. 547; Lauterpacht, p. 309. FM 27-10, par. 321, is more restrictive than the rule stated above.

9. De Louter, p. 301.

10. Merignhac-Lemonon, p. 607. Of course papers connected with the war may be seized. British Manual of Military Law, par. 431.

11. Huber, p. 660.

12. FM 27-10, par. 320. Funds and realizable securities will be discussed later.

pay indemnities for it upon the conclusion of the peace.¹³ Although Article 53, paragraph 1, uses the word "saisir"¹⁴ in referring to the occupant's right of appropriating movable state property, he may undoubtedly use such property, remove it from the country, sell, destroy or consume it.¹⁵ Holland states that "the occupying army may not only 'take possession' (saisir) of the things mentioned, but may also confiscate them for the benefit of its own Government absolutely".¹⁶

Means of
Transport
Belonging
to State.

An occupant may appropriate state owned automobiles, trucks, horses, and airplanes, and, as has been shown, there is no duty of restitution or indemnity on the conclusion of the peace. However, there has been considerable disagreement on the treatment of railroad material belonging to the state such as engines and other rolling stock. Some writers state that railroad rolling stock is an

13. The peace treaty may provide to the contrary. Rolin, par. 547.

14. FM 27-10, par. 320, translates it as "take possession of".

15. Huber, p. 662.

16. Holland, p. 57. See Spaight, pp. 410, 418, who uses the word "confiscate" to describe the "taking" and states that the property becomes the occupant's outright without the duty of indemnity or compensation.

integral part of the land and must be treated as immovable property. Under the Hague Regulations an occupant has a right of use in immovable property and may not sell the property or keep it after the peace.¹⁷ The same argument has been advanced with regard to the telephone and telegraph equipment.¹⁸ The predominant view seems to be that Article 53, paragraph 1,¹⁹ intentionally omitted any reference to restitution although it specifically speaks of "means of transport" as property subject to appropriation.²⁰ Latifi states:

Some writers have attempted to establish an immunity in favour of the rolling-stock of railways, telegraphs, postal wagons, steamboats (other than those governed by maritime law), etc., belonging to the State on the principle that superficies solo cedit; Article 53 of The Hague Convention has, however, removed all doubt on the subject by expressly declaring all means of transport owned by the hostile Government liable to confiscation.²¹

Funds and
Realizable
Securities.

An occupant may according to the express terms of Article 53 appropriate cash, funds, and realizable

17. Rivier, p. 311; Merignhac-Lemonon, p. 612; Rolin, par. 547.

18. Rolin, par. 547.

19. FM 27-10, par. 330.

20. Latifi, p. 16; Huber, p. 669. See Rouard de Card, cited in Spaight, p. 413. Tracks, buildings and other immovable property connected with a state railroad are subject to Art. 55 relating to real property. FM 27-10, par. 315.

21. Latifi, p. 16.

securities which are strictly the property of the state.²² Thus the occupant may appropriate specie, paper money and bullion belonging to the state.²³ The power of the occupant to collect taxes, dues and tolls is admitted.²⁴ The problems with respect to realizable securities relate to the right of the occupant to collect debts owing to the legitimate sovereign when evidenced by written instruments such as bonds, negotiable instruments and similar securities, or ordinary debts not so evidenced. Bearer instruments belonging to the legitimate sovereign may be appropriated as booty by the occupant and he may sell the security before maturity or sue at maturity irrespective of whether he has maintained his occupation.²⁵ Bearer instruments are assimilated to specie money.²⁶

An occupant may not sell securities payable to the legitimate government or its order.²⁷ The occupant is not the legal successor to the legitimate

22. FM 27-10, par. 320.

23. Huber, p. 669.

24. See p. 184, *supra*, for discussion.

25. Westlake, Part II, p. 113; Huber, p. 664; Spaight, p. 411.

26. Huber, p. 665.

27. Westlake, Part II, p. 114; Huber, pp. 664, 665.

government and is therefore incapable of passing title to such securities.²⁸ Whether the occupant may collect the debt evidenced by such an instrument on maturity will be considered separately.

The right of an occupant to collect debts whether evidenced by instruments payable to the legitimate government or order or resting on a contract right not so evidenced is the subject of considerable controversy. The term "realizable securities", according to Holland, is intentionally ambiguous.²⁹ There is substantial agreement that the term "realizable securities" as used in Article 53 refers to matured debts. Some writers argue that this merely prohibits an occupant from collecting debts not matured but does not authorize him to collect matured debts owing to the state.³⁰ They reason that incorporeal rights such as a debt inhere in the person of the creditor and since the occupant is not the successor to the legitimate government payment to the occupant would not be a discharge of

28. Westlake, Part II, p. 114.

29. Holland, p. 57. The original text is "valeurs exigibles". The Germans officially translated it as "eintreibbare Forderungen", suable claims. Huber, p. 671.

30. Westlake, Part II, p. 114.

the debt.³¹ The predominant view, according to Hershey, is that an occupant may collect all debts due to the legitimate government which have matured during the period of occupation.³² All authorities, however, are agreed that the occupant may not require payment of a debt before maturity as the debtor is entitled to the benefit of his contract.³³ There is also unanimity on the proposition that unmatured debts, except bearer instruments, may not be sold or transferred by the occupant since he is not the successor to the legitimate government, nor, for the same reason, may he release the debtor by accepting a premature payment or forgive the debt even if matured.³⁴ Latifi states that Article 53 of the Hague Regulations settles the dispute; he says: "The army of occupation can take possession of the enemy's 'realizable securities', a term which includes all obligations already accrued or that accrue during occupation."³⁵ Latifi finds additional justification

31. Rolin, par. 257, et seq.; see Spaight, p. 411, citing Hall, Westlake and Pillet.

32. Hershey, p. 620; Huber, pp. 664, 669, 670; Bordwell, p. 324; Latifi, p. 25; Merighnac-Lemonon, p. 609; Rivier, p. 308.

33. Rivier, p. 308.

34. Rivier, p. 308; Huber, p. 675.

35. Latifi, p. 25.

on the ground that the occupant may collect the debts due to the legitimate sovereign as administrator of the occupied territory "so that the debtor may not be enriched without cause".³⁶ Bordwell states:

The practice of appropriating debts due the legitimate power is too well established, however, to be questioned as a rule of law, and on principle it has the weight of authority in its favor * * * It springs from the authority the occupant has over the persons of the inhabitants rather than from that over property itself. If the occupant is entitled to collect the public obligations due the legitimate power, there seems no valid reason why he should not be entitled to the private obligations due the legitimate power also. In both cases, the right of appropriation is purely a de facto right. As far as either claim has been actually paid under compulsion, such payment binds the legitimate power, but only so far. The release of an obligation beyond the amount actually collected is in no wise valid against the restored sovereign.³⁷

36. Latifi, p. 26.

37. Bordwell, p. 324. In 1923 the Polish Supreme Court refused to recognize the cancellation of a judicial mortgage in the sum of 10,916 roubles on a Polish landowner's estate in favor of the Russian Government by the German administration in occupied Russia. In 1911 the Russian Government recovered a judgment against T, a landowner, in the sum of 10,916 roubles which became a judicial mortgage against T's real estate. During the occupation of Russia by the Germans, T asserted a counter-claim against the Russian Government. The German authorities cancelled the Russian Government's mortgage against T as a result of a compromise agreement whereby T released his counter-claim against the Russian Government and paid 3,800 roubles on the mortgage to the German administration. The decision is based principally on the lack of power of the occupant to compromise an unliquidated claim against the sovereign. See Szymon Rundstein, *Revue de Droit International et de législation comparee*, 1925, pp. 607-614, for a broader interpretation of this decision; *Annual Digest*, 1923-24, Case No. 246.

Huber states that in 1870-1871 the German authorities in occupied France collected matured debts or debts in arrears. He also says: "The conduct observed by the Allies in the Balkan wars of 1912 agrees in that respect with that of the Germans in 1870; without exception all credits * * * found in banks were collected by them."³⁸

In January of 1899, a British banking firm, whose principal place of business was at Manila, Philippine Islands, sold through its branch house on the island of Luzon, a draft for \$100,000 in favor of the Treasurer of the Philippine insurgents. The United States military authorities required the British banking firm to pay over to them the funds represented by the draft. Mr. Magoon, law officer of the War Department, Division of Insular Affairs, advised that the United States authorities were justified in their conduct and that the right of the United States to do so did not depend upon the possession or surrender of the draft issued by the bank when the money was received by it.³⁹ According to Mr. Magoon, an attempt by the Insurgents to compel

38. Huber, p. 671.

39. Magoon, p. 261; Moore, Vol. VII, p. 278. This transaction took place after the signing of the treaty of peace but before the exchange of ratifications.

the banking house to pay the debt a second time would be plunder.⁴⁰ According to Huber an occupant must recognize the right of set-off which a debtor has against the legitimate sovereign arising from a current-account relationship. He states that the problem has arisen twice in practice: during the German occupation of Strasbourg in 1870-1871 and the Serbian occupation of Turkey in 1912. In both cases the legitimate government had accounts in private banks and the banks had claims against the governments as a result of a current-account relationship. Huber continues:

The German and French Governments admitted that a bank must only deliver to the occupant claims of the State to the extent to which its accounts show a debtor balance by it. The Turkish Government, supported by France, took the same position in the case of the Ottoman Bank at Uskub.

The problem may be complicated by a branch bank being in occupied territory and the principal office in unoccupied territory. The French State had a current-account relation with the Bank of France, a private bank, opened in the bank's principal office in Paris. The Germans in occupying Strasbourg in 1870 seized a credit of 2,870,000 francs with the Strasbourg branch.

40. Magoon, p. 263. See Huber, p. 664, who states that the collection of a matured debt by the occupant discharges the debtor and must be recognized by the legitimate sovereign.

The Germans later restored the money to the branch.⁴¹ The reason for restoring the money, according to Huber, was that no independent debt existed at the Strasbourg branch in favor of the French Government; that the credit balance at Strasbourg was subject to set-offs on a nation-wide basis.

The power of the occupant to recover debts due the legitimate sovereign presupposes that either the person of the debtor or his property is within the occupied territory.⁴² The mere possession by the occupant of the evidence of indebtedness, bearer instruments excepted, is insufficient. Conversely, the failure of the occupant to possess the evidence of indebtedness is immaterial if the debtor be within the occupied territory.⁴³ If the debt be secured by a pledge of movable or immovable property Huber believes that the occupant has the right to recover the debt if the debtor is domiciled in the occupied territory although the pledge is outside the occupied territory. On the other hand, the possession of the pledge alone, says Huber, does not give the occupant

41. Huber, pp. 673, 677.

42. See Bordwell, p. 325, who states that "the right of appropriation is purely a de facto right".

43. Magoon, p. 261.

a right to collect the debt or realize on the pledge.⁴⁴

It is difficult to agree with Huber's conclusion.

It is believed that the rules of conflict of laws with respect to situs of debts are not binding on the occupant.⁴⁵ The presence of the person or property of the debtor within the occupied territory is sufficient to give the occupant the power of collection.⁴⁶

Immovable
State
Property.

Article 55 of the Hague Regulations states that the occupant shall be regarded as administrator and usufructuary of public buildings, real estate, forest, and agricultural estates belonging to the hostile state. The occupant must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.⁴⁷

A person, says Holland, is said to be a usufructuary or to enjoy a usufruct, in property in which he has an interest of a special kind for life or some lesser period.⁴⁸ The rules of usufruct require that the property be used in such a manner that its

44. Huber, p. 678.

45. The doctrines of conflict of laws have no international sanction. Beale, Vol. I, p. 51.

46. See Bordwell, p. 325.

47. FM 27-10, par. 315.

48. Holland, p. 59.

corpus is not impaired.⁴⁹ The occupant has no right of appropriating immovable property of the enemy state as booty.⁵⁰ He has a duty of managing such property and is entitled to the profits arising therefrom.⁵¹ He may not sell or alienate such property since this would be exercising sovereignty over the occupied territory.⁵² He may lease or utilize lands or buildings for the period of occupation,⁵³ e.g., he may lease the operation of public railroads, agricultural lands and forests and other public property and receive the profit from their operation.⁵⁴

It should be especially noted that in operating or leasing state owned railroads the occupant has a right of receiving the profit without any duty of accounting therefor.⁵⁵ Revenue arising from state property such as tolls from canals, bridges and roads, etc., belong to the occupant.⁵⁶

49. Holland, p. 59.

50. Huber, p. 661.

51. Westlake, Part II, p. 119.

52. Lauterpacht, p. 307.

53. FM 27-10, par. 316.

54. Bordwell, p. 328.

55. Wehberg, p. 35.

56. Rolin, par. 555.

An occupant may not remove and transport tracks on public railroads out of the occupied territory, relocate the right of way of such lines, or divert canals into new channels.⁵⁷ These are acts of permanent diversion or change and not within the power of a usufructuary.⁵⁸

An occupant may work mines, cut timber, and sell crops produced on the public domain.⁵⁹ The limits of the occupant's use are determined by the rules of usufruct. Where there is a difference in the rules of usufruct between those of the occupied territory and those of the occupant's country, it has been suggested that the occupant follow those of the occupied territory.⁶⁰ This has been justified on the ground that the occupant is bound to maintain existing law as far as possible.⁶¹ Bluntschli would allow the occupant to apply his own rules.⁶² The prevailing opinion at the Brussels

57. Garner, Vol. II, p. 128; Rolin, par. 555.

This is subject to the exception of paramount military necessity.

58. Rolin, par. 555.

59. FM 27-10, par. 316.

60. Spaight, p. 416.

61. Rolin, par. 556; Spaight, p. 416.

62. Bluntschli, sec. 646, cited in Spaight, p. 416.

conference was that the occupant does not exceed his rights so long as he works the property according to some recognized rules of usufruct.⁶³ What has been said is subject to the rule that public as well as private property may be seized, damaged or destroyed in the conduct of military operations.⁶⁴ Thus excessive cutting of trees or the denuding of a forest is justifiable if necessary for the actual conduct of hostilities.⁶⁵ Rolin poses this question: Is excessive cutting of a forest permissible in order to construct barracks?⁶⁶ Imperative military necessity would justify such an act during the conduct of military operations; mere convenience, says Rolin, is not enough.⁶⁷

63. Bordwell, p. 329. See Hall, p. 504, who says, "in cutting timber, for example * * * he [the occupant] must conform to the forest regulations of the country, or at least he must not fell in a destructive manner so as to diminish the future annual productiveness of the forests." The German War Book, p. 129, states that the occupant is not bound to follow the mode of administration of the enemy's forest authorities, but it must not damage the forest by excessive cutting, still less may it cut them down altogether.

64. See p. 127, supra.

65. Rolin, par. 556.

66. Rolin, par. 556.

67. It may be more convenient to cut timber than to buy it--but this is not imperative military necessity. Rolin, par. 556; Garner, Vol. II, p. 128.

It is agreed that the duty of the occupant "to safeguard the capital" of immovable property imposes an obligation on him not to exercise his rights in such a wasteful and negligent manner as to impair its value.⁶⁸ Some writers have interpreted this provision as requiring the occupant to use the income from the property so far as necessary to pay for the periodic expenses such as the interest on mortgages, etc., as well as the costs of upkeep to prevent impairment of the capital.⁶⁹ While it may be admitted that the use of income to pay costs necessary to preserve the property is proper, it does not follow that the payment of interest, etc., on indebtedness against the property is necessarily required. Feilchenfeld has pointed out that "an occupant administering real estate may simply 'safeguard the capital' by preventing creditors from attaching the property".⁷⁰ It should be noted that generally a sovereign's property is not subject to execution process without his consent. This is part of the broader rule that a sovereign may not

68. FM 27-10, par. 315; Hyde, Vol. II, p. 378.

69. De Louter, p. 300; Huber, p. 661.

70. Feilchenfeld, p. 69.

be sued without his consent.⁷¹ AMG in the occupation of Sicily gave the custodians of enemy property the power, exercisable in their discretion, to pay any mortgage interest or other obligations accrued on the property, to pay any other sums necessary for the preservation of the property, and to raise on the security of the property any sum required for its preservation.⁷²

Immovable
State Property -- Contracts of
Exploitation.

An occupant may make contracts for the exploitation of immovable state property for the period of occupation. Such contracts become inoperative on the termination of the occupation.⁷³ An instance occurring in the Franco-German War of 1870 illustrates this point. In 1870 the German Government, during the occupation of the departments of the Meuse and the Muerthe, sold 15,000 oaks growing in the state forests to a Berlin firm who paid in advance for the privilege of cutting the timber. The contractors had not completed the felling of the trees at the time that France re-entered its territory pursuant to the treaty of peace. The contractors contended that the Germans had the right to enter into the

71. Cf. United States v. Alabama, 313 U.S. 274.

72. M 353-2, p. 148.

73. Hall, p. 579; Bordwell, p. 328. See p. 162, supra, for distinction between contracts for the benefit of the occupied territory and contracts of exploitation for the benefit of the occupant.

contract and that the French Government was bound to permit them to complete the felling of the trees.

The contract was annulled by the French courts on the ground that the sale was wasteful and excessive, i.e., beyond the bounds of usufruct.⁷⁴ A separate ground taken by the French Government was that such a contract was valid only for the period of occupation and not thereafter.⁷⁵

Tests for
Determining

State Property. It should be remembered that an occupant is not the successor to the legitimate sovereign and, therefore, when he appropriates state property as booty, he is not obliged as a general rule to assume the liabilities of the legitimate government. He appropriates, says Huber, not the net wealth of the state but its gross wealth.⁷⁶

The Hague Regulations do not define state property nor do they lay down any tests for determining

74. Hall, p. 504.

75. Hall, p. 579; Lauterpacht, p. 483.

76. Huber, p. 694. In 1870-71, the German occupation authorities advanced money to the Savings Banks of Alsace and Lorraine on deposits made by the latter to the French State. Huber says that this was a mere measure of administrative expediency for alleviating economic crisis and is not a precedent. He also states that the occupant did not advance the Savings Banks enough money for complete reimbursement; depositors of below 50 francs were paid in full and others received percentage payments. Huber, p. 695.

what is state property.⁷⁷ Where there is any doubt whether property is public or private it is considered as public property until its private character is proved.⁷⁸ Wherever the ownership is doubtful the occupant may assume control over the property, that is, sequester it.⁷⁹

The practice of nations does not, with few exceptions, furnish any certain guide for determining the status of property.⁸⁰ The problem has become especially complicated in recent years by the active participation of governments in economic enterprise.⁸¹ Generally property and funds in the possession of the state or its departments are state property.⁸² State practice furnishes several apparent exceptions to this rule: property which "nominally belongs to the state, e.g., the funds of savings banks, may be

77. Huber, p. 658.

78. British Manual of Military Law, par. 432; FM 27-10, par. 322.

79. Huber, p. 663. Cf. M 353-2, p. 142. In the AMG occupation of Sicily, semistatal property, i.e., enterprises not the absolute property of the state but in which the state had a substantial interest, were treated as state owned at least for the purposes of control.

80. Huber, p. 681.

81. See Encyclopaedia of Social Sciences, Vol. VII, pp. 106, 109, for various types of organizations.

82. Huber, p. 667.

in reality private property under State management".⁸³ Trust funds administered by the state for pensions of widows and children, etc., are private property.⁸⁴ Colorable transfers of state property to private persons for the purpose of avoiding appropriation by the occupant are not binding on the latter.⁸⁵ The property of municipalities and higher administrative bodies has already been discussed.⁸⁶ Institutions devoted to religion, charity, education and other idealistic purposes are treated as private property even when owned by the state.⁸⁷

A separate legal personality may own property the status of which is in doubt by reason of the close connection between the state and the owner. Once the status of the owner, says Feilchenfeld, has been classified either as public or private,

83. Holland, p. 57. Such funds and securities, says Huber, must be separated physically or by earmarking from general government funds. Huber, p. 693.

84. Spaight, p. 411. See M 353-2, p. 274, for AMG handling of Social Insurance in Sicily.

85. Huber, p. 665, gives an example of this rule from the Balkan Wars of 1911-1912, where fictitious transfers of state funds were made to a Turkish general. The Serbian authorities treated the funds as state property.

86. See p. 197, *supra*.

87. See p. 200, *supra*.

his property follows his status.⁸⁸ The essential inquiry is the substantial identity between the owner and the state arising from the control and interest of the state in the enterprise.⁸⁹ The law of the occupied territory will fix the rights and powers of the state with relation to the owner.⁹⁰ It would seem, however, that the occupant is not bound by the conclusion reached by local law that an enterprise is private. No occupant would complain where the local law designated an organization as public, i.e., as having substantial identity with the state.

Various indicia have been suggested for determining the substantial identity of the state and the owner. The important fact to bear in mind is that many enterprises are subject to state regulation or supervision, but, nonetheless, retain their private status. The question is purely one of degree and the solution will depend on the cumulative effect of a combination of indicia or tests rather

88. Feilchenfeld, p. 58.

89. Cf. Huber, p. 682.

90. Huber, p. 683, says that in determining whether property may be appropriated as booty of the state the legislation of the occupied territory which is effectively in force there at that time must be considered.

than any one of them.⁹¹ Some of the indicia showing the substantial identity of the owner with the state are as follows:

1. Elements of state control.

a. State direction of the internal affairs of the owner as distinguished from simple supervision.⁹²

b. State representation by appointment or otherwise on the managing body of the enterprise.⁹³

c. Power of state to remove directors or managers of enterprise.

d. Requirement of state approval of specific matters arising in administration of enterprise.

e. State audit of accounts, periodic reports regarding its operations and financial condition.

f. Control by state regulatory commissions with regard to rules, changes, etc.

g. State power of disallowing by-laws and regulations of enterprise.

91. Cf. Huber, p. 680, et seq., who uses multiple tests. See also Feilchenfeld, p. 61.

92. See Huber, p. 682.

93. Huber, p. 682; cf. Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen et al., 43 F. (2d) 705.

h. State control over disposal of assets.

2. Other elements of state interest.

a. No separate assets from those of state except for accounting purposes.⁹⁴

b. State subsidies or other financial aid to enterprise.

c. State interest in resulting surplus or deficit.

d. Immunity from taxation or laws of state applicable to private persons generally.

e. Creation by state action apart from general law applicable to private persons.

f. State ownership of stock and extent thereof.

3. Function of enterprise.

a. Owner fulfilling a function normally performed by the state, i.e., a public function.⁹⁵

b. Owner invested with extraordinary rights generally exercised by the state such as expropriation.

94. Cf. Huber, p. 682.

95. Huber, p. 682.

CHAPTER VII

CONTRACTS AND OTHER TRANSACTIONS OF OCCUPANT

Contracts of
Occupant --
With Inhabi-
tants of Oc-
cupied Ter-
ritory.

An occupant who is in possession of territory for any considerable period may find it necessary to contract with the inhabitants. Hostile territory occupied by the United States is not "enemy territory" for the purposes of the Trading with the Enemy Act of 6 October 1917, as amended.¹ Where an occupant contracts with the inhabitants, the latter may not sue the occupant in the courts of the occupied territory. This result follows from the supremacy of the occupant's authority. He is subject neither to the law nor the courts of the occupied territory.² Even in peacetime, a state is immune from suit in the courts of another state without its consent.³ Recently, a New York court applied this rule of immunity in a suit brought against an

1. 40 Stat. 411, 50 U.S.C. App. 1. Sec. 2 of the act defines the words "United States" as used in the act to include all land occupied by the military or naval forces of the United States. See p. 30, *supra*.

2. Stauffenberg.

3. A number of countries -- Italy, Belgium, Egypt -- have permitted suits against a state arising out of commercial transactions. This exception is highly controversial. See 26 Am. J. Int. L. Supp. 455, at p. 606.

enemy state with which the United States is at war.⁴

Several decisions by domestic courts and a Mixed Arbitral Tribunal involve the question whether an occupant's contracts with the inhabitants are subject to his own law or to the law of the occupied territory. The German Supreme Court has held that:

A State occupying enemy territory during a war and concluding contracts with the population through its competent organs for the purchase and delivery of goods, will generally not have the intention to subject itself to the private law of the occupied territory in regard to these contracts, but rather to apply its own law thereto, and this situation will generally be recognized also by the other contracting party. Exceptions from this principle are, however, conceivable.⁵

In another case before the German Supreme Court, the German occupation authorities operated a railroad from Nisch to Belgrade and the question arose whether Germany was liable for the loss of goods in transit. The court stated:

Germany ran the Serbian railroad after the occupation of the country primarily for public purposes, in particular for the transport of army materiel and the maintenance of contact between Germany proper and the fighting army. To some extent Germany also permitted the transport of private freight on that railroad. It is obvious from all the facts that in doing so it had no intention in every respect to assume the liabilities of a forwarder but the intention clearly was to undertake transportation only

4. Telkes v. Hungarian National Museum, 265 App. Div. 192, 38 N.Y.S. (2d) 419 (1942).

5. Fontes Juris Gentium, Series A, Sec. II, Book I, p. 187, No. 259.

to the extent that no obligation would be imposed which would be difficult to perform during the war on enemy territory.⁶

A contrary view has been expressed by a Belgian-German Mixed Arbitral Tribunal under the following facts: a Belgian national made a claim against Germany arising out of an accident in Belgium in 1916 when the claimant was employed on a railway operated by the German authorities. The Tribunal held that a Belgian law of 1903 in regard to labor accidents governed. It declared that Article 43⁷ of the Hague Regulations meant "implicitly that as far as they are not abrogated, the laws of the country, and in particular legislation in respect to private law, remain fully in force". The Tribunal did not decide whether the German authorities could have introduced German law in regard to responsibility without violating Article 43.⁸

According to Stauffenberg, the occupant as the supreme authority does not submit to the local law

6. See Stauffenberg; *Fontes Juris Gentium*, Series A, Section 2, Book 1, p. 653, No. 266.

7. FM 27-10, par. 282.

8. II *Recueil des décisions des Tribunaux Arbitraux Mixtes*, 715, 719; Hackworth, Vol. VI, p. 394; Stauffenberg argues that Art. 43 is not applicable to contractual relations between the inhabitants of occupied territory and the occupant.

and consequently when he contracts with the inhabitants he is subject to his own law unless a contrary intention is shown.⁹ This presumption is rebutted, says the German Supreme Court, "if the business involved could be more effectively conducted according to the law of the occupied territory or if it was more practicable or advantageous for the occupying authorities or if for certain other reasons the application of the law of occupied territory seems to have been intended by the contracting parties".¹⁰

The Anglo-American law, says Stauffenberg, never regards the state as a private individual. Under this view, argues Stauffenberg, it is inconceivable that the occupant should be subject to a foreign jurisdiction or its law, particularly in a country where it exercises supreme authority.¹¹

9. Stauffenberg. Cf. 23 Comp. Gen. 733, where it was held that in the absence of a statute or treaty to the contrary, pay roll deductions may not be made pursuant to Brazilian Social Security laws from the salaries of Brazilian Nationals who are civilian employees of the Navy Department in Brazil, nor may employer contributions be made by the Navy Department for such employees under said laws.

10. Fontes Juris Gentium, Series A, Sec. 2, Book I, p. 646, No. 259.

11. Stauffenberg. William T. R. Fox, 35 Am. J. Int. L. 632, states that the United States courts have not recognized any exceptions to the doctrine of sovereign immunity.

Taxation of
Occupant's
Transactions.

The occupant's exemption from the local jurisdiction and its law carries with it freedom from local taxation. No tax may be collected on the property of the occupant, his agencies or instrumentalities, nor may a tax be collected on any purchase from, sale to, or any transaction of any kind by him, or his authorized instrumentalities.¹²

Similarly, members of the armed forces of the occupant are not subject to taxation.¹³ Thus no tax may be levied on their property or income by the occupied country. The occupant may, in exercise of his supreme authority, prevent the burden of a tax from falling on his soldiers by being included in the price of merchandise sold to them.¹⁴ In the United States' occupation of Germany in 1918, the question arose whether luxury taxes imposed by the German Government could be collected from the members of the armed forces. The taxes were placed on merchants who included the tax in the price of merchandise sold. At first the occupation authorities

12. Cf. *Taxation of Friendly Foreign Armed Forces* by Charles Fairman and Archibald King, 38 *Am. J. Int. L.* 258.

13. Cf. *Dow v. Johnson*, 100 U.S. 158, TM 27-250, p. 73; see p. 235, *infra*, for discussion.

14. The use of the term "indirect" tax is avoided because of its varied meaning.

prohibited the collection of these taxes. The German tax officials encountered great difficulty in collecting the taxes from merchants who used the Order of the occupation authorities as an excuse for refusing to pay. There was no way to determine which taxable article had been purchased by Germans or members of the occupying forces. Later the occupation authorities permitted the inclusion of the tax in sales to its soldiers. Finally, the difficulty was solved by exempting the members of the occupying forces from the tax but requiring the merchants who made sales to them to receive signed coupons from them showing the article purchased, the price paid, etc.¹⁵

Contracts of
Occupant --
Increasing
Indebtedness
of Occupied
State.

The occupant may, of course, create any indebtedness he sees fit against himself. Seemingly, the occupant acting as administrator of the occupied territory may refinance or consolidate the existing indebtedness of the occupied state in the interest of sound public administration. Such an act does not increase the indebtedness of the occupied state and may be necessary, if the occupation be of long duration, to re-establish the commercial and social life of the country. Some writers have asserted

15. Hunt Report, pp. 238, 239, 240.

that "an occupant cannot validly burden the treasury of the occupied state with new debts".¹⁶ Although this reflects the general rule, it is believed to be subject to an exception based on necessity. An occupant may create new debts against the occupied state if necessary for the welfare of the community and if the transaction is fair and reasonable.¹⁷ In an opinion to the Secretary of War, Attorney General Griggs said:

The administration of the United States in Cuba is of a military nature, and merely temporary, no action binding the island or any of its municipalities to large expenditures and continuing debt ought to be made except upon grounds of immediate necessity, which in this case do not appear to be present.¹⁸

16. Feilchenfeld, p. 69.

17. In *Crcnin v. Patrick County*, 89 Fed. 79, TM 27-250, p. 43, the validity of a bond issue made by a county in payment of a subscription to capital stock in a railroad was challenged on the ground that the magistrates who ordered the vote of the people authorizing the issuance of the bonds were appointed by the military commandant of Virginia. The defense was rejected, the court stating that the military government was a de facto government whose acts in all matters of general administration were valid. See also p. 161, supra, for discussion of *New Orleans v. Steamship Co.*, 20 Wall. 387, where the court said: " * * * it is insisted that when the military jurisdiction terminated the lease fell with it. We cannot take this view of the subject. The question arises whether the instrument was a fair and reasonable exercise of the authority under which it was made * * * "

18. 22 Op. Atty. Gen. 408, at p. 410. The Attorney General, 8 September 1900, stated that the rights of the United States in Cuba were based on the laws of war. *Magoon*, p. 371.

CHAPTER VIII

JURISDICTION OF LOCAL COURTS OVER OCCUPANT'S FORCES

Jurisdiction
of Local
Courts Over
Occupant's
Forces --
Civil Matters.

Members of the occupying army may enter into contracts with the inhabitants of the occupied territory or commit civil wrongs against the persons or property of the inhabitants.¹ May the local courts assume jurisdiction over such matters? All authorities agree that members of the occupant's army are not subject to the civil jurisdiction of the local courts during the period of occupation. Some writers base this immunity on the practical ground that it would be contrary to the interest of the occupant to permit his soldiers to be sued in the local courts.²

In Dow v. Johnson,³ a case arising out of the civil war in the United States, the Supreme Court of

1. As a matter of law a soldier is not civilly responsible for taking or damaging property of enemy inhabitants if the act is in accordance with the laws of war. Ford v. Surget, 97 U.S. 574, at p. 605.

2. This approach exempts such soldiers from the jurisdiction of the local court but does not necessarily exempt them from the local substantive law. Thus Stauffenberg says: "It may be said that their position in these matters is very similar to the position of ambassadors. Today it is almost universally agreed that ambassadors as well as other persons enjoying immunity are exempt from the jurisdiction of the foreign state to which they are accredited but that the foreign substantive law is applicable to them."

3. 100 U.S. 158, TM 27-250, p. 73.

the United States regarded members of the occupant's army as having an extraterritoriality against the enemy. In that case, a civil suit was instituted in a local court of New Orleans, then occupied by the United States forces, against General Dow, a member of the occupant's army, for the illegal taking of personal property. General Dow did not appear and judgment by default was entered for the plaintiff. The Supreme Court held that General Dow was not subject to the jurisdiction of the local court. The court, however, used the following language:

When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account * * *

* * *

This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army, when in Pennsylvania, as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war.

In the German occupation of Belgium in World War I, the local courts were not permitted to entertain

suits by or against members of the occupying forces. Claims by members of the occupying army against the inhabitants were handled administratively by the occupation authorities. Claims by the inhabitants against the occupant's soldiers were also dealt with administratively by the occupation authorities who, in their discretion, could refer such claims to their own courts for adjudication.⁴

Although the members of the occupant's army are exempt from the jurisdiction of the local courts, questions concerning transactions or acts done by them in the occupied territory may arise in the occupant's own tribunals.⁵ What law shall such tribunal apply in deciding the issue, the occupant's own law or the law of the occupied territory? Of course the tribunal will apply its own rules of conflict of laws.⁶ Stauffenberg states that if members of the army of occupation contract with the inhabitants the customary principles of conflict of laws will apply, i.e., the law intended by the parties or the law in force where the contract was made or

4. Stauffenberg.

5. Cf. *Freeland v. Williams*, 131 U.S. 405, at pp. 423 and 424.

6. See Beale, Vol. I, p. 52; Stauffenberg.

to be performed.⁷ In a decision by the German Supreme Court a member of the German army of occupation in Polish Russia married a Russian woman before a Catholic clergyman. The marriage was valid according to Russian law. On the husband's petition for a declaration of nullity on the ground that it did not conform with the German law, the court held that the marriage was valid and that the occupied territory must be regarded as foreign territory where German marriage law did not apply.⁸ Hall is quoted as saying that since an army has no extra-territoriality as against its enemy, it would be too much to expect the local courts to recognize a marriage after the end of a belligerent occupation unless it happened also to satisfy the requirements of the local law.⁹

Jurisdiction
of Local
Courts Over
Occupant's
Forces --
Criminal Law.

The power of local courts to try members of the army of occupation after the war has ended for criminal acts committed within the occupied territory has been the subject of considerable controversy.

7. Stauffenberg.

8. Annual Digest, 1923-24, Case No. 237. See decision of German Supreme Court, 17 Sept. 1941, quoted in brief 91 University of Pennsylvania Law Rev. 775, apparently taking a contrary view.

9. McNair, 57 Law Quart. Rev. 40. McNair says that marriages solemnized in enemy territory by British officers in accordance with the British Foreign Marriage Act would be valid in Britain.

Other questions of disagreement relate to the trial of war criminals by international tribunals and the punishment of heads of state.¹⁰ These questions are beyond the scope of this text and will be touched on only incidentally.

It is generally agreed that soldiers of the occupant's forces are not subject to the jurisdiction of the local courts during the period of occupation for violations of local criminal law.¹¹ Some authorities contend that this simply amounts to immunity from prosecution in the local criminal courts during the period of occupation and not freedom from the substantive criminal law of the country.¹² Such writers argue that the local courts may, after the occupation has ceased, punish members or ex-members of the occupant's army for acts committed by them during the occupation contrary to the local criminal law. In this connection it should be noted that many war crimes are also violations of ordinary criminal law, e.g., the killing of an enemy person

10. See Czechoslovak Yearbook of International Law, 1942, p. 67; 14 Am. J. Int. L. 70; 56 H.L.R. 1059; 37 Am. J. Int. L. 407.

11. It is assumed that the occupant may punish his own soldiers by proper military tribunals.

12. Nast, p. 124; see Fontes Juris Gentium, Series A, Sec. 2, Book 1, p. 132, No. 171; Garner, Vol. II, pp. 476, 479, 480, citing many continental authorities.

by a soldier is lawful only if done in accordance with the laws of war, otherwise it may be murder.¹³ Garner summarizes the position of these authorities in the following manner:

The right of the belligerent in whose territory, even if it be at the moment under the military occupation of the enemy, crimes are committed by enemy soldiers, to try and punish the offenders must be admitted in the interest of justice. The fact that the territory in which the offence is committed is at the time under hostile occupation would not seem to constitute a legal impediment to the assumption of jurisdiction by the courts of the country occupied since under the modern conception of occupation there is no extinction of sovereignty but only its temporary displacement. In practice France has proceeded on the assumption that its courts may take jurisdiction of crimes committed by German soldiers within French territory under German military occupation.¹⁴

A German General was charged by a French subject with stealing personal property during the German occupation of France in World War I. The Judge Advocate of the Third Army, A.E.F., stated:

It is obvious that the facts present a case of larceny under French law, committed in France...Of course, ordinarily, the provisions of this law [the French criminal law] are not put in effect against members of the army of occupation because such army of occupation will not allow it. That must, however, be merely a matter of military expediency. Strangers committing crimes in a foreign state are ordinarily subject to the local criminal law. Therefore in this case, if the thief can be apprehended and brought back within the local jurisdiction, no

13. Garner, Vol. II, p. 473; Nast, p. 115.

14. Garner, Vol. II, p. 477; Schwarzenberger, p. 61.

legal reason is perceived why the thief could not be tried by the French civil court.¹⁵

In Coleman v. Tennessee,¹⁶ which arose from the civil war in the United States, the court laid down the broad principle that the occupant's soldiers are not subject to the local law of the occupied state or amenable to the local tribunals for offenses committed by them in occupied territory.

The facts of that case were as follows: A soldier belonging to the Federal forces occupying part of Tennessee murdered a woman in the occupied territory. He was tried, convicted and sentenced by a court-martial to death by hanging. He escaped from confinement and the sentence was not executed. After peace was restored, the soldier was indicted in a Tennessee court for the same murder, tried, convicted and sentenced to death. The Supreme Court in reversing the judgment said:

* * * when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war * * * exclusive jurisdiction to try and punish offences of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished.

15. 4 Am. Mil. Govt. 360.

16. 97 U.S. 509, TM 27-250, p. 76.

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* * * In other words, the municipal laws of the State, and their administration, remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent.

This doctrine does not affect, in any respect, the exclusive character of the military tribunals over the officers and soldiers of the army of the United States in Tennessee during the war; for, as already said, they were not subject to the laws nor amenable to the tribunals of the hostile country. The laws of the State for the punishment of crime were continued in force only for protection and benefit of its own people.

If these views be correct, the plea of the defendant of a former conviction for the same offence by a court-martial under the laws of the United States was not a proper plea in the case. Such a plea admits the jurisdiction of the criminal court to try the offence, if it were not for the former conviction. Its inapplicability, however, will not prevent our giving effect to the objection which the defendant, in this irregular way, attempted to raise, that the State court had no jurisdiction to try and punish him for the offence alleged. The judgment and conviction in the criminal court should have been set aside, and the indictment quashed for want of jurisdiction.

Whatever view one may take with regard to the application of the local criminal law of the occupied territory to an occupant's soldiers, practically all authorities agree that such soldiers are subject to the laws of war.¹⁷ Until peace is restored,¹⁸

17. Cf. 24 Op. Atty. Gen. 570, at p. 574; Schwarzenberger, pp. 59, 60; Garner, Vol. II, p. 476; 37 Am. J. Int. L. 420; 56 H.L.R. 1059, at p. 1077.

18. A cessation of hostilities is not a peace. FM 27-10, par. 253.

captured enemy soldiers who have committed war crimes in territory occupied by their army may be tried and punished by the appropriate tribunals of the opposing belligerent.¹⁹ The Instructions for the Government of Armies of the United States in the Field²⁰ stated that "a prisoner of war remains answerable for his crimes against the captor's army or people committed before he was captured, and for which he has not been punished by his own authorities". Such charges may be dealt with not only by military courts but, according to the British Manual of Military Law, by such courts as the belligerent concerned may determine.²¹ The kind of court used by a belligerent is purely a question of domestic law.²² Military tribunals are not restricted by principles of territorial jurisdiction and may therefore try captured enemy soldiers for war crimes

19. See FM 27-10, par. 346; British Manual of Military Law, par. 449; 56 H.L.R. 1059, at p. 1063, et seq. Of course, a belligerent may punish his own soldiers for war crimes committed by them. See *Coleman v. Tennessee*, supra.

20. G.O. 100, art. 59.

21. British Manual of Military Law, par. 449; see 56 H.L.R. 1059, for discussion on feasibility of conferring jurisdiction on United States district courts or courts specially created by Congress to try war criminals.

22. Davis, p. 320.

committed by them either in the enemy's own country or in territory occupied by the enemy against the captor's soldiers or nationals.²³ Wirz, an officer in the Confederate forces, was tried by a military commission convened in Washington, D.C., in 1865, by order of the President of the United States, on charges of mistreating prisoners of war and murdering some of them contrary to the laws of war.²⁴ The acts charged were committed by Wirz while he was commandant of a Confederate military prison at Andersonville, Georgia (enemy territory). He filed a plea to the jurisdiction of the military commission stating, among other things that "he objects to, and denies the jurisdiction of this commission to try him for any offence whatever * * *". Wirz was hanged on 6 November 1865.²⁵

The Permanent Court of International Justice considered the question whether States must adopt

23. "A military commission, whether exercising a jurisdiction strictly under the laws of war or as a substitute in time of war for the local criminal courts, may take cognizance of offenses committed during the war, before the initiation of the military government or martial law, but not then brought to trial." Dig. Op. JAG, 1912, p. 1067, I C 8a(3) (b) [27]

24. The civil war did not terminate in Georgia until 2 April 1866. Moore, Vol. VII, p. 337.

25. Trial of Henry Wirz, 40th Cong., 2nd Sess., House of Representatives, Ex. Doc. No. 23.

the territorial principle in the prosecution of crimes. The court said:

Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.²⁶

President Roosevelt, Prime Minister Churchill and Premier Stalin signed a declaration dated 30 October 1943, Moscow, stating in part:

Accordingly, the aforesaid three allied Powers, speaking in the interests of thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein * * *

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The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.²⁷

26. The Lotus Case, Series A 10, p. 20.

27. 38 Am. J. Int. L. Supp. 7.

Under customary international law war crimes committed by the enemy, which are not also ordinary crimes, must be punished by the opposing belligerent before the conclusion of the peace.²⁸ This results from the amnesty which is implied in every peace treaty in the absence of an express stipulation to the contrary.²⁹ The Peace Treaties of 1919 contained express stipulations preserving the right to prosecute war criminals after the end of the war by military tribunals.³⁰

28. Lauterpacht, p. 476. The jurisdiction of a Military Commission convened under the laws of war may be exercised up to the date of peace. Dig. Op. JAG, 1912, p. 1068, I C 8a(3) (b) [47].

29. Lauterpacht, p. 476. Ordinary crimes are not affected by the peace treaty.

30. The treaty of peace with Germany signed in 1919 stated that "the German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies." The treaty also provided for the surrender to the Allied Powers of persons accused by them of war crimes. The Allied Powers actually abandoned their claim under the treaty and permitted German courts to try the war criminals. See Mullins, Leipzig Trials; Cohn, The Problem of War Crimes Today, 26 Grotius Society 125; Lauterpacht, p. 453; Garner, Vol. II, p. 471.

CHAPTER IX

THE LEGAL DEFENSE "ACT OF STATE"

Members of the armed forces of State A commit acts in foreign territory at the direction of their government which but for that fact would be crimes or torts. May the members of the armed forces interpose the defense of "act of State" in the courts of State A? The question of the jurisdiction of local courts of the occupied territory has been discussed elsewhere.¹ An "act of State" as used here is an act of government performed in the course of its relations with another State, including its relations with the subjects of that State.²

The courts of the United States and England³ will not assume jurisdiction over questions arising out of the relations of States to one another or acts of their organs done in a foreign country.⁴

1. See p. 234, *supra*.

2. According to the British cases there is no "act of state" between a government and its citizens or, even a resident alien. See *Walker v. Baird* [1892], A.C. 491, at p. 494, and *Johnstone v. Pedlar* [1921], 2 A.C. 262.

3. The rule does not obtain in the courts of Germany and Italy. Lauterpacht, *The Functions of Law in the International Community*, p. 389.

4. Lauterpacht, *The Functions of Law in the International Community*, p. 388; 15 B.Y.B. 98.

The reason suggested for this rule is that "stability and convenience require that a State should not address its neighbors in two voices", i.e., through its executive department and its courts.⁵ The courts express this rule of limitation on their jurisdiction in various ways. In Oetjen v. Central Leather Company,⁶ the court stated: "The conduct of the foreign relations of the government of the United States is committed by the Constitution to the executive and legislative departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."⁷ At other times, especially in suits against officers of government sounding in tort, the stress is laid on the immunity of the agent for an act authorized or subsequently

5. See Lauterpacht, *The Functions of Law in the International Community*, p. 390. In Johnstone v. Pedlar [1921], 2 A.C. 262, 278, the court stated: "It is on the authorities quite clear that the injury inflicted upon an individual by the act of State of a sovereign authority does not by reason of the nature of the act by which the injury is inflicted cease to be a wrong. What these authorities do establish is that a remedy for the wrong cannot be sought for in the Courts of the sovereign authority which inflicts the injury, and that the aggrieved party must depend for redress upon the diplomatic action of the State, of which he is a subject."

6. 246 U.S. 297.

7. See also Johnstone v. Pedlar [1921], 2 A.C. 262, 290.

ratified by his State. In the *Paquete Habana*⁸ Mr. Justice Holmes speaking for the court said:

But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued.

Mr. Justice Holmes' conclusion may be elaborated as follows: A United States officer commits an act abroad against a foreigner at the direction or upon the subsequent ratification of his government; this is an act of the State; acts of State are political questions over which the United States' courts will not assume jurisdiction in a suit against the officer.⁹

During the United States military occupation of Cuba, General Brooke, the military governor, issued an order abolishing a franchise or concession which belonged to a Spanish countess. The franchise consisted of the right to conduct the public slaughter house, which belonged to the municipality, and receive certain fees for each head of cattle slaughtered. The Spanish countess sued General Brooke for damages. He showed that after his order was issued it was ratified by the so-called Platt Amendment.

8. 189 U.S. 453, 465.

9. Cf. *Buron v. Denman* 18487, 2 Exch. 167; see *Kingsbury*, 4 Am. J. Int. L. 362.

The court said:

The old law, which sometimes at least was thought to hold the servant exonerated when the master assumed liability still is applied to a greater or less extent when the master is sovereign. It is not necessary to consider what limits there may be to the doctrine, for we think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a "tort only in violation of the laws of nations, or of a treaty of the United States" it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress and the treaty-making power all have adopted the act. We see no reason to doubt that the ratification extended to the conduct of General Brooke.¹⁰

May a State by adopting and approving an act of one of its soldiers as an "act of State" require the dismissal of a criminal prosecution brought against such soldier in a foreign jurisdiction?¹¹

An instance of historic importance is the case of McLeod which occurred in 1840. McLeod, a British subject and officer in the British colonial forces, was allegedly a member of a British force sent by the British Government in 1837 for the purpose of capturing the "Caroline", a small passenger ship of United States register. The boat was equipped for crossing into Canadian territory and taking help to Canadian insurgents. The British force took possession of the "Caroline", set her afire and then

10. O'Reilly v. Brooke, 209 U.S. 45.

11. This problem has no connection with the position of an occupant's forces in enemy territory which is considered elsewhere.

sent her adrift over Niagara Falls. Durfee, a citizen of the United States, was killed in the course of the attack on the "Caroline". McLeod came into New York State in 1840 on business and was arrested and indicted for killing Durfee. The British Government demanded the release of McLeod on the ground that he was, at the time of the alleged crime, a member of a British armed force sent into the territory of the United States by the British Government under the necessity of self-preservation and self-defense. The British Government contended that the destruction of the "Caroline" was "a public act of persons in Her Majesty's service, obeying the order of their Superior authorities"; that it could "only be the subject of discussion between the two national Governments", and could not justly be made the ground of legal proceedings in the United States against the persons concerned. The New York court denied a writ of habeas corpus filed on behalf of McLeod,¹² who was later tried and acquitted on the defense of an alibi. Mr. Webster, Secretary of State, denied the justification of the expedition, while admitting McLeod's immunity from trial by

12. The New York court held that the approval of the act by a foreign sovereign could "take nothing from the criminality of the principal offender". *People v. McLeod*, 25 Wendell 483.

the New York court. Mr. Webster said in part that "after the avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not * * * to be holden personally responsible in the ordinary tribunals for their participation in it".¹³ Although Britain and the United States were at peace, the attack on the "Caroline" was a war-like act.¹⁴ The propriety of the attack was a political question for the executive departments of the respective governments and not the courts. It should be noted that McLeod's own conduct, apart from being a member of the attacking forces, was not called in question.¹⁵ Hyde disagrees with the view taken by Mr. Webster. . He states:

If, however * * * the movement or expedition constitutes an essentially illegal invasion of the territory of a friendly state, in time of peace, it is difficult to see how any member of the force derives exemption from the local jurisdiction by reason of the fact that his acts as a participant are in obedience to the commands of a foreign sovereign.¹⁶

13. See 32 Am. J. Int. L. 82 for full discussion; Oppenheim, Vol. I, 5th ed., p. 663; Moore, Vol. II, p. 24. See *Arce v. State*, 83 Tex. Cr. 292 /1918/ in accord.

14. See Mr. Webster's letter to Mr. Crittenden, 15 March 1841, Moore, Vol. II, pp. 25, 26.

15. See 60 Law Quart. Rev. 63, 65. W. Harrison Moore, *Act of State in English Law*, p. 131, suggests two limitations on the rule in the McLeod case: (1) it applies only to the public and open employment of force and (2) the acts themselves must be of a kind which international law recognizes as lawful in the case of actual war.

16. Hyde, Vol. I, p. 433. See Mr. Calhoun's view, Moore, Vol. II, p. 26.

CHAPTER X

DEFENSE OF SUPERIOR ORDER

The Common
Law.

The general rule established by the decisions of the United States and British courts is that a soldier or officer cannot avoid civil liability for an unlawful act by pleading an order from a superior as justification.¹ In *Little v. Barreme*² a naval captain received illegal orders from the Navy Department during the limited hostilities between France and the United States in 1799; the orders were accompanied by a copy of the statute upon which they were purportedly based. On the basis of the orders the captain seized a vessel which was later restored to its owner by order of court. Chief Justice Marshall in affirming the judgment against the captain said:

I confess, the first bias of my mind was very strong in favor of the opinion, that though the instruction of the executive could not give a right they might yet excuse from damages. I was much inclined to think, that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle,

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1. *Johnstone v. Pedlar*, 1921 2 A.C. 262 and cases cited; *Little v. Barreme*, 2 Cranch 170.
 2. 2 Cranch 170.

that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think, that where, in consequence of orders from the legitimate authority, a vessel is seized, with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, nor legalize an act which, without these instructions, would have been a plain trespass.³

In *Little v. Barreme* and *Mitchell v. Harmony* the bona fides of the inferior, his knowledge or imputed knowledge of the illegality of the order were not discussed. The language of the court was broad enough to exclude these questions as irrelevant. Later cases by State courts⁴ and several lower federal courts have enunciated a more liberal rule. The subordinate is civilly responsible for executing an unlawful order of a superior only when he believes it was illegal or when it was so

3. To the same effect, *Mitchell v. Harmony*, 13 How. 115, TM 27-250, p. 19, where the court said: "And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify."

4. See *Fairman*, p. 304 et seq.; 55 H.L.R. 651.

palpably illegal that a reasonable man would recognize its illegality.⁵

Superior order is not a justification for a criminal act committed by an inferior in obedience to it.⁶ Such order may be relevant in determining the existence of a criminal intent on the part of the inferior.

In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstances that he acts in obedience to orders given him by a civil or military superior; but the fact that he does so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders.⁷

If the inferior, as a reasonable man, could not be expected to know that the order was illegal then the inferior is protected.⁸ In such case, the wrongful intent necessary in a crime, is absent.

War Criminals.

In 1865 Henry Wirz, an officer in the Confederate army and Commandant of the military prison at

5. See Restatement of the Law of Torts, sec. 146; 51 Law Reg. 161 et seq.

6. United States v. Jones, 1876, Fed. Cas. No. 15, 494.

7. Stephen's Digest Criminal Law, art. 202.

8. In re Fair, 100 Fed. 149; Com. v. Shortall, 206 Pa. 165.

Andersonville, Georgia, was tried by a military commission for the mistreatment of prisoners of war and the murder of some of them contrary to the laws of war. One of his defenses was that he had done some of the acts pursuant to orders of higher authority. The Judge Advocate General in his report to the President of the United States said:

While it may be and probably is the fact that his action in this matter was sanctioned by the rebel [General] Winder when he was on duty at that place, it does not relieve the prisoner of responsibility for the result.⁹

The Instructions For the Government of Armies of the United States, 1863,¹⁰ did not contain any reference to superior orders and, presumably, did not recognize it as a defense.¹¹ The British Manual of Military Law, 1914 edition, written by Professor Oppenheim and Colonel T. E. Edmonds formulated the rule that --

Members of armed forces who commit such violations of the recognized rules of warfare as are ordered by their commander are not war criminals and cannot therefore be punished by the enemy...¹²

9. Trial of Henry Wirz, 40th Congress, 2nd sess., House of Representatives, Ex. Doc. No. 23, p. 812.

10. G.O. 100.

11. Trial of Henry Wirz, *supra*.

12. Edmonds and Oppenheim, par. 443.

The basis for the rule, according to Oppenheim, is that "the law cannot require an individual to be punished for an act which he was compelled by law to commit."¹³ The United States Rules of Land Warfare, 1914 edition, and the present edition,¹⁴ lists certain war crimes and then states:

Individuals of the armed forces will not be punished for these offenses /i.e., the specific offenses listed/ in case they are committed under orders or sanction of their government or commanders. The commanders ordering the commission of such acts or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they fall.

The United States Rules of Land Warfare differs from the British Manual of Military Law in several important respects: (1) The British Manual purports to state a legal principle that members of the armed forces who commit violations of the recognized rules of warfare as are ordered by their commanders are not war criminals and cannot be punished by the enemy. The United States Manual,¹⁵ on the other hand, simply enumerates certain offenses and states that these will not be punished if they are committed

13. Oppenheim, International Law, 4th ed., p. 410, footnote 2.

14. FM 27-10, par. 347.

15. FM 27-10, par. 347.

under superior orders. The difference, briefly stated, is that one purports to state a legal principle, the other a matter of policy. (2) The British Manual provides that persons who violate the rules of warfare by order of their Government, or commander, are not war criminals.¹⁶ The United States Manual provides that the enumerated offenses will not be punished in case they are committed under the orders or sanction of their government or commanders. It has been stated that the word "sanction" would save from punishment an enemy soldier who committed a war crime without any specific orders or even general direction, if subsequently the act was sanctioned by his government or commander.¹⁷

According to Merignhac the French military courts in World War I refused to recognize the defense of superior orders in the trial of German soldiers for war crimes.¹⁸

At the trials in Leipzig following World War I, the German Supreme Court applied the German Military Penal Code to defendants charged with war crimes.

16. British Manual Military Law, par. 443.

17. Sack, 60 Law Quart. Rev., p. 63, at 65.

18. 24 Revue Generale de Droit Public, p. 53; Garner, Vol. II, p. 487; Sack, 60 Law Quart. Rev., p. 67.

The German Code states that if the execution of an order results in the commission of a crime the subordinate who carries out the order of his superior may be punished if he knew that the order related to an act which involved a civil or military crime.¹⁹ In The Llandovery Castle, the German Supreme Court of Leipzig said:

Military subordinates are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law.²⁰

In another war criminal trial before the German Supreme Court, the accused, a German submarine commander, sank the English hospital ship Dover Castle on the orders of the German Admiralty. The accused believed that the German Admiralty was carrying out legitimate reprisals against hospital ships which allegedly were being used for military purposes.

The court said:

Neither was he the accused guilty of obeying the order although he knew the act in question

19. Mullins, p. 220.

20. Mullins, p. 131.

would involve a criminal or civil misdemeanor. He was in the circumstances of the case entitled to hold the opinion that the measures taken by the German authorities against foreign hospital ships were not contrary to international law, but were legitimate reprisals.²¹

In view of the disparity in practice among nations it is difficult to say that there is any rule of international law which requires a belligerent to accept the plea of superior orders under all circumstances. The vast majority of writers are in accord with Lauterpacht's view that:

The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent Commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent....Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that the rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisal. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime....However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity. To limit liability to the person responsible

21. Annual Digest, 1923-1924, Case No. 231.

for the order may frequently amount, in practice, to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial.²²

A separate and distinct defense is that of compulsion.²³ There must be fear of immediate death or grievous bodily harm to the actor if he refuses to obey; threats of future injury do not excuse.²⁴

CHAPTER XI

THE RETURNING SOVEREIGN

The *jus postliminii* of the Romans was a legal fiction by which persons, and, in some cases, things, taken by an enemy, were restored to their original legal status immediately on coming under the power of the nation to which they formerly belonged.¹ Writers of international law engrafted the term *postliminy* to describe the legal inference by which persons, property, and territory, captured by an enemy, were presumed to revert to their former condition on the withdrawal of

22. Lauterpacht, p. 453.

23. Schwarzenberger, p. 64.

24. Stephen's Digest Criminal Law, Art. 31; United States v. Haskell, Fed. Cas. No. 15, 321. It is very doubtful whether at common law fear of personal danger will excuse a person who joins in committing a homicide. ⁴ Blackstone 30; *Arp v. State*, 97 Ala. 5, 12 So. 301.

1. Halleck, Vol. II, p. 535.

enemy control.² Broadly speaking, the doctrine indicates that mere possession by a belligerent in the course of war of property or territory of the enemy in itself is insufficient to transfer title or sovereignty, as the case may be, against the enemy owner or sovereign who regains possession during the continuance of the war.³ Oppenheim uses the term postliminy to indicate the fact that territory, individuals, and property, after having come in time of war under the authority of the enemy, return during the war or at its end, under the rule of their original sovereign.⁴ This definition does not purport to give the legal effects the postliminium has; it simply indicates the return to the legitimate sovereign of that which has been for a time under the control of the enemy.⁵

The varied concepts evoked by the term postliminium complicate the problems arising from the return of the sovereign. These may be resolved on principle without reference to that doctrine.⁶ In

2. Phillipson, pp. 230, 231; Walker, Vol. II, p. 321.

3. Hyde, Vol. II, p. 857.

4. Lauterpacht, p. 481.

5. Lauterpacht, p. 481.

6. Phillipson, p. 231; Hyde, Vol. II, p. 857; Wilson, International Law, 3rd ed., p. 452.

effect, says Hall, the doctrine of postliminium amounts to a truistic statement that property and sovereignty cannot be regarded as appropriated until their appropriation has been completed in conformity with the rules of international law.⁷

Military occupation of enemy territory does not transfer sovereignty to the occupant. The territory remains under the sovereignty of the legitimate government until subjugation or cession by treaty of peace. Hence the moment the occupant evacuates the territory and the sovereign returns, the territory and its inhabitants at once come under his rule. The liberation of occupied territory by an ally of the legitimate sovereign does not necessarily re-establish the authority of the sovereign.⁸ Military necessity may require the ally of the liberated country to establish military government therein.⁹

Certain questions relating to domestic law are excluded from this discussion. Thus whether the Constitution of the State or its laws are automatically revived on the return of the sovereign is a

7. Hall, p. 578.

8. FM 27-5, pars. 3d and 7; Feilchenfeld, p. 7.

9. FM 27-5, par. 3d. Cf. Lauterpacht, p. 482; Halleck, Vol. II, p. 538.

problem of domestic law and not international law.¹⁰ Similarly, whether criminal sentences imposed during the occupation by the enemy should be set aside is a domestic question.¹¹ As a general rule, however, the returning sovereign will annul sentences imposed by the occupant for acts affecting the security of the occupant and not criminal by the domestic law of the occupied state, e.g., war treason.¹² Questions between the subjects and the government of the same State are matters of domestic law. Issues between the government of one State and the subjects or the government of another State, are international.¹³ The return of the sovereign raises many problems but "international law can deal only with such effects...as are international."¹⁴

The returning sovereign must recognize the validity of acts done (*faits accomplis*) by the occupant which the latter was competent to perform according to international law.¹⁵ Oppenheim says:

10. Hall, p. 578; Lauterpacht, p. 482.

11. Lauterpacht, p. 482.

12. Spaight, p. 367; Hall, p. 579.

13. Phillimore, Vol. 3, p. 813.

14. Lauterpacht, p. 482.

15. Lauterpacht, p. 482; Taylor, p. 615.

Indeed, the State into whose possession such territory has reverted must recognise these legitimate acts, and the former occupant has by International Law a right to demand this. Therefore, if the occupant has collected the ordinary taxes, has sold the ordinary fruits of immoveable property, has disposed of such moveable State property as he was competent to appropriate, or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate sovereign after he has again taken possession of the territory.¹⁶

According to Birkhimer, no nation recognizes the right of its subjects pecuniarily to assist the enemy by becoming purchasers of property appropriated by the enemy as booty since such an act is at variance with the obligations of good citizenship.¹⁷

Huber poses this problem:

One may, however, wonder whether the State to whose prejudice the booty was taken, should protect in his rights one who without good faith acquires directly from the captor objects or securities. There would be no infraction on the part of the occupant of the principle of the inviolability of private property guaranteed by international law, if the injured State declared in advance that it will not recognize such alienations, because nobody is obliged and can never be forced to acquire such property.¹⁸

If the occupant has performed acts which, according to international law, were in excess of his rights, the returning sovereign may ignore these acts. Thus if the occupant has sold immovable state

16. Lauterpacht, p. 483.

17. Birkhimer, p. 223.

18. Huber, p. 665.

property, the sovereign may retake it from the purchaser, whoever he is, without compensation.¹⁹ If the occupant unlawfully sold public or private property, it may afterwards be claimed from the purchaser without payment of compensation.²⁰

On January 4, 1943, the United States, the nations of the British Commonwealth, Russia, China, and other countries, issued a declaration stating that they--

reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever, (a) 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 (b) 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 if transactions apparently legal in form even when they purport to be voluntarily effected.²¹

19. Lauterpacht, p. 483.

20. Lauterpacht, p. 483.

21. 37 Am. J. Int. L. 282.

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