CIVIL AFFAIRS
MILITARY GOVERNMENT

SELECTED CASES
AND MATERIALS

THE JUDGE ADVOCATE GENERAL'S SCHOOL
U.S. ARMY
CHARLOTTESVILLE, VIRGINIA

SEPTEMBER 1958

This annotated casebook is designed for use in conjunction with Department of the Army Field Manual 27-10, The Law of Land Warfare, July 1956.

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PART I

AN INTRODUCTION

1. Scope of the course. This course is intended to identify and consider a variety of legal problems which the future administration of enemy occupied territory may be expected to produce.

2. The law of belligerent occupation. Rather than to be stated as a fact, it is to be questioned whether there is a law, as such, of belligerent occupation. In the early centuries of man's existence the "law" for the conquered simply had been the will of the conqueror. The conduct of the wars of the last two centuries, however, seems to indicate, albeit inconclusively, that the civilized nations of the world have been willing to temper the exercise of their complete power as conquerors in the interest of the cause of humanity and the dictates of public conscience. As nations successively and consistently chose to limit their power, in certain respects, in favor of the rights of inhabitants of occupied territory, so there developed, in those certain respects, customs which civilized nations have respected and recognized as obligatory upon them. Thus in those areas of state practice where yesterday's customs are responsive to the purposes for which war is waged and territory is occupied today, there can be said to be law, i.e., law which delineates not the power of a conqueror but rather his rights, duties, and authority.

The development of a state practice into a custom and thence into law is, to be sure, an unhurried process. For this reason there was little law applicable to a belligerent occupation at the turn of the 19th century. To fill the void, the civilized nations of the world resorted to multilateral conventions (The Hague Conventions of 1907 and the Geneva Conventions of 1949 are the two multilateral conventions with which we are now concerned). Thus, a search for the law of belligerent occupation requires reference not only to customary international law but to conventional international law as well. The two sources are not, of course, wholly separable, for many provisions of the multilateral conventions mentioned represent, and were so intended, agreed restatements of accepted customs. But if one understands law to mean a precise rule of conduct, a deviation from which is wrong, there is still to be considered the question whether the provisions of these conventions amount to law. Where it is

provided, for example, that enemy private property cannot be confiscated (art. 46, HR), it would seem that there is law. But where it is provided that a belligerent occupant shall respect, unless absolutely prevented, the local laws of the country occupied (art. 43, HR); that the quantum of requisitions shall be in proportion to the resources of the country (art. 52, HR); and that taxes are to be collected, insofar as is possible, in accordance with existing rules of assessment and incidence (art. 48, HR), to illustrate, it may be unrealistic to classify such vague and abstract provisions as law, having both a force and a binding effect. It may be more correct to label them what they are, principles and standards, susceptible of producing law only to the extent that civilized nations interpret and apply them uniformly. To date, evidence of such uniformity is lacking. This may be explained, it is believed, by the fact that each new war has involved ideological, sociological and technological considerations unlike those of preceding wars. Understandably, with security interests paramount, no nation is willing to commit itself today as to its conduct tomorrow in any but the most general of terms. In the last analysis, therefore, it may be correct to conclude that the law of belligerent occupation is derived more from the post-bellum acts and deeds of conquerors than from pre-bellum conventions. See, Sutherland, Constitutional Powers and World Affairs 80 (1919). McDougal and Feliciano, International Coercion and World Public Order: The General Principles of the Law of War, 67 Yale Law J. 809 (1958).

Stone in his book, Legal Controls of International Conflict (1954), at p. 727, characterizes the law of belligerent occupation as a kind of "legal paradise." His point is that it is unrealistic to think that the myriad of challenging questions bound to be raised in a future global war may be answered on the basis of propositions accepted at the turn of the 19th century. Do you agree?

FM 27-10, 18 July 1956, is entitled, "The Law of Land Warfare." Its predecessor, dated 1 October 1940, was entitled, "The Rules of Land Warfare." What significance, if any, do you attach to this change? See, Fratcher, The New Law of Land Warfare, 22 Missouri Law Rev. 143 (1957). Von Glahn, The Occupation of Enemy Territory 19 (1957).

3. Evidence of the law of belligerent occupation: the legal status of FM 27-10.

Read: Pars. 1, 7, and 14, FM 27-10.

NOTE

Article 1, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 18 October 1907, requires the contracting powers to instruct their armed land forces in the provisions of the Hague Regulations. FM 27-10 has then a legal basis in international law, in that is is issued in compliance with the Hague Regulations and the Geneva Conventions. This is not to suggest, of course, that mere publication of FM 27-10 operates to discharge that requirement. Army Regulations 350-216, 19 December 1956, requires instruction be given in the Geneva Conventions of 1949; no mention is made of the Hague Regulations, however.

As a matter of historical interest, the United States first published a summary of the rules of land warfare in 1863 with the issuance of General Orders No. 100, entitled, "Instructions for the Government of Armies of the United States in the Field," the so-called Lieber code.

It has been said that FM 27-10 has the binding force of a military order on members of the Army of the United States. Fratcher, The New Law of Land Warfare, 22 Missouri Law Rev. 143, 144 (1958). Do you agree? If you do, then is not the question whether there exists a law, as such, of belligerent occupation made moot?

4. The Hague Conventions of 1907 and the Geneva Conventions of 1949; binding upon whom?

Read: Foreword and paragraph 5, FM 27-10.

NOTE

By early 1957 a total of fifty-eight nations had accepted the Geneva Civilians Convention (GC), the convention with which this course will be particularly concerned. For a list of the fifty-eight, see,Von Glahn, The Occupation of Enemy Territory 17 (1957). Since then, East Germany, North Korea, and communist Viet-Nam have deposited adherences to (with reservations), and communist China (also with reservations) and the United Kingdom have ratified, all four Geneva Conventions. See, 37 Dept. State Bulletin 861, Nov. 1957.

Suppose a war (or police action), were to involve a number of states, all but one of which had ratified, or adhered to, the Hague Conventions and the Geneva Conventions. Would the fact that one party to the conflict had not accepted those conventions operate to excuse the other states from complying with the provisions of the conventions? See, article 2, Hague Convention No. IV and par. 8c, FM 27-10. But see, Preamble to HR and article 158, GC (par. 6, FM 27-10), and Krupp Trial, 10 Law Reports of Trials of War Criminals 133 (1949). Was this not the situation in Korea in 1950? See, Baxter, The Role of Law in Modern War, Proceedings of the American Society of Int. Law, 90, 96 (1953).

Do the Geneva Conventions have any application in a civil war? Do the Hague Regulations? See, par. 11, FM 27-10.

Is the law of belligerent occupation applicable within liberated territory? See, Tan Tuan et al. v. Lucena Food Control Board (Philippines 1949), Int'l Law Rep., 1951, Case No. 181 (U.S. liberation of Philippines during WW II). Do the Hague Regulations apply? Do the Geneva Conventions apply?

PART II

AN UNDERSTANDING OF TERMS

1. What is a military government?

a. Read: Pars. 12, 362, and 368, FM 27-10.

b. COMBINED DIRECTIVE FOR MILITARY GOVERNMENT IN GERMANY PRIOR TO DEFEAT OR SURRENDER

" * * *

"2. Military government will be established and will extend over all parts of Germany, including Austria, progressively as the forces under your command capture German territory. Your rights in Germany prior to unconditional surrender or German defeat will be those of an occupying power.

"3. a. By virtue of your position you are clothed with supreme legislative, executive, and judicial authority and power in the areas occupied by forces under your command. This authority will be broadly construed and includes authority to take all measures deemed by you necessary, desirable or appropriate in relation to the exigencies of military operations and the objectives of a firm military government.

"b. You are authorized at your discretion, to delegate the authority herein granted to you in whole or in part to members of your command, and further to authorize them at their discretion to make appropriate subdelegations. You are further authorized to appoint members of your command as Military Governors of such territory or areas as you may determine.

"c. You are authorized to establish such military courts for the control of the population of the occupied areas as may seem to you desirable, and to establish appropriate regulations regarding their jurisdiction and powers.

* * *

Appendix A

POLITICAL GUIDE

"1. The administration shall be firm. It will at the same time be just and humane with respect to the civilian population so far as consistent with strict military requirements. You will strongly discourage fraternization between Allied troops and the German officials and population. It should be made clear to the local population that military occupation is intended; (1) to aid military operations; (2) to destroy Nazism-Fascism and the Nazi Hierarchy; (3) to maintain and preserve law and order; and (4) to restore normal conditions among the civilian population as soon as possible, insofar as such conditions will not interfere with military operations.

* * *

"4. You will take steps to prevent the operation of all Nazi laws which discriminate on the basis of race, color, or creed or political opinions. All persons who were detained or placed in custody by the Nazis on such grounds should be released subject to requirements of security and interests of the individual concerned.

"5. a. The operation of the criminal and civil courts of the German Reich will be suspended. However, at the earliest possible moment you should permit their functioning under such regulation, supervision, and control as you may determine. The operation of politically objectionable courts, e.g., People's courts, will be permanently suspended with a view to eventual abolition. All Nazi elements will be eliminated from the judiciary.

* * *

"6. The replacement of local Government officials who may be removed will rest with the Supreme Commander who will decide whether the functioning of the military government is better served by the appointment of officers of the occupation forces or by the use of the services of Germans. Military Government will be effected as a general principle through indirect rule. The principal link for this indirect rule should be at the Bezirk or Kreis level; controls at higher levels will be inserted at your discretion. Subject to any necessary dismissals, local officials should be instructed to continue to carry out their duties. No actual appointment of Germans to important posts will be made until it has been approved by the Combined Chiefs of Staff. It should be made clear to any German, after eventual appointment to an important post,

and to all other Governmental officials and employees, that their continued employment is solely on the basis of satisfactory performance and behavior. In general the entire Nazi leadership will be removed from any post of authority and no permanent member of the German General Staff nor of the Nazi Hierarchy will occupy any important Governmental or Civil position. The German Supreme Command and General Staff will be disbanded in such a way as will insure that its possible resuscitation later will be made as difficult as possible.

"7. Subject to the provisions of paragraph 10, and to the extent that military interests are not prejudiced, freedom of speech and press, and of religious worship should be permitted. Consistent with military necessity, all religious institutions shall be respected and all efforts will be made to preserve historical archives, classical monuments, and objects of art.

* * *

"10. a. The propagation of Nazi doctrines and propaganda in any form shall be prohibited. Guidance on German education and schools will be given to you in a separate directive.

"b. No political activity of any kind shall be countenanced unless authorized by you. Unless you deem otherwise, it is desirable that neither political personalities nor organized political groups, shall have any part in determining the policies of the military administration. It is essential to avoid any commitments to, or negotiations with, any political elements. German political leaders in exile shall have no part in the administration.

"c. You will institute such censorship and control of press, printing, publications, and the dissemination of news or information by the above means and by mail, radio, telephone, and cable or other means as you consider necessary in the interests of military security and intelligence of all kinds and to carry out the principles laid down in this directive.

* * *

Appendix C

REVISED FINANCIAL GUIDE FOR GERMANY

* * *

"6. Upon entering the area, you will take the following steps and will put into effect only such further financial measures as you may deem to be necessary from a strictly military standpoint:

"a. You will declare a general or limited moratorium if you deem such measure to be necessary. In particular, it may prove desirable to prevent foreclosures of mortgages and the exercise of similar remedies by creditors against individuals and small business enterprises.

"b. Banks should be placed under such control as deemed necessary by you in order that adequate facilities for military needs may be provided and to insure that instructions and regulations issued by military authorities will be fully complied with. Banks should be closed only long enough to introduce satisfactory control, to remove objectionable personnel, and to issue instructions for the determination of accounts to be blocked under paragraph e below. As soon as practicable banks should be required to file reports listing assets, liabilities, and all accounts in excess of 25,000 marks.

"c. You will issue regulations prescribing the purposes for which credit may be extended and the terms and conditions governing the extension of credit. If banking facilities are not available you may establish such credits or make such loans as you deem necessary for essential economic activities. These will be restricted to mark credits and loans.

"d. You will close all stock exchanges and similar financial institutions.

"e. Pending determination of future disposition, all gold, foreign currencies, foreign securities, accounts in financial institutions, credits, valuable papers and all similar assets held by or on behalf of the following, will be impounded or blocked and will be used or otherwise dealt with only as permitted under licenses or other instructions which you may issue:

"(1) German national, state, provincial, and local governments, and agencies and instrumentalities thereof.

* * *

"10. The railways, postal, telegraph and telephone service, radio and all government monopolies will be placed under your control and their revenues made available to the military government.

"11. You will, consistent with international custom and usage, maintain existing tax laws, except that discriminatory taxes introduced under the Nazi regime will be abolished. Prompt action should be taken to maintain the inflow of revenue at the highest possible level. You will resume service on the public debt as soon as military and financial conditions permit."

NOTE

This directive was approved by the Combined Chiefs of Staff and transmitted by them to the Supreme Commander, Allied Expeditionary Force, on April 28, 1944.

Do you consider the following definition of a military government to be a correct one: "Military Government connotes a situation where the commander of the armed forces rules a territory from which the enemy armed forces have been expelled? Cf., par. 12, FM 27-10. But cf., Winthrop's Military Law and Precedents 800 (Reprint 1920), quoted at fn. 13 in Madsen v. Kinsella, page18, **infra**.

Here the student should begin to consider the following questions:

Is military government a form of administration for an occupied territory having its legal basis in the law of belligerent occupation?

If so, may a military government validly continue to function in territory no longer subject to the law of belligerent occupation, i.e., subsequent to the coming into force of an armistrice or a treaty of peace?

Do we have today a military government in Guam?

In the Ryukyu Islands?

Generally, what is the relationship of the law of belligerent occupation to a military government?

These questions should be answerable later on the basis of the material contained in Part III of this book.

2. What is a civil affairs administration?

a. Read: Par. 354, FM 27-10.

b. DIRECTIVES AND AGREEMENTS ON CIVIL AFFAIRS IN FRANCE
August 25, 1944

"1. As a result of the discussions between American, British and French representatives, agreement has been reached on the practical arrangements for civil affairs administration in Continental France.

* * *

"4. In connection with your rights and powers to use or requisition war materials and other property, information has come to hand indicating that the Germans customarily requisition all usable supplies in any area before abandoning it. In exercising your right to use such supplies you should, so far as military necessity permits, give the greatest consideration to the economic interests of the civilian population and, where possible, leave at the disposal of the French authorities such transport material, food supplies and building materials as have been requisitioned by the German armies or handed over to them under duress, and which are not needed by you in connection with military operations.

MEMORANDUM NO. 1 RELATING TO ADMINISTRATIVE AND
JURISDICTIONAL QUESTIONS

* * *

"1. In areas in which military operations take place the Supreme Allied Commander will possess the necessary authority to ensure that all measures are taken which in his judgment are essential for the successful conduct of his operations. Arrangements designed to carry out this purpose are set forth in the following Articles.

"2. (i) Liberated French Continental territory will be divided into two zones: a forward zone and an interior zone.

"(ii) The forward zone will consist of the areas affected by active military operations; the boundary between the forward zone and the interior zone will be fixed in accordance with the provisions of paragraph (iv) below.

"(iii) The interior zone will include all other regions in the liberated territory, whether or not they have previously formed part of the forward zone. In certain cases, having regard to the exigencies of operations, military zones may be created within the interior zone in accordance with the provisions of Article 5 (ii) below.

"(iv) The Delegate referred to in Article 3 below will effect delimitation of the zones in accordance with French law in such a manner as to meet the requirements stated by the Supreme Allied Commander.

"3. (i) In accordance with Article 1 of the ordinance made by the French Committee of National Liberation on March 14, 1944 a Delegate will be appointed for the present theater of operations. Other Delegates may be appointed in accordance with the development of operations.

* * *

"4. In the forward zone: (i) The Delegate will take, in accordance with French law, the measures deemed necessary by the Supreme Allied Commander to give effect to the provisions of Article 1, and in particular will issue regulations and make appointments in and removals from the public services.

"(ii) In emergencies affecting military operations or where no French authority is in a position to put into effect the measures deemed necessary by the Supreme Allied Commander under paragraph (i) of this Article, the latter may, as a temporary and exceptional measure, take such measures as are required by military necessity.

"(iii) At the request of the Supreme Allied Commander, the French Military Delegate will take such action under his powers under the state of siege in accordance with French law as may be necessary.

"5. (i) In the interior zone the conduct of the administration of the territory and responsibility therefor including the powers under the state of siege, will be entirely a matter for the French authorities. Special arrangements will be made between the competent French authorities and the Supreme Allied Commander at the latter's request in order that all measures may be taken which the latter considers necessary for the conduct of military operations.

"(ii) Moreover, in accordance with Article 2 (iii) and (iv), certain portions of the interior zone (known as military zones) may be subjected to a special regime on account of their vital military importance; for example, ports, fortified naval areas, aerodromes, and troop concentration areas. In such zones, the Supreme Allied Commander is given the right to take, or to cause the services in charge of installations of

military importance to take, all measures considered by him to be necessary for the conduct of operations, and, in particular, to assure the security and efficient operation of such installations. Consistent with these provisions, the conduct of the territorial administration and the responsibility therefor will nevertheless be solely a matter for the French authorities.

* * *

"7. (i) Members of the French Armed Forces serving in French units with the Allied Forces in French territory will come under the exclusive jurisdiction of the French courts.

"(ii) Persons who are subject to the exclusive jurisdiction of the French authorities may, in the absence of such authorities, be arrested by the Allied Military Police and detained by them until they can be handed over to the competent French authorities.

"8. (i) In the exercise of jurisdiction over civilians, the Delegate will make the necessary arrangements for ensuring the speedy trial, in competent French courts in the vicinity, of such civilians as are alleged to have committed offenses against the persons, property or security of the Allied Forces.

"(ii) For this purpose the Military Delegate will establish military tribunals as laid down in the ordinance of June 6, 1944 and ensure their effective operation. The Supreme Allied Commander will designate the military formations to which he wishes a military tribunal to be attached. The Military Delegate will immediately take the necessary measures to allocate these tribunals accordingly. The Supreme Allied Commander will be kept informed of the result of the proceedings.

"9. (i) Without prejudice to the provisions of Article 13, Allied service courts and authorities will have exclusive jurisdiction over all members of their respective forces.

"(ii) British or American nationals not belonging to such forces who are employed by or who accompany those forces, and are subject to Allied Naval, Military, or Air Force law, will for this purpose be regarded as members of the Allied Forces. The same will apply to such persons, if possessing the nationality of another Allied state provided that they were not first recruited in any French territory. If they were so recruited they will be subject to French jurisdiction in the absence of other arrangements between the authorities of their state and the French authorities.

"(iii) The Allied military authorities will keep the French authorities informed of the result of proceedings taken against members of the Allied Forces charged with offenses against persons subject to the ordinary jurisdiction of the French courts.

* * *

"10. Persons who, in accordance with Article 9, are subject to the exclusive jurisdiction of Allied service courts and authorities may however be arrested by the French Police for offenses against French law, and detained until they can be handed over for disposal to the appropriate Allied service authority. The procedure for handing over such persons will be a matter for local arrangements.

"11. A certificate signed by an Allied officer of field rank or its equivalent that the person to whom it refers belongs to one of the classes mentioned in Article 9 shall be conclusive.

"12. The necessary arrangements will be made between the Allied military authorities and the competent French authorities to provide machinery for such mutual assistance as may be required in making investigations, collecting evidence, and ensuring the attendance of witnesses in relation to cases triable under Allied or French jurisdiction.

"13. Should circumstances require provision to be made for the exercise of jurisdiction in civil matters over non-French members of the Allied Forces present in France, the Allied Governments concerned and the competent French authorities will consult together as to the measures to be adopted.

"14. (i) The Allied Forces, their members and organizations attached to them, will be exempt from all direct taxes, whether levied for the state or local authorities. This provision does not apply to French nationals, nor, subject to the provisions of paragraph (iii) below to foreigners whatsoever their nationality, resident in France and recruited by the Allied Forces on the spot.

"(ii) Articles imported by the Allied Forces or for their account, or by members of those forces within the limit of their personal needs, or imported by Allied Forces or agencies for the purpose of free relief, will be exempt from customs duties and from all internal dues levied by the customs administration, subject to the provisions of paragraph (iii) below.

"(iii) The application of the above provisons, including any questions relating to the sale to the civilian population of imported

articles referred to in paragraph (ii) above, will form the subject of later negotiations, which, at the request of either party, may be extended to cover taxes which are not referred to in this article.

"15. The immunity from French jurisdiction and taxation resulting from Articles 9 and 14 will extend to such selected civilian officials and employees of the Allied Governments, present in France in furtherance of the purposes of the Allied Forces, as may from time to time be notified by the Allied military authorities to the competent French authority.

"16. (i) The respective Allied authorities will establish claims commissions to examine and dispose of any claims for compensation for damage or injury preferred in Continental France against members of the Allied Forces concerned (other than members of the French Forces), exclusive of claims for damage or injury resulting from enemy action or operations against the enemy. These claims commissions will, to the greatest extent possible, deal with these claims in the same way and to the same extent as the competent French authorities would deal with claims growing out of damages or injury caused in similar circumstances by members of the French Armed Forces.

"(ii) The competent Allied and French authorities will later discuss and determine the detailed arrangements necessary for examining and disposing of the claims referred to in this Article.

"(iii) Nothing in this Article contained shall be deemed to prejudice any right which the French authorities, acting on behalf of French claimants, may have, under the relevant rules of international law, to present a claim through diplomatic channels in a case which has been dealt with in accordance with the foregoing provisions of this Article.

"17. (i) The Allied Forces may obtain, within the limits of what is available, the supplies, facilities and services which they need for the common war effort.

"(ii) At the request of the Supreme Allied Commander, the French authorities will requisition, in accordance with French law (in particular as regards prices, wages, and forms of payment) supplies, facilities and services which the Supreme Allied Commander determines are necessary for the military needs of his command. However, in the exceptional cases provided for in Article 4 (ii) above, the right of requisition is delegated to the Supreme Allied Commander, who will exercise it in accordance with current French prices and wages.

"(iii) In order that the satisfaction of the local requirements of the Allied Armed Forces may have least possible disruptive effect on

the economy of France, the Allied military authorities and the French authorities will consult together, whenever operations permit, as to the stores, supplies and labor which procurement agencies and individual officers and men of the Allied Forces are permitted by the Supreme Allied Commander to obtain locally by requisition, purchase or hire. The Allied military authorities will place such restrictions as are agreed to be necessary on purchases whether by agencies or troops.

"(iv) The French and Allied military authorities shall jointly take the measures necessary to ensure that the provisions of this Article are carried out.

"18. Other questions arising as a result of the liberation of continental French territory which are not dealt with in this memorandum shall form the subject of separate arrangements. Special arrangements will be made to secure the observation by the Allied Forces of the French regulations concerning the exchange of currency and export of capital and will be set out in an Appendix which will be attached to this memorandum.

MEMORANDUM NO. 2 RELATING TO CURRENCY

"1. The notes denominated in francs which have been printed for the needs of Allied forces in continental France, as well as the notes denominated in francs which will be printed in the future for the same purpose, will be issued by the Tresor Central Francais.

"2. The notes denominated in francs which have been printed for the requirements of the Allied forces in continental France and which have been placed at their disposal before the signature of this memorandum, will be considered as having been issued by the Tresor Central Francais.

"3. The Allied forces will retain in their possession the notes denominated in francs which have been placed at their disposal prior to the signature of this memorandum.

* * *

"6. Allied military authorities shall keep a record of use of franc notes placed at their disposal. French authorities shall be kept fully informed, and as regularly as practical, of all expenditures in these notes. A representative shall be specially appointed for this purpose by the Tresor Central Francais.

"7. The Allied forces will not introduce into continental France notes other than those which have been made available to them by the Tresor Central Francais. The notes of the Bank of France used in continental France by the Allied forces will also be subject to the provisions of this memorandum. However, if it should become essential in the conduct of military operations to cause notes other than the French franc notes furnished hereunder to be used, such notes shall only be used by the Commander as an exceptional and temporary measure and after consultation with the French authorities.

* * *

"9. The financial arrangements which will be made with the French authorities in connection with the notes and coins dealt with in this memorandum and with the other costs arising out of operations or activities in continental France shall be negotiated between the U.S. and French authorities on the one hand, and between the British and French authorities on the other.

NOTE

General Eisenhower was authorized to enter into this agreement with the French Committee of National Liberation (a committee not recognized by the United States Government as the provisional government of France), prior to the invasion of Europe. Similar agreements were entered into with the Norwegian, Belgian, and Netherlands governments-in-exile.

Consider now the respects in which a military government and a civil affairs administration are alike, and the respects in which they differ.

Do they have the same legal basis?

Are they concerned with administering the same type of territory?

Are they both but temporary measures?

Is the law of belligerent occupation applicable to a civil affairs administration? Do the Hague Regulations and the Geneva Conventions apply to a civil affairs administration?

Is the distinguishing feature of military government the power to tell people what is law and what is not law and to put them in jail if they do not obey? See, Dillard, Power and Persuasion: The Role of Military Government, 42 Yale Review 212, 219 (1953).

Do you consider the provisions of a civil affairs agreement to be analogous to those of a status of forces agreement?

PART III

THE ESTABLISHMENT OF AN ADMINISTRATION FOR OCCUPIED AREAS

1. Its importance to commanders. The primary purpose, the main objective, call it what you will, of military government is to support military operations in the field. Military government is therefore a command responsibility. Specifically, an effective military government administration can render that support by:

a. Preserving law and order among the local populace with the result that behind-the-lines casualties and losses of, or damage to, military supplies and property are minimized.

b. Controlling the movement of civilian personnel with the result that civilian interference with military movement, flow of supplies, reinforcements, etc., is reduced.

c. Establishing health and sanitation controls, with the result that the possibilities of military casualties from diseases and epidemics are minimized.

d. Re-establishing a friendly and cooperative local government with the result that some occupation troops can be released to field commanders and that a source of local supplies is obtained. See, par. 3a, FM 41-10, Civil Affairs Military Government Operations, May 1957.

2. Its importance to judge advocates. It is the stated policy of the United States so to conduct itself as to preclude allegations that it has violated or even acted in contravention of accepted principles of International Law concerned with the acts of a military occupant. See, par. 3b, FM 41-10, supra.

3. Its importance to generations of future Americans. A more subtle objective of military government is to implant and foster the national policies of the United States. See, subpar. 3c, FM 41-10, supra.

" * * * In this connection, the view is oftimes expressed and seriously argued, that we are dealing with a defeated enemy and that we need

not over-trouble ourselves as to the treatment accorded. A mature reflection, however, must convince even the most radical that the question involved is really not what is due the inhabitants of the defeated country, but what is owed to the victorious country by the army which represents it. An occupying army in a defeated country is making history which is bound to be written. As that army conducts itself, so is the world largely to regard the country which it represents. If its army is dishonorable in its relations with a fallen foe and treats the population with injustice and subjects the people to a rule more harsh than is necessary for the preservation of order and the establishment of proper decorum and respect, that army and the country it represents are bound to stand in disrepute before the civilized world. * * *"
Excerpt from American Military Government of Occupied Germany, 1918-20, a report of the officer in charge of Civil Affairs, Third Army and American Forces in Germany.

4. Its legal basis.

a. MADSEN v. KINSELLA
343 U.S. 341 (1952)

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question here is whether a United States Court of the Allied High Commission for Germany had jurisdiction, in 1950, to try a civilian citizen of the United States, who was the dependent wife of a member of the United States Armed Forces, on a charge of murdering her husband in violation of § 211 of the German Criminal Code. The homicide occurred in October, 1949, within the United States Area of Control in Germany. For the reasons hereafter stated, we hold that such court had that jurisdiction.

The present proceeding originates with a petition for a writ of habeas corpus filed by petitioner, Yvette J. Madsen, in the United States District Court for the Southern District of West Virginia, seeking her release from the Federal Reformatory for Women in West Virginia where she is serving a sentence imposed by a United States Court of the Allied High Commission for Germany. She contends that her confinement is invalid because the court which convicted and sentenced her had no jurisdiction to do so. The District Court, after a hearing based on exhibits and agreed facts, discharged the writ and remanded petitioner to the custody of the respondent warden of the reformatory. 93 F. Supp. 319. The Court of Appeals affirmed. 188 F.2d 272. Because of the importance and novelty of the jurisdictional issues raised, we granted certiorari. 342 U.S. 865.

I. Petitioner's status in Germany.--Petitioner is a native-born citizen of the United States who lawfully entered the American Zone of Occupied Germany in 1947 with her husband, Lieutenant Madsen of the United States Air Forces. In 1949, she resided there, with him, in a house requisitioned for military use, furnished and maintained by military authority. She was permitted to use the facilities of the United States Army maintained there for persons in its service and for those serving with or accompanying the United States Armed Forces. In brief, her status was that of a civilian dependent wife of a member of the United States Armed Forces which were then occupying the United States Area of Control in Germany.

October 20, 1949, following her fatal shooting of her husband at their residence at Buchschleg, Kreis Frankfurt, Germany, she was arrested there by the United States Air Force Military Police. On the following day, before a "United States Military Government Court," she was charged with the murder of her husband in violation of § 211 of the German Criminal Code. In February, 1950, she was tried by "The United States Court of the Allied High Commission for Germany, Fourth Judicial District." That court was composed of three United States civilians, two of whom had been appointed as district judges and one as a magistrate by or under the authority of the Military Governor of the United States Area of Control. The court adjudged her guilty and sentenced her to 15 years in the Federal Reformatory for Women at Alderson, West Virginia, or elsewhere as the Secretary of the Army might direct. In May, the "Court of Appeals of the United States Courts of the Allied High Commission for Germany," composed of five United States civilians appointed by the Military Governor of the Area, affirmed the judgment but committed her to the custody of the Attorney General of the United States or his authorized representative. The Director of the United States Bureau of Prisons designated the Federal Reformatory for Women at Alderson, West Virginia, as the place for her confinement.

II. Both United States courts-martial, and United States Military Commissions or tribunals in the nature of such commissions, had jurisdiction in Germany in 1949-1950 to try persons in the status of petitioner on the charge against her.--Petitioner does not here attack the merits of her conviction nor does she claim that any nonmilitary court of the United States or Germany had jurisdiction to try her.[7] It is agreed by

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7. There was no nonmilitary court of the United States in Germany. She enjoyed the immunity from the jurisdiction of all German courts which had been granted to nationals of the United Nations and to families of members of the occupation forces. United States Military Government Law No. 2, Art. VI(1), 12 Fed. Reg. 2191, 2192, Appendix, infra, p. 364; Allied High Commission, Law No. 2, Art. 1, 14 Fed. Reg. 7457, Appendix, infra, p. 369; Allied High Commission, Law No. 13, Art. 1, 15 Fed. Reg. 1056-1057, see Appendix, infra, p. 370.

the parties to this proceeding that a regularly convened United States general court-martial would have had jurisdiction to try her. The United States, however, contends, and petitioner denies, that the United States Court of the Allied High Commission for Germany, which tried her, also had jurisdiction to do so. In other words, the United States contends that its courts-martial's jurisdiction was concurrent with that of its occupation courts, whereas petitioner contends that it was exclusive of that of its occupation courts.

The key to the issue is to be found in the history of United States military commissions[8] and of United States occupation courts in the nature of such commissions. Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war.[9] They have

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8. "By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law, and cannot be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. . . . There [Their] competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of the Attorneys General. During the Civil War they were employed in several thousand cases; . . . ." Howland, Digest of Opinions of the Judge-Advocates General of the Army (1912), 1066-1067.

9. In speaking of the authority and occasion for the use of a military commission, Colonel William Winthrop, in his authoritative work on Military Law and Precedents (2d ed. 1920 reprint), says at 831:

". . .it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war. In some instances. . . Congress has specifically recognized the military commission as the proper war-court, and in terms provided for the trial thereby of certain offenses. In general, however, it has left it to the

been called our common-law war courts.[10] They have taken many forms and borne many names.[11] Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth. See In re Yamashita, 327 U.S. 1, 18-23.

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9. (continued) President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offenses not cognizable by court-martial.

"The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. . . . Hence, in our military law, the distinctive name of military commission has been adopted for the exclusively war-court, which . . . is essentially a distinct tribunal from the court-martial of the Articles of War."

For text of General Scott's General Order No. 20, as amended by General Order No. 287, September 17, 1847, authorizing the appointment of military commissions in Mexico, see Birkhimer, Military Government and Martial Law (2d ed. 1904), App. I, 581-582. See also, Duncan v. Kahanamoku, 327 U.S. 304; In re Yamashita, 327 U.S. 1; Santiago v. Nogueras, 214 U.S. 260; Neely v. Henkel, 180 U.S. 109; Mechanics' & Traders' Bank v. Union Bank, 22 Wall. 276, 279 note; The Grapeshot, 9 Wall. 129, 132; Cross v. Harrison, 16 How. 164, 190; II Halleck, International Law (3d ed. 1893), 444-445. For an example of the exercise of jurisdiction in a murder case by a Provisional Court established in Louisiana, in 1862, by executive order of the President of the United States and an opinion by the Provisional Judge reviewing the constitutional authority for the establishment of his court, see United States v. Reiter, 27 Fed. Cas. No. 16,146.

10. While explaining a proposed reference to military commissions in Article of War 15, Judge Advocate General Crowder, in 1916, said, "A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law." S. Rep. No. 130, 64th Cong., 1st Sess. 40.

11. Such as Military Commission, Council of War, Military Tribunal, Military Government Court, Provisional Court, Provost Court, Court of Conciliation, Arbitrator, Superior Court, and Appellate Court. And see Winthrop, op. cit. 803-804.

In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities.[12] The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms.[13] The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate. That evident restraint contrasts with its traditional readiness to "make Rules for the Government and Regulation of the land and naval Forces; . . . ."[14] Under

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12. It has been recognized, even after peace has been declared pending complete establishment of civil government. See Duncan v. Kahanamoku, 327 U.S. 304; In re Yamashita, 327 U.S. 1, 12-13; Santiago v. Nogueras, 214 U.S. 260; Neely v. Henkel, 180 U.S. 109; Burke v. Miltenberger, 19 Wall. 519; Leitensdorfer v. Webb, 20 How. 176; Cross v. Harrison, 16 How. 164.

13. See Article 43 of The Hague Regulations respecting the laws and customs of war on land with special relation to military authority over the territory of a hostile state (1907):

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." 36 Stat. 2306.

"Military Government. . . is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. . . . The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part suspended and others substituted in their stead--in the discretion of the governing authority." Winthrop, op. cit. 800.

14. U.S. Const., Art. I, § 8, cl. 14.

that clause Congress has enacted and repeatedly revised the Articles of War which have prescribed, with particularity, the jurisdiction and procedure of United States courts-martial.

Originally Congress gave to courts-martial jurisdiction over only members of the Armed Forces and civilians rendering functional service to the Armed Forces in camp or in the field. Similarly the Articles of War at first dealt with nonmilitary crimes only by surrendering the accused to the civil authorities. Art. 33, American Articles of War of 1806, Winthrop's Military Law and Precedents (2d ed. 1920 reprint). 979. However, in 1863, this latter jurisdiction was enlarged to include many crimes "committed by persons who are in the military service of the United States. . . ." Still it did not cover crimes committed by civilians who, like petitioner, were merely accompanying a member of the Armed Forces.

Finally, in 1916, when Congress did revise the Articles of War so as to extend the jurisdiction of courts-martial to include civilian offenders in the status of petitioner, it expressly preserved to "Military commissions, provost courts, or other military tribunals" all of their existing concurrent jurisdiction by adding a new Article which read in part as follows:

"II. COURTS-MARTIAL.

. . . . . .

"C. JURISDICTION

. . . . . .

"Art. 15. Not exclusive.--The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." 39 Stat. 651, 652, 653.

Article 15 thus forestalled precisely the contention now being made by petitioner. That contention is that certain provisions, added in 1916 by Articles 2 and 12 extending the jurisdiction of courts-martial over civilian offenders and over certain nonmilitary offenses, automatically deprived military commissions and other military tribunals of whatever existing jurisdiction they then had over such offenders and offenses. Articles 2 and 12, together, extended the jurisdiction of courts-martial so as to include "all persons accompanying or serving with the armies of the United States. . . ." The 1916 Act also increased

the nonmilitary offenses for which civilian offenders could be tried by courts-martial. Article 15, however, completely disposes of that contention. It states unequivocally that Congress has not deprived such commissions or tribunals of the existing jurisdiction which they had over such offenders and offenses as of August 29, 1916. 39 Stat. 653, 670. See In re Yamashita, 327 U.S. 1, and Ex parte Quirin, 317 U.S. 1.

The legislative history strengthens the Government's position. During the consideration by Congress of the proposed Articles of War, in 1916, Judge Advocate General of the Army Crowser sponsored Article 15 and the authoritative nature of his testimony has been recognized by this Court. In re Yamashita, supra, at 19 note, 67-71. Before the Senate Subcommitte on Military Affairs he said:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced: . . . ."

"It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient." S. Rep. No. 130, 64 Cong., 1st Sess. 40.

The concurrent jurisdiction thus preserved is that which "by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals." (Emphasis supplied.) 39 Stat. 653, 41 Stat. 790, 10 U.S.C. § 1486. The "law of war" in that connection includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government. The jurisdiction exercised by our military commissions in the examples previously extended to nonmilitary crimes, such as murder and other crimes of violence, which the United States as the occupying power felt it necessary to suppress. In the case of In re Yamashita, 327 U.S. 1, 20, following a quotation from Article 15, this Court said, "By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war." The enlarged jurisdiction of the courts-martial therefore did not exclude the concurrent jurisdiction of military commissions and of tribunals in the nature of such commissions.

III. The United States Courts of the Allied High Commission for Germany were, at the time of the trial of petitioner's case, tribunals in the nature of military commissions conforming to the Constitution and laws of the United States.--Under the authority of the President as Commander-in-Chief of the United States Armed Forces occupying a certain area of Germany conquered by the **allies**, the system of occupation courts now before us developed gradually. The occupation courts in Germany are designed especially to meet the needs of law enforcement in that occupied territory in relation to civilians and to nonmilitary offenses. Those courts have been directed to apply the German Criminal Code largely as it was theretofore in force. (See Appendix, infra, pp. 362-371, entitled "Chronology of Establishment of United States Military Government Courts and Their Jurisdiction over Civilians in the United States Area of Control in Germany 1945-1950.") The President, as Commander-in-Chief of the Army and Navy, in 1945 established, through the Commanding General of the United States Forces in the European Theater, a United States Military Government for Germany within the United States Area of Control. Military Government Courts, in the nature of military commissions, were then a part of the Military Government. By October 20, 1949, when petitioner was alleged to have committed the offense charged against her, those courts were known as United States Military Government Courts. They were vested with jurisdiction to enforce the German Criminal Code in relation to civilians in petitioner's status in the area where the homicide occurred.

September 21, 1949, the occupation statute had taken effect. Under it the President vested the authority of the United States Military Government in a civilian acting as the United States High Commissioner for Germany. He gave that Commissioner "authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the governmental functions of the United States in Germany (other than the command of troops) . . . ." Executive Order 10062, June 6, 1949, 14 Fed. Reg. 2965, Appendix, infra, p. 367; Office of the United States High Commissioner for Germany, Staff Announcement No. 1, September 21, 1949, Appendix, infra, p. 368. Under the Transitional Provisions of Allied High Commission, Law No. 3, Article 5, 14 Fed. Reg. 7458, Appendix, infra, p. 369, preexisting legislation was applied to the appropriate new authorities. Finally by Allied High Commission, Law No. 1, Article 1, 15 Fed. Reg. 2086, Appendix, infra, p. 370, effective January 1, 1950, the name of the "United States Military Government Courts for Germany" was changed to "United States Courts of the Allied High Commission for Germany." They derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops. Although the local government was no longer a "Military Government," it was a government prescribed by an occupying power and it depended upon the continuing military occupancy of the territory.

The government of the occupied area thus passed merely from the control of the United States Department of Defense to that of the United States Department of State. The military functions continued to be important and were administered under the direction of the Commander of the United States Armed Forces in Germany. He remained under orders to take the necessary measures, on request of the United States High Commissioner, for the maintenance of law and order and to take such other action as might be required to support the policy of the United States in Germany. Executive Order 10062, supra.

The judges who served on the occupation courts were civilians, appointed by the United States Military Governor for Germany, and thereafter continued in office or appointed by the United States High Commissioner for Germany. Their constitutional authority continued to stem from the President. The members of the trial court were designated by the Chief Presiding District Judge as a panel to try the case. The volume of business, the size of the area, the number of civilians affected, the duration of the occupation and the need for establishing confidence in civilian procedure emphasized the propriety of tribunals of a non-military character. With this purpose, the Military Government Courts for Germany, substantially from their establishment, have had a less military character than that of courts-martial. In 1948, provision was made for the appointment of civilian judges with substantial legal experience. The rights of individuals were safeguarded by a code of criminal procedure dealing with warrants, summons, preliminary hearings, trials, evidence, witnesses, findings, sentences, contempt, review of cases and appeals. This subjected German and United States civilians to the same procedures and exhibited confidence in the fairness of those procedures.

It is suggested that, because the occupation statute took effect September 21, 1949, whereas the crime charged occurred October 20, 1949, the constitutional authority for petitioner's trial by military commission expired before the crime took place. Such is not the case. The authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully. Santiago v. Nogueras, 214 U.S. 260; Neely v. Henkel, 180 U.S. 109, 124; Burke v. Miltenberger, 19 Wall. 519; Leitensdorfer v. Webb, 20 How. 176; Cross v. Harrison, 16 How. 164.

IV. Petitioner and the offense charged against her came within the jurisdiction assigned to the court which tried her.--Under the United States Military Government Ordinance No. 31, August 18, 1948, Article 7, 14 Fed. Reg. 126, Appendix, infra, p. 365, the United States gave its Military Government District Courts "criminal jurisdiction over all persons in the United States Area of Control except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations." It thus excepted from

the jurisdiction of those occupation courts military men and women who were subject to military law but expressly gave those courts jurisdiction over civilian men and women who were subject to military law. Article of War 2 (d) further defined "any person subject to military law" as including "all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States. . . ." This included petitioner.

Article 7 of United States Military Government Ordinance No. 31 further provided, however, that "No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command." 14 Fed. Reg. 126, Appendix, infra, p. 365. That authorization appears in the official correspondence relating to the case of Wilma B. Ybarbo. The correspondence includes a written endorsement from the proper authority, dated December 11, 1948, covering not only the Ybarbo case but also the case "of any dependent of a member of the United States Armed Forces. . . ." See Appendix, infra, p. 367.

The applicability of the German Criminal Code to petitioner's offense springs from its express adoption by the United States Military Government. The United States Commanding General, in his proclamation No. 2, September 19, 1945, stated that, except as abrogated, suspended or modified by the Military Government or by the Control Council for Germany, "the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation. . . ." 12 Fed. Reg. 6997, Appendix, infra, p. 363. Section 211 of the German Criminal Code accordingly was applicable to petitioner on October 20, 1949. d The United States also expressly required that its civilians be tried by its occupation courts rather than by the German courts. United States Military Government Law No. 2, German courts, Art. VI (i)(c) and (d), 12 Fed. Reg. 2191, 2192, Appendix, infra, p. 364. United States Military Government Ordinance No. 2, Art. II (2)(iii), 12 Fed. Reg. 2190-2191, Appendix, infra, p. 363.

The jurisdiction of the United States Courts of the Allied High Commission for Germany to try petitioner being established, the judgment of the Court of Appeals affirming the discharge of the writ of habeas corpus for petitioner's release from custody is

Affirmed.

NOTE

"Chief Justice Chase [in Ex parte Milligan, 4 Wallace 141] describes military government as 'exercised by the military commander under the direction of the President, with the express or implied sanction of Congress.' Congress having, under its constitutional powers, declared or otherwise initiated the state of war, and made proper provision for its carrying on, the efficient prosecution of hostilities is devolved upon the President as Commander-in-chief. In this capacity, unless Congress shall specially otherwise provide, it will become his right and duty to exercise military government over such portion of the country of the enemy as may pass into the possession of his army by the right of conquest. In such government the President represents the sovereignty of the nation, but as he cannot administer all the details, he delegates, expressly or impliedly, to the commanders of armies under him the requisite authority for the purpose. Thus authorized, these commanders may legally do whatever the President might himself do if personally present, and in their proceedings and orders are presumed to act by the President's direction or sanction." Winthrop's Military Law and Precedents 801 (Reprint 1920).

Accord; MacLeod v. United States, 229 U.S. 416 (1913). United States v. Reiter, Fed. Case No. 16,146 (1865).

The significant distinction between the facts in the Madsen case and the facts in the old authorities relied upon by the court was that at the time of the Madsen trial the occupied territory was administered not by military personnel but by civilian personnel, who, judicially, operated pursuant to civilian procedures rather than military procedures. Thus, the case contributes significantly to an understanding of the nature of the relationship which exists between the law of belligerent occupation and the term military government. See, Raymond, Madsen v. Kinsella; Landmark and Guidepost in Law of Military Occupation, 47 Am. J. Int'l L. 300 (1953).

May an occupant avoid the application of the law of belligerent occupation by establishing a local puppet government to administer the territory? See, paragraph 366, FM 27-10. State of Netherlands v. Jessen (Holland 1953), Int'l Law Rep., 1953, 646 (Civil administration). Randsfjordsbruket and Jevnaker Kommune v. Viul Tresliperi (Norway 1951), Int'l Law Rep., 1951, Case No. 199 (Quisling government).

b. Read: Par. 363, FM 27-10.

NOTE

The laws of war not only give rights to a belligerent occupant, but they impose duties upon him as well. II Oppenheim's International Law, 433, 434 (7th ed. Lauterpacht 1952).

If the laws of war are the standards by which the responsibilities of belligerents of the past have been tested, will a future belligerent who has undertaken a war of aggression be entitled to have his responsibilities tested by such favorable standards, or will he be tested by the laws of peace? See, Von Glahn, The Occupation of Enemy Territory, 5, 6 (1957). But see, In re List and others (Hostages Trial) (U.S. Mil. Trib., Nuremburg 1948), Annual Digest, 1948, Case No. 215.

PART IV

THE LAW OF BELLIGERENT OCCUPATION; COMMENCEMENT AND TERMINATION

1. The commencement; the occupation of territory.

a. Read: Pars. 351, 352, 355, and 356, FM 27-10.

NOTE

May territory be occupied within the contemplation of the Hague Regulations in time of peace? Are (or were) the United States' forces in Lebanon, in 1958, occupying territory as a belligerent so as to be bound by the law of belligerent occupation? See, Von Glahn, The Occupation of Enemy Territory 27 (1957).

b. KEELY v. SANDERS
99 U.S. 441 (1878)

Facts: This was a suit brought to quiet title to certain real property purchased by plaintiff from a U.S. Board of Tax Commissioners at Memphis, Tennessee, in June of 1864. The property involved had been sold by the Commissioners in default of taxes pursuant to an act of Congress which had authorized them to "enter upon the discharge of the duties of their office whenever the commanding general of the forces of the United States, entering into an insurrectionary state or district should have established the military authority throughout any parish, or district, or county of the same." It was the defendant's contention that Union military authority had not been established over Shelby county (Memphis) in June of 1864, and, as a consequence, that the sale by the Commissioners was void.

Issue: When may territory be considered occupied?

Opinion: Judgment for plaintiff. No conquering army occupies the entire country conquered. Its authority is established when it occupies and holds securely the most important places, and when there is no opposing governmental authority within the territory. The inability of any other power to establish and maintain governmental authority is the test.

NOTE

The criteria for an effective occupation are rather exacting; (1) the belligerent must be able to control the territory, i.e., suppress on the spot any resistance to his authority; (2) he must succeed in denying the local government the power to exercise its authority; and (3) he must succeed in setting up his own administration for the territory. Fenwick, International Law 569 (3d ed. 1948). II Oppenheim's International Law 434 (7th ed. Lauterpacht 1952).

The ability to control the territory is perhaps the most nebulous criterion. Control may not necessarily result from a defeat of the principal armies of the enemy in the field. There is likely to be the matter of partisan and guerrilla forces to be reckoned with. At what point do the activities of such forces cause the occupation to be ineffective? Consider, pars. 356 and 360, FM 27-10. See, In re List and others (Hostages Trial), (U.S. Mil. Trib., Nuremberg, 1948), Annual Digest, 1948, Case No. 215.

Paragraph 356, FM 27-10, seems to contemplate that control will be maintained by ground units. Could not that control be maintained by military aircraft? See, 3 Hyde, International Law Chiefly as Interpreted and Applied by the United States 1882 (2d ed. 1945).

Beyond considerations merely of control, could a belligerent establish an effective occupation solely through the use of his air forces? See, Von Glahn, The Occupation of Enemy Territory 28, 29 (1957).

c. Proclamations.

MILITARY GOVERNMENT - GERMANY
SUPREME COMMANDER'S AREA OF CONTROL

Proclamation No. 1

To the People of Germany:

I, General Dwight D. Eisenhower, Supreme Commander, Allied Expeditionary Forces, do hereby proclaim as follows:

I

The Allied Forces serving under my Command have now entered Germany. We come as conquerors, but not as oppressors. In the area of Germany

occupied by the forces under my command, we shall obliterate Nazism and German Militarism. We shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel, oppressive and discriminatory laws and institutions which the Party has created. We shall eradicate that German Militarism which has so often disrupted the peace of the world, Military and Party leaders, the Gestapo and others suspected of crimes and atrocities, will be tried, and, if guilty, punished as they deserve.

II

Supreme legislative, judicial and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers under my direction. All persons in the occupied territory will obey immediately and without question all the enactments and orders of the Military Government. Military Government Courts will be established for the punishment of offenders. Resistance to the Allied Forces will be ruthlessly stamped out. Other serious offenses will be dealt with severely.

III

All German courts and educational institutions within the occupied territory are suspended. The Volksgerichtshof, the Sondergerichte, the SS Police Courts and other special courts are deprived of authority throughout the occupied territory. Reopening of the criminal and civil courts and educational institutions will be authorized when conditions permit.

IV

All officials are charged with the duty of remaining at their posts until further orders, and obeying and enforcing all orders or directions of Military Government or the Allied Authorities addressed to the German Government or the German people. This applies also to officials, employees and workers of all public undertakings and utilities and to all other persons engaged in essential work.

/s/ DWIGHT D. EISENHOWER,
General,
Supreme Commander,
Allied Expeditionary Forces

NOTE

This proclamation was released in September of 1944.

Does the mere issuance of a proclamation establish as a fact that territory has been occupied? Does international law require a belligerent to announce his occupancy by a proclamation? See, par. 357, FM 27-10. If it is the practice of the United States to make a proclamation, who is authorized to make it? See, par. 145, FM 41-10. In what language? See pars. 150a and 152, FM 41-10; par. 435, FM 27-10.

PLANTERS BANK v. UNION BANK
83 U.S. 483 (1872)

Facts: Upon the occupation of New Orleans by Union forces during the Civil War, the Union commander, General Butler, issued a proclamation in which he stated: "All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." At the time this proclamation was issued the Union Bank of New Orleans carried on its books a large balance in favor of the Planters Bank of Tennessee. One year later, General Banks, the successor to General Butler, issued an order requiring all banks in New Orleans to pay over to the chief quartermaster of the Union Army all moneys in their possession belonging to, or standing upon their books to the credit of, any corporation, association etc., in hostility to the United States. Pursuant to this order the Union Bank paid to the quartermaster the balance standing to the credit of the Planters Bank. Subsequently, the Planters Bank drew on the Union Bank the sum of $86,466, the amount it considered due it. The Union Bank refused to pay, defending on its compliance with General Banks' order. Thereupon the Planters Bank sued to recover the money alleged to be due it.

Issue: Was the payment to the quartermaster a satisfaction of the Planters Bank's claim?

Opinion: No. General Butler's proclamation amounted to a pledge that rights of property would be respected. This pledge was binding upon his successor. General Banks' order was therefore, one he had no authority to make. It was wholly invalid.

NOTE

Does the holding in this case amount to a principle of international law, or should it be treated merely as an anomaly of the time and circumstance? Irrespective of a subjective evaluation of the case, what practical suggestions does it offer the legal adviser to a military governor of the future?

Absent General Butler's proclamation, would General Banks' order have been legal? May private property be confiscated? May it be sequestered? See, Kobylinsky v. Banco Di Chivari (Italy 1951), Int'l Law Rep., 1951, Case No. 214 (German sequestration of silver deposited with local bank).

d. Proof of occupation.

KEELY v. SANDERS, supra

Facts: As stated, supra.

Issue: May the defendant be permitted to litigate the factual question whether the occupation was effective?

Opinion: No. Whether military authority had been established throughout Shelby county before the Commissioners entered upon the discharge of their duties, is a political question to be answered by the executive branch of the government and not by the courts.

NOTE

The effectiveness of an occupation is a most important factual question. Only if there be an effective occupation is the law of belligerent occupation available to validate the acts and orders of the enemy authorities. This is so even if their actions and orders otherwise are in accordance with the Hague Regulations and the Geneva Conventions. Occupation is then the factual condition precedent to an invocation of the law, customary or conventional. But how meaningful is this precedent if it cannot be litigated? To illustrate, in Bank of Ethiopia v. National Bank of Egypt and Liguori, 1 Chancery 513 (Gt. Brit. 1937), the issue was whether the Bank of Ethiopia had been validly

dissolved or had otherwise ceased to exist by the terms of a decree promulgated by the Italian Government one month after the capital Addis Ababa, had been seized but several months before the whole of Ethiopia had been subjugated. In dismissing a suit instituted by the former directors of the Bank of Ethiopia to require a settlement of outstanding accounts between it and the Egyptian Bank, the English court held that the Italian decree was valid and that the directors had no standing to sue, because the British Foreign Office had subsequently extended de facto recognition to the Italian Government in Ethiopia. [Under British law, de facto recognition operates retroactively to validate the internal acts of the government recognized.]

2. The termination.

a. Read: Pars. 353 and 361, FM 27-10.

NOTE

Generally speaking, the law of belligerent occupation has been considered to terminate upon the coming into force of a treaty of peace, upon the dissolution of the local sovereign entity, or upon the valid annexation of the territory after all hostilities have ceased; subject, of course, to the continued application of the articles of GC referred to in paragraph 249, FM 27-10. See, Stone, Legal Controls of International Conflict 721 (1954).

A twilight period between hostilities and the coming into force of a treaty of peace is often created by an armistice agreement. Does the law of belligerent occupation continue to apply to enemy territory held under an armistice agreement? Specifically, do the Hague Regulations continue to apply? May the parties to the armistice agreement agree to provisions at variance with the Hague Regulations? See, 3 Hyde, International Law Chiefly as Interpreted and Applied by the United States 1905 (2d ed. 1945). Stone, Legal Controls of International Conflicts 696, n. 13, 721 (1954). Von Glahn, The Occupation of Enemy Territory 28 (1957). Cf., subpar. 487d, FM 27-10.

b. SANTIAGO v. NOGUERAS
214 U.S. 260 (1908)

Facts: During the Spanish-American War, military forces of the United States occupied the Spanish island of Puerto Rico, and established a military government. That military government, with its occupation courts, continued to function after the coming into force of a treaty of peace by which Spain ceded Puerto Rico to the United States.

Issue: Does the authority of a military government terminate, ipso facto, with the coming into force of a treaty of peace?

Opinion: No. The military authority in control of conquered territory ceded to the United States under a treaty of peace continues, if not dissolved by the Commander-in-Chief, until legislatively changed.

NOTE

Accord; Cross v. Harrison, 16 How. 164 (1853). Burke v. Miltenberger, 19 Wall. 519 (1873).

How may the holding in the Santiago case be reconciled with the principles of international law discussed in subparagraph 2a, above?

As a point of digression into facets of Constitutional law, wherein lies the authority of Congress to legislate with respect to foreign territory occupied by U.S. forces? Subsequent to the coming into force of a treaty of peace? Prior to the coming into force of a treaty of peace? Consider, by analogy, Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).

PART V

THE STATUS OF OCCUPIED TERRITORY; ITS INHABITANTS; ITS LAWS

1. Sovereignty and other considerations.

a. Read: Par. 358, FM 27-10.

b. FLEMING v. PAGE
9 How. 603 (1850)

"This action is brought by the plaintiffs, merchants, residing in the city of Philadelphia, against the defendant, the late collector of port of Philadelphia, to recover the sum of one thousand five hundred and twenty-nine dollars, duties paid on the 14th of June, 1847, under protest, on goods belonging to the plaintiffs, brought from Tampico while that place was in the military occupation of the forces of the United States.

"On the 13th of May, 1846, the Congress of the United States declared that war existed with Mexico. In the summer of that year, New Mexico and California were subdued by the American armies, and military occupation taken of them, which continued until the Treaty of Peace of May, 1848.

"On the 15th of November, 1846, Commodore Conner took military possession of Tampico, a seaport of the State of Tamaulipas, and from that time until the treaty of peace it was garrisoned by American forces, and remained in their military occupation. Justice was administered there by courts appointed under the military authority, and a custom-house was established there, and a collector appointed, under the military and naval authority.

"On the 29th of December, 1846, military possession was taken by the United States of Victoria, the capital of Tamaulipas; garrisons were established by the Americans at various posts in that State; and, at the period of the voyages from Tampico of the Schooner Catharine, hereinafter mentioned, Tamaulipas was reduced to military subjection by the forces of the United States, and so continued until the treaty of peace.

"On the 19th of December, 1846, the schooner Catharine, an American vessel chartered by the plaintiffs, cleared coast-wise from Philadelphia for Tampico.

"On the 13th of February, 1847, she was cleared at the custom-house at Tampico, on her return voyage to Philadelphia, under a coasting manifest, signed by Franklin Chase, United States acting collector.

"The Catharine brought back a cargo of hides, fustic, sarsparilla, vanilla, and jalap, the property of the plaintiffs, which was admitted into the port of Philadelphia free of duty. The Catharine cleared again coast-wise from Philadelphia, for Tampico, on the 18th of March, 1847, and in June, 1847, brought back a return cargo of similar merchandise, owned by the plaintiffs, which the defendant, acting under the instructions of the Secretary of the Treasury, refused to admit, unless the duties on the merchandise brought by the Catharine on her former voyage were paid, as well as the duties on the goods brought by her on this voyage.

"Thereupon, the plaintiffs, on the 14th of June, 1847, paid under protest the duties on both voyages, amounting to $1,529, and brought this action to recover back the money so paid.

"The question for the decision of the court is, whether the goods so imported by the Catharine were liable to duty. If the court are of the opinion that they were not so liable, then judgment is to be entered for the plaintiffs, for the sum of $1,529, with interest from the 14th of June, 1847.

"If they are of the opinion that they were liable to duty, then judgment is to be entered for the defendant.

* * *

Mr. Chief Justice Taney delivered the opinion of the court:

The question certified by the Circuit Court turns upon the construction of the Act of Congress of July 30, 1846. The duties levied upon the cargo of the schooner Catharine were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment Tampico was not a foreign port within the meaning of the act of Congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military

authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress.

The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority of the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to emply them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own

institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.

Again, there was no act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, but as a measure of hostility, and of a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country. The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States, as the documents required by the act of Congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

* * *

In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question but the rights of war. After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

* * *

Order.

* * * it is the opinion of this court, that Tampico was a foreign port within the meaning of the Act of Congress of July 30, 1846, entitled "An Act reducing the duties on imports, and for other purposes," and that the goods, wares, and merchandise as set forth and described in the record were liable to the duties charged upon them under said act of Congress. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

NOTE

The shipments involved in Fleming v. Page left Tampico prior to the coming into force of a treaty of peace with Mexico. Would the result in the case have been the same if the shipments had occurred subsequent to the coming into force of a treaty of peace? Would your answer depend upon the terms of the treaty? What if Mexico had ceded Tampico to the United States? What if Mexico had merely relinquished sovereignty over Tampico, ceding it to no state? Consider, Neely v. Henkel, 180 U.S. 109 (1901).

A provision of the Immigration and Nationality Act operates to expatriate an American citizen who voluntarily votes in a political election in a foreign state. Would this provision be applicable to a political election held in the American Occupied Zone of Germany in 1946? See Acheson v. Wohlmuth, 196 F.2d 866 (D.C. Cir. 1952), cert. den., 344 U.S. 833 (1952). See, also, Acheson v. Kuniyuki, 189 F.2d 741 (9th Cir. 1951), reh. den., 190 F.2d 897 (1951), cert. den., 342 U.S. 942 (1951), (political election in occupied Japan). As to the constitutional issue involved, see Perez v. Brownell, 356 U.S. ____ (1958).

Is a native of the Ryukyu Islands a national of the United States? See, United States v. Ushi Shiroma, 123 F. Supp. 145 (D. Hawaii 1954). Cf., Cobb v. United States, 191 F.2d 604 (9th Cir. 1951), cert. den., 342 U.S. 913 (1952).

Fleming v. Page and Ushi Shiroma, supra, may serve as a point of departure for a consideration, generally, of the question of the applicability of U.S. laws to U.S. controlled areas outside the continental limits of the United States. For a valuable article on the subject, see, Green, Applicability of American Laws to Overseas Areas Controlled by the United States, 68 Harv. Law Rev. 781 (1955).

c. V/O SOVFRACHT v. N. V. GEBR. VAN UDENS SCHEEPVAART
(HOUSE OF LORDS 1943)
A. C. 203

Facts: Before the outbreak of war between Great Britain and Germany in September of 1939, a Dutch shipowning corporation (N.V. Gebr. Van Udens Scheepvaart), incorporated under the law of the Netherlands and having its principal place of business in Rotterdam, chartered one of their vessels to V/O Sovfracht, a Russian company. Disputes arose between them and the Dutch corporation sought arbitration in London in accordance with a provision in the charter party. That arbitration was in progress when in May 1940 the Germans invaded Holland and brought the country entirely under their control. The Russian company thereupon refused to proceed with the arbitration contending that the Dutch corporation was now an alien enemy within the British Trading With The Enemy Act. The Dutch corporation then filed this suit asking for the appointment of an umpire. The Russian company moved to dismiss the suit on the theory that under the British Trading With The Enemy Act an alien enemy has no right to resort to British courts.

Issue: Does the occupation of allied territory by enemy forces transform an allied corporation into an enemy corporation within the meaning of the mentioned Act, so as to disqualify it from maintaining the instant suit?

Opinion: Yes. Invasion of allied territory, resulting in the enemy being in effective control and exercising some kind of government or administration over it gives the area an enemy character and disqualifies residents of the territory from suing in the King's courts.

NOTE

Is the result in this case **reconcilable** with the provisions of paragraph 358, FM 27-10, and the rule in Fleming v. Page, supra?

The resort to a territorial test rather than to a nationality test to fix the nature of a person's economic interests in wartime is of impressive historic origin. In 1815, Chief Justice Marshall announced the rule that for certain belligerent and commercial purposes third nations have a right to place an enemy character upon the produce of the soil of friendly territory occupied by enemy forces. Thirty Hogsheads of Sugar, 9 Cranch 191.

To what extent, if any, do you think that the British court in the V/O Sovfracht case and the American court in the Sugar case were influenced by a desire to reach economic resources which would otherwise have been available to the enemy? See, Stone, Legal Controls of International Conflict 417-419 (1954).

Would the Trading With the Enemy Act (U.S.) operate against a United States citizen residing in American occupied Bavaria? Which rule applies? Fleming v. Page? V/O Sovfracht? See, Feyerabend v. McGrath, 189 F.2d 694 (D.C. Cir. 1951). Cf., Mrs. Alexander's Cotton, 2 Wall. 404 (1864), (Union sympathizer (?) residing in Confederate territory).

2. The inhabitants of occupied territory; allegiance and duty.

a. Read: Pars. 359 and 432, FM 27-10.

NOTE

In Fleming v. Page, supra, the court spoke of the inhabitants of Tampico as owing the United States a "temporary allegiance." Is that characterization correct today? See, Baxter, The Duty of Obedience to the Belligerent Occupant, 27 Brit. Y. B. Int'l L. 235 (1950).

If sovereignty is not transferred solely by the fact of a military occupation, to whom do the inhabitants of the occupied territory owe allegiance?

b. PUBLIC PROSECUTOR v. LIAN
(Norway 1945), Annual Digest 1943-45, Case No. 155

Facts: During the German occupation of Norway, Lian, a Norwegian citizen residing in Norway, bought property which had belonged to a Norwegian who had fled Norway, and which had been confiscated by the Germans pursuant to an occupation decree designed to discourage such flights. When the occupation ended, Lian was tried before a Norwegian court and convicted under a Royal Decree which had been issued by the Norwegian Government-in-exile and which made his act punishable. He appealed to the Supreme Court and alleged, inter alia, that a belligerent occupant was, according to international law, vested with certain rights including that of forbidding inhabitants of the occupied territory to leave the territory, and of punishing such acts. As a consequence he contended that the property was lawfully bought and that the sovereign-in-exile was not allowed to make his purchase a criminal offense by issuing legislation at variance with the legislative measures of the occupant, in cases where the latter's legislation is in conformity with international law.

Issue: Was the Norwegian decree at variance with the German occupation decree, and, if so, which controlled?

Opinion: Conviction sustained. No variance existed. The German decree simply did not imply any obligation to buy the confiscated property.

Dictum: "In any case a Norwegian decree will, as a rule, be binding on Norwegian citizens even if it is at variance with international law."

NOTE

See, also, In re Policeman Vollema, (Holland 1947), Annual Digest, 1947, Case No. 116 (Dutch policeman in occupied Holland enforced German ordinance by arresting a Dutch naval intelligence officer about to leave Holland).

Where is the juridical basis for this absentee legislation? Are there no limits to its subject and scope? Will third countries recognize it? See, State of Netherlands v. Federal Reserve Bank of New York, 201 F.2d 455 (2d Cir. 1953). Comment, 52 Michigan Law Rev. 753 (1953-54).

What is the inhabitant to do who finds himself in the delemma created by conflicting decrees?

Is he under a duty to his absent sovereign to **disobey illegal orders** of the occupant? See, D'Escury v. Levensoerzekerings-Maatschappij Utrecht Ltd., (Holland 1948), Annual Digest, 1948, Case No. 189 (yes). Is resolution of the conflict an international law question or is it merely a conflict of laws question to be resolved in ad hoc fashion by a domestic forum? See, 3 Hyde, International Law, Chiefly as Interpreted and Applied by the United States 1886 (2d ed. 1945). Morganstern, Validity of the Acts of the Belligerent Occupant, 28 Brit. Y.B. Int'l Law 291 (1951).

3. Application of existing laws.

a. Order of President McKinley to the Secretary of War, July 18, 1898, on the occupation of Santiago de Cuba by the American Forces.

" * * * The municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. * * *

"He (C-I-C) will possess the power to replace or expel the native officials in part or altogether; to substitute new courts of his own constitution for those that now exist * * *."

b. Read: Pars. 363 and 370, FM 27-10.

NOTE

An accepted theory that the laws best suited for people are the laws with which they have lived, is responsible for the development of a customary rule of international law (subsequently codified at Article 43, HR; par. 363, FM 27-10), that a belligerent occupation does not ipso facto effect a change in the private law applicable to inhabitants in their usual dealings with one another. Thus, in Thorington v. Smith, 8 Wall. 1 (1868), a contract for the purchase of private property in occupied territory was enforced even though the consideration due was in Confederate money. See, also, Housmann v. Koninklijke Rotterdamse Lloyd (Holland 1952), Int'l Law Ref., 1952, Case No. 29, (private contract entered into in Japanese occupied Netherlands Indies governed by Netherlands Indies law).

The reference to "the laws in force" both in President McKinley's order and in Art. 43, HR (par. 363, FM 27-10), suggests that the belligerent occupant is under no legal obligation to apply laws promulgated by the absent sovereign subsequent to the occupation. For a factually interesting article suggesting that as a practical matter the occupant should apply such laws, where possible, see Stein, Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre, 46 Mich. Law Rev. 341 (1948).

c. COLEMAN v. TENNESSEE
97 U.S. 509 (1878)

Facts: Coleman was a Union soldier who, in 1865, murdered a woman in Tennessee, a State then under Union occupation. He was tried for his offense by an army court-martial, convicted and sentenced to death. Before the sentence could be carried out, he escaped from military control and remained at large until he was apprehended by civil authorities in Tennessee. He was brought to trial before the criminal courts of Tennessee for the same offense of which he had previously been convicted by the court-martial. His plea of former conviction was overruled; he was convicted and again sentenced to death. This action is an appeal from an adverse decision on his application for habeas corpus.

Issue: Do the local courts of an occupied territory have jurisdiction to try and sentence a member of the occupation forces for an act in violation of the criminal laws of that territory?

Opinion: No. "The doctrine of international law on the effect of military occupation of enemy's territory upon its former laws is well established. Though the late war was not between independent Nations, but between different portions of the same Nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition; and the character and form of the government to be established depend entirely upon the laws of the conquering State or the orders of its military commander. By such occupation, the political relations between the People of the hostile country and their former government or sovereign are for the time severed; but the municipal laws, that is, the laws which regulate private rights, enforce contracts, punish crime and regulate the transfer of property, remain in full force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror. And the tribunals by which the laws are enforced continue as before, unless thus changed. 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. Halleck, Int L, ch 33.

"This doctrine does not affect, in any respect, the exclusive character of the jurisdiction 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 the protection and benefit of its own People. As respects them the same acts which constituted offenses before the military occupation constituted [518] offenses afterwards; and the same tribunals, unless superseded by order of the military commanders, continued to exercise their ordinary jurisdiction.

* * *

"In thus holding, we do not call in question the correctness of the general doctrine asserted by the Supreme Court of Tennessee: that the same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from

its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for the application of the doctrine. The laws of Tennessee with regard to offenses and their punishment, which were allowed to remain in force during its [519] military occupation, did not apply to the defendant, as he was at the time a soldier in the Army of the United States and subject to the Articles of War. He was responsible for his conduct to the laws of his own government only as enforced by the commander of its army in that State, without whose consent he could not even go beyond its lines. Had he been caught by the forces of the enemy, after committing the offense, he might have been subjected to a summary trial and punishment by order of their commander; and there would have been no just ground of complaint, for the marauder and the assassin are not protected by any usages of civilized warfare. But the courts of the State, whose regular government was superseded and whose laws were tolerated from motives of convenience, were without jurisdiction to deal with him.

* * *

"It follows from the views expressed, that the judgment of the Supreme Court of Tennessee must be reversed and the cause remanded, with directions to discharge the defendant from custody by the sheriff of Knox County on the indictment and conviction for murder in the state court. But as the defendant was guilty of murder, as clearly appears, not only by the evidence in the record in this case but in the record of the proceedings of the court-martial, a murder committed, too, under circumstances of great atrocity, and as he was convicted of the crime by that court and sentenced to death, and it appears by his plea that said judgment was duly approved and still remains without any action having been taken upon [520] it, he may be delivered up to the military authorities of the United States, to be dealt with as required by law."

NOTE

For a post-World War II application of the rule in Coleman v. Tennessee, see In re Lo Dolce, 106 F. Supp. 455 (W.D. N.Y. 1952). Note, 12 Washington & Lee Law Rev. 213 (1955).

Paragraph 374, FM 27-10, restates the holding in Coleman v. Tennessee as an accepted principle of international law. But cf., In re S.S.

Member Ahlbrecht (Holland 1947), Annual Digest, 1947, Case No. 92 (distinguishing crimes committed in a non-official capacity). It states, however, that military and civilian personnel of the occupying forces can be made subject to the local law and to the jurisdiction of the local courts by the express direction of a competent officer of the occupation forces. There would appear to be a serious question whether this latter statement is wholly accurate, or at least whether it should be taken literally. With respect to the subjection of United States military and civilian personnel of the occupation forces to the local law, has not that result been accomplished simply by expressly continuing the local law in effect? See Madsen v. Kinsella, page 18, supra. United States v. Schultz, 4 CMR 104, 115 (1952). Cf., Belgian State v. Botte (Belgium 1953), Int'l Law Rep., 1953, 634. With respect to the subjection of United States military and civilian personnel of the occupation forces to the jurisdiction of the local criminal courts, some doubt has been expressed as to the "propriety" of such a practice. United States v. Schultz, 4 CMR 104, 112 (1952). Cf., Reid v. Covert, 354 U.S. 1 (1957). But cf., Neely v. Henkel, 180 U.S. 109 (1901).

A by-product of the decision in Coleman v. Tennessee was the heretofore troublesome dicta in the court's opinion that a foreign army permitted to be stationed in a friendly country, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. See that dicta stated as a rule at par. 12, MCM 1951 and in United States v. Sinigar 20 CMR 46, 53 (1955)). The recent decision of the United States Supreme Court in Wilson v. Jirard, 354 U. S. 524 (1957), leaves no doubt that dicta was an unwarranted extension of Chief Justice Marshall's opinion in The Schooner Exchange v. McFaddon, 7 Cranch 116 (1812).

d. DOW v. JOHNSON
100 U.S. 158

Facts: New Orleans was occupied by Union forces early in the Civil War. The Union military commander issued a proclamation limiting the exercise of criminal jurisdiction by the local Louisiana courts. That proclamation was completely silent with respect to the exercise of civil jurisdiction, however. Subsequently (1863) Johnson, a citizen of New Orleans, sued General Dow, the Union commander of Forts Jackson and St. Philip, for damages resulting from the taking by troops under General Dow's command of certain personal property from his (Johnson's) plantation. Suit was filed in a local Louisiana civil court. The petition alleged that the property taken had not been necessary for the prosecution of the war or the maintenance of the army of occupation.

Service was had upon General Dow personally, but he chose not to appear. As a consequence, a default judgment was entered against him. Johnson then attempted to sue on that judgment in a federal court for the state of Maine (apparently where he was able to locate General Dow). Johnson was successful in the lower courts. The case came before the Supreme Court on a writ of error.

Issue: Do the civil courts of an occupied territory have jurisdiction to entertain a suit, and enter a judgment against, an officer of the occupying force for acts ordered by him in his military character?

Opinion: No. From the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. The latter are responsible for their conduct only to their own government and the tribunals by which those laws are administered.

NOTE

It is significant that the result in this case was reached independent of a consideration whether the act complained of was done "in the performance of official duty," as that expression enjoys popular use today.

Suppose the situs of General Dow's action was not occupied territory but was friendly territory subject to a civil affairs administration. Would the same result obtain? See, paragraphs 9(i) and 13, Directives and Agreements on Civil Affairs In France, page 10, supra.

The other side of the Dow v. Johnson coin discloses that there is then no local forum before which occupation personnel may come as plaintiffs to secure civil redress from the inhabitants with whom they have entered into business transactions in an individual capacity. Such a situation existed in Okinawa, for example, until the promulgation of Executive Order 10713, June 5, 1957 (D.A. Bull. No. 3, 10 June 1957), which opened the civil courts of the Government of the Ryukyu Islands to suits by and against military and civilian personnel of the U.S. forces (see sec. 10(b)(2)).

e. Marriages and births in occupied territory.

A child born in occupied territory, Norway during World War II for example, of Norwegian parents would be of what nationality? Norwegian? German?

If a child was born, in occupied Norway, of a marriage between a Norwegian woman and a German soldier, would it have a dual nationality?

An American soldier stationed in occupied enemy territory desires to marry a local girl. Assuming there is no reason why he should not, by whom would you advise him to have the ceremony performed? An Army chaplain? A local clergyman?

Would your advice be the same if the soldier's fiance was an Army nurse?

As to births, see McNair, Legal Effects of War 333-335 (3d Ed. 1948). Von Glahn, The Occupation of Enemy Territory 60 (1957). Wong Man On v. The Commonwealth (Australia 1952), Int'l Law Rep., Case No. 58 (child born in German Guinea during Australian occupation of 1914).

As to marriages, see McNair, id, 335, 336. Holdowanski v. Holdowanski (Gt. Brit. 1956) 3 W.L.R. 935 (Polish army chaplain performed ceremony in Italy during World War II between a Polish soldier and a Polish girl). Kochanski v. Kochanska (Gt. Brit. 1957) 3 W.L.R. 619 (marriage in Polish DP camp in Germany). N v. Belgian State etc. (Belgium 1949), Annual Digest, 1949, Case No. 170 (German military official performed ceremony between German officer and Belgian woman in occupied Belgium). De Alwis v. De Alwis (Malaya 1947), Annual Digest, 1948, Case No. 195 (Japanese appointed official performed ceremony between two residents of the Japanese occupied Malayan state of Selangor).

PART VI

THE MILITARY GOVERNOR; LEGISLATIVE AUTHORITY; COURTS

1. The Military Governor, The President's alter ego.

   a. Madsen v. Kinsella and Note, page 18, supra.

   b. OCHOA v. HERNANDEZ
   230 U.S. 139 (1913)

Facts: During the Spanish-American war, the United States military governor for Porto Rico promulgated a "judicial order" which amended the civil law then in force so as to reduce from twenty years to six years the period during which adverse possession must continue in order to convert an entry of possession into a record of ownership upon the public records. This order was stated to have retroactive effect. The plaintiffs, minors at the time of the "order," claimed certain land through inheritance. The defendant, a good faith purchaser from a fraudulent vendor, claimed over six years adverse possession.

Issue: Was the "judicial order" valid?

Opinion: **No. President McKinley's order to the Secretary of War** stated: "The inhabitants so long as they perform their duties are entitled to security in their persons and property * * *. Private property * * * is to be respected." [see page45, supra.] Accordingly, the military governor had exceeded the authority granted him by the President as Commander-in-Chief.

NOTE

Is the authority of a successor military governor also limited by the terms of a proclamation issued by his predecessor? See, Planters Bank v. Union Bank, page 33, supra.

There is interesting dicta in the Ochoa case to the effect that the "Judicial Order" amounted to an unconstitutional deprivation of property without due process of law. Does the Constitution follow the flag? Consider, **Seery** v. United States, 127 F. Supp. 601 (Ct. Cl. 1955), reaffirmed, 161 F. Supp. 395 (Ct. Cl. 1958), page 88, **infra**.

2. Occupation laws, civil and criminal.

a. Read: Pars. 363, 365, 369, 370, 371, FM 27-10.

NOTE

Under Lower Saxony law, a member of the legislature could not be tried in a criminal court without the consent of the House of Lords. May a British military occupation tribunal try a member of the Lower Sacony legislature for an act in violation of an occupation ordinance, without the consent of the House of Lords? See, Landwehr v. Director of Prosecutions (Brit. Control Comm. 1950), Int'l Law Rep., 1950, Case No. 132.

Prior to the Peace Treaty with Japan, were United States military authorities in Okinawa free to alter Ryukuan tort law? See, Coble v. United States, 191 F.2d 604 (9th Cir. 1951), cert. den., 342 U.S. 913 (1952). The key here is the limiting phrase "unless absolutely prevented" of Article 43, HR (par. 363, supra). What facts or circumstances would operate absolutely to prevent the occupant from respecting the local laws? Refusal of local officials to cooperate? Military operations? Security considerations? Ideological conflicts? Were the Allied Powers "absolutely prevented" from respecting Nazi laws and institutions? See, paragraph I, General Eisenhower's Proclamation No. 1, pages 31-32, **supra**. If the continuation in force of certain local laws would interfere with the accomplishment of the objects for which the war was inaugurated, would the occupant be "absolutely prevented" from respecting them? See, Sutherland, Constitutional Powers and World Affairs (1919) 80. Stone, Legal Controls of International Conflict (1954) 698, 699.

As a practical matter, who is there to question the legality, the propriety, the fairness of the occupant's legislation? Of course, when the absent sovereign returns invocation of a doctrine somewhat loosely referred to as jus postliminii--the right under which persons and things taken by the enemy in war are restored to their former state on the coming

again into power of the nation to which they belonged (Ballantine's Law Dictionary (2d ed. 1948)--will operate to litmus test the validity of the occupant's acts.

If measures taken by the military occupant are given extraterritorial effect (disputatious question in itself; see, Schwenk, Legislative Power of the Military Occupant Under Article 43, Hague Regulations, 54 Yale Law J. 393 (1944-45)), then third countries may have occasion to pass upon the validity of the occupant's legislation. In Callwood v. Virgin Islands National Bank, 121 F. Supp. 379 (D.V.I. 1954) and Kent Jewelry Co. v. Kiefer, 119 N.Y.S. 2d 242 (1952), the courts refused to recognize as valid transactions entered into in occupied territory in violation of a military government ordinance.

3. Public officials, judges, and local courts.

a. The immediate object in war is to force the enemy to surrender. But after surrender what? There are three legal possibilities; (1) dispossess the local government altogether and administer the country by a military government; (2) dispossess the hostile regime and set up a new regime of indigenous officials willing and anxious to collaborate, and (3) permit the existing regime to continue to function under supervision. At one time or another during World War II each of these three possibilities was implemented.

NOTE

Is there a limit to the extent to which the second mentioned possibility may be implemented? May a successful belligerent transform a monarchy into a democratic state? A free enterprise society into a communistic society? Do Article 43, HR (par. 363, FM 27-10), and Article 64, GC (par. 369, FM 27-10) mark the limit? Are the HR and GC applicable in the case of an unconditional surrender? See, Dalldorf and Others v. The Director of Prosecutions (Brit. Control Comm. 1949), Annual Digest, 1949, Case No. 435. Stone, Legal Controls of International Conflict, 698, 721 (1954). Von Glahn, The Occupation of Enemy Territory 273-290 (1957).

b. Read: Pars. 422, 423, and 424, FM 27-10.

NOTE

Do you interpret Article 54, GC (par. 422, above) to mean that the occupant may not compel local public officials and judges to continue in office if military necessity requires it? May the occupying power remove judges from their posts? Do you consider the provisions of paragraph 423, above, to be in derogation of Article 45, HR (par. 359, FM 27-10)? See, Article V, Supreme Commander's Area of Control, Law No. 2, page 58, **infra**.

c. ALVAREZ Y. SANCHEZ v. UNITED STATES
216 U.S. 167 (1910)

Facts: Prior to the Spanish-American war, the plaintiff had purchased, in perpetuity, the office known as "Solicitor of the Courts of the First Instance of the capital of Porto Rico," and had received a patent to that office from the King of Spain. Under Spanish law such a transaction was authorized and was customary; the purchaser acquiring a property right in the office which was transferable in perpetuity. The plaintiff held the office until it was absolished by a decree of the United States military governor of Porto Rico on April 30, 1900. On 12 April 1900, Congress passed (to take effect 1 May 1900), the Foraker Act (31 Stat. 77, 79), section 8 of which provided as follows:

> "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered, or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico, or by act of Congress of the United States."

Plaintiff filed this action to recover $50,000, the value of the office he had held, alleging that the effect of section 8 of the Foraker Act was to confiscate his property without compensation in violation of the Treaty of Peace between the United States and Spain, December 1898. That Treaty provided pertinently: "Spain cedes to the United States the island of Porto Rico * * *" Article 7. "* * * And it is hereby declared that the * * * cession * * * cannot in any respect impair the property or rights which by law belong to the peaceful possession * * * of private individuals * * *." Article 8.

Issue: Does the Foraker Act operate to deprive the plaintiff of a property right secured to him under the Peace Treaty?

Opinion: No. The provisions of the Peace Treaty were not intended to refer to such public or quasi-public stations as the plaintiff's. It is inconceivable that the United States intended to restrict its sovereign authority so that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions.

NOTE

Is the result in this case reconcilable today with Article 54, GC (par. 422, FM 27-10)? See, Article 6, GC (par. 361, FM 27-10).

d. Read: Pars. 372 and 373, FM 27-10.

NOTE

With respect to Article 23(h), HR (par. 372, FM 27-10), the British Court of Appeal in Porter v. Freudenberg (1915), said that that article " * * * 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" (quoted in VI Hackworth, Digest of International Law 364). Do you agree with this narrow interpretation, or do you feel that the Article operates to the benefit of enemy aliens situated within the territory of a belligerent as well? How have the drafters of FM 27-10 interpreted it?

Does Article 23(h), HR, mean that the inhabitants of the occupied territory may sue the occupant and his forces in local courts? See, Coleman v. Tennessee and Dow v. Johnson, p. 49, supra. If not directly, may they do so indirectly by litigation which raises in issue the validity of the occupant's acts. In other words, does a local court otherwise having jurisdiction over the parties, have the right to rule upon the validity of the acts of the occupant? See, par. 12c, Article VII, Law No. 2, page 59, infra. See, Morgenstern, Validity of the Acts of the Belligerent Occupant, 28 Brit. Y.B. Int'l L. 297 (1951).

e. Law No. 2.

MILITARY GOVERNMENT-GERMANY

SUPREME COMMANDER'S AREA OF CONTROL

LAW No. 2

GERMAN COURTS

It is hereby ordered:

ARTICLE I

Temporary Suspension of Ordinary and Administrative Courts

I. The following German Courts and Tribunals are hereby suspended and deprived of authority in the occupied territory until authorized to re-open:

a. The Oberlandesgerichte, and all courts over which said courts exercise appellate or supervisory jurisdiction;

b. All subordinate courts over which the Reichsverwaltungsgericht exercises appellate or supervisory jurisdiction;

c. All other courts not dissolved under Article II.

2. The Reichsgericht and the Reichsverwaltungsgericht have until further notice no authority over any court or otherwise in the occupied territory.

3. Every decision, judgment, writ, order or direction issued by any such court or tribunal after the effective date of this law and during the period of suspension shall, within the occupied territory, be null and void.

ARTICLE II

Dissolution of Special and Party Courts and Tribunals

4. The jurisdiction and authority of the following courts and tribunals in the occupied territory are hereby abolished:

a. The volksgerichtshof;
b. The Sondergerichte;
c. All courts and tribunals of the NSDAP and of its organizations, formations and connected associations.

ARTICLE III

Authority for Re-opening Ordinary Civil and Criminal Courts

5. Each Oberlandesgericht, Landgericht, and Amtsgericht within the occupied territory shall re-open and resume its usual functions only when and to the extent specified in written directions of Military Government.

* * *

ARTICLE V

Qualifications of Judges, Prosecutors, Notaries and Lawyers

8. No person shall be qualified to act as judge, prosecutor, notary, or lawyer, until he shall have taken an oath in the following form:

OATH

"I swear by Almighty God that I will at all times apply and administer the law without fear or favour and with justice and equity to all persons of whatever creed, race, colour or political opinion they may be, that I will obey the laws of Germany and all enactments of the Military Government in spirit as well as in letter, and will constantly endeavour to establish equal justice under the law for all persons. So help me God."

Every person who takes the foregoing oath is no longer bound by the obligations of any oath of office previously subscribed by him.

9. No person shall act as judge, prosecutor, notary, or lawyer without the consent of Military Government.

ARTICLE VI

Limitations on Jurisdiction

10. Except when expressly authorized by Military Government, no German Court within the occupied territory shall assert or exercise jurisdiction in the following classes of cases:

a. Cases involving the Navy, Army, or Air Forces of any of the United Nations or any persons serving with or accompanying any thereof;

b. Cases against any of the United Nations or any national of the United Nations;

c. Cases arising under any German law suspended or abrogated by Military Government;

d. Cases involving offences against any order of the Allied Forces, or any enactment of Military Government, or involving the construction or validity of any such order or enactment;

e. Any case over which jurisdiction has been assumed by a Military Government Court;

f. Any case or class of cases transferred by Military Government to the exclusive jurisdiction of Military Government Courts.

g. Cases involving claims for money against the German Government or any legal entity existing under public law.

11. Any proceedings taken or decision rendered after the date hereof by a German Court in any cases excluded from its jurisdiction shall be null and void.

ARTICLE VII

Powers of Military Government

12. The following powers of control and supervision are without prejudice to the subsequent exercise of any additional or other powers, vested in the Military Government:

a. To dismiss or suspend any German judge, Staatsanwalt or other court official; and to disbar from practice any notary or lawyer;

b. To supervise the proceedings of any court, to attend the hearing of any case, whether in public or in camera, and to have full access to all files and records of the court and documents in the cases;

c. To review administratively all decisions of German trial and appellate courts and to nullify, suspend, commute or otherwise modify any finding, sentence or judgment rendered by any such court;

d. To transfer to the jurisdiction of the Military Government Courts any case or classes of cases;

e. To control or supervise the administration, budgets and personnel of all German courts authorized to function.

13. No sentence of death shall be carried out without the consent of Military Government.

14. No member of the Allied Forces nor any employee, of whatever nationality, of the Military Government, shall be required or permitted to testify in any German court without the consent of the Military Government.

* * *

ARTICLE IX

Penalties

16. Any person violating any of the provisions of this Law shall, upon conviction by a Military Government Court, be liable to any lawful punishment, including death, as such court may determine.

By Order of Military Government

NOTE

Par. 373, FM 27-10, speaks of suspending local courts. Where is the authority to dissolve local courts, as was done in Article II of Law No. 2, supra? May he dissolve both civil and criminal courts? Is there a provision of HR or GC pertinent? Consider, Article 64, GC (par. 369, FM 27-10), and Article 66, GC (par. 436, FM 27-10).

4. Occupation courts.

a. Historical precedent (U.S.A.)

HEADQUARTERS OF THE ARMY
TAMPICO, February 19, 1847

GENERAL ORDERS
No. 20

1. It may well be apprehended that many grave offenses not provided for in the act of Congress "establishing rules and articles for the government of the armies of the United States," approved April 10, 1806, may be again committed--by, or upon, individuals of those armies, in Mexico, pending the existing war between the two Republics. Allusion is here made to atrocities, any one of which, if committed within the United States or their organized territories, would, of course, be tried and severely punished by the ordinary or civil courts of the land.

2. Assassination; murder; malicious stabbing or maiming; rape; malicious assault and battery; robbery; theft; the wanton desecration of churches, cemeteries or other religious edifices and fixtures, and the destruction, except by order of a superior officer, of public or private property are such offenses.

3. The good of the service, the honor of the United States and the interests of humanity, imperiously demand that every crime, enumerated above, should be severely punished.

4. But the written code, as above, commonly called the rules and articles of war, provides for the punishment of not one of those crimes, even when committed by individuals of the army upon the persons or property of other individuals of the same, except in the very restricted case in the 9th of those articles; nor for like outrages, committed by the same individuals, upon the persons or property of a hostile country, except very partially, in the 51st, 52nd, and 55th articles; and the same code is absolutely silent as to all injuries which may be inflicted upon individuals of the army, or their property, against the laws of war, by individuals of a hostile country.

5. It is evident that the 99th articles, independent of any reference to the restriction in the 87th, is wholly nugatory in reaching any one of those high crimes.

6. For all the offences, therefore, enumerated in the second paragraph above, which may be committed abroad--in, by, or upon the army, a supplemental code is absolutely needed.

7. That unwritten code in Martial Law, as an addition to the written military code, prescribed by Congress in the rules and articles of war, and which unwritten code, all armies, in hostile countries, are forced to adopt--not only for their own safety, but for the protection of the unoffending inhabitants and their property, about the theatres of military operations, against injuries contrary to the laws of war.

8. From the same supreme necessity, martial law is hereby declared, as a supplemental code in, and about, all camps, posts and hospitals may may be occupied by any part of the forces of the United States, in Mexico, and in, and about all columns, escourts, convoys, guards and detachments, of the said forces, while engaged in prosecuting the existing war in, and against the said republic.

9. Accordingly, every crime, enumerated in paragraph No. 2, above, whether committed--1. By any inhabitant of Mexico, sojourner or traveller therein, upon the person or property of any individual of the United States' forces, retainer or follower of the same; 2. By any individual of the said forces, retainer or follower of the same, upon the person or property of any inhabitant of Mexico, sojourner or traveller therein, or 3. By any individual of the said forces, retainer or follower of the same, upon the person or property of any other individual of the said forces, retainer or follower of the same--shall be duly tried and punished under the said supplemental code.

10. For this purpose it is ordered, that all offenders, in the matters aforesaid, shall be promptly seized and confined, and reported, for trial, before Military Commissions to be duly appointed as follows:

11. Every military commission, under this order will be appointed, governed and limited, as prescribed by the 65th, 66th, 67th and 97th of the said rules and articles of war, and the proceedings of such commissions will be duly recorded, in writing, reviewed, revised, disapproved or approved, and the sentences executed--all, as in the cases of the proceedings and sentences of courts-martial; provided, that no military commission shall try any case clearly cognizable by any court-martial and provided also that no sentence of a military commission shall be put in execution against any individual, whatsoever, which may not be, according to the nature and degree of the offense, as established by evidence,

in conformity with known punishments, in like cases, in some one of the States of the United States of America.

12. This order will be read at the head of every company of the United States' forces, serving in Mexico, or about to enter on that theatre of war.

By command of Major General Scott:

(Signed) H. L. SCOTT
A.A.A.G.

NOTE

Military commissions established under General Orders No. 20 had jurisdiction over two categories of offenders; military offenders not subject to trial under the then Articles of War, and indigenous offenders under the laws of war. It is this latter category with which we are here concerned. Promulgation of General Orders No. 20 marked the beginning of military commissions. It is interesting to learn that General Scott submitted a draft of this order to the War Department prior to his departure for Mexico to relieve General Taylor. It was quickly returned to him as "too explosive for safe handling." Birkhimer, Military Government and Martial Law 97 n. (1892). Non quod dictum est, sed quod factum est, in jure inspicitur.

Note that the jurisdiction of military commissions was limited to the offenses specifically mentioned in the second paragraph of the order. Unprivileged belligerents, Mexican guerrillas, were tried by a "Council of War," yet another innovation of General Scott's. For further historical information, see, Winthrop's Military Law and Precedents 832-834 (2d ed. 1920). Madsen v. Kinsella, page 18, supra.

b. Establishment.

(1) Read: Par. 436, FM 27-10.

(2) Ordinance No. 2.

MILITARY GOVERNMENT-GERMANY

SUPREME COMMANDER'S AREA OF CONTROL

ORDINANCE NO. 2

MILITARY GOVERNMENT COURTS

It being necessary to establish Military Courts for the trial of offences against the interests of the Allied Forces, it is ordered:

ARTICLE I

Kinds of Military Courts

Military Government Courts in the occupied territory shall be:
General Military Courts,
Intermediate Military Courts,
Summary Military Courts.

ARTICLE II

Jurisdiction

1. Military Government Courts shall have jurisdiction over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law and are serving under the command of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any forces of the United Nations.

2. Military Government Courts shall have jurisdiction over:

a. All offences against the laws and usages of war;
b. All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces;
c. All offences under the laws of the occupied territory or of any part thereof.

ARTICLE III

Powers of Sentence

3. a. A General Military Court may impose any lawful sentence including death.

b. An Intermediate Military Court may impose any lawful sentence except death, or imprisonment in excess of ten years, or fine in excess of 2,500 pounds-($10,000).

c. A Summary Military Court may impose any lawful sentence except death, or imprisonment in excess of one year, or fine in excess of 250 pounds-($1,000).

d. Within the limits of the powers given to the court, both a term of imprisonment and a fine may be imposed for the same offence, and a further term of imprisonment within the powers of the court may be imposed in default of payment of the fine.

e. In addition to or in lieu of sentence of fine, imprisonment or death (within its powers), a Military Government Court may make such orders with respect to the person of the accused and the property, premises or business involved in the offence as are appropriate and authorized by the rules of Military Government Courts; and shall have power to impound money or other objects, to grant bail and accept and forfeit security therefor, to order arrest, to compel the attendance and order the detention of witnesses, to administer oaths, to punish for contempt, and such other powers as may be necessary and appropriate for the due administration of justice.

f. Where an offence is charged under the laws of the occupied territory or any part thereof, the punishment which may be imposed shall not be limited to the punishment provided by such laws.

ARTICLE IV

Composition of Courts

4. All members of the Military Government Courts shall be officers of the Allied Forces.

5. General Military Courts shall consist of not less than three members. Intermediate and Summary Military Courts shall consist of one or more members.

6. Advisers to sit with any court may be appointed either by the court itself or by an authority empowered to appoint such class of court. They shall give the court such advice and assistance as it may require but shall have no vote.

7. Clerks, interpreters, and other persons necessary for the conduct of proceedings, may be appointed by the court.

ARTICLE V

8. Every accused before a Military Government Court shall be entitled:-

a. To have in advance of trial a copy of the charges upon which he is to be tried.
b. To be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice.
c. To consult a lawyer before trial and to conduct his own defence or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person from appearing before the court.
d. In any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented.
e. To bring with him to his trial such material witnesses in his defence as he may wish, or to have them summoned by the court at his request, if practicable.
f. To apply to the court for an adjournment where necessary to enable him to prepare his defence.
g. To have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted.
h. In the event of conviction, within a time fixed by the Rules of Military Government Courts, to file a petition setting forth grounds why the findings and sentence should be set aside or modified.

* * *

By Order of Military Government

NOTE

Current CA/MG doctrine prescribes military government courts of the type and jurisdiction as those created by Ordinance No. 2, above. See, par. 32, FM 27-5, October 1947.

The act of a United States military governor in establishing a military government court (military commission) is presumed to be that of the President. Pennywit v. Eaton, 15 Wall. 382 (1872). Mechanics and Traders Bank v. Union Bank, 22 Wall. 276 (1874). Madsen v. Kinsella, page 18, **supra**. See also, Article 21, UCMJ; note MCM 1951, p. 420.

c. Jurisdiction.

(1) As to persons.

Madsen v. Kinsella, page 18, **supra**.

NOTE

It should be noted that the opinion of the Supreme Court in the recent case of Reid v. Covert, 354 U.S. 1 (1957), wherein it was held that Article 2(11), UCMJ, cannot constitutionally be applied to authorize court-martial trials for capital offenses of servicemen's civilian dependents overseas in time of peace, does not vitiate the holding in Madsen v. Kinsella in the least. In Reid v. Covert, the court by way of a footnote (63) stated: "Madsen v. Kinsella, 343 U.S. 341, is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas, the army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the army or not." (Emphasis supplied.) Everyone? See, paragraph 13, FM 27-10. Not dissuaded by footnote 63, Mrs. Madsen sought habeas corpus upon the authority of Reid v. Covert. It was denied. Madsen v. Overholser, 251 F.2d 387 (D.C. Cir. 1958), cert. den., 26 L.W. 3277, April 1, 1958. For evidence of recent advocacy that Madsen v. Kinsella supports the jurisdiction of a general court-martial to try a civilian employee of the Department of the Army in Berlin, Germany, see, United States v. Wilson, U.S.C.M.A. (No. 9638), 28 March 1958.

(2) As to offenses.

Read: Pars. 369, 436, and 440, FM 27-10.

NOTE

Generalizing, is it correct to say that indigenous criminal courts have jurisdiction over offenses committed by inhabitants against local law, whereas military occupation courts have jurisdiction over offenses committed by inhabitants against occupation decrees?

Is the jurisdiction of a military commission limited by territorial considerations? See, par. 13, FM 27-10. Note, Jurisdiction Over Extra-territorial Crimes, 41 Cornell Law § 276 (1955-56).

d. Composition.

Read: Par. 436, FM 27-10.

NOTE

What does the term "non-political military court" mean? Does it mean that the American practice during World War II of appointing civilian attorneys and judges to the courts during the latter stages of the occupation is now illegal? See, Madsen v. Kinsella, supra. Par. 32, FM 27-5.

Does it mean that a transfer of the occupation courts to the supervision of the Secretary of State as was done in Germany (see, Madsen v. Kinsella), is now illegal?

Does it forbid the appointment of a court of mixed composition, i.e., occupation personnel and indigenous personnel? See, re Condarelli (Italy 1952), Int'l Law Rep., 1952, Case No. 133 (British occupation court in Ethiopia composed of one British judge and two Italian judges).

e. Procedure.

(1) PUBLIC PROSECUTOR v. LATZA AND OTHERS
(Norway 1948), Int'l Law Rep., 1950, Case No. 147

Facts: The accused were charged with a war crime in that they as members of a German occupation court had sentenced members of the Norwegian resistance movement to death for the offense of failing to give information to the German authorities on acts of sabotage committed by Norwegian citizens. It was also contended that the accused were guilty of a war crime in that they had conducted the trials without an observance of the minimum standards required for a fair trial. The accused were acquitted at the trial court and the Public Prosecutor appealed.

Issue: Did the accused commit war crimes?

Held: As to the first charge, the Court held that the accused did not act in violation of international law. As to the second charge, the court said: "It has been contended that the proceedings before the German court were not genuine proceedings, mainly on the ground that evidence was adduced by means of reports from unnamed persons, such reports being read at the trial by the prosecutor, and also on the ground that the accused had not previously been acquainted with all the evidence. The proceedings before the 'court-martial' are open to severe criticism, more particularly having regard to the fact that there was no written indictment, that no counsel appeared for the defence, that all the evidence was circumstantial (and hearsay), that the proceedings were very short and summary, and that confirmation of verdict and sentence by higher military authority seemed to have been secured before the trial in a manner which provided no guarantees for the persons on trial. The fact that the Germans desired to dispose of the cases before them as speedily as possible does not suffice to justify these shortcomings. . . . I cannot, however, attach decisive importance to these matters."

NOTE

Are judges entitled to a rather special consideration at the post-liminium?

(2) Read: Pars. 437, 441, 442, 444, and 248, FM 27-10.

NOTE

There shall be no ex-post facto criminal legislation. Article 67, GC (par. 437, FM 27-10). Against whom are the provisions of Article 67 directed? Is this unusual?

Would the result in the Latza case be different if tried today? See, Article 71, GC (par. 441, FM 27-10) and Article 72, GC (par. 442, FM 27-10).

(3) "Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, these tribunals will be guided by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial" (par. 2, MCM, 1951).

"Military government tribunals are not governed by the provisions of the Manual for Courts-martial nor by the limitations imposed on courts-martial by Articles of War. Experience has demonstrated that in administering justice in an occupied area, it is desirable to follow forms of judicial procedure which are generally similar to the forms of procedure to which the people are accustomed. Thus, in Europe, the rules governing procedure in military government courts incorporated features of continental practice" (par. 32c, FM 27-5, October 1947).

NOTE

Are these two paragraphs hopelessly in conflict? From the occupant's standpoint, would it be better to use his own judicial procedure than to adopt that of the occupied territory? From a postliminium standpoint, would judgments of occupation courts entered without compliance with local law and procedure be considered valid? Consider, Article 43, HR (par. 363, FM 27-10).

Should the prosecutor before military government courts have the right to appeal acquittals?

f. Punishments.

(1) Read: Pars. 438, 439, 445, and 448, FM 27-10.

NOTE

With respect to the second paragraph of Article 68, GC (par. 438, FM 27-10), what does the term "military installation" include? Would it include a house occupied by an officer of the occupation forces? Would it include a public building shared by a CA/MG detachment and the local authorities? Would it include the city water works if guarded by an occupation soldier?

With respect to the third paragraph of Article 68, GC, does it mean that a state may abolish capital punishment on the eve of occupation and thus thwart its enemy? Is this why the United States made a reservation here? Similar reservations were made by Canada, Great Britain, the Netherlands, and New Zealand.

Related to the matter of punishments is the question of double jeopardy. No provision of the GC specifically mentions it. Is it implicit within "general principles of law" (Art. 67, GC; par. 437, FM 27-10) and/or "fair and regular trial" (Art. 5, GC; par. 248, FM 27-10). Is it wholly a question of local law and the application of Article 43, HR (par. 363, FM 27-10)? Of course, the double jeopardy situation with which we are here concerned involves the same accused in successive appearances before an occupation tribunal to answer for the same offense. That a person may be punished both by an occupation court and by a local court for the same act seems clear under principles of dual sovereignty. See, Double Jeopardy Case (German Fed. Rep. 1954), Int'l Law Rep., 1954, 480 (trial by allied military government court is not bar to later trial by German court for same offense).

g. Appeals.

Read: Par. 436, FM 27-10.

NOTE

Is the occupant required to establish courts of appeal? See, Article 73, GC (par. 443, FM 27-10).

Is habeas corpus available to an enemy national convicted and sentenced to confinement by a military commission of the United States? See, Johnson v. Eisentrager, 339 U.S. 763 (1950); but see, Walker, Military Law 505 (1954). By an international military commission? See, Hirota v. MacArthur 338 U.S. 197 (1948).

h. Civil jurisdiction.

Read: Pars. 369 and 436, FM 27-10.

NOTE

Do these paragraphs have any relevance to the question whether a belligerent occupant may vest his occupation courts with jurisdiction over civil cases? May he? Under what circumstances? Consider, Article 43, HR (par. 363, FM 27-10). See, The Grapeshot, 9 Wall. 129 (1869).

PART VII

PROPERTY AND PROCUREMENT IN OCCUPIED TERRITORY

1. Property generally.

Read: Par. 393, FM 27-10.

NOTE

The conventional rules of belligerent occupation dealing with property seem to be an obstacle course of semantical barriers. One must discriminate between seize and take and confiscate and destroy and sequester and requisition and contribute and use; between private property and public property, movables and immovables, of a military character and of a non-military character, etc. The high degree of compartmentalization which results dictates a detailed consideration, compartment by compartment.

2. The basic discrimination; public vs. private.

Read: Pars. 394 and 405, FM 27-10.

NOTE

Conceding that paragraph 394 supplies helpful criteria, is not the predicate for the application of these criteria lacking? Is the predicate local law or the national law of the occupant? If under Soviet law, for example, collective farms were to be considered as private property, would such a determination be controlling, notwithstanding resort to the criteria of paragraph 394 might produce a contrary conclusion? Does Article 43, HR (par. 363, FM 27-10) supply the answer, or is it another conflict of laws problem to be resolved under the law of the forum?

3. Public property.

a. Immovables.

Read: Pars. 400, 401, and 402, FM 27-10.

NOTE

Here a distinction seems to be made between immovables of a military character and immovables of a non-military character. What is the nature of the distinction?

With respect to immovables of a non-military character, what is the usufructuary principle? Does it place the occupant in a position analogous to that of a life tenant at common law?

May an occupant take over a state-owned prison and use it to confine his own soldiers? Would the usufructuary principle apply?

May an occupant take over a state-owned park and establish a R&R center there? Would the usufructuary principle apply?

May an occupant take over a state-owned university and establish a NCO academy there? Would there be any liability for rent or damages involved? Consider the implications of par. 405, FM 27-10.

b. Movables.

Read: Pars. 396, 403 (1st par.), and 404, FM 27-10.

FRENCH STATE v. ESTABLISSEMENTS MONMOUSSEAU
(France 1948), Annual Digest, 1948, Case No. 197

Facts: This was an appeal by the French State against a decision by the court of first instance of Blois to the effect that it could not

recover twenty metal wine vats, the former property of the French army supply department, which had been seized by the German occupation authorities and had been sold by them to the defendant company. The lower court held that the seizure and disposition was in accordance with international law. On appeal, the French State contended that the wine vats must be regarded as immovable property of which the occupant, according to Article 55, HR (par. 400, FM 27-10), was only the administrator and usufructuary. This argument was advanced by reference to the French concept of "immeuble par destination" which, apparently, in certain circumstances juridically assimilates permanent fixtures to the immovable property with which they are connected. The vats which were in dispute here had been permanent fixtures in an army storehouse.

Issue: Were the German occupation authorities authorized by the Hague Regulations to seize and sell the vats?

Opinion: Yes. "* * * The occupant becomes the owner of property of the occupied state which is movable, susceptible to use for operations of war and thus subject to seizure. He may freely dispose of it, whether by using it for military purposes, by taking it to his own territory, or even by alienating it in order to transform it into cash which may be used for the conduct of hostilities.

In the present case the vats were used by the French army supply department for the provisioning of the French army. They were thus used for operations of war. As movable property they could be seized by the German army in conformity with Article 53, paragraph I, of the Hague Convention. They thus became the property of the occupant. . . .

The belligerent States are bound to comply, in the conduct of war, with the usages and customs defined by international conventions, not by the legislation of the occupied State. The legal concept of immeuble par destination is a creation of French law. . . . It does not exist in a number of legal systems. In particular, German law does not recognise it. None of the articles of the Hague Convention refers to it. It cannot figure in that Convention without the formal consent of the contracting parties whose municipal law does not recognise it. Consequently the Hague Convention, in speaking of the movable and immovable property of the occupied State and its inhabitants, must be considered to use these terms in the customary sense attached to them by the law of all States."

NOTE

It would appear from the foregoing that state-owned movable property, except that devoted to one of the privileged purposes mentioned in Article 56, HR (par. 405, FM 27-10), which is susceptible of any military use may be seized, taken, confiscated, etc., at will. Title to the property passes to the occupant, of course, as soon as he reduces it to his possession. Having acquired title to the property, he is free to do with it what he will. Do you agree?

4. Private property.

a. Generally.

Read: Pars. 397 and 406, FM 27-10.

NOTE

Is the extent of the general protection afforded private property simply that it may not be confiscated? How literally should Article 46 HR (par. 406a, FM 27-10), be taken? For example, would it be illegal for an occupant to promulgate a decree announcing that the private automobile of any inhabitant found driving after curfew will be confiscated?

b. Specifically.

(1) Susceptible to direct military use (war supplies).

Read: Pars. 403 (2d par.), 408, 409, and 410, FM 27-10.

NOTE

Do the provisions of these paragraphs provide for the confiscation of certain private property? For what do they provide?

N.V. DE BATAAFSCHE PETROLEUM MAATSCHAPPLI & ORS v. THE WAR DAMAGE COMMISSION

22 Malayan Law Journal 155 (C.A. Singapore 1956), reproduced in 51 American Journal of International Law 802 (1957).

Facts: During World War II, crude oil stocks in the Netherlands East Indies, which were owned by Dutch corporations, were seized by Japanese occupation forces and used for Japanese civilian and military purposes. They were not, however, requisitioned by the Japanese under the Hague Regulations. Large quantities of these stocks (since refined) were found in Singapore at the end of the war, and were seized by the British army as war booty. The Dutch corporations claimed compensation. Their claim was dismissed below and they have taken this appeal.

Issue: Did the Japanese seizure lawfully divest the original owners of title to the crude petroleum?

Opinion: No. "It is against this background of facts that I now turn to consider the numerous issues of law which have been raised in this case. As I have already indicated, they fall broadly under two heads, municipal law and international law; but it would be wrong to suppose that this division represents a true dichotomy, and indeed the complexity and multiplicity of the arguments in this case may well be due, in part at least, to a tendency to treat the issues as belonging rigidly to one or other of these branches of the law. The substantial contest in this case is between the appellants and the respondents' predecessors in title, the Japanese belligerent occupant, who is an International Person, and therefore it follows that when their competing claims are considered under municipal law, there is inevitably introduced an element of international law in view of the international status of one of the claimants. . . .

* * *

I now proceed to consider whether the Japanese belligerent occupant had a right, under international law, to seize the crude oil in the ground and so deprive the appellants of their title to it. It was common ground that if such a right did exist in the belligerent occupant, it was derived from Article 53 of the Hague Regulations. Before, however,

I examine this Article, it is necessary to consider a formidable submission advanced by the appellants which, if sound, renders a detailed examination of the Hague Regulations academic. The appellants contended that Japan commenced the war, or at least launched an invasion against the Netherlands Indies, in order to secure the oil supplies of that country, because oil is an indispensable raw material in conditions of modern warfare. Therefore, the Japanese invading armies, as soon as they had established the necessary military superiority, seized the appellants' installations, "lock, stock and barrel," and then proceeded, as speedily as possible, to repair and put them into operation, using for that purpose civilian technicians, called "Gunzokus," who where attached to the army and placed under service discipline. The whole operation, according to the appellants' argument, was prepared and executed by the Japanese military forces in accordance with Japan's Master Plan to exploit the oil resources of the Netherlands Indies in furtherance of their war of aggression. The plan was successful and enabled the Japanese forces in South East Asia in the course of the war to distribute vast quantities of oil, both crude and refined, to meet the needs of military and civilian consumers in the territories under their control and in Japan proper. This exploitation of the oil resources of the Netherlands Indies was, so the appellants contend, premeditated plunder of private property by the Japanese State on a totalitarian scale and, as such, it was contrary to the laws and customs of war.

The appellants rely upon the evidence of Japanese naval and military officers to prove the facts upon which this submission is based. The Chief of the Fuel Section of the Supply Depot of the Ministry of the Navy in Tokyo stated that he was concerned in the spring of 1942 with plans for restoring the oil fields of the Netherlands Indies and later he toured the captured oil fields and arranged for personnel and material to be sent to repair them and put them into working order again. From October 1943 onwards he was stationed in Singapore which was then being used as a storage and forwarding point for naval and military fuel; some of it was crude oil which was forwarded to Japan to be refined, some of it was aviation spirit and diesel oil and was used by the army and navy in Singapore. Further details concerning the processing, refining and distribution of the oil were given by the Japanese military officers who were stationed at Palembang and at the Headquarters of the Petroleum Office in Singapore which clearly show that in addition to supplying military requirements, the oil was also used to meet civilian demands. In my view this evidence establishes that the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

These facts being proved, the next question to be determined is whether seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war. On this point there is, fortunately, considerable authority available from decisions arising out of the war in Europe. First, there is the decision of the Nuremberg Tribunal, delivered in 1946, in which the principle is laid down that to exploit the resources of occupied territories in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws and customs of war. This principle has been approved and further expounded in the cases of In re Flick, (1947) U.S. Military Tribunal, Nuremberg, and In re Krupp, (1948) U.S. Military Tribunal, Nuremberg, and In re Krauch, (1948) U.S. Military Tribunal, Nuremberg, where it was applied to the acts of German industrialists who systematically plundered the economy of occupied territories by acquiring substantial or controlling interests in private property contrary to the wishes of the owners. The present case is much stronger as the plunder of the appellants' property was committed not by Japanese industrialists but by the Japanese armed forces themselves, systematically and ruthlessly, throughout the whole period of the occupation. In my opinion, these authorities fully support the appellants' submission. Accordingly I reach the conclusion that the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants in Sumatra was in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

I now turn to the alternative argument urged by the appellants under this head, namely, that in any event the seizure was illegal as the crude oil in the ground was not "munitions-de-guerre" within the meaning of Article 53 of the Hague Regulations because it was then a raw material and, moreover, an immovable raw material. According to the British Manual of Military Law issued by the Army Council pursuant to the provisions of Article I of the Hague Regulations, "munitions-de-guerre," are such "things as are susceptible of direct military use." The respondents accept this interpretation of "munitions-de-guerre," as indeed they are bound to do since they are, in fact, the Crown although not appearing as the Crown eo nomine in these proceedings. Consequently they are compelled to argue that crude oil in the ground, although a raw material, is susceptible of direct military use or at least had a sufficiently close connection with direct military use to bring it within Article 53. No direct authority was cited for the proposition that raw materials could be "munitions-de-guerre" but the respondents referred to a passage in Oppenheim's International Law (7th Edition) at page 404 where it is said that "all kinds of private movable property which can serve as war material, such as . . . . . cloth for uniforms,

leather for boots . . . . . may be seized . . . for military purposes . . ." which they contend supports the view that raw materials can be "munitions-de-guerre." On the other hand, Professor Castren, a Finnish Professor, in "Law of War and Neutrality," at page 236, says that "Raw materials and semi-manufactured products necessary for war can hardly be regarded as munition of war." It may be that certain types of raw material or semi-manufactured products, such as cloth for uniforms and leather for boots, which could possibly be made up into finished articles by army personnel without the assitance of civilian technicians and outside plant can, without stretching the meaning of "munitions-de-guerre" unduly, be regarded as having a sufficiently close connection with direct military use to bring them within Article 53. It is not, however, necessary to decide this point as the facts of this case show that there is no such close connection in the present instance. According to the evidence, elaborate installations and civilian technicians were needed by the army to enable them to appropriate this oil and prepare it for use in their war machines. It had to be extracted from underground reservoirs, and then transported to a refinery, and then subjected to a complicated refining process before it was of any use to any one. In thise circumstances, it cannot be said, in my opinion, that at the moment of its seizure in the ground, the oil had a sufficiently close connection with direct military use to bring it within the meaning of "munitions-de-guerre" in Article 53.

A further argument advanced by the appellants was that "munitions-de-guerre" does not include an immovable and as the crude oil, when seized, was part of the realty, it was not a "munitions-de-guerre." The appellants conceded that certain things included in the categories specified in Article 53 which partake of the character of the realty, as for example, a railway transportation system, are seizable but they contended that these are exceptional cases and ordinarily Article 53 does not apply to immovables. It was contended that oil in the ground could not be regarded as an exceptional case and in support of this view, reliance was placed on a dictum of Lord Simon in Schiffahrt-Treuhand v. Procurator General, (1953) A.C. 232, (at page 262) to the effect that "it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting). . . ." Lord Simon was not, of course, intending to give an exhaustive interpretation of "munitions-de-guerre" but, it would, I think, be a startling extension of his phrase "arms or ammunition which could be used against the enemy in fighting" to say that it could include minerals in situ. In my judgment, Article 53 was intended to apply, generally speaking, to movables and only in those categories where the description is wide enough to include things which may belong, in part, to the realty, as, for example, "applicances for the transport of persons or things" mentioned at the beginning of the second paragraph

of the Article, is it permissible to interpret it so as to include immovables. "Munitions-de-guerre" is not, in my view, such a category. Accordingly I hold that crude oil in the ground, being an immovable and not susceptible of direct military use, is not a "munitions-de-guerre" within the meaning of Article 53.

The appellants, who were nothing if not prolific in preferring alternative arguments, contended that even if crude oil in the ground could be seized as "munitions-de-guerre" under Article 53, the seizure in this case was invalid because no receipt was given to the owners or any one representing them. Article 53 does not in terms require a receipt whereas Article 52 (which deals with requisitioning) expressly provides for one; consequently it might be said, as a matter of pure construction, that the omission in Article 53 was deliberate on the part of those who framed the Regulations and such a requirement ought not to be implied. This, however, is not the view taken by municipal courts which have construed this Article. In the case of Billotte, (1948) Netherlands District Court, Arnhem . . . it was held that the failure of German military personnel to give a receipt when seizing a car rendered the seizure invalid. The Court of Cassation at the Hague took a similar view in Hinrichsen's case in 1950. In that case a German Customs Frontier Guard seized two motor cycles without giving a receipt to the owner and the Court held that "this may not be done without in some way being officially acknowledged, in order to ensure compliance with the rule that such goods must be returned and compensation fixed when peace is made." In reaching their decision the Court of Cassation referred to the report of the proceedings at the First Hague Peace Conference (1899) in which it was stated that although it had not seemed opportune to make a special stipulation with regard to a receipt, the Committee nevertheless were of the opinion that the fact of seizure should be clearly stated one way or another if only to furnish the owner with an opportunity to claim an indemnity. Furthermore, as the Court of Cassation pointed out, the British Manual of Military Law contains a statement to the same effect. The respondents sought to distinguish these authorities from the present case on the ground that a receipt or acknowledgment was not required when the seizure was otherwise notorious. No authority was cited in support of this view, but in any case it does not meet the case where, as here, the fact of seizure is notorious but the quantity seized is unknown. The appellants do not know and have no means of discovering how much crude oil was seized from their oil reservoirs during the Japanese occupation and even if everything else had been done according to law, it would not now be possible for them to claim the compensation expressly provided for in Article 53. It would have been quite a simple matter for the Japanese belligerent occupant to have given an official acknowledgment to the Custodian of Enemy Property, who, so the Court was told, was appointed by the Japanese in Sumatra to represent absent owners, and to have furnished him with proper records of the crude oil they extracted; but nothing of the kind was done and the failure to do so, was, in my opinion, an infringement of Article 53 and renders the seizure invalid.

The last alternative argument advanced by the appellants on the construction of Article 53 was that even where the seizure is valid in all respects, the belligerent occupant obtains only a provisional title to the seized property and must restore it to the original private owner if it is still in esse at the cessation of hostilities. They contended that in the present instance the seized property was still in esse when the hostilities ended and therefore the rights of the appellants revived and the property should have been restored to them. In support of this proposition, the appellants relied, first, upon the express words of the Article which states that "seized articles must be restored . . . when peace is made," secondly, upon the views of Westlake (War, Vol. II, page 115) and Rolin (Le Droit Moderne de la guerre, paragraph 492), and lastly on two cases decided in municipal courts in 1943 and 1947 (Pigeat et Hazard v. Cie de Traction sur les Voies Navigables, (1943) Dijon Court of Appeal; Austrian Treasury v. Auer, (1947) Supreme Court, Austria). The respondents conceded that the provisions about restoration apply to some seizures and that if, for example, the seized article had been a motor lorry, the belligerent occupant would have been bound to restore it to the owner; but they contended that it would be contrary to common sense to apply these provisions to consumable war materials, such as petroleum, which are not readily identifiable as belonging to any particular owner. Such a distinction does not appear to be based on any principle but rather on the supposed difficulty of carrying out the provisions of the Article in practice. But if, in fact, there is no practical difficulty in identifying the owner of the property, as was the position in this case, I can see no justification for departing from the plain words of Article 53. The respondents further objected that if there was a duty to restore these petroleum stocks, it did not arise until peace was actually made. It is obvious, however, that the right of the belligerent occupant to use "munitions-de-guerre" must cease with the cessation of hostilities, and it appears to me that when this occurs, the only right then remaining in the belligerent occupant is a right to retain possession of the property on behalf of the owner, all other rights in the property revesting in the original owner. Accordingly I am of the opinion that, on any view of the matter, the appellants were entitled to require the belligerent occupant to hold these surplus petroleum stocks on their behalf until such time as they could be restored in accordance with the provisions of Article 53.

I have now dealt with the many contentions put forward by the appellants in respect of the Hague Regulations. At the outset of his argument, counsel for the appellants claimed that in seizing this crude oil, the Japanese military forces had contravened the rules of international law in every single particular. It was a sweeping claim but I am bound to say that I think he has made it good [that] the seizure of

the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a "munitions-de-guerre," the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled. In all these matters, the belligerent occupant, in my judgment, contravened the laws and customs of war and consequently failed either to acquire a valid title for himself or to deprive the appellants of the title which I have found existed in them prior to the seizure.

Before I leave the subject of the Hague Regulations I will refer briefly to the appellants' contention that in a war of aggression, such as this was, the aggressor state cannot in any circumstances acquire any legal title under the Regulations. This question was not very fully argued as counsel for the appellants asked that the appeal should be decided on narrower grounds although he naturally asked for the point to be kept open. Certainly this contention raises grave issues, reaching and extending far beyond the present case, touching indeed the springs of international law. The compelling logic of those who assert that all legal rights should be refused to an aggressor is opposed by persuasive reasoning of those who maintain that such rules of war as are accepted by States should continue to prevail, notwithstanding the illegality of the war. Learned jurists differ profoundly on this matter and municipal courts have yet to give a decisive answer. In this state of uncertainty of the law, it is not, I think, desirable to express views on a matter which is not necessary for the decision in this case, and accordingly I do not pass upon it.

* * *

For these reasons I am of the opinion that the appeal should be allowed. The appellants should have the costs of the appeal and of the proceedings before the Board." [Other opinions omitted.]

NOTE

Omitted from this reproduction is that part of the court's opinion which discussed the question whether the claim should be disallowed on the theory that under Netherlands Indies law the act of the Japanese in refining crude oil into petroleum operated to vest them with title to the end product. On that point the court held that a belligerent occupant who violates the Hague Regulations may not purge himself of that violation by invocation of a municipal law, the application of which is irreconcilable with the Hague Regulations.

This case is noted in 71 Harvard Law Rev. 568 (1958).

Were the oil stocks here movables or immovables? Does it make any difference?

If crude oil in the ground does not qualify as "munitions-de-guerre," what does? Is "war supplies" too broad a translation? Is "ammunition of war" a more precise translation?

To qualify as "munitions-de-guerre" is it necessary that the property be capable of direct use in either attack or defense? See, Lauterpacht, The Hague Regulations and the Seizure of Munitions De Guerre, 32 Brit. Y. B. Int'l L. 218 (1955-56). See, also In re Esau (Holland 1949), Annual Digest, 1949, Case No. 177 (scientific instruments used for research held not to be "munitions-de-guerre").

In 1864, the Supreme Court of the United States sustained the validity of a seizure by Union Forces of bales of cotton from a lady's Louisiana plantation. Mrs. Alexander's Cotton, 2 Wall. 404. See, also, Lamar, Executer v. Browne, 92 U.S. 187 (1875), (involving bales of privately-owned cotton seized months after the end of hostilities). Could Confederate cotton qualify today as "munitions-de-guerre"?

Is the occupant required to furnish a receipt to owners of private property seized as "munitions-de-guerre"? Does Article 53, HR (par. 403, FM 27-10) mention receipts?

If the occupant does furnish a receipt, does he thereby acquire title to the property or does he merely acquire a right to use it? See, Statens Jorlovsudvalg v. Pedersen (Denmark 1948), Annual Digest, 1949, Case No. 189, (requisition of two horses). Why?

May the occupant seize private property as "munitions-de-guerre" in such quantity as he desires?

Assuming private property is validly seized as "munitions-de-guerre," is there any limitation upon the use the occupant may make of it thereafter? May he use it outside the occupied territory?

(2) Not susceptible to direct military use (requisitions).

Read: Pars. 407, and 412 thru 417, FM 27-10.

N.V. De Bataafsche Petroleum Maatschappli & Ors. v. The War Damage Commission, page 77, supra.

NOTE

The first important limitation to notice here is that the requisitions must be for the needs of the occupation forces (and "administrative personnel," in the case of foodstuffs and medical supplies). Does this mean that the occupant may not requisition for the needs of his forces outside the occupied territory? See, In re Fiebig (Holland 1950), Annual Digest, 1949, Case No. 180 (criminal proceedings against Dutch officials responsible for mass removal of Dutch machinery to Germany).

Does it mean that the occupant may not requisition for the needs of the inhabitants? If food is lacking, is he obliged to bring in his own food to feed the inhabitants? See, par. 384, FM 27-10.

If goods are requisitioned and a receipt given, does title pass to the occupant? See, Vitse v. Brasser and the Dutch State (Holland 1948), Annual Digest, 1948, Case No. 200 (tractor seized from French farmer; receipt furnished). If no receipt is furnished, is there no transfer of title? See, Johansen v. Gross (Norway 1948), Annual Digest, 1949, Case No. 176 (motor seized; no receipt). Would a BFP for value from the occupant be protected? Is all this true with respect to privately owned realty as well as personalty, i.e., may occupant acquire title to realty via requisitions? See, par. 407, FM 27-10.

Suppose the occupant's seizure of private property cannot be sustained as a valid requisition, does it follow, ipso facto that he acquires no title to the property, and possibly, that he has committed a war crime? What if the owner voluntarily consents to the seizure? See, In re Krauch and Others (I.G. Farben Trial), (U.S. Mil. Trib. Nuremburg 1948), Annual Digest, 1948, Case No. 218 ("negotiations" with owners in occupied territory).

The services of a Dutch corporation were requisitioned by the German occupation forces to repair six airfields in Holland. After the war the officials of the corporation were prosecuted by their sovereign for having aided the enemy in violation of a Dutch decree-in-exile. The officials defended on the ground that the German requisition was valid under Article 52, HR, and that they were under a legal duty to obey the occupant. What result? In re Directors of the Amsterdamse Ballast Maatschappij (Holland 1951), Int'l Law Rep., 1951, Case No. 206.

Hypo: Just prior to the occupation of the Aggressor city of Martel, Aggressor officials transferred the ownership of all state-owned truck and automobile tires and batteries there to the city. As legal adviser to the occupation authorities, what significance do you attach to this transfer? Consider, paragraph 405, FM 27-10.

Hypo: A farmer in occupied territory has protested that he has been reduced to poverty by the requisition of all of his cattle (payment deferred), while other farmers in the area have had few if any of their cattle requisitioned. As legal adviser to the occupation authorities you ascertain that the reason this farmer has been singled out is simply because his cattle are of better quality. Do you see a legal question involved?

c. Compensation.

SOVIET REQUISITION (AUSTRIA) CASE
(Austria 1952) Int'l Law Rep., 1952, Case No. 143

Facts: The plaintiffs, owners of a hotel requisitioned by the Soviet army of occupation, claimed compensation from the Republic of Austria (defendants herein) for the use of their property by the Occupant. It was contended on their behalf that as the Occupant had failed to pay rent for the use of their property and as by virtue of Article 52 of the Hague Regulations they were entitled to receive rent, the liability of the Occupant must fall on the Republic of Austria; and further, that according to general principles of law the burdens imposed by the Occupant must fall equally upon all the inhabitants of an occupied country and that they, the plaintiffs, were therefore entitled to claim compensation from the Republic of Austria. On behalf of the Republic of Austria it was contended that the Hague Regulations conferred rights only on States, and not on individuals, and that in any event Article 52 thereof imposed a duty only on the Occupant, and not on the occupied country; and further, that there were no general principles of law which required that the burdens imposed by the Occupant must fall equally upon all the inhabitants of an occupied country.

Issue: Is the occupied state legally obliged under international law to reimburse its inhabitants for things requisitioned by the occupant?

Opinion: No. The Court held that the plaintiffs themselves could not derive any benefits from the operation of Article 52 of the Hague Regulations, which, in any event, did not impose any liabilities upon the Government of an occupied country vis-a-vis its inhabitants, and that the Republic of Austria was accordingly not liable to pay compensation to the plaintiff. The Court said:

"According to the Hague Regulations, the plaintiffs cannot successfully assert a claim against the defendants. Quite apart from the fact that, except where otherwise provided, an international treaty confers rights and imposes duties only on subjects of international law, viz., on the States parties to the treaty, the following considerations have to be borne in mind: Article 52 of this Convention draws a distinction between the supply of goods and services. Goods must, as far as possible, be paid for in cash, alternatively receipts must be given in respect thereof and payment made as soon as possible. It is within the discretion of the Occupant to do the one or the other. Neither this nor any other provision of the Hague Regulations, however, imposes a duty on the occupied State to compensate its inhabitants in respect of goods which they have been compelled to supply to the Occupying Power. There can be no doubt--and this is conceded by the plaintiffs--that the requisition of the plaintiffs' property does not constitute services required from the plaintiffs, viz., the personal performance of work, but compels the supply of goods within the meaning of the said Article 52. According to the Hague Regulations, only the Occupying Power is under a duty to pay for goods supplied. Having regard to the fact that the Treaty is silent on the matter, the occupied State can be compelled to pay compensation only if, and to the extent that, it has undertaken such a liability by virtue of its own municipal law. There can be no doubt that there is no Austrian law providing for any such duty to pay compensation.

"Lastly, the plaintiffs rely in support of their claim on general principles of law. They contend that the costs of occupation fall on the population of the occupied country from the beginning, and therefore have to be borne by the occupied State. This is not correct. It follows clearly from Article 52 of the Hague Regulations that the Occupying Power is entitled directly to demand contributions from individual inhabitants of the occupied State. The extent to which the burden has to be taken off the shoulders of the individual inhabitants immediately affected and distributed among the population in general is nowhere referred to in the Treaty; it is a matter for municipal legislation. This contention, therefore, cannot--any more than the other contentions--result in the plaintiffs' claim being successful, because in this case also there is no rule of municipal law which would allow such a claim to be recognized."

NOTE

If the occupied state is under no international legal obligation to reimburse its inhabitants, who is? The occupant? See, Soc. Timber, Soc. Zeta, Soc. Ombla v. Ministeri Esteri e. Tesoro (Italy 1951), Int'l Law Rep., 1951, Case No. 192 (suit by Yugoslav corporations to recover value of things requisitioned by Italian forces in Yugoslavia).

Article 76 of the Italian Peace Treaty provided pertinently:

" * * * The Italian Government agrees to make equitable compensation in lire to persons who furnished supplies or services on requisition to the forces of allied or Associated Powers in Italian territory and in satisfaction of non-combat damage claims against the forces of Allied or Associated Powers arising in Italian territory" (61 Stat. 1402).

SEERY v. UNITED STATES
127 F. Supp. 601 (Ct. Cl. 1955)

Facts: During the American occupation of Austria in World War II the chateau of Mrs. Seery was requisitioned and used as an officers' club. Mrs. Seery, a citizen of the United States and a resident since 1935, filed this action in the Court of Claims to recover just compensation for the taking of her property (in addition to rent, she sought reimbursement for damage to her chateau and the loss of many of its furnishings). The Government made a motion to dismiss her petition and for summary judgment.

Issue: Is Mrs. Seery entitled to compensation under the Vth Amendment for property taken and used by United States forces in wartime in liberated Austria?

Opinion: Yes. "The Government contends that because the property was not in the United States when it was taken, the Constitutional guaranty of just compensation, contained in the Fifth Amendment is inapplicable. We have recently held to the contrary. Turney v. United States, 115 F. Supp. 457, 126 Ct. Cl. 202, 215. We recognized that there were no precedents upon the question, but it seemed to us that, since the Constitutional provision could be applied, without inconvenience, to such a situation, it ought to be so applied. In the Turney case, supra, the plaintiff was an alien corporation, whereas the instant plaintiff is an American citizen. If that fact is material it is to her advantage.

The Government contends that the plaintiff's property, probably meaning her real property, was "enemy property" within the meaning of those words in international law, and was therefore subject to temporary appropriation by our armed forces. It cites Chief Justice Marshall's opinion in The Thirty Hogsheads of Sugar v. Boyle, 9 Cranch 191, 3 L.Ed. 701, to the effect that a sugar plantation in a Danish island seized by England in the War of 1812 was enemy property, and that the sugar produced therefrom was likewise enemy property, subject to seizure as a prize, when found on board a British ship. It cites Young v. United States, 97 U.S. 39, 60, 24 L.Ed. 992, which concerned cotton located in Confederate territory, but belonging to a British citizen. It quotes this language from the opinion in that case:

> "All property within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral, owning property within the enemy's lines, holds it as enemy property, subject to the laws of war; and, if it be hostile property, subject to capture."

The Government cites The Juragua Iron Co., Ltd. v. United States, 42 Ct. Cl. 99; Id., 212 U.S. 297, 306, 29 S. Ct. 385, 388, 53 L.Ed. 520, and quotes the following language from the Supreme Court's opinion:

> "The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject, under the laws of war, to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy."

It cites Green v. United States, 10 Ct. Cl. 466, a case of a landlord of a building in Nashville, Tennessee, who, before the capture of the city by Union Troops, voluntarily went into and remained in Confederate territory. The court approved the confiscation of rents due him.

In response to the Government's argument on this point, the plaintiff insists that Austria was not, in July 1945, and thereafter, which was after the surrender of the German Army, enemy territory. She refers us to the Moscow-Conference Agreement, the text of which appears in a Department of State publication dated November 1, 1943, which is reproduced in Document No. 351 of the House of Representatives, 78th Congress, 1st Session. The Agreement said:

"The Governments of the United Kingdom, the Soviet Union and the United States of America are agreed that Austria, the first free country to fall a victim to Hitlerite aggression, shall be liberated from German domination.

"They regard the annexation imposed upon Austria by Germany on March 15, 1938, as null and void. They consider themselves as in no way bound by any changes effected in Austria since that date. * * *"

The plaintiff cites us to Office of Public Affairs, Department of State Publication 5012, European and British Commonwealth Series 43, Released May, 1953, which contains the following statements on the pages indicated:

(p. 2) The Moscow Pledge:

"In the Moscow Declaration of November 1, 1943, the Four Powers pledged themselves to regard, and so treat, Austria as a liberated, not an enemy, country. * * *

"When the United States entered the war, President Roosevelt, December 9, 1941, named the countries which had been invaded by the Axis Powers and which must be liberated. Austria was included. * * *"

Later, August 1945, the Potsdam Agreement provided that "reparations should not be exacted from Austria. * * *"

(p. 3) "It was pointed out to the Soviets that Austria had never been considered as an enemy state, that Austria had never declared war against any member of the United Nations, that no U. N. nation had ever declared war against Austria, and that the position of Austria, both during the war and later, had been explicitly defined in the Moscow Declaration as that of a liberated country."

(p. 5) "The avowed purpose of the occupation was, first, to divorce Austria completely from German control--to undo the Anschluss of 1938. It was, second, to root out Austrian nazism and to punish war criminals. Lastly, it was to aid in the restoration of a free Austria in the spirit of the Moscow Declaration."

The plaintiff cites Department of State Bulletin Vol. XV, No. 384, November 10, 1946, which says, at the pages indicated:

(p. 864) United States Policy on Status of Austria (released to the press October 28):

"The Department of State considers that the visit to the United States of Dr. Karl Gruber, Foreign Minister of the Austrian Federal Republic, represents an appropriate occasion to reaffirm United States policy with respect to the status of Austria.

"During the period following the first World War, the United States Government steadily encouraged the development of a free and independent Austrian state based on democratic principles, and viewed with strong disapproval all Nazi attempts to force Austria into the German Reich. The attitude of the United States toward the military occupation of Austria by Germany and its formal incorporation in the German Reich in 1938 was guided by this consideration and by the well established policy of the United States toward the acquisition of territory by force. While, as a practical matter, the United States was obliged in its effort to protect American interests to take certain administrative measures based upon the situation created by the Anschluss, this Government consistently avoided any step which might be considered to constitute de jure recognition of the annexation of Austria by Germany.

"In his radio address on May 27, 1941 President Roosevelt referred repeatedly to the seizure of Austria, and described the Austrians as the first of a series of peoples enslaved by Hitler in his march of conquest. Secretary Hull stated at a press conference on July 27, 1942, that 'this Government has never taken the position that Austria was legally absorbed into the German Reich.' * * *"

(P. 865) "The United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War. The Department of State believes that this view has received diplomatic recognition through the Moscow Declaration on Austria. * * * In accordance with the objectives set forth in the Moscow Declaration to see reestablished a free and independent Austria, an Austrian Government was formed after free elections were held on November 25, 1945. This Austrian Government was recognized by the four powers represented on the Allied Council, as announced simultaneously on January 7, 1946 in Vienna and the capitals of these states. In its meeting of April 25, 1946 the Allied Council, moreover, considered a statement of the United States Government's policy in Austria made by General Mark Clark, and expressed its general

agreement with section I, "Status of Austria," in which the United States maintained that since Austria had been liberated from Nazi domination it should be treated as a liberated area. * * *

"In order to clarify the attitude of the United States Government in this matter, the United States recognizes Austria for all purposes, including legal and administrative, as a liberated country. * * *"

On the question, then, of whether the property in question was subject to confiscation as enemy property, or as property in enemy territory, it seems to us that the precedents cited do not support the Government's contention. Assuming, for the moment, that Austria was, at the time in question, enemy territory, the personal property taken was not a product of enemy soil, as in the case of The Thirty Hogsheads of Sugar v. Boyle, supra. Neither the land nor the personal property was hostile property, as was the cotton involved in Young v. United States, supra. The property did not endanger the safety of our troops, as in the Juragua Iron Works case, supra. The owner of the property did not live within the enemy lines, voluntarily, as in Green v. United States, supra, or at all.

Oppenheim on International Law, 6th Ed. 1940, Vol. II, says at Section 140 that Article 46 of the Hague Regulations, which says that "private property may not be confiscated" does not prevent the utilization of private buildings, temporarily, as hospitals, barracks and stables, without compensation. Wheaton on International Law, 7th Ed. 1944, page 248 says substantially the same. From the context it would seem that these departures from the Hague Regulations are permitted in order to enable a commander in the field to meet emergency situations relating to his troops and supplies. They would hardly seem to be applicable to the taking of a luxurious estate, at a remote location in a resort area, for use as an officers' club some months after hostilities had ended.

We do not find it necessary to decide whether taking without compensation would have been lawful if the circumstances had been otherwise the same as they were, except that the property was in enemy territory. We think that Austria was not, at the time in question, enemy territory. The German armed forces had surrendered, unconditionally, some months before, and there were no enemy activities in Austria.

If we take at anywhere near face value the numerous expressions of the Executive Department, which is responsible for the conduct of our foreign relations, Austria was, after the surrender of Germany, a nation liberated from a German occupation which had never been recognized

as lawful by our Government. The property in question, then, was no more subject to uncompensated confiscation that it would have been had it been located in Holland or France or the Philippines. The fact that the Allies chose to maintain occupation forces in Austria to prevent possible pro-Nazi uprisings, and perhaps to keep watch over each other, seems to us not to be material.

The Government defends further on the ground of an agreement made between Lieutenant General Geoffrey Keyes, the United States High Commissioner in Austria, and the Chancellor for the Federal Government of Austria, on June 21, 1947. That agreement provided that the United States would pay Austria 308,382,590 schillings (the schilling was worth at the time, about 5 cents) in full settlement for all obligations incurred by United States forces during the period 9 April 1945 to 30 June 1947. The agreement, by its terms covered claims of the kind here involved, and extended not only to claims of nationals of Austria, but to persons owning property in Austria. The Austrian Government agreed to settle or adjudicate such claims and to guarantee full protection to the United States against such claims. The agreement appears in a publication of the Department of State, Treaties and Other International Acts, Series No. 1920, 61 Stat. 4168.

We are now confronted with this problem. From what we have said in this opinion, it is evident that we think that the plaintiff's property was taken under such circumstances that she was entitled under the Fifth Amendment to the Constitution, to be paid just compensation. We must now decide whether the agreement took that right from her.

The Government cites United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796; United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134; B. Altman & Co. v. United States, 224 U.S. 583, 32 S.Ct. 593, 56 L.Ed. 894, to the effect that an executive agreement such as the one here present is, though not ratified by the Senate, a treaty within the meaning of Article VI, Clause 2, of the Constitution.

The plaintiff urges that even if that were so, it would be immaterial, because even a formally ratified treaty cannot accomplish what the Constitution forbids. She cites Doe ex dem. Clark v. Braden, 16 How. 635, 657, 14 L.Ed. 1090; The Cherokee Tobacco, 11 Wall. 616, 620-621, 20 L.Ed 227; De Geofroy v. Riggs, 133 U.S. 258, 267, 10 S.Ct. 295, 33 L.Ed. 642. She points out that in the cases cited by the Government no constitutional rights of American citizens were impaired by the executive agreements with which those cases were concerned, and that in the Pink case, supra, Justice Douglas, 315 U.S. at page 227, 62 S.Ct. at page 564, and Justice Frankfurter, 315 U.S. at page 236, 62 S.Ct. at page 568, impliedly reserved the question as to whether the executive agreement would have been valid if it had impaired Constitutional rights of American citizens.

Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights. Statements made in our opinion in Etlimar Societe Anonyme of Casablanca v. United States, 106 F. Supp. 191, 123 Ct. Cl. 552, which point in the other direction, are hereby overruled. The decision in the Etlimar case, supra, was justified by the fact that the plaintiff there sought and obtained the compensation from France to which the executive agreement there involved relegated it. In Hannevig v. United States, 84 F. Supp. 743, 114 Ct. Cl. 410, this court held that a formally ratified treaty between the United States and Norway, which relegated a Norwegian citizen who had a claim against the United States for the taking of his contract to have ships constructed in an American shipyard, to diplomatic procedures for the settlement of his claim, amounted to the withdrawal by the United States of its consent to be sued by him.

It is probably still the law that Congress could effectively destroy a citizen's Constitutional right such as, for example, the right to just compensation upon a taking of his property by the Government, by a statute withdrawing the Government's consent to be sued. But Congress have given consent to be sued for such a taking and has conferred jurisdiction upon this court to adjudicate such a suit. It would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen. In United States v. Guy W. Capps, Inc., 4 Cir., 204 F.2d 655, the court held that an executive agreement which conflicted with an Act of Congress was invalid.

The Government's motion for summary judgment is denied. The plaintiff's cross-motion for summary judgment is also denied, since the facts which we have assumed for the purpose of discussing these motions have not been proved.

It is so ordered.

NOTE

Subsequently, when the case was heard on the merits, the court reaffirmed its earlier holding and awarded Mrs. Seery $11,000. Seery v. United States, 161 F. Supp. 395 (Ct. Cl. 1958).

The Seery case raises a number of interesting questions. Do you agree with the Court's disposition of the Sugar case?

Do you agree with the limitation imposed on the authority of an occupant to requisition real estate under the Hague Regulations?

If Austria was not held under a belligerent occupation, then was it held under a pacific occupation?

If an executive agreement was no barrier to the application of the Vth Amendment, would a treaty have been a barrier? Consider, Reid v. Covert, 354 U.S. 1 (1957).

What was the taking that entitled Mrs. Seery to just compensation under the Vth Amendment; the requisition or the executive agreement?

For elucidating comments on the Seery case, see Sutherland, The Flag, The Constitution, and International Agreements, 68 Harv. Law Rev. 1374 (1955). Note, 49 Am. J. Int'l L. 362 (1955).

Where the United States acts unilaterally as it did in the Seery case, it seems logical that it be to the United States to whom its citizens should look for compensation. But in the Far East during World War II where an allied occupation was the rule, to whom should a citizen of the United States there look for compensation for a taking by the Allied Powers? The Court of Claims relying on Hirota v. MacArthur, 338 U.S. 197 (1948), (military tribunal established in Japan by SCAP for trial of war criminal is not a tribunal of U.S. for purposes of application for habeas corpus), has consistently held that Japan, not the United States, is the sovereign to whom U.S. citizens must look for compensation for private property taken by Japan in response to procurement demands issued on the authority of the Supreme Commander Allied Powers. Anglo-Chinese Shipping Co. v. United States, 127 F. Supp. 553 (Ct. Cl. 1955). Standard Vacuum Oil Co. v. United States, 153 F. Supp. 465 (Ct. Cl. 1957). See, note, 71 Harv. Law Rev. 1160 (1958).

Once, long ago, the Supreme Court held that the U.S. military commander who authorized the seizure of private property of a U.S. citizen in wartime on foreign soil for use in an attack was personally liable to make compensation for its loss. Mitchell v. Harmony, 13 How. 115

(1851). Needless to say, the decision in Mitchell v. Harmony has provoked considerable comment. For a critical comment by a then leading spokesman of the military, see Birkhimer, Military Government and Martial Law, 255 (1892). A sure cure-all to this undesirable result lies in the enactment by Congress of legislation ratifying and validating the acts of military commanders during the occupation. "It is impossible for the courts to declare an act a tort in violation of the law of nations or of a treaty of the United States, when the Executive, Congress, and the Treaty-making power **have all adopted it."** De Camera v. Brooke, 209 U.S. 45 (1908). See, e.g., Article 4(b), Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3173.

d. Destruction.

Read: Pars. 56, 393b and 410b, FM 27-10.

NOTE

The cases and materials heretofore have been concerned with the authority of an occupant to take and use property found in occupied territory, and with the extent of his pecuniary liability for such use. A single criterion enters into consideration where property is destroyed by the occupant. If destroyed under conditions of absolute necessity, no liability results. See, e.g., United States v. Caltex (Philippines) Inc. et al., 344 U.S. 149 (1952), (petroleum depots of U.S. corporation destroyed in Philippines to prevent them from falling into hands of Japanese invaders). Juragua Iron Co. v. United States, 212 U.S. 297 (1909), (buildings of U.S. corporation burned in Cuba during Spanish-American War under belief they were contaminated with yellow fever germs). Of course, destruction does not operate retroactively to extinguish liability for any previous use. United States v. Russell, 13 Wall. 623 (1871). Cf., United States v. Caltex, supra.

e. Sequestration.

Read: Pars. 399 and 431, FM 27-10.

NOTE

Where is the juridical basis for sequestration of private property in occupied territory? In conventional international law? In customary international law? See, Fraleigh, The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights, 35 Cornell Law Quarterly, 89, 98 et seq. (1949).

During the occupation of Greece in World War II, the Germans in order to prevent profiteering in olive oil ordered it all placed under their control and permitted sales to be made only with their approval. This was contrary to Greek law. Was this legal? See, L&N (Olive Oil Case), (Greece 1949), Annual Digest, 1948, Case No. 186. See, also, Agati v. Soc. Electrica Coloniale Italiano (Italy 1950), Int'l Law Rep., 1950, 421 n. (in Italian North Africa during World War II the allied governments by proclamation assumed "control over goods essential to the needs of the armed forces and the inhabitants of the occupied territory"). See, also, Magri v. Di Marco (Italy 1951), Int'l Law Rep., 1951, Case No. 212 (Allied Military Government in Italy set up boards to control the price of timber, with powers to dictate the terms of future contracts for the sale of timber and to vary those of contracts already entered into which remained unexecuted).

If sequestration is legal in principle, may the occupant sequester things that he may not requisition?

5. Procurement of Services.

a. General limitations.

Read: Pars. 32, 382, 412, 419, 420, FM 27-10.

NOTE

The right to requisition the services of inhabitants of occupied territory would appear to be subject to three important limitations; (1) it must not involve the inhabitants in "taking part in the operations of war directed against their own country" (art. 23, HR; par. 32, FM 27-10; art. 52, HR; par. 412, FM 27-10); (2) it must not entail a deportation or forced labor outside their country (art. 49, GC, par. 382, FM 27-10); and (3) it must not be disproportionate to the resources of the country (art. 52, HR, par. 412a, FM 27-10).

Perhaps the most important limitation--certainly the most provocative--is that against using inhabitants in "the operations of war directed against their own country." What constitutes taking part in operations of war? In years gone by a distinction was made between digging trenches in the front lines, which was universally agreed to be prohibited, and constructing fortifications in rear areas, which most authorities regarded as permissible. Is such a distinction valid today? Consider, par. 420, FM 27-10.

May an occupant validly requisition the services of a local inhabitant to guide his forces? To furnish him with information? Consider, par. 270, FM 27-10. What if the inhabitant volunteers to help? Is the occupant obliged to refuse his services?

May an occupant validly requisition the services of inhabitants to dig anti-aircraft gun emplacements about cities?

May an occupant validly requisition the services of inhabitants to repair tanks and armored cars at rear area ordnance shops?

May an occupant validly requisition the services of inhabitants to work in a munitions plant?

May an occupant validly requisition the services of inhabitants as interpreters and translators to assist in the processing of prisoners of war?

b. Conditions of employment.

Read: Pars. 418 and 421, FM 27-10.

NOTE

Private property may be requisitioned only for the needs of the army of occupation. Is this true with respect to the requisition of private services?

Does Article 52, HR (par. 412, FM 27-10), require that the occupant pay wages to inhabitants whose services have been requisitioned? Consider, paragraph 416, FM 27-10.

Is the requirement of Article 51, GC (par. 418, FM 27-10) that a fair wage be paid applicable, as it has been suggested, only for services in aid of civilian needs? See, Stone, Legal Controls of International Conflict 712 (1954).

A practice during World War II was to pay for requisitioned services with food. Is that practice now illegal?

Suppose there is a shortage of manpower in the occupied territory. May the occupant compel women to work at tasks the legislation in force in the occupied country prohibits? Consider, the implications, if any, of Article 27, GC (par. 266, FM 27-10).

PART VIII

PUBLIC FINANCE

1. Taxes.

Read: Pars. 425, 426, and 427, FM 27-10.

NOTE

In Ligabue v. Finanze (Italy 1952), Int'l Law Rep., 1952, Case No. 137, the Court said: "It is the opinion of writers, and it appears, indeed, from the wording of that Article [48] that the obligation to respect so far as is possible the tax system already in force in the occupied territory, as distinct from the obligation to defray the costs of administration on the same scale as the legitimate Government, does not disable the Occupying Power from imposing new taxes or abolishing or modifying those already in existence. And on this basis, orders of the Occupying Power cancelling customs duties on goods imported for military purposes or for the needs of the occupying force may be seen to be justified. But, if the rule laid down in Article 48 is not to be deprived of all force as a provision designed for the protection of the population of the occupied territory, it must be held to require that the imposition of new taxes or the remission of old ones shall be effected by measures of a general character. Fiscal impositions or exemptions effected under colour of the Occupant's power of taxation by particular orders, and creating in effect privileges for individuals prejudicial to the general civil order which the Occupant is bound to maintain, must be regarded as contrary to the international laws of war."

Although both par. 426b, FM 27-10, and the Ligabue case seem clearly to stand for the proposition that the occupant may increase taxes, some authorities take the position that he may not. See, e.g., Von Glahn, The Occupation of Enemy Territory 150 (1957). Von Glahn states that it is obvious that the occupant is legally unable to increase taxes (id., 151). Are you in accord?

May the occupant withhold income taxes from the wages paid inhabitants whose services he has requisitioned? Consider, par. 418, FM 27-10.

Local law may require employers to contribute to unemployment, health insurance and similar welfare funds. Is the occupant who utilizes the services of indigenous personnel legally bound to make such contributions?

2. Customs Duties

Read: Par. 376, FM 27-10.

NOTE

Ample authority exists for the proposition that a belligerent occupant may establish a customs house, license and regulate commercial shipping, and impose customs duties. United States v. Rice, 4 Wheat. 246 (1819), (British occupation of Castine, Me., during War of 1812). Fleming v. Page, 9 How. 603 (1850), page 37, supra. Dooley v. United States, 182 U.S. 222 (1901), (U.S. occupation of Puerto Rico during Spanish-American War).

Does Article 48, HR (par. 425a, FM 27-10), have any application to the subject of customs duties?

If a shipper pays the customs duties assessed by the occupant, is he insulated against a nunc pro tunc assessment by the legitimate sovereign upon the latter's return? See, United States v. Rice, supra. Does it depend upon whether the occupant's assessment was valid under international law? See, Ligabue v. Finanze (Italy 1952), Int'l Law Rep., 1952, Case No. 137.

3. Contributions.

Read: Pars. 428 and 429, FM 27-10.

NOTE

The exaction of contributions is as old as war itself. It was the traditional means of sparing a city from pillage.

Is there a limit on the amount of contributions that may be exacted from the inhabitants of a community? Must contributions be proportionate to the resources of the country as is the case with requisitions (par. 412a, FM 27-10)?

May an occupant exact contributions to secure funds with which to pay for goods and services that he has requisitioned? Would such a practice violate the spirit of the Hague Regulations?

Is there an obligation to repay contributions?

4. Currency.

a. Occupation currency.

Read: Par. 430, FM 27-10.

NOTE

Where is the juridical basis for an occupant to issue his own currency? Is it implied in Article 43, HR (par. 363, FM 27-10)? See, Aboitiz & Co. v. Price, 99 F. Supp. 602 (D. Utah 1951). Is there a basis in customary international law as well? See, Hearings on Occupation Currency Transaction before Committees on Appropriations, Armed Services and Banking and Currency (80th Cong., 1st Sess., 1947, pp. 72-84; Bishop, International Law 615-618 (1953)).

What does the occupant use to cover his occupation currency?

Does occupation currency imply a promise on the part of the occupant to pay? Is payment a matter to be resolved later by the terms of an armistice or peace treaty? See, Fairman, Some Observations on Military Occupation, 32 Minn. Law Rev. 319 (1948).

Military currency was also used by the United States and Great Britain in liberated countries such as France, Belgium, and the Netherlands. This, of course, pursuant to a civil affairs agreement. See, e.g., par. 3, Memo No. 2, Directives and Agreements on Civil Affairs in France, page10, supra. So much of this currency as was used for the payment of troops was made good at the end of the war in dollars and sterling respectively. So much as was used to pay for supplies and services procured locally was charged as an off-set against lend-lease. See, Fairman's article cited in the preceding paragraph.

From an accounting standpoint, the following is of interest:

"The appropriation accounting procedure used by the Army in connection with the issuance of military currency is fully adequate to safeguard the control of Congress over the size of military appropriations.

"Simultaneously with the issuance of AM currency in Sicily, the Army set up an appropriation accounting procedure to insure against the possibility that the issuance of such currency would have the effect of increasing the Army's appropriation beyond that provided by the Congress. The procedure used is to debit the Army's appropriation in an amount equivalent to all military disbursements made in AM currency, such as payment of wages to troops and purchases of supplies. No similar debit is made in the case of disbursements of AM lire for purely local government purposes, such as payment of local government employees and maintenance of hospitals, schools, etc. The amounts thus debited against the appropriation are set up in a special suspense account in the Treasury and will be available in connection with any final settlement of financial responsibility for the AM currency. It is understood that the British Army and Treasury are following a similar procedure." U.S. Treasury Memo on Occupation Currency. Sept. 23, 1943 (Hearings on Occupation Currency Transactions before Committees on Appropriations, Armed Services and Banking and Currency, U.S. Senate, 80th Cong., 1st sess., 1947, pp. 72-84.

b. Rates of exchange.

EISNER v. UNITED STATES
117 F. Supp. 197 (Ct. Cl. 1954)

Facts: Plaintiff, a U. S. citizen, had an account in a Berlin bank dating back to a period before the Allied occupation. In the beginning, the occupation authorities closed all such accounts. Later in 1948, the Allied occupation authorities issued an ordinance calling in the old currency consisting of Reichsmarks to be exchanged for new Deutsche Marks at the rate of ten to one. The ordinance was expressly inapplicable to such accounts as that of the plaintiff. In 1949 the United States commandant in Berlin authorized such accounts to be converted at the rate of twenty to one if the owner of the deposit was a national of one of the United Nations. Plaintiff sues for just compensation claiming that the twenty to one conversion rate operated to confiscate 95% of her account.

Issue: Did the action of the U.S. commandant constitute a taking of plaintiff's property without just compensation?

Opinion: **No. The plaintiff is not entitled to recover.** The task of occupying powers in a great and complex country such as Germany, whose own Government had completely collapsed, was an almost insuperable one. Certainly it included the power to establish a rational monetary system. The difficulties of such a reform were so great that it was long, perhaps too long, delayed. But until a stable currency was established, economic recovery lagged, the population suffered, and the financial burden upon the occupying powers continued. The hoped-for benefits of the currency reform were realized almost at once. Like any other fundamental change of law or Government policy, it brought hardships to some people. Such hardships cannot, of course, be regarded as creating claims against the Government, else all legal change would become fiscally impossible.

* * *

The currency reform here in question was a sovereign act, reasonably calculated to accomplish a beneficial purpose, and if it did have any adverse effect upon the plaintiff, she cannot, under well-settled principles, shift that effect to the public treasury.

* * *

It is not necessary for us to decide whether the fact that the property here in question was outside the United States would be a bar to the plaintiff's claim.

The Government's motion for a summary judgment is granted, and the plaintiff's petition is dismissed.

It is so ordered.

NOTE

What criterion exists upon which to determine the lawfulness of the rate of exchange fixed by the occupant? Is he an insurer against inflation? Is he some sort of a fiduciary? See, par. 430, FM 27-10.

The German practice during World War II was to issue near valueless occupation currency in large quantities as a device for stripping the occupied area of its goods and its labor for the benefit of Germany. Was this illegal?

c. Banks and banking.

HAW PIA v. CHINA BANKING CORP.
(Philippines 1949), Annual Digest, 1951, Case No. 203

Facts: Before the Japanese occupation of the Philippine Islands the plaintiff owed the defendant bank, a Filipino concern, a debt which was secured by a mortgage on land. During the occupation period the plaintiff paid, in Japanese occupation currency (so-called "Mickey Mouse" money), the amount of the debt to the Bank of Taiwan, which had been appointed by the Japanese military authorities in the Philippines as the liquidator of the defendant bank. After the war plaintiff requested the defendant bank to cancel the mortgage. The bank refused, claiming that plaintiff's payment to the Bank of Taiwan was not a satisfaction of the debt. The plaintiff instituted this action to compel the defendant to cancel the mortgage.

Issue: Was plaintiff's payment in occupation currency to the Bank of Taiwan a satisfaction of the debt?

Opinion: Yes. The Court said: "[T]he Japanese military authorities had power, under the international law, to order the liquidation of the China Banking Corporation and to appoint and authorize the Bank of Taiwan as liquidator to accept the payment in question, because such liquidation is not a confiscation of the properties of the bank appellee, but a mere sequestration of its assets which required the liquidation or winding up of the business of said bank. . . .

"Before the Hague Convention, it was the usage or practice to allow or permit the confiscation or appropriation by the belligerent occupant not only of public but also of private property of the enemy in a territory occupied by the belligerent hostile army; and as such usage or practice was allowed, a fortiori, any other act short of confiscation was necessarily permitted. Sec. III of the Hague Regulations only prohibits the confiscation of private property by order of the military authorities (art. 46), and pillage or stealing and thievery thereof by individuals (art. 47). . . The belligerents in their effort to control enemy property within their jurisdiction or in territories occupied by their armed forces in order to avoid their use in aid of the enemy and to increase their own resources, after the Hague Convention and specially during the first World War, had to resort to such measures of prevention which do not amount to a straight confiscation, as freezing, blocking, placing under custody, and sequestrating the enemy private property. Such acts are recognized as not repugnant to the provisions of Art. 46 or any other article of the Hague Regulations. . . .

* * *

. . . It having been shown above that the Japanese Military Forces had power to sequestrate and impound the assets or funds of the China Banking Corporation, and for that purpose to liquidate it by collecting the debts due to said bank from its debtors, and paying its creditors, and therefore to appoint the Bank of Taiwan as liquidator with the consequent authority to make the collection, it follows evidently that the payments by the debtors to the Bank of Taiwan of their debts to the China Banking Corporation have extinguished their obligation to the latter. . . .

"The fact that the money with which the debts have been paid were Japanese war notes does not affect the validity of the payments. . . .

[In conclusion, the court said:] "whatever might have been the intrinsic or extrinsic worth of the Japanese war-notes which the Bank of Taiwan has received as full satisfaction of the obligations of the appellee's debtors to it, is of no consequence in the present case. . . .

the Japanese war-notes were issued as legal tender at par with the Philippine peso, and guaranteed by the Japanese Government 'which takes full responsibility for their usage having the correct amount to back them up' (Proclamation of Jan. 3, 1942). Now that the outcome of the war has turned against Japan, the enemy banks have the right to demand from Japan, through their States or Governments, payments or compensation in Philippine pesos or U.S. dollars as the case may be, for the loss or damage inflicted on the property by the emergency war measure taken by the enemy. If Japan had won the war or were the victor, the property or money of said banks sequestrated or impounded by her might be retained by Japan and credited to the respective States of which the owners of said banks were nationals, as a payment on account of the sums payable by them as indemnity under the treaties, and the said owners were to look for compensation in Philippine pesos or U.S. dollars to their respective States. . . .And if they cannot get any or sufficient compensation either from the enemy or from their States, because of their insolvency or impossibility to pay, they have naturally to suffer, as everybody else, the losses incident to all wars."

NOTE

It is interesting to note that Professor Hyde, whose book, International Law Chiefly as Interpreted and Applied by the United States (2d ed. 1947), relied upon by the Court to support the result reached, wrote a bitter criticism of the Haw Pia case. See, 24 Philippine Law Journal 141 (1949). He argued that to hold that payment to the liquidator in worthless occupation currency was a satisfaction of the debt was to rob the creditor bank of its property. The result in the case, he contended, gave judicial sanction to a violation of Article 43, HR, by the Japanese. In, Gibbs et al. v. Rodriguez et al. (Philippines 1950), Int'l Law Rep. 1951, Case No. 204, the Court replied to Professor Hyde and reaffirmed its holding in Haw Pia.

Suppose the debt had been contracted during the occupation and had been denominated in occupation currency. If money was still owing at the end of the occupation, in what currency should it be payable? At what rate of exchange? Consider, Thorington v. Smith, 8 Wall. 1 (1868), (suit, subsequent to occupation, to secure payment of a note given prior to occupation to secure payment of land purchased in Confederate territory; note, by its terms, payable in Confederate money). See, also

Aboitiz and Co. v. Price, 99 F. Supp. 602 (D. Utah 1951), (inmate of Japanese prisoner of war camp in Philippines borrowed money clandestinely from Filipino bank; loan made in occupation currency, but repayable in dollars). The Aboitiz case is commented upon in 50 Mich. Law Rev. 1066 (1952).

The Haw Pia case illustrates another form of permissible sequestration of private property. In Gates v. Goodloe, 101 U.S. 612 (1879), the Supreme Court upheld the sequestration of rents from property in occupied territory due landlords absent in Confederate territory.

5. State debts.

Read: Par. 403, FM 27-10 (1st par.).

NOTE

The first paragraph of Article 53, HR (par. 403, FM 27-10), raises, rather than answers, the question whether the occupant may collect debts due the ousted sovereign. The question is complicated by the argument that as state debts constitute obligations between the debtors and the ousted sovereign and as occupation does not transfer sovereignty, the occupant does not succeed to the privity enjoyed by the ousted sovereign. Some authorities accept this rationale and take the position that the occupant cannot legally collect any debts due the state. See, Von Glahn, The Occupation of Enemy Territory 156-159 (1957). Other authorities, resorting to Article 48, HR (par. 425a, FM 27-10), contend that as the occupant is obliged to defray the expenses of administration of the territory, he ought to be authorized to collect those debts falling due during the period of his occupation. See, Stone, Legal Controls of International Conflict 717 (1954).

In Germany, General Eisenhower was instructed to impound or block all credits held by or on behalf of the German national, state, provincial, and local governments, and agencies and instrumentalities thereof, pending determination of future disposition. See, par. 6e(1), Appendix C, Combined Directive for Military Government in Germany Prior to Defeat or Surrender, page 5, supra.

PART IX

POSTLIMINIUM

1. Civil matters.

WEISS v. WEISS
(Luxemburg 1948), Annual Digest, 1949, Case No. 173

Facts: Certain difficulties arose in the administration of an estate commenced during the German occupation of Luxemburg and not yet completed. The plaintiff sought to apply Luxemburg civil law, while the defendant attempted to set up a rule of German civil law which had been introduced by the occupation authorities and was in force when the administration began.

Issue: Do the legislative enactments of the occupant apply after the termination of the occupation to matters arising during the period of occupation?

Opinion: No. "The legal consequences of events which occurred during the occupation are governed by the ordinary law of this country. German laws then introduced and forcibly imposed lost all validity in this country as the immediate result of the liberation of Luxemburg."

NOTE

The old Roman concept of the jus postliminii is concerned with restoring the legal state of things upon the termination of the occupation and the return of the legitimate sovereign to power. See, Ireland, The Jus Postliminii and the Coming Peace, 18 Tulane Law Rev. 584 (1944). More than just the continued application of the occupant's legislative enactments is involved; the validity of the judgments of his courts, the validity of contracts and property transactions entered into during the occupation, to mention a few, all fall within the ambit of postliminium.

Unless the provisions of the treaty of peace deny him this (see, e.g., Article 4(b), Treaty of Peace with Japan, Sept. 8, 1951, 3 UST 3173 (1952)), the returning sovereign has the power to do what he will with respect to occupation transactions. To the extent that nations have customarily chosen to do the same thing there can be said to be law. See, Morganstern, Validity of the Acts of the Belligerent Occupant, 28 Brit. Y.B. Int'l. L. 291 (1951). Generally, the courts of the returning sovereign will not upset a transaction fundamentally right and fair under his concept of law and justice. For example, in Hefferman v. Porter, 46 Tenn. 323 (1869), a reconstruction era state court recognized the judgment of an occupation court in a civil case as res judicata of the issues involved; whereas in Lasere v. Rocherau, 17 Wall. 437 (1873), the Supreme Court vacated the judgment of an occupation court entered without the defendant having been granted an opportunity to present his defense.

Do you see the postliminium question involved in any of the cases studied thus far?

2. Criminal matters.

Read: Par. 447, FM 27-10.

PERALTA v. DIRECTOR OF PRISONS
75 Phil. Rep. 285 (1945)

Facts: During the Japanese occupation of the Philippines, Peralta, a local policeman, was convicted of the offense of robbing in violation of a law enacted by the Japanese puppet government, and was sentenced to life imprisonment. This is a habeas corpus action brought before the courts of the restored government of the Philippine Islands.

Issue: Does the judgment of an occupation court in a criminal case cease to be valid upon the return of the legitimate sovereign?

Opinion: Writ granted. After first determining that the law of which Peralta had been convicted of violating was of a political complexion, in that it could be violated only by persons charged or connected with the supervision and control of the production, procurement, and distribution of food and other necessaries--enacted to prevent such items

from reaching guerrillas--the court held that under the doctrine of postliminium Peralta's conviction must be considered as having ceased to be valid, ipso facto, upon the liberation of the Philippines by General MacArthur.

NOTE

Accord; Criminal Files (Greece) Case, (Greece 1951), Int'l Law Rep., 1951, Case No. 195.

Would the result in the Peralta case have been the same if Peralta had been charged with the robbery of a bank in violation of a local law continued in force by the Japanese?

PART X

UNCONVENTIONAL AND IRREGULAR COMBATANTS

1. General. There exists no greater threat to the security of occupied territory than the combatant who masquerades as a civilian. Behind his disguise he may be a spy, a saboteur, a partisan, or a guerrilla. Whichever he is, the law of war has provided for him.

2. Unconventional combatants.

a. Spies.

Read: Pars. 74, 75, 76, 77, 78 and 248, FM 27-10.

NOTE

What is a spy? Is it essential that he act clandestinely? See, par. 75, FM 27-10. In re Wuistz (France 1947), Annual Digest 1948, Case No. 127 (accused wore uniform of resistance movement).

What is the extent of the protection granted a spy by the laws of war? A prompt trial before a prompt execution?

For an excellent article analyzing the juridical basis of spying and the disposition made of spies, see Baxter, So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs, 28 Brit. Y.B. Int'l L. 323 (1951).

IN RE MARTIN
45 Barbours Sup. Ct. Rep. 142 (N.Y. 1865)

Facts: After Lee's surrender at Appomattox, Martin, a former Confederate officer, was arrested by General Hooker and charged with the offense of arson and spying, both of which were alleged to have occurred

in the city of New York during the war. This is an action of habeas corpus brought by Martin who contends that he is illegally restrained by General Hooker.

Issue: May one be held and tried as a spy after he has returned to his own lines and the war has ended?

Opinion: No. The Court in granting the writ said: "I know of no case in modern history or in reports of cases decided by the courts where any person has been held or tried as a spy who was not taken before he had returned from the territory held by his enemy, or who was not brought to trial and punishment during the existence of the war."

NOTE

Accord; In re Rieger (French Mil. Trib. 1948), Annual Digest, 1948, Case No. 152 (German intelligence officer tried subsequent to demobilization for wartime espionage).

In December of 1944 the German 150th Brigade, commanded by Otto Skorzeny, was ordered to follow the spearhead of the Ardennes offensive across the American lines. The men of the Brigade dressed in captured American uniforms and wore German parachute overalls over these uniforms. Once inside the American lines, they were to discard their overalls and, dressed in American uniforms, seize three key bridges. When the spearhead failed, Skorzeny attached his Brigade to an S.S. corps and participated in the Malmedy attack. Here certain of his men were seen fighting in American uniforms. After the war Skorzeny and nine of his officers were arrested and charged with violating the laws of war. All were acquitted. Trial of Otto Skorzeny and Others, Case No. 56, 1947, 9 Law Rep. of Trials of War Criminals 90 (1949).

What violation of the laws of war do you see in the facts of the Skorzeny case?

b. Saboteurs.

EX PARTE QUIRIN
317 U.S. 1 (1942)

Facts: During the hours of darkness on June 13, 1942 and again on June 17, 1942, German submarines landed a total of eight specially trained saboteurs on the shores of the United States. Four were landed at Amogansett Beach on Long Island and four were landed at Ponte Vedra Beach, Florida. All eight wore German Marine Infantry uniforms, while landing. Immediately after landing they buried their uniforms, together with a supply of explosives, fuses, and incendiary and timing devices, and proceeded in civilian dress to key cities in the United States. The eight had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States. Agents of the Federal Bureau of Investigation apprehended them, however, before they could carry out their mission.

On July 2, 1942, the President, as Commander-in-Chief, appointed a Military Commission and directed it to try Quirin and his seven associates for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of trial and of any judgment or sentence of the Commission. On July 8, 1942, the trial of the prisoners commenced. They were charged, generally, with violations of the law of war, aiding the enemy in violation of A.W. 81, spying in violation of A.W. 82, and conspiracy to commit the mentioned offenses. Before the judgment of the military commission was announced, the defendants filed applications for writs of habeas corpus in the Federal District Court for the District of Columbia. Their applications were denied. The Supreme Court granted certiorari.

Issues: 1. Has the President constitutional or statutory authority to order the eight Germans (one claimed to be a U.S. citizen, however), to be tried by a military tribunal for the offenses charged, and

2. If so, is the order of the President prescribing the procedure for their trial legal and valid in view of the provisions of Articles 38, 43, 46, 50-1/2 and 70, Articles of War, which conflict therewith?

3. Do the petitioners, as enemy belligerents, have access to the Federal Courts?

Opinion: Answering all questions in the affirmative, the court stated (insofar as is here pertinent): "By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations [citing HR] and also

between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. 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 an 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." [Citing Winthrop's id., pp. 1196, 1197, 1219-1221; the trial of Major John Andre, 1780; and numerous Mexican and Civil War cases.] * * *

"The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."

NOTE

Here again, see Baxter's article cited in the note accompanying paragraph 2a, above.

3. Irregular combatants; partisans, and guerrillas.

a. Partisans.

Read: Pars. 61A(2) and 64, FM 27-10.

NOTE

The term "partisans" is used here in the legal context suggested by Professor Baxter to identify those irregular combatants who do meet the criteria of Article 4, GC (par. 61A(2), FM 27-10). The term is not intended to include the members of a levee en masse. See pars. 61A(6) and 65, FM 27-10. It is not possible, in a legal sense, for a levee en masse to arise in occupied territory. But cf., Von Glahn, The Occupation of Enemy Territory 29 (1957).

IN RE LIST AND OTHERS (HOSTAGES TRIAL)
(U.S. Mil. Trib. Nuremberg 1948), Annual Digest, 1948, Case No. 215

Facts: The ten accused were high-ranking officers in the German armed forces. They were charged with, insofar as is here pertinent, responsibility for the drafting and distribution of orders directing that quarter must be refused to resistance troops; that the latter should be denied the status and rights of prisoners of war; and that prisoners of war should be summarily executed.

Issue: Did the civilian resistance forces operating in the Balkans qualify as lawful combatants under the Hague Regulations so as to be entitled to prisoner of war status upon capture?

Opinion: No. "It is the contention of the defendants that after the respective capitulations a lawful belligerency never did exist in Yugoslavia or Greece during the period here involved. The Prosecution contends just as emphatically that it did. The evidence on the subject is fragmentary and consists primarily of admissions contained in the reports, orders and diaries of the German army units involved. There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of International Law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

"The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common

uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovitch and the Edes of General Zervas. It is evidence also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being francs-tireurs. . . .

"The evidence is clear that during the period of occupation in Yugoslavia and Greece, guerrilla warfare was carried on against the occupying power. Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganized forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. The rule is based on the theory that the forces of two states are no longer in the field and that a contention between organized armed forces no longer exists. This implies that a resistance not supported by an organized government is criminal and deprives participants of belligerent status, an implication not justified since the adoption of Chapter I, Article I, of the Hague Regulations of 1907.

In determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision, and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.

"We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

"It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of the subject is essential to a proper determination of the applicable law. Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly, and (d) if they observe the laws and customs of war. See Chapter I, Article I, Hague Regulations of 1907. In considering the evidence adduced on this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the Court. The question of the right of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899.) A review of the positions assumed by the various nations can serve no useful purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulations, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one."

NOTE

For a provocative article by a Soviet spokesman ridiculing, in effect, any effort to take the provisions of the Hague Regulations (now Article 4a(2), GC) literally and apply them in a "peoples" war, see Trainin, Questions of Guerrilla Warfare in the Law of War, 40 Am. J. Int'l L. 534 (1946). See, also, D.A. Pam. 20-244, The Soviet Partisan Movement, 1941-1944, August 1956.

IN RE HOFFMAN
(Denmark 1948), Annual Digest, 1949, Case No. 191

Facts: The accused, a member of the German Security Police in occupied Denmark, had in 1944-1945 in several cases ill-treated and tortured, or ordered the ill-treatment and torture, of Danish subjects who had been arrested as being members of the resistance movement. In his defence the accused contended that his acts and orders were lawful on the grounds that the resistance movement and its members, being francs-tireurs, enjoyed no protection from the rules of international law; that the German occupation authorities were therefore entitled to use all means in their power to defeat them; that the ill-treatment had been undertaken in self-defence seeing that the attacks of the resistance movement exposed to danger the lives of German soldiers; and that this danger could only be prevented by obtaining from the arrested members in the shortest possible time information as to the organization of the resistance movement.

Issue: Were the accused's action justifiable under international law?

Opinion: No. The court said that the accused was guilty. "The actions of the Danish resistance movement were not contrary to the rules of international law. Moreover, irrespective of the question whether the members of the movement enjoyed the protection of the rules of international law, the acts with which the accused was charged could not be recognised as lawful acts of self-defence or self-preservation in accordance with international law."

NOTE

May the Hoffman case be reconciled with the List case? What conclusions do you draw from these two cases?

"Francs-tireurs," literally translated means free-shooters. They were originally formed as civilian rifle clubs in the east of France with an unofficial military character. In case of war they were expected to act as light troops. Thousands were executed by the Prussians as unlawful belligerents during the Franco-Prussian war.

b. Guerrillas.

Read: Pars. 71, 73, 80, 247, and 248, FM 27-10.

NOTE

The term "guerrillas" is used here again in the legal context suggested by Professor Baxter to identify those irregular combatants who do not meet the criteria of Article 4, GC.

For an excellent historical account of the use made of guerrillas and the disposition made of them upon capture during the wars of the last two centuries, see, Nurick and Barrett, Legality of Guerrilla Forces Under the Laws of War, 40 Am. J. Int'l. L. 563 (1946).

IN RE VON LEWINSKI (CALLED VON MANSTEIN)
(Brit. Mil. Trib., Hamburg 1949), Annual Digest, 1949, Case No. 192

Facts: The accused was a high-ranking officer in the German army who was charged with, insofar as is here pertinent, executing Russian prisoners of war as guerrillas without a trial.

Issue: Is a guerrilla entitled under international law to a trial?

Opinion: Yes. The court said: "The submission of the Defence with regard to guerrilla warfare was this, that a Commander is entitled to take all measures that are necessary to ensure the protection of his troops, provided that he does not indulge in arbitrary methods. The civilian inhabitants are entitled to protection only as long as they remain peaceful, and if individual members commit hostile acts, then the belligerent is entitled to require the aid of the population to prevent their recurrence. If he does not get that aid, he is entitled to punish the individual--that is as a means of preventing it in the future. This, of course, is part of the law of reprisals. It was further submitted that it was neither the law nor the custom that any form of trial should be granted to a franc-tireur, he may simply be shot on capture--that the only limitation to the measures which a Commander might take to protect his troops from civilian attack were the particular circumstances of each case. In considering this question, which is a considerable part of the Defence in this case, it is first necessary to decide what is the nature of the question in issue.

"The armed forces of a belligerent may consist of (1) the regular armies, and (2) the irregular forces. The irregular forces in turn, may be of two kinds: (1) such as are authorised by the belligerent, and (2) such as are acting on their own initiative. Article I of the Convention sets down that the laws, rights and duties of war apply not only to the Army, that is the first of the above, but also to Militia and Volunteer Corps fulfilling all the following conditions: '(1) They must be commanded by a person responsible for his subordinates, (2) they must have a design recognisable at a distance, (3) they must carry arms openly and (4) they must conduct their operations in accordance with the laws and customs of war.' That is to say, if the Militia comply with those 4 conditions then they enjoy the same status as members of the Army. Furthermore, it may happen during the War that on the approach of the enemy a belligerent calls the whole population to arms, and so makes them all, more or less, irregulars of his armed forces. Those who take part in such an organised levy en masse also enjoy the privilege that is due to members of the armed forces, provided they carry arms openly and respect the laws of war, and receive some organisation. Again, a levy en masse may take place spontaneously without organisation by the belligerent, and as to this Article 2 stipulates they shall be regarded as belligerent if they carry arms openly and if they respect the laws and customs of war. That is to say, such inhabitants taking part in a levy en masse are entitled to the rights and status of a belligerent. This provision, however, attaches only to the population of a territory not under occupation, and who take up arms on the approach of the enemy, and does not apply to the portion of the country which is occupied.

"By Article 42 territory is considered occupied when actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and is in a position to assert itself. The result of a failure on the part of an

individual to comply with the requirements of these two Articles, whichever is applicable to his circumstances, is that the individual is deprived, if he is captured, of the status of a prisoner-of-war. The next question that arises with regard to such an individual is, what are his rights, and what are the duties of his captor towards him? The Convention lays down no rule with regard to this, but it is submitted by the Prosecution that the answer is afforded by Article 30 which says a spy taken in the act shall not be punished without a previous trial. It cannot be alleged that one against whom it is alleged that he has forfeited his right to prisoner-of-war status can be shot without any enquiry such as is demanded in the case of a spy. The fact that a man has been captured in circumstances which render him suspect of guerrilla warfare cannot of itself justify his being treated on the basis of that suspicion having been proved correct. . . .

"With regard to the first clause [? class], that is the regular armed forces, the position is clear. Obviously, it is not for either of the belligerents arbitrarily to limit the classes of persons among their opponents entitled to be regarded as belligerents and entitled to the protection of the Rules of the Convention. Regular soldiers are so entitled without any of the 4 requirements set out in Article I; they are requisite in order to give the Militia and the Volunteer Corps the same privileges as the Army. No notice stating that soldiers who do not report at a certain time or within a given time will be treated as <u>francs-tireurs</u> can have any validity, nor is a belligerent entitled to treat a soldier as <u>franc-tireur</u> by reason of the fact that he has become detached from his unit. The soldier in uniform who is shot solely by reason of his non-compliance with such an order, or because he is found away from his unit, is murdered.

"In the present case the Prosecution say that it is abundantly clear from the evidence that the levy <u>en masse</u> was organised, and energetically organised, by the State before the invasion started, and that therefore those who took part in it enjoy the privileges due to members of the armed forces, provided they comply with the requirements; that whether they did so is a matter for consideration in respect of each individual concerned. That the Russians indulged in guerrilla warfare on a large scale is obvious. That it constituted a constant menace to the German forces is equally clear. No one who could be proved to have been acting as a franc-tireur could claim to be entitled to the status of a prisoner-of-war. But this presupposes some form of trial just as in the case of a spy, and it is no answer for a Commanding General to say that he had no time for trials. The rules of war cannot be disregarded merely because it is inconvenient to obey them."

NOTE

Is this the extent of the protection afforded a guerrilla under the laws of war; a prompt trial before a prompt execution?

Is a guerrilla captured in other than occupied territory entitled to a trial? See, par. 81, FM 27-10.

How is it determined whether a civilian combatant qualifies as a partisan, or, failing that, is a guerrilla?

If a guerrilla is an unprivileged belligerent who is liable to be disposed of with a minimum of formality upon capture, what fate awaits those regular members of the armed forces who in small teams have linked up with guerrilla bands to organize and guide their activities?

RED ARMY LEAFLET ADDRESSED TO PARTISANS (1941)

Citizens of the Soviet Union!

Fascist thieves, who have temporarily occupied Soviet territories, have talked much and often in their propaganda about you. Red Partisans. This is not just because the Fascists are in deadly fear; the Fascist beast has felt your blows on its hide. They have to conduct two wars, one front against the troops of the Red Army and a second one, in the rear, against partisans. Their tail is caught, they are in a state of panic, and they are screaming, "The partisans are breaking the rules of war." To that one can say, "Whose cow is bellowing, but the Fascist cow is silent." [Adaptation of a Russian proverb.]

When the Fascists broke into our fatherland, without a declaration of war, on June 22 of this year, they gave no thought to any laws of war. When the Fascist animals annihilate the peaceful population, hack children to pieces, and violate women, they are not remembering the laws of war. When they treat wounded Red Army soldiers and partisans like animals, they forget the laws of war.

Comrades, we have but one law for the Fascist oppressors and killers: Hit them with everything available to you, wherever you find them and wherever you can. Blood for blood, death for death! That is our right and our law.

The Fascists say in their leaflets and publications in the occupied Soviet territories that you partisans are robbers and bandits. Thus they want to rouse the people against you. But the Fascist dogs will not succeed in this.

Comrades, men and women partisans, your heroic struggle against the Fascist dogs is right and honest. When you fight them and destroy their war material, you are doing a great deed for your people.

Every partisan is a hero of the people.

The State Defense Committee of the U.S.S.R. issued an order on July 29, 1941, according to which partisans will continue to receive their pay, like volunteers, up to the median monthly wage.

The entire Soviet nation with its government and Stalin look with pride and love at your work. You are surrounded by the interest of all the Soviet people. Seventy-three partisans were awarded orders and medals of the Soviet Union for heroism in partisan warfare to the rear of the German Fascists. The partisans Tichon Pavelowitch Busaschkow and Fedor Illorinowitch Pawlawski received the highest award of the U.S.S.R., the title of "Hero of the Soviet Union."

The Soviet People does not forget your warlike work, comrades partisans; your victories will be written in golden letters in the history of our fatherland. Remember that the day is not far away when the Hitler army will be just like the army of William II in 1918, when it will be driven from the Soviet soil.

Heavier blows against the hateful enemy!

Do not give the Fascists peace, day or night!

Strike them without mercy like mad dogs!

RUSSIAN LEAFLET ADDRESSED TO PARTISANS (1941?)

Dear Brothers!
Dear Sisters!
We remember you,
We think of you.

We are with you with our hearts, in this serious hour,
When the Fascists, full of wrath,
Stretch the bloody robber's hand toward your heads
And abandon the territories separated from the homeland
To hunger, death and pain.

Deo not despair! We are coming soon.
We return to you under the banners of victory,
And the deeds of the accursed Fascist cannibals
Will be repaid with fire and steel.

Await each day the victory,
Do not spend the time idly, suffering, quietly and asleep.
Holy hatred and your reason
Will show you the right way.

Strike the enemy in the rear, without pity,
Destroy the houses, trains, stations and tracks!
Burn the grain, the forests and warehouses!
Blow up the tanks! Tear down the wires!

And thus make an end to the bloodthirsty Hitler
Through blows from rear and front.
From both sides we destroy his army,
From both sides we drive the enemy to his tomb.

Arise, all of you! It is necessary to get to work
With the combined strength of the workers and peasants.
You must fight alone,
And you must form partisan groups.

The entire people rises in a fight to the death
Under the banner of the Stalin victory.

The Soviet land sends you, its dear comrades, its best wishes.
We shall overcome all difficulties.
The hour of revenge is coming!
Dear Brothers! Dear Sisters!
We remember you. We think of you.