World War I, [37] the belligerents confiscated private property in World War II. Such confiscation may be a bad policy in some circumstances,[38] but the practice of states, as Justice Marshall observed, has not indicated that it is illegal under all circumstances.[39]

III. THE ACTIVITY OF ENEMY ALIENS IN THE UNITED STATES

A. Restriction Upon Personal Liberty of Resident Enemy Aliens

Upon the outbreak of war there are four restrictions which may be placed upon the personal liberty of enemy aliens. They are: (1) Denial of permission to leave the country; (2) Expulsion from the country or only from some sections thereof; (3) Assigned residence; and (4) Internment.

1. *Denial of Permission to Leave*

The practice of universal conscription made all enemy aliens of military age potential fighting men. Consequently, in 1914, Germany and Austria detained all British and French males of military age. France gave all aliens permission to depart prior to the first day of mobilization. The United Kingdom detained all enemy aliens who had not departed by 10 August 1914. Austria also detained many not of military age, and in 1916, a cartel was arranged between Germany, Austria, France and Turkey in which many of those of non-military age held by each were exchanged for those of their own citizens held by the other. The United States allowed all those who wished to return to their homeland to do so upon the outbreak of war.[40] Article 35 of the Geneva Civilian Convention of 1949 makes the following provision for protected persons:

> All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.

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37 Bitter and Zelli, *No More War on Foreign Investments; A Kellogg Pact for Private Property* (Philadelphia: Dorrance and Co., Inc., 1938).

38 For example, if a state, one of the banking centers of the World, confiscates private enemy deposits in wartime, it may find that it has lost that position upon the restoration of peace.

39 *Brown v. The United States*, 12 U.S. 110 (1814), *op. cit.*, n. 4. On the constitutional rather than the international law aspects, see note, "Judicial Review of Alien Property Control," 55 *Yale L. J.* 836–842 (1946).

40 See generally, Wilson, "Treatment of Civilian Enemy Aliens" 37 *A.J.I.L.* 32 (1943); *Commentary*, *op. cit.*, pp. 232–235, and Benterich, "Alien Enemies in the United States," *Contemporary Review*, p. 226, (1943).

If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.

Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave.

2. *Expulsion*

International law clearly allows a belligerent to expel enemy aliens from all, or merely a portion, of its territory.

a. *Expulsion from the country.*

In neither World War was expulsion from the country the normal procedure. Expulsion along with other methods of restraint is permissible in the United States under the Alien Enemy Act.[41] Such expulsion must, however, be carried out in the following manner:[42]

When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

This statutory provision is in conformity with Article 36 of the Geneva Civilian Convention which provides—

Departures permitted under the foregoing Article shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food. All costs in connection therewith, from the point of exit in the territory of the Detaining Power, shall be borne by the country of destination, or, in the case of accommodation in a neutral country, by the Power whose nationals are benefited. The practical details of such movements may, if necessary, be settled by special agreements between the Powers concerned.

The foregoing shall not prejudice such special agreements as may be concluded between Parties to the conflict concerning the exchange and repatriation of their nationals in enemy hands.

b. *Expulsion from certain sections of the country.*

The expulsion of aliens from portions of a belligerent's territory was common in World Wars I and II. For example, the United States expelled many Japanese aliens, and even American citizens of Japanese ancestry, from the West Coast in World War II and France required all enemy aliens who did not leave the country in

41 PL 181 of 16 April 1918, 40 Stat. 531, 50 U.S.C. 21.
42 50 U.S.C. 22.

1914 to retire behind a line stretching from Dunkirk to Nice. Such disruption of the life of the enemy alien may in many cases present an economic hardship. The Geneva Civilian Convention of 1949 has taken this fact into account and has provided that—

> Where a Party to the conflict applies to a protected person methods of control which result in his being unable to support himself, and especially if such person is prevented for reasons of security from finding paid employment on reasonable conditions, the said Party shall ensure his support and that of his dependents.[43]

3. *Assigned Residence*

A clear distinction is made between assigned residence and internment in the 1949 Geneva Civilian Convention.[44] Since both drastically curtail the liberty of an individual, either may be resorted to only if the security of the Detaining Power makes it absolutely necessary.[45] The provisions of Article 39(2) quoted in the paragraph above concerning support also apply to enemy aliens who are assigned a specific residence.

4. *The Internment of Enemy Civilians*

a. *Introduction.*

The lack of any detailed international convention prior to 1949 for the protection of civilians was the result not of an indifference to their welfare but rather because the limited nature of war with its resulting cardinal principle which confined military operations to the armed forces, permitting the civilian population to enjoy complete immunity. As a result of this principle of the law of war the representatives at the Hague Conference of 1907 mistakenly decided not to include a provision to the effect that the nationals of a belligerent residing in the territory of the adverse Party should not be interned, considering that such a prohibition went without saying.

Immediately after the outbreak of World War I the traditional principle was profoundly modified. A large number of civilians were interned. Without the guide of specific rules the International Committee of the Red Cross had to improvise means of assisting them.[46] It was apparent that the practice of States had in the past been influenced more by the limited nature of warfare conducted than by any cardinal principle.

The International Committe held a conference at Tokyo in 1934, one of the purposes of which was to close the unfortunate gaps that were apparent in World War I for the treatment of interned civilian populations. The draft convention drawn up at this

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43 Article 39(2), *GC.*
44 Article 41(1), *GC.*
45 Article 42(1), *GC.*
46 *Commentary, op. cit.*, n. 1, p. 8.

conference contained only two Articles dealing with internment. One article required that the internment camp be separate from the Prisoner of War camp and not set up in an unhealthy district. The other article incorporated by analogy the 1929 Convention relative to the treatment of prisoners of war. These articles were thought to be inadequate. As a consequence the Geneva Civilian Convention of 1949 comprises fifty-seven articles concerning the treatment of internees, about one-third of the entire Convention.

This section will concentrate on three aspects of internment; first, the reasons for internment, second, the authorized penal and disciplinary sanctions against internees, and third, the release from internment.

b. *The commencement of internment.*

(1) *In the Territory of a Party to the Conflict.* Article 42 sets forth the grounds for the internment of protected persons in the territory of a party to the conflict. Article 79 specifically states that no protected person shall be interned, except in accordance with the provisions of Article 42. Article 42 requires that the internment of protected persons may be ordered only if "the security of the Detaining Power makes it absolutely necessary." No attempt is made in the treaty to define the meaning of the term "security." It is thus left very largely to each government to decide if the protection of its security requires such a measure. Such discretion does not render the article meaningless because the test of reasonableness will be applicable. Bad faith is usually readily apparent and can no more easily breach Article 42 than other articles of the Convention. Therefore, the mere fact that an alien is a subject of an enemy power cannot be considered as threatening the security of the State in which he is now living. Standing alone enemy nationality would not be a valid reason for interning him. That test alone was often used in World War II. The article seeks to put an end to such practices.[47]

It should be pointed out that the Diplomatic Conferences which drafted the Convention discussed at great length whether a statement should be inserted that any decision concerning internment should only be taken individually. It was decided to reject such a requirement because a situation may arise where a nation would have to take collective action without sufficient time to consider individual cases.[48]

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[47] Even the fact that an alien is of military age should not necessarily be considered as justifying internment unless there is a danger of him being able to join the enemy armed forces (*Commentary, op. cit.*, p. 258).

[48] See *Final Record*, Vol. II–A, pp. 568 and 808–809; Vol. II–B, p. 411; Vol. III–C, pp. 126-127; and *Commentary, op. cit.*, p. 256.

The statutory laws of the United States governing internment of enemy nationals are 50 U.S.C. 21 and 23. The following pertinent extracts will illustrate the discretion, not inconsistent with Article 42 of the Geneva Convention, which resides in the President of the United States.

50 U. S. C. 21: *Restraint, regulation, and removal.*

All natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases and upon what security their residence shall be permitted.

50 U. S. C. 23: *Jurisdiction of United States courts and judges.*

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice, and after a full examination and hearing on such complaint, and sufficent cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed.

The proclamation of the President under Section 21 can be implemented either by the Attorney General alone or through the United States courts. 50 U.S.C. 23, which grants jurisdiction to Federal Courts to intern enemy aliens pursuant to the President's proclamation after a full examination and hearing, and after there appears sufficient cause, has been held not to be a restriction on internment under 50 U.S.C. 21 but merely an alternative procedural method of dealing with an enemy alien.[49]

(2) *In Occupied Territory.* A protected person may be interned in occupied territory for two reasons:

First, for imperative reasons of security of the occupying power.[50]

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[49] *Ex parte Graber*, 247 F. 882 (1918); *Schlueter v. Watkins*, 67 F. Supp. 556 affirmed in 158 F. 2d 858 (1946); and *U.S. ex rel Ludecke v. Watkins*, 163 F. 2d 148 (1947). 50 U.S.C. 21 and 23 have been supplemented by the Emergency Detention Act of 1950, 50 U.S.C. 811–826, which permit the President to "detain" in case of an "internal service emergency" individuals, particularly communists. The individuals thus detained need not be enemy aliens. They could be American citizens.

[50] Article 78(1), *GC.*

Second, as a sentence in lieu of imprisonment handed down by a properly constituted occupation court.[51]

Article 78, which pertains to internment in occupied territory, has been construed by the International Committee of the Red Cross to establish a stricter criterion for internment than does Article 42 pertaining to internment in domestic territory, because in occupied territory the question of nationality does not arise. In addition, there can be no question of taking collective measures as might be allowed in the territory of a party to the conflict. Each case should be decided separately.[52]

Article 78(2), *GC* requires that the decision to intern be made through a regular procedure prescribed by the Occupying Power. This procedure shall include the right of appeal.

c. *Penal and disciplinary sanctions.*

(1) *Penal.* The general penal laws applicable to all citizens of the occupied territory or to all citizens of the territory of a party to the conflict continue to apply to individuals after their internment. Only for a violation of these substantive laws may an internee be subjected to judicial punishment.[53] The procedural provisions of Arts. 71 to 76 apply in case of penal trial of an internee whether he be in the territory of a party to the conflict or in occupied territory.[54] He, therefore, is subject to no adverse discrimination because of his status as an internee. He is tried by the same courts under the same procedures as those applicable to noninternees with the added assurance that the procedural safeguards in Articles 71–76 provide him with a minimum standard.

(2) *Disciplinary.* Acts which are punishable when committed solely by internees shall entail disciplinary punishments only.[55] The punishment for such acts are severely curtailed. No internee can receive a fine of more than 50% of his pay for one month, fatigue duties not exceeding two hours daily for one month, or imprisonment for more than one month.[56]

Such disciplinary punishment may only be ordered by the commandant of the place of internment, or by one to whom the commandant has delegated his disciplinary powers.[57]

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51 Article 68(1), *GC*.

52 *Commentary*, p. 367.

53 Article 117(1), *GC*. An exception to this rule in favor of internees occurs where internees escape or aid other internees to escape from internment. 18 U.S.C. 751 makes escapes from the custody of the Attorney General a crime. Article 120(1), *GC* classifies such acts as disciplinary breaches only. It would appear that Article 120(1) *GC* modifies the application of 18 U.S.C. 751.

54 Article 126, *GC*.

55 Article 117(2), *GC*.

56 Article 119(1), *GC*.

57 Article 123(1), *GC*.

The disciplinary sanctions allowed against internees are the same as those against prisoners of war. For example, paragraph 2 of Article 117 reproduces word for word the text of paragraph 2 of Article 81 of the Prisoners of War Convention. The object of the Convention has been to prevent the abuse of internees by guards who might impose cruel disciplinary punishments for sadistic or revengeful purposes.

Escape and attempts to escape have usually presented probelms for a Detaining Power. Articles 120 and 121 deal specifically with escapes. Article 120 expressly states that such conduct can be punished as a disciplinary matter only, even if it is a repeated offense. The same rule applies to internees who are aiders and abettors to the escape. The special surveillance over recaptured escapees authorized by paragraph 2, Article 120, has been interpreted to mean primarily a strengthening of the guard and not a restriction placed on the internee's rights.[58] The probable correctness of this interpretation is borne out by the provision of Article 120 that such surveillance cannot "entail the abolition of any of the safeguards granted by the present Convention."

Discipline in a different sense, that is discipline pertaining to the efficient running of the camp rather than to punishment for infractions, is discussed in Article 100. This article prohibits physical exertion dangerous to health, tattooing or marking of the body, prolonged standing and roll calls, military drill and maneuvers, and the reduction of food rations. Therefore, because of Article 100, the limited punishments authorized by Article 119 cannot be circumvented by terming the punishment a "routine camp disciplinary measure."

d. *Termination of internment.*

(1) *During Hostilities.* Both Articles 43 and 78 require that the internment status of individuals, whether interned in occupied territory or in territory of a party to the conflict, be subject to periodic review at least every six months in domestic territory, and if possible, every six months in occupied territory. Article 43 specifies that such review be accomplished by an appropriate court or administrative board designated by the Detaining Power for that purpose. Article 78, referring to occupied territory, merely requires that such review be undertaken by "a competent body set up by the [occupying] Power."

It has been construed that an occupying Power is bound by Article 43 in occupied territory even as it is in its own territory. Therefore, "a competent body" should be either a court or an administrative board. It cannot be one individual. The decision

[58] *Commentary*, p. 485.

to release or to retain the internee must be a joint decision, thereby offering a better guarantee of fair treatment.[59] The make up and the procedure of such review bodies is a task of the military commander in occupied areas.

It is important that a uniform procedure be adopted for the taking of any necessary evidence concerning a change in the circumstances which caused the initial internment. Such uniformity is necessary for the protection of both the internee and the Detaining Power. There must be close coordination between the court or board and those responsible for internment of protected persons. If not a released internee may be quickly reinterned, or an internee kept in camp long after the real reason for the internment has passed. The Senate Committee, which examined the four Geneva Conventions of 1949 prior to the Senate's advice and consent to ratification, expressed its view that the administrative boards and competent bodies required by Articles 35(2) [alien requests to leave the country], 43(1), and 78(2) of the Civilian Convention for the review of the detention and internment of civilians may be created with advisory functions only, leaving the final decision to a high official or officer of the government.[60] If such a procedure is in accord with the interpretation generally given to these articles, it would insure a consistent policy of internment and release.

Article 132 is complimentary in part to Articles 43 and 78. It requires the release of an interned person as soon as the reasons which necessitated his or her internment no longer exist. However, this article adds one additional proviso in order to effect the release of those interned. The security of the Detaining Power or the welfare of the interned persons may only permit their release if they are sent back to their own country or to a neutral state. In either case, Article 132 urges that agreements between belligerents be concluded for exchanges, or between a belligerent and a neutral for accommodation in a neutral country. Several such exchanges between belligerents actually occurred during World War II.[61] Article 132 is designed to encourage more such instances in any future war. Usually there is no reason why the elderly,

[59] *Ibid.*, p. 369.

[60] The Senate, by a vote of 77–0, gave its advice and consent to the four Geneva Conventions of 1949 on July 6, 1955 (33 *Dept. of State Bulletin* 69 [July 11, 1955]). Baxter, "The Geneva Convention of 1949 Before the U.S. Senate," 49 *Am. J. Int'l L.* 550 (1955).

[61] Exchanges of nationals took place on the following occasions: (1) In 1940 between Germany and France and England; (2) In 1942 28,000 Italians were granted permission to leave Abyssinia; (3) In 1943 1,500 American civilians were exchanged for 1,500 Japanese civilians; and an exchange also took place between German and Italian internees via Lisbon; (4) In 1944 three exchanges occurred at Barcelona in May between German civilian internees and British and American civilian internees; at Lisbon, in July between German civilian internees from South Africa and British civilian internees; at Goteborg, in September between German and British civilian internees (*Commentary, op. cit.*, pp. 284, 511).

women with infants, and children should be retained by each side when an exchange could take place.

(2) *At the Close of Occupation.* If occupation is terminated by the withdrawal of the occupying power before the close of hostilities, such power may not forceably transfer internees out of the former occupied territory. This prohibition is evident from Article 49 which forbids the forced transfer of protected persons from occupied areas, from Article 77 which requires that even protected persons sentenced in occupied areas for a violation of law must be turned over to the authorities of the liberated area at the close of occupation, and from the fact that internees are not criminals but are individuals with full civil capacity[62] who have been detained because the security of the occupying power so demanded. The security of the Detaining Power in the occupied area is no longer in question if it has evacuated that area.

(3) *At the Close of Hostilities.* Article 133 requires that internment cease as soon as possible after the close of hostilities. Since the existence of hostilities are the main cause for internment, internment should cease when hostilities cease. By the phrase "after the close of hostilities" in Article 133, as was stated in Part I, is not meant to describe the legal situation covered by laws or decrees fixing the date of cessation of hostilities but the actual factual end of fighting. Article 132 recognizes that internment might possibly be retained for a short period after the fighting either because of the disorganization caused by the war or because of delays in obtaining facilities for the transportation of internees to their former residence or back to their home country. However, such delays cannot be used to prolong indefinitely the internment in order to benefit the Detaining Power.

(4) *Conclusion.* During World War II the United States interned, under 50 U.S.C. 21, 16,073 individuals. They consisted of 7,051 Germans; 5,431 Japanese; 3,567 Italians, and 24 others.[63] They were accorded treatment similar to that of prisoners of war.[64] Since that time international law has developed, both as to the criteria for detention, expulsion, and internment and the conditions under which each will be exercised. United States municipal law, governing as it does only the broad outlines of a procedure for internment, needs no revision. However, the discretion of executive officials who act under 50 U.S.C. 21 and 23 is now limited by the specific provision of Articles 35–43 of the 1949 Geneva civilian contention.

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62 Article 80, *GC.*

63 Domke, *Control of Alien Property, op. cit.*, p. 81.

64 "Treatment of Civilian Enemy Aliens and Prisoners of War," 6 *Dept. of State Bulletin*, 445 (1942).

B. Restrictions on Access to Courts by Enemy Aliens

According to Article 33(h) of the Regulations attached to the Hague Convention of 1907, respecting the Laws and Customs of War on Land, it is forbidden "to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." In practice the United States and England have interpreted this provision as merely restricting the "authority of commanding generals and their subordinates in the theater of belligerent activity."[65] The result of such a construction is to leave to the common law and to federal statutes to define an enemy alien's rights in United States courts in time of war. In the absence of federal legislation or executive implementation of existing legislation the standing in court of an enemy alien depends primarily upon whether he is a resident or non-resident.

1. *Resident Enemy Alien's Right To Sue*

Ex parte Kumezo Kawato[66]

"Mr. Justice BLACK delivered the opinion of the Court.

"The petitioner, born in Japan, became a resident of the United States in 1905. April 15, 1941, he filed a libel in admiralty against the vessel Rally in the District Court for the Southern District of California. He claimed wages were due him for services as a seaman and fisherman on the Rally, and sought an allowance for maintenance and cure on allegations that he had sustained severe injuries while engaged in the performance of his duties. Claimants of the vessel appeared and filed an answer on grounds not here material, but later, on January 20, 1942, moved to abate the action on the ground that petitioner, by reason of the state of war then existing between Japan and the United States, had become an enemy alien and therefore had no 'right to prosecute any action in any court of the United States during the pendency of said war.' The District Judge granted the motion. Petitioner sought mandamus in the Circuit Court of Appeals for the Ninth Circuit to compel the District Court to vacate its judgment and proceed to trial of his action, but his motion for leave to file was denied without opinion. We granted leave to file in this Court, 316 U.S. 650, 62 S. Ct. 1301, 86 L. Ed. 1732, and the cause was submitted on answer, briefs and oral argument.

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65 Higgins, *Hague Peace Conferences*, (Cambridge: University Press, 1909), 263-265, noted in Hyde, *International Law Chiefly as Interpreted and Applied by the United States*. (Boston: Little, Brown, 1945) III, p. 1714, n. 7.

66 317 U.S. 69; 63 Sup. Ct. Rep. 115, 87 L. Ed. 94 (1942); analyzed by a note in 28 *Wash. U. Law Q.* 39 (1943).

"'Alien enemy' as applied to petitioner is at present but the legal definition of his status because he was born in Japan with which we are at war. Nothing in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them. His suit invokes the protection of those laws through our courts both to obtain payment of wages alleged to have been promised him by American citizens for lawful work and reimbursement on account of damages suffered while working for those citizens.

"Petitioner contends that he has the right under the common law and treaties to proceed with his action, and that this right is not limited by the statutes. In our view the possibility of treaty rights, which has not been argued extensively, need not be considered. Applicable treaties are ambiguous and should not be interpreted without more care than is necessary in this case.[1]

"There doubtless was a time when the common law of England would have supported dismissal of petitioner's action, but that time has long since passed. A number of early English decisions, based on a group concept which made little difference between friends and enemies barred all aliens from the courts. This rule was gradually relaxed as to friendly aliens[2] until finally in *Wells v. Williams*, 1 Ld. Raym. 282 (1698), the Court put the necessities of trade ahead of whatever advantages had been imagined to exist in the old rule, and held that enemy aliens in England under license from the Crown might proceed in the courts. As applied ever since, alien enemies residing in England

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[1] Petitioner argues that his case is covered by article 23h of the Annex to the IVth Hague Convention of 1907: "It is especially prohibited * * * to declare abolished, suspended, or inadmissible in a Court of law the rights and action of the nationals of the hostile party." This clause, which was added to the Convention of 1899 without substantial discussion either by the Delegates in General Assembly or by the committee and sub-committee which dealt with it, III Proceedings of the Hague Convention of 1907, 12, 107, 136, 240; and I *Ibid.* 88, was construed by an English Court to apply solely in enemy areas occupied by a belligerent. *Porter v. Freudenberg*, [1915] 1 K.B. 857. The question has not been raised in the courts in this country, but the English interpretation was repeated with approval by Representative Montague of the Interstate Commerce Committee in his address to the House when he presented to it the Trading With the Enemy Act, 50 U.S.C.A. Appendix § 1 et seq. 55 Cong. Rec. 4842 (1917).

[2] According to Littleton, an alien might not sue in either a real or personal action; but this rule was modified by Coke to bar such actions only by alien enemies and to permit personal actions by alien friends. See Coke on Littleton 129b. Pollock and Maitland suggest that this modification by Coke was "a bold treatment of a carefully worded text." 1 History of English Law, 2d ed., 459. The early law treated all aliens as a group. See the sub-titles of Pollock and Maitland's chapter, "The Sorts and Conditions of Men," some of which are: The Knights, The Unfree, The Clergy, Aliens, The Jews, Women, etc. *Ibid.*, Chap. II. For a summary of English views now largely obsolete on alien standing in court see Hansard, Law Relating to Aliens, chapter 7 (1844). For a survey of the common law on inheritance of land by aliens see *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, Cardozo, J.

have been permitted to maintain actions, while those in the land of the enemy were not; and this modern, humane principle has been applied even when the alien was interned as is petitioner here.[3] *Schaffenius v. Goldberg*, [1916] 1 K. B. 284.

"The original English common law rule, long ago abandoned there, was, from the beginning, objectionable here. The policy of severity toward alien enemies was clearly impossible for a country whose life blood came from an immigrant stream. In the war of 1812, for example, many persons born in England fought on the American side.[4] Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth. Hence in 1813 Chief Justice Kent, in *Clarke v. Morey*, 10 Johns., N. Y. 69, 72, set the legal pattern which, with sporadic exceptions, has since been followed.[5] The core of that decision he put in these words: 'A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.'[6]

"It is argued that the petitioner is barred from the courts by the Trading With the Enemy Act, 50 U.S.C.A. Appendix § 1 et seq. particular clause relied on is Sec. 7: 'Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in §10 hereof [which relates to patents]; . . .' Analysis of its terms makes clear that this section was not meant to apply to petitioner, and an examination of its legislative history makes this doubly certain. Section 7 bars from the courts only an 'enemy or ally of enemy.' Section 2 of the Act defines the 'alien enemy'

[3] Petitioner was interned some months after the court had abated his action. The government has filed a supplemental brief stating that it does not consider that this circumstance alters the position of petitioner in respect to his privilege of access to the courts.

[4] One writer estimates that half of the 400 men on board the Constitution when it captured the Guerriere were seamen who had deserted the British, and the ship United States was reported by its captain to have no men on board who had not served with British war ships. Bradley, The United Empire Loyalists, 192; and see 3 MeMaster, History of the United States, 242.

[5] For collection of cases see 30 Georgetown L. J. 421; 28 Virginia L. R. 429; 27 Yale L. J. 105; Huberich, Trading With The Enemy, 188 et seq.; *Daimler Co. v. Continental Tyre Co.*, Ann. Cas. 1917C, 170, 204; *In the Petition of Bernheimer*, 3 Cir., 130 F. 2d 896; and for English cases, McNair, Legal Effects of War.

[6] Story was one of the few commentators to approve any part of the early common law rule. He accepted so much of that doctrine as required enemy aliens entitled to relief in the courts to have entered the country under safe conduct or license. Story on Civil Pleadings, p. 10; Story's Equity Pleadings, Sec. 51-54, and particularly Sec. 724. This requirement was reduced to legal fiction in *Clarke v. Morey*, *supra*, 10 Johns., N.Y., at page 72, when Chief Justice Kent held that "The license is implied by law and the usage of nations."

to which the Act applies as those residing within the territory owned or occupied by the enemy; the enemy government or its officers,[7] or citizens of an enemy nation, wherever residing, as the President by proclamation may include within the definition. Since the President has not under this Act[8] made any declaration as to enemy aliens, the Act does not bar petitioner from maintaining his suit.

"This interpretation, compelled by the words of the Act, is wholly in accord with its general scope, for the Trading With the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. Prior to the passage of the Act, the courts had consistently held that during a state of war, commercial intercourse between our nationals and non-resident alien enemies, unless specifically authorized by Congress and the Executive, was absolutely prohibited, and that contracts made in such intercourse were void and unenforceable.[9] This strict barrier could be relaxed only by Congressional direction, and therefore the Act was passed with its declared purpose 'to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on.'[10] Thus Congress expressly recognized by the passage of the Act that 'the more enlightened views of the present day as to treatment of enemies makes possible certain relaxation in the old law.'[11]

"Since the purpose of the bill was to permit certain relations with non-resident alien enemies, there is no frustration of its purpose in permitting resident aliens to sue in our courts. State-

[7] Some possible confusion on the part of the Court below and of other courts may have developed from our per curiam opinion in *Ex parte Colonna*, 314 US 516, 86 L ed 379, 62 S Ct 378, in which leave to file a petition for writs of prohibition and mandamus in connection with a proceeding brought in behalf of the Italian government was denied on the basis of the Trading With the Enemy Act. That opinion emphasized that an enemy government was included within the definition of the classification "enemy" as used in that act, and that such enemy plaintiffs had no right to prosecute actions in our courts. The decision has no bearing on the rights of resident enemy aliens. The Colonna decision was momentarily misapplied in *Kaufman v. Eisenberg*, 177 Misc 939, 32 NYS(2d) 450, but the trial judge corrected a stay in proceedings he had previously allowed, upon his further consideration of the fact that the plaintiff was a resident alien.

[8] The President has issued a Proclamation taking certain steps with reference to alien enemies under the Alien Enemy Act of 1798 as amended, 50 USCA § 21, but this Proclamation has no bearing on the power of the President under the Trading With the Enemy Act.

[9] Report of the Senate Committee on Commerce, Report No. 111, 65th Cong. 1st Sess. pp. 15-22. *Coppell v. Hall*, 7 Wall. (US) 542, 554, 557, 558, 19 L ed. 244, 247, 248.

[10] Report of the Senate Committee on Commerce, Report No. 111, 65th Cong. 1st Sess., p. 1.

[11] Report of the Senate Committee on Commerce, Report No. 111, 65th Cong. 1st Sess., p.

ments made on the floor of the House of Representatives by the sponsor of the bill make this interpretation conclusive.[12]

"Not only has the President not seen fit to use the authority posessed by him under the Trading With the Enemy Act to exclude resident aliens from the Courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner from our courts,[13] and this stand is emphasized by the government's appearance in behalf of petitioner in this case.[14]

"The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them. Were this not true, contractual promises made to them by individuals, as well as promises held out to them under our laws, would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law-abiding aliens seeking to enforce rights growing out of legal occupations. Let the writ issue."

2. *Nonresident Enemy Alien's Standing in U.S. Courts*

The right to sue was suspended for the duration of the war by means of 7(b)(3) of the Trading With the Enemy Act. Section 7(b)(3) provides:

> Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: Provided, however, That an enemy or ally of enemy licensed to do business under this Act may prosecute

[12] "Mr. Montague: A German resident in the United States is not an enemy under terms of the bill, unless he should be so declared subsequently by the proclamation of the President, in which case he would have no standing in court. . . .

"Mr. Stafford: Do I understand that this bill confers upon the President any authority to grant to an alien subject doing business in this country the right to sue in the courts to enforce his contract?

"Mr. Montague: If he is a resident of this country, he has the right under this bill without the proclamation of the President.

"Mr. Stafford: If so, where is that authority?

"Mr. Montague: In the very terms of the bill defining an enemy, whereby German residents in the United States have all rights in this respect of native-born citizens, unless these rights be recalled by the proclamation of the President for hostile conduct on the part of the Germans resident in the United States." 55 Cong. Rec. 4842, 4843 (1917).

[13] "No native, citizen or subject of any nation with which the United States is at war and who is resident in the United States is prevented by federal statute or regulation from suing in federal or state courts." Dept. of Justice press release, Jan. 31, 1942.

[14] The determination by Congress and the Executive not to interfere with the rights of resident enemy aliens to proceed in the courts marks a choice of remedies rather than a waiver of protection. The government has an elaborate protective program. Under the Alien Enemy Act, 50 USCA § 21, the President has ordered the internment of aliens, has instituted a system of identification, and has regulated travel. Under the First War Powers Act, 50 USCA Supp 1, 1940 ed Appx § 5(b), and various executive orders he has controlled the funds of resident enemy aliens. Many other statutes make a composite pattern which Congress has apparently thought adequate for the control of this problem. See, *e.g.*, the controls on alien ownership of land in the territories, 8 USCA chapter 5.

and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: And provided further, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

3. *Conclusion*

It should be noted that had the President made the proclamation which Congress authorized him to do under Section 2(c) of the Trading With the Enemy Act the resident enemy alien's right to sue would have been no better than the non-resident enemy alien's. Section 7(b)(3) does not restrict its prohibition to non-resident aliens. It merely uses the term "enemy alien." It was only because of the failure of the President to use his power under Section 2(c) that the prohibition applied only to non-resident enemy aliens. Because of this absence of a statutory prohibition the court in *Kawato* went to the common law where it found that resident enemy aliens did retain in wartime their right of access to our courts.

C. Restrictions on Business Transactions With Non-Resident Enemy Aliens.

1. *Contracts With Enemy Aliens Entered into During the War*

During the First World War most continental European belligerents, particularly France and Germany, found nothing wrong with continuing, as far as it was possible, economic and commercial relations with each other. Great Britain, on the other hand, carefully pursued a policy which prevented British nationals and other persons subject to British sovereignty from trading with enemy nationals or other persons where the proceeds of the transaction might conceivably inure to the benefit of the enemy economically. These practices were adopted by the United States upon her entry into that conflict. Both the United States and Great Britain followed the same policy during the Second World War, and, as before, many continental European countries did not feel as strongly about this matter.

Section 3 (a) of the Trading With the Enemy Act sets out the general rule as far as the United States is concerned:

> [It shall be unlawful] for any person in the United States, except with a license of the President, granted to such persons, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or

indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy (40 Stat. 412).[67]

In order to assist traders in complying with the section, particularly the last portion which prohibits dealings with those conducting trade *indirectly* with or *on behalf of* an enemy, the U.S. Government published a "black list." By January 12, 1945, the United States had placed 14,534 names on this list.[68] Such a list is bound to contain many business organizations in neutral countries who make their livelihood from trade with the enemy. Neutral nations naturally resent the listing of their nationals.[69]

2. *Contracts With Enemy Aliens Entered into Before the War*

a. *Executory contracts with enemy aliens.* In regard to contracts which are executory on both sides, Section 8(b) of the Trading with the Enemy Act provides as follows:

> That any contract entered into prior to the beginning of the war between any citizen of the United States or any corporation organized within the United States, and an enemy or ally of an enemy, the terms of which provide for the delivery, during or after any war in which a present enemy or ally of enemy nation has been or is now engaged, of anything produced, mined, or manufactured in the United States, may be abrogated by such citizen or corporation by serving thirty days' notice in writing upon the alien property custodian of his or its election to abrogate such contract.

There have been very few cases or activities under this subsection. It involves principally two types of contracts: First, those wherein property located in the United States is to be shipped out of the United States, and second, situations where a suspension of the contract for the duration of the war would negate the purpose of the contract.[70] Other contractual relations are not abrogated unless the nature of the relationship requires intercourse during the war.[71] Such contracts are merely suspended for the duration of the war.

b. *Executed contracts on the part of the enemy alien.* Contracts which have been executed on the part of the enemy national and on which payment is still due on the part of the United States

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[67] It must be kept in mind that the "enemy" here consists of those defined as an enemy in Section 2. Therefore, trade with enemy nationals resident in this country is permitted in the absence of a Presidential proclamation to the contrary.

[68] Stone, *Legal Control of International Conflict*, (New York: Rinehart, 1954) p. 452.

[69] On the early American reaction as a neutral to the British black list, see Morrissey, *The American Defense of Neutral Rights—1914–1917* (Cambridge: Harvard University Press, 1939), p. 142–153. On the Swiss reaction see Guggenheim, *Traite de Droit International Public* (Geneva, Librairie de L'Universite, 1954) II, p. 369–375, 386–388.

[70] Diamond, "The Effect of War on Pre-Existing Contracts Involving Enemy Nationals," 53 *YLJ* 700 at 701[0] (1948).

[71] See generally Hyde, *op. cit.*, n. 34, pp. 1707–1709, and Stone, *op. cit.*, n. 68, pp. 431–434. Compare *Sutherland v. Mayer*, 271 U.S. 272 wherein a partnership was dissolved as being incompatible with a state of war with *Williams v. Paine* 169 U.S. 55 wherein an agency was not so considered.

citizen may be disposed of by payment to the Alien Property Custodian under Section 7(c).

If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefore, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on acount of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act. (40 Stat. 1020.)

If the President does not require that the debt be paid to the Alien Property Custodian, the payment is suspended and the noncompliance at the due date may be defended under Section 7(b) (4):

Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be prima facie defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war any contract or other obligation. In any prosecution under section sixteen hereof, proof of receipt of notice from the President to the effect that he has reasonable cause to believe that any person is an enemy or ally of enemy shall be prima facie evidence that the person receiving such notice has reasonable cause to believe such other person to be an enemy or ally of enemy within the meaning of section three hereof.

c. *Executed contracts on the part of neutrals.* Section 8(c), Trading With the Enemy Act provides as follows:

The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: Provided, however, that nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.

CHAPTER 6

OCCUPATION

I. THE COMMENCEMENT AND TERMINATION OF OCCUPATION

The speed and mobility of modern armed forces, the rise of "resistance movements," and the lapse of time between cessation of fighting and the signing of an agreement ending the war have all tended to blur the precise point in time when occupation responsibilities commence and terminate. Yet such time must be known if both the military and the civilian population are to be held accountable for the fulfillment of any rights or duties imposed upon them by treaty or by customary law.

A. Commencement of Occupation

Once the occupation commences international law attributes certain powers to the occupier that it would not otherwise possess. A complicated trilateral set of legal relations springs up between the occupier, the ousted sovereign and the inhabitants of the occupied area. It is therefore necessary to know when occupation commences.[1]

1. *Hague Regulations of 1907.* The only conventional definition of "occupation" is that contained in Art. 42 of the Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land. It provides:

> Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised.

Article 42 of the Hague Regulations of 1907 emphasizes the primacy of FACT as the test of whether or not occupation exists. Yet it is precisely this emphasis of FACT that raises certain problems. The facts may be transitory, confused, or uncertain. There may be a period of imprecise duration during which an army may be present and operating, but when occupation has not been established.[2] All of those duties incumbent on an occupant under the Convention could not in fact be carried out until the passage of some interval to permit consolidation of control.

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1 Stone, *Legal Controls of International Conflict* (N.Y.: Rinehart, 1954), p. 694.

2 Lauterpacht, *Oppenheim's International Law*, 7th ed (N.Y.: Longmans, Green, 1952), II, pp. 434, 435 wherein the author refers to the distinction between invasion and occupation.

Article 43 of the Hague Regulations continues the theme of the traditional law with its provision for a clear transfer of authority.

> 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 insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. (Emphasis supplied.)

Articles 42 and 43 look to a state of affairs where the area is either subdued or not subdued. If it is subdued a temporary authority passes to the occupier.[3] If it is not, then the authority remains in the original government. However, such transfer of authority may not be so clear cut. Fighting may continue long after the regular sovereign and his army have been driven out. The concept of undisturbed authority in one or the other was not always in the past and may not in the future be factually true. The following factors have tended to upset both contestants in their roles of governor of a certain territory:

(1) *Factors Affecting the Regular Sovereign*

(a) Raids and large-scale air bombings may take place, and control may be temporarily exercised by the enemy, within the territory the sovereign still retains.[4]

(b) Guerrillas within the area evacuated by the regular sovereign may dispute his claim to any residual authority, and even deny his return.[5]

(2) *Factors Affecting the Occupying Power*

(a) Guerrilla forces within the occupied area may disregard any "rights" the occupier is supposed to possess.[6]

(b) The displaced sovereign may attempt to legislate in the areas which he has lost.[7]

(c) The displaced sovereign or his allies may attempt by declaration to restrict the authority of the occupier in areas under belligerent occupation. For example the following declaration was made by the Allies on 5 January 1943:

> Accordingly the governments making this declaration [17 States] and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property rights, and inter-

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3 "Belligerent occupation . . . necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional." (FM 27–10, *The Law of Land Warfare* (1956), par. 353.)

4 Air power has exposed the entire area of each belligerent to attack. No longer is there a "front" where hostilities are confined.

5 Such took place in World War II in Yugoslavia and in Poland. Governments-in-exile tend to lose authority to local partisan leaders.

6 These rights center chiefly around the right to expect obedience by the population to those efforts of the occupier in maintaining law and order. This problem will be discussed more fully in Section II.

7 See *State of the Netherlands v. Federal Reserve Bank of New York*, 201 Fed. 2d 455 for a discussion of the legislative powers of a displaced sovereign in occupied territory.

ests of any description whatsoever which are, or have been situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transaction apparently legal in form, even when they purport to be voluntarily effected.[8]

2. *The 1949 Geneva Civilian Convention.* Article 6(1) of the 1949 Geneva Civilian Convention states as follows:

> The present Convention shall apply from the outset of any conflict or occupation.[9]

However, neither Article 6 nor any other Article of the Convention defines "occupation."

The 1949 Convention manages to circumvent, in part, a reliance on the fact of occupation in order to afford protection to civilian persons. Civilian persons are protected who—

> . . . at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying Power of which they are not nationals.[10]

Therefore, in regard to the protection of persons, the narrow time and space requirements (during occupation) of the Hague Regulations are not applicable. An area need not be occupied. For general protection the person need only be "in the hands a party to the conflict."

However, the 1949 Geneva Civilian Convention does not solve all the problems. It pertains only to persons. The 1907 Hague Regulations treated not only persons in the Occupied area but also property, finance, and general governmental administration. It is these vast areas where the existence of occupation is still extremely important.

3. *Applicabilities of the Hague and Geneva Conventions to Areas Not Yet Belligerently Occupied.* FM 27–10, *The Law of Land Warfare,* applies by analogy the laws of occupation to other areas, areas which should increase in modern mobile warfare.

a. Nature of Invasion. Invasion is not necessarily occupation, although occupation is normally preceded by invasion and may frequently coincide with it. An invader may attack with naval or air forces or

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8 *Dept. of State Bulletin* 21 (1948).

9 The term "occupation" in the 1949 Convention has a broader meaning than the manner in which it was used in the 1907 Hague Regulations. (Pictet, *Commentary,* IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War [Geneva: International Committee of the Red Cross, 1958], p. 60). This conclusion is based on the statement of the Rapporteur of Committee III. "It was perfectly well understood that the word 'occupation' referred not only to occupation during war itself, but also to sudden occupation without war, as provided in the second paragraph of Article 2" (*Final Record of the Diplomatic Conference of Geneva of 1949,* Vol. II–A, p. 515).

10 Art. 4 (1), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* hereinafter cited as *GC.*

its troops may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation. Small raiding parties or flying columns, reconnaissance detachments or patrols moving through an area cannot be said to occupy it. Occupation on the other hand, is invasion plus taking firm possession of the enemy territory for the purpose of holding it.

b. Application of Law of Occupation. The rules set forth in this chapter [Ch. 6, FM 27–10] apply of their own force only to belligerently occupied areas, but they should, as a matter of policy, be observed as far as possible in areas through which troops are passing and even on the battlefield.[11]

B. The Termination of Occupation

Occupation may terminate in any of several ways. (1). The first is by withdrawal. In itself this presents no particular factual problems.[12] (2). A second method of termination is by ejection.[13] A word of caution is needed here. The existence of a rebellion or activity of guerrilla or para-military units in occupied territory does not in itself cause the occupation to cease, provided the occupant could at any time it desired assume physical control of any part of the territory.[14] FM 27–10 states the criterion as follows:

> It is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. It is immaterial whether the authority of the occupant is maintained by fixed garrisons or flying columns, whether by small or large forces, so long as the occupation is effective.[15]

(3). Termination by subjugation occurs when the displaced sovereign is defeated and part or all of the occupied territory is annexed by the occupant or permanently severed from the authority of the displaced sovereign. If annexed by the occupier his national law would control after the transfer of sovereignty. However, subjugation cannot be effective while the allies of the defeated sovereign are still carrying on the fight.[16]

Occupation does *not* cease upon the termination of all hostilities. It continues until full sovereignty of the occupied area is returned to the displaced sovereign or until such sovereignty is assumed by another state. The real problem here concerns the

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11 FM 27–10, *The Law of Land Warfare* (1956), para. 352. See also FM 41–5, *Civil Affairs/Military Government* (1958), para. 11 for CA operations in mobile situations.

12 The Geneva Civilian Convention places certain requirements upon the occupier upon his withdrawal, chief of which is to turn over to the returning sovereign civilians he has sentenced or has placed in internment camps (Arts. 77 and 134, *GC*).

13 FM 27–10, para. 360.

14 In *U.S. v. List, et al.*, XI, Trials of War Criminals (Washington: U.S. Gov. Printing Office, 1950) 1230 *et. seq.* the court dealt with the effectiveness of the German occupation as a result of partisan fighting in Yugoslavia and Greece.

15 FM 27–10, para. 356.

16 *Opinion and Judgment of the Nuremberg Military Tribunal* (Washington, U.S. Gov. Printing Office, 1947), at p. 83 wherein the court refused to acknowledge annexation of territory by Germany while World War II was in progress. See also Art. 47, *GC*.

specific rules of occupation which apply after the cessation of hostilities. It has been the view of the United States that after the unconditional surrender of Germany and Japan, the Regulation annexed to Convention No. IV of the Hague Convention of 1907 were, in strict law, no longer applicable to those countries.[17] Nevertheless, the United States has as a matter of policy been guided as far as possible by provisions of this Convention.

The 1949 Geneva Civilian Convention has made all its articles relating to occupied territory applicable for one year following the general conclusion of military operations.[18] Thereafter only certain articles apply until the end of the occupation.[19]

II. CIVILIAN PERSONS IN OCCUPIED AREAS

A. The Problem of a "Duty" Owed to the Occupying Power

Once a determination is made that an occupation exists, the Occupying Power may be said to possess certain rights over and acquire certain obligations toward the population of the enemy territory which it occupies. The question that follows is what obligations, if any, do the inhabitants owe to the Occupying Power.

The 1949 Geneva Civilian Convention gives the civilians in occupied areas many rights. However, it is silent on their duties. The rights range from the qualified right against compulsory labor[20] to the unqualified right against compulsory enlistment in the armed forces of the occupant.[21] The Convention, itself, must be consulted for each individual right. Article 47 of the 1949 Geneva Civilian Convention is specifically designed to prevent a belligerent from circumventing the rights of individuals by the establishment of puppet governments in occupied territory or annexing a part of the occupied territory before the legal prerequisites for annexation exist.[22] Under this Article any agreements which

17 Memorandum for the Judge Advocate General. Subject: Present applicability of the Hague and Geneva Conventions in Germany, dated 10 December 1946. This memorandum is commented on in *World Polity* (Washington: Georgetown University, 1958) I, p. 177 *et. seq.*

18 Art. 6 (3), *GC.*

19 Arts. 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143 *GC.* These articles preserve the right to basic humanitarian treatment, the right to a fair trial, and protection against forced transfers, evacuations and deportations. It is to be noted that such affirmative and costly responsibilities as food, medical care and the like do not carry over beyond the first year following the general close of military operations.

20 Art. 51 (2) (3), *GC.*

21 Art. 51 (1), *GC.*

22 For example, in World War II, the Vichy Government of France concluded agreements with Germany affecting the status of persons in the portions of French territory physically occupied by the German military authorities. Similar arrangements were made with the Croatian Government formed on part of Yugoslav territory (*U.S. v. List, op. cit. et.* pp. 1301–1303). See also FM 27-10, par. 366.

would adversely affect the protected persons in occupied territory would be without legal effect.

To find any duties owed an analysis must be made of the Hague Regulations of 1907 and the customary law upon which those Regulations are based. Article 45 of the Hague Regulation forbids an Occupying Power to compel the inhabitants of occupied territory to swear allegiance to it. However, this does not mean that the military occupant cannot expect the persons in occupied territory to respect its authority. There has, however, been disagreement on whether or not this respect amounts to an actual duty. Some authorities conclude that, in return for receiving the protection of the Occupying Power, civilian persons in occupied areas do have a legal duty to respect the laws of the Occupying Authority so long as the Occupying Authority performs its obligations under Article 43 of the Hague Regulations to "restore and insure, as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." [23] Others reason that the Occupying Power is there and maintains its hold by sheer weight of arms. As a consequence no legal duties flow from the population to it.[24] FM 27–10 is clear in its statement of a duty.

> It is the duty of the inhabitants to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the troops or in respect to their operations, and to render strict obedience to the orders of the occupant.[25]

FM 27–10 does not state that an individual who has breached this duty, particularly by acts of sabotage or by attacks upon the occupation forces, has committed a war crime. The manual is silent on this particular issue. However, a Dutch court in 1948 had occasion to pass upon this point in the trial of *General Rauter. In re Rauter*[27] is illustrative of the view that disobedience is not a war crime, but nevertheless may be punished. The fact that it was not a war crime caused General Rauter's defense of reprisal to fail.[28]

For almost five years, from June 1940 to March 1945 General Rauter was General Commissioner for Security in occupied Hol-

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23 See the discussion in Stone, *op. cit.*, pp. 723–726 where he reasons to the existence of a qualified duty.

24 Baxter, "The Duty of Obedience to the Belligerent Occupant," 27 *British Year Book of International Law* 235 (1950); Von Glahn, *The Occupation of Enemy Territory* (Minneapolis: University of Minn. Press, 1957), pp. 45–48.

25 FM 27–10, para. 482.

27 Reported in Lauterpacht, *Annual Digest and Reports of Public International Law Cases*, 1948, pp. 434–435; and in XIV *Law Reports of Trials of War Criminals* (1949) pp. 89–138.

28 A reprisal is itself an unlawful act, justified only because of the unlawfulness of a prior act. If the prior act was not unlawful then the unlawfulness of the reprisal act is without justification.

land. When a resistance movement gained some force in Holland, General Rauter attempted to suppress it by every means available, including collective fines, executions, and forcible removal of civilians. He maintained that these measures, if illegal, were justified on the ground that such resistance to his authority was itself illegal.

The court rejected this defense. It conceded that the resistance forces did not meet the requirements prescribed for regular armed forces in the Hague Regulations of 1907. Therefore, the defendant was not required to deal with them as he would an opposing regular armed force. However, this court went on to state, that fact does not forbid the formation of such resistance forces by the civilian inhabitants. They are not bound either morally or legally, the court concluded, by any duty of obedience to the occupying power. It followed that such underground resistance against the enemy in occupied territory could be a permissible form of warfare. Therefore, such activity could not justify reprisals, which are illegal acts, by the occupation authorities. The court compared the situation to that of spying wherein one belligerent could lawfully employ spies and the other could lawfully punish them when captured.

Following the rational in the *Rauter* case the concern of the occupation commander is, therefore, not with the legality or illegality of resistance movements, but with the means he uses to suppress such movements. The 1949 Geneva Civilian Convention has restricted the methods the commander may employ. This convention will next be analysed from the standpoint of the means it gives a commander to control an occupied area.

B. Control of Persons in Occupied Areas

Military authorities in occupied areas have the right not only to perform the police functions within the area but also to protect their own security. The protection of this security is difficult if civilians engage in widespread guerrilla warfare. World War II witnessed the Axis Powers striking against such warfare with severe repressive methods. With the excesses of these repressive methods in mind, drafters of the 1949 Geneva Civilian Convention attempted to balance the security of the occupant against the rights of innocent civilians behind whom the guerrilla is hiding. They sought to protect the innocent by placing the burden of finding the guilty parties upon the Occupying Power. The purpose of this section is to analyze the measures the commander may legitimately adopt in maintaining the peaceful submission of a hostile civilian population.

1. *Prohibited Methods of Control*

a. *Violence.* Protected persons are entitled, in all circumstances, to respect for their persons, their honor, and their family rights. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof.[29]

b. *Coercion.* No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.[30]

c. *Brutality.* The Occupying Power is prohibited from causing physical suffering or extermination of protected persons in his hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation, and medical experiments, but also to any other measures of brutality whether applied by civilian or military agents.[31] With an eye to the practices of World War II, the Convention *specifically* states that "murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person," are prohibited and also "any measures of brutality whether applied by civilian or military agents."[32] It may be noted that Article 32 prohibits the type of activity which was proscribed by the London Charter as "a crime against humanity" and punished by the war crimes trials following World War II. Presumably, any violation of the Article would be a "grave breach of the Convention," and should justify prosecution of the individuals responsible as war criminals. However, the provisions of this article are more restrictive in their application than acts proscribed as "crimes against humanity" after World War II because the range of protected persons is smaller. This range is limited by the exclusion from the protection of this article of the Convention (1) nationals of the belligerent in question, (2) neutrals in the domestic territory of a party and, (3) co-belligerents who have diplomatic representation with that belligerent.[33]

d. *Punishment for acts of others.* No protected person may be punished for an offense he or she has not personally committed.[34] Therefore, collective penalities and reprisals against protected persons and their property are prohibited.[35]

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29 Art. 27, *GC*. This article is basic. In the absence of a preamble it must serve as the point around which the whole convention revolves (*Commentary, op. cit.*, pp. 199–201).

30 Art. 31, *GC*.

31 Art. 32, *GC*.

32 These prohibitions seem almost too obvious to mention. However, the drafters felt that they could take nothing for granted (*Commentary, op. cit.*, p. 221).

33 Art. 4 (2), *GC*.

34 Art. 33 (1), *GC*.

35 Art. 33 (1) and (3), *GC*.

The taking of hostages is specifically prohibited.[36] The United States has made little of any use of hostages in recent times. Heretofore, the taking of hostages as an extreme measure has been recognized.[37] The Charter of the International Military Tribunal listed the "killing of hostages" as a war crime. However, in *The Hostages Case*, War Crimes Tribunal No. V held that only the killing of hostages without having exhausted all other means of combatting illegal warfare, without a trial, or in excessive numbers, constituted a war crime.[38] During World War II, Germany killed hostages on so large a scale that the drafters of the 1949 Geneva Convention unanimously and with little discussion prohibited altogether the taking of hostages for any reason.[39]

e. *Deportations.* Individuals as well as mass forcible deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of the motive.[40] The rule is designed to prevent such practices as the Nazi slave labor program during the latter period of World War II. The prohibition against such a transfer to the territory of another country is designed to frustrate evasion of the provisions of the Convention by transferring persons from the territory occupied by one co-belligerent to the homeland of another.

2. *Permissible Methods of Control*

a. *Control by restricting freedom of movement.* The occupant may withdraw from individuals the right to change their residence, restrict freedom of internal movement, forbid visits to certain districts, prohibit emigration and immigration, and require that all individuals carry identification documents.[41]

There is another aspect to the restriction of the freedom of movement of civilian populations which relates not to the security of the occupation forces but to their tactical mobility. The International Committee of the Red Cross, in its Commentary on Article 49 of the 1949 Geneva Civilian Convention, states the need for some law to prevent the panic flights of civilian populations which cause not only danger to themselves but interfere with the tactical mobility of the military.

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[36] Art. 33 (2), *GC.*

[37] Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2d rev. ed., (Boston: Little, Brown and Co., 1945) III, pp. 1902, 1903; FM 27-10, *Rules of Land Warfare* (1940), para. 359.

[38] *U.S. v. List, op. cit.*, p. 1250. See generally Wright, "The Killing of Hostages as a War Crime," 25 *British Year Book of International Law*, p. 296 (1948).

[39] Art. 34, *GC.*

[40] Art. 49 (1), *GC.*

[41] FM 27-10, para. 375.

It will be enough to remember the disastrous consequences of the exodus of the civilian population during the invasion of Belgium and Northern France. Thousands of people died a ghastly death on the roads and these mass flights seriously impeded military operations by blocking lines of communication and disorganizing transport.[42]

Such memory led to the insertion of the following paragraph in Article 49, *GC* which was designed to permit an Occupying Power to forbid the hurried movement of populations from danger zones:

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

Civilians are usually prevented from interfering with military operations either by a "standfast" order directed to the civilian population, or by routing them onto secondary roads.

b. *Control by evacuation.* The Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations are hedged by the Civilian Convention with many safeguards.[43] (a) Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory. (b) The Occupying Power must insure "to the greatest practicable extent" that the removal is executed in satisfactory conditions of hygiene, safety, and nutrition. (c) There must be proper accommodations at the place of new residence. (d) to the extent practicable, members of the same family must not be separated. The Occupying Power must inform the Protecting Power of any evacuations as soon as they have taken place.[44] Prior notice to the Protecting Power is not mandatory because evacuations often have military significance.

c. *Control by holding incommunicado.* Where in occupied territory an individually protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the 1949 Geneva Civilian Convention.[45]

Ordinarily representatives of the Protecting Power are able to interview all protected persons wherever they are. However,

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42 *Commentary, op. cit.*, p. 283.

43 Art. 49, (2) (3), *GC*.

44 Art. 49 (4), *GC*.

45 Art. 5 (2), *GC*.

such visits may be prohibited for reasons of imperative military necessity, as an exceptional and temporary measure.[46]

d. *Control by judicial process.* Articles 64 through 77 of the Convention deal with judicial administration and the enforcement of the laws in occupied territory. These articles will be covered in detail since they are among the most important in the Convention, from the standpoint of the JAG officer.

(1) *The Law.* The Occupying Power may subject the population of the occupied territory to penal laws which are essential (a) to enable the Occupying Power to fulfill its obligations under the treaty, (b) to enable the Occupying Power to maintain the orderly government of the territory, (c) and to insure the security of the Occupying Power.[47] These are the three bases for the legislative power of the occupant. The second and third are by far the most important. Legislation enacted under the second basis is normally called "laws". Legislation under the third basis is usually termed "ordinances."

In restoring and maintaining public order and safety, the occupant must continue in force the ordinary civil and penal laws of the occupied territory except to the extent that it is authorized by the Geneva Convention[48] or the Hague Regulations[49] to alter, suspend, or repeal those laws.[50] Hague Regulations, Article 43, states:

> 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.

The laws will be administered by local officials insofar as that is practicable and crimes not of a military nature and not affecting the security of the occupant are normally left to the jurisdiction of the local courts.[51]

It should be noted that personnel of the occupying forces are not subject to the local laws or courts which remain operative by virtue of Article 64, *GC*, and Art. 43, *HR*.[52] However, such

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46 Art. 143 (3), *GC*. See Von Glahn, *op. cit.*, pp. 125–127 for a comment on the possible abuse of the authority granted an occupation commander under Arts. 5 (2) and 143 (3), *GC*.

47 Art. 64 (2), *GC*.

48 Art. 64 (2), *GC*.

49 Art. 43, *Hague Regulations of 1907*.

50 FM 27–10, para. 370. Paragraph 371, FM 27–10 sets out the types of laws which may be altered, repealed or suspended by an Occupying Power.

51 FM 27–10, para. 370.

52 FM 27–10, para 374. It is well established in American law that occupational personnel are not subject to the local law or courts of the occupied area (*Coleman v. Tennessee*, 97 U.S. 509 [1878]; Dow v. Johnson, 100 U.S. 158 [1879]). Nevertheless occupation authorities often make this immunity express (see Art. VI, Military Government Law No. 2, Military Government for Germany, U.S. Zone, 12 Fed. Reg. 2189 [1947]; Allied High Commission [Germany] Law No. 13. "Judicial Powers in the Reserved Fields," dated 25 November 1949, 15 Fed. Reg. 1056 [1950]).

personnel may be expressly made subject thereto by a "competent officer of the occupying forces or occupation administration."[53]

Awkward situations may arise if military personnel did not have access to a civil court in occupied areas. They may be remediless against torts of the inhabitants. For that reason military authorities should see that tribunals exist to deal with civil litigation to which military personnel are parties and with any offenses committed by them.[54]

The Geneva Civilian Convention requires the Occupying Power to publish any penal provisions enacted by it and to bring them to the knowledge of the inhabitants in their own language before they become effective. It specifically states that such penal provisions shall not be retroactive.[55] A publication by radio and loudspeaker does not satisfy the requirements of publication. Such penal provisions must be promulgated in written form.[56] Normally a gazette is used which contains all laws, ordinances, amendments, and other official notices.

(2) *The Court.* In case of breach of ordinances the Occupying Power may hand over the accused inhabitant to its properly constituted, nonpolitical military court. This court must sit in the occupied country.[57] It is preferable that the courts of appeal also sit in the occupied country.

No sentence can be pronounced by these courts except after a "regular trial."[58] This idea of a regular trial is extremely important. It occurs in Art. 3 which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" and in Article 147, *GC*, where the fact of wilfully depriving a protected person of "the rights of fair and regular trial prescribed the present Convention" is included among the grave breaches listed in that article.

(3) *The Charge.* The court can apply only those ordinances which were published and applicable prior to the offence.[59]

Persons shall not be charged with acts committed or for opinions expressed before the occupation, with the exception of breaches of the law and customs of war.[60]

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53 FM 27-10, para. 374.
54 Id.
55 Art. 65, *GC*.
56 FM 27-10, para. 435 b.
57 Art. 66, *GC*.
58 Art. 71, *GC*.
59 Art. 67, *GC*.
60 Art. 70 (1), *GC*.

Nationals of the Occupying Power who, before the outbreak of hostilities have sought refuge in an occupied State shall not be prosecuted except for offenses committed after the outbreak of hostilities.[61]

(4) *The Trial.* The accused shall be brought to trial as rapidly as possible. At the trial the accused shall have the following rights: (a) to present evidence, (b) to call witnesses, (c) to be assisted by counsel of his own choice, and (d) to be aided by an interpreter.[62]

(5) *The Sentence*

(a) *Major and minor offenses.* Art. 68, *GC* places very definite restrictions upon the imposition of punishments for offenses against ordinances promulgated by the Occupying Power. Punishments are determined first by whether the offense charged is major or minor.

Major offenses are—(1) attempts on the life or limb of members of the occupying forces or administration, (2) acts which constitute a grave collective danger, or (3) which seriously damage the property or installations of the occupying forces.

The precise definition of the term "grave collective danger" does not appear in the background papers to the Convention. However, it would seem from the tenor of the entire paragraph that this should be given restrictive application.

Minor offenses consist of acts solely intended to harm the Occupying Power, but which do not constitute those major offenses listed above.

(b) *Death.* The death penalty may be imposed on a protected person only in cases where the person is guilty—(1) of espionage, (2) of serious acts of sabotage against the military installations of the Occupying Powers, or (3) of intentional offenses which have caused the death of one or more persons, *provided* that such offenses were punishable by death under the law of the occupied territory in force before the occupation began.[63]

The United States has made the following reservation in regard to Article 68 (2):

> The United States reserves the right to impose the death penalty in accordance with the provisions of Art. 68, para. 2, without regard to whether the offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.

The United States delegate inserted this reservation in order to retain for the occupation commander sufficient authority to

61 Art. 70 (2), *GC.*
62 Arts. 71, 72, *GC.*
63 Art. 68 (2), *GC.*

protect his security, unhindered by municipal laws designed for other times and circumstances. It must be remembered that the United States' reservation does not apply to the limitations as to type of offenses (i.e., espionage, sabotage, etc.). Consequently, the remainder of para. 2 is applicable to U.S. forces.

The death penalty may not be pronounced against a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.[64]

The death penalty also may not be pronounced against a protected person who was under eighteen years of age at the time of the offense.[65]

All persons condemned to death shall have the right of petition for pardon or reprieve.[66]

No executions shall be carried out until six months after notification to the Protecting Power. This period can only be shortened in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces.[67]

(c) *Confinement.* The imprisonment must be proportionate to the offence.[68] Pretrial confinement must be deducted from any period of imprisonment awarded.[69]

The court shall take into consideration the fact that the accused is not a national of the Occupying Power in determining the sentence.[70]

The sentence shall be served in the occupied country.[71] Those still serving sentences at the close of occupation shall be handed over with the relevant records, to the authorities of the liberated territory.[72]

(d) *Fines.* The first paragraph of Article 68, *GC* does not limit the right of the Occupying Power to assess penalities such as fines, in addition to the internment or imprisonment authorized by Article 68.[73] This limitation is a reasonable interpretation of the statement that internment or imprisonment shall be the only measure adopted for depriving protected persons of liberty.

(6) *Appeal.* A convicted person has the right of appeal provided for by the laws applied by the court. He must be fully

64 Art. 68 (3), *GC.*
65 Art. 68 (4), *GC.*
66 Art. 75 (1), *GC.*
67 Art. 75 (2), (3), *GC.*
68 Art. 68 (1), *GC.*
69 Art. 69, *GC.*
70 Art. 67, *GC.*
71 Art. 76 (1), *GC.*
72 Art. 77, *GC.*
73 FM 27-10, para. 488 a.

informed of this right to appeal or petition and of any time limit within which he may do so.[74]

(7) *The Role of the Protecting Power.* The Protecting Power must be informed at least three weeks before the first hearing of all proceedings instituted by the Occupying Power against protected persons in respect of charges involving the death penalty or imprisonment for two years or more. Unless, at the opening of the trial, evidence is submitted that the provisions as to notification are fully complied with, the trial shall not proceed. It has a right, at any time, to obtain information regarding the state of such proceedings. In addition, the Protecting Power is entitled, on request, to be furnished with all particulars of proceedings instituted by the Occupying Power against protected persons no matter what the punishment involves.[75]

Representatives of the Protecting Power have the right to attend the trial of any protected person. This right is qualified by the fact that the Occupying Power may, as an exceptional measure, hold the trial *in camera* in the interest of its security. To prevent abuse of such exceptional privilege the Occupying Power must notify the Protecting Power of the date and place of such trial.[76]

e. *Control by assigned residence.* An Occupying Power may, for imperative reasons of security order a protected person to an assigned residence.[77] Protected persons made subject to assigned residence and thus required to leave their homes must be supported financially by the occupier if they cannot or are not able to find paid employment near the new residence.[78]

f. *Control by internment.* The Geneva Civilian Convention authorizes internment of enemy nationals found both in occupied countries and in the territory of a party to the conflict. This method of control was analyzed in detail in the preceding Chapter in connection with the internment of enemy civilians in the domestic territory of a belligerent.

III. PROPERTY IN OCCUPIED AREAS

A. Military Commander's Power Over Property in Occupied Areas

The powers which a military commander may exercise over property in enemy territory may be classified broadly as destruction, confiscation, seizure, requisition, and control. An analysis

74 Art. 78, *GC.*
75 Art. 71, (2), (3), *GC.*
76 Art. 74, (1), *GC.*
77 Art. 78 (1), *GC.*
78 Arts. 39 (2) and 78 (3), *GC.*

of the nature of each of these powers will illustrate the lawful extent to which each may be exercised.

1. *Destruction.* Destruction is the partial or total damage of property. Property of any type or ownership may be damaged where such is necessary to, or results from, military operations either during or preparatory to combat. Destruction is forbidden except where there is some reasonable connection between the destruction of the property and the overcoming of the enemy army. Two treaties have specifically laid down rules as to destruction, Article 23 (g) of the Hague Regulations, and Article 53 of the Geneva Civilian Convention.

a. *Article 23 (g), The Hague Regulations.*

> It is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

This rule covers all property in any territory involved in a war, whether that property is in occupied territory or not, and whether that property is publicly or privately owned. Paragraph 56, FM 27–10, should be construed as illustrating only a part of the destruction permissible under Art. 23 (g), *H.R.* The acts listed in paragraph 56, FM 27–10 apply to hostilities or to invasion. However, they are not the direct result of hostilities itself, such as damage from explosives but are rather acts done incidental to or in preparation for fighting (such as the use of real estate as a camp site, or as a path of march, the use of buildings as forts or hospitals, the demolition of crops, buildings, or roads in order to make a landing strip, clear a field of fire, or furnish fuel). They therefore furnish a guide to the permissible destruction in occupied areas.[79] FM 27–10 offers further assistance to permissible destruction in occupied areas by authorizing the destruction of enemy fortifications and stores located in an area which has surrendered.[80]

Article 23 (g) *H.R.* has been supplemented as far as occupation is concerned by Art. 53 of the 1949 Geneva Civilian Convention.

b. *Article 53, Geneva Civilian Convention of 1949.*

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is ordered absolutely necessary by military operations.

[79] Para. 56 is the same as para. 324 of FM 27-10 (1940). It was moved from the section on private property in occupied areas in the 1940 edition to a spot in the 1956 edition more appropriate to acts committed in actual combat.

[80] FM 27-10, para. 41.

The original intention of this article was to cover only *private* property and to protect civilians by insuring that property in their possession and needed for their livelihood, such as food, tools, clothing, cattle, etc., should not be destroyed unless absolutely necessary.[81] Such a provision that would restrict the protection of the Convention only to private property was naturally opposed by the Soviet Union.[82] Not only did the Soviets wish to extend the protection of the article to public property, they also wished to extend it beyond occupied areas. This latter extension was resisted because Art. 23 (g), *H.R.*, was sufficiently clear in that regard. As a compromise, Article 53 was amended to extend its provisions to property owned collectively and property belonging to the state. Such an extension gives the article a scope greater than that of the Convention as a whole, which is the protection of individuals, not states. However, the attempt by the Soviet bloc to extend the protection of the Convention to areas not under occupation was unsuccessful. It must, therefore, be kept in mind that Article 53 is not a complete reenactment of *H.R.*, Art. 23 (g), because of its geographic limitations. Such a limitation does not lessen the importance of the article. The "scorched earth" policies of Germany in Norway[83] and in the U.S.S.R.[84] were carried out in areas technically under occupation.

2. *Confiscation.* Confiscation is the taking of enemy public movable property without obligation to compensate the State to which it belongs. The term only applies to *public* property because *H.R.* Art. 46 specifically forbids the confisation of private property.[85] It is further limited to public *movable* property because *H.R.*, Art. 55 permits the Occupant to act only as an administrator and usufructuary of public immovable property. The restrictions on confiscation apply only to occupied areas and to the battlefield, not to the domestic territory of the parties.

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81 See *Commentary, op. cit.*, pp. 300–302, for a discussion of the background of article 53, *GC*.

82 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II–A, pp. 719–721.

83 General Rendulic was charged and acquitted of such destructon, his defense being that such destruction was necessary under the circumstances as they appeared to him, even though he was mistaken as to his pursuit by Russian forces (*U.S.V. List, op. cit.*, n. 144, pp. 1113 *et. seq.*, and pp. 1295–1297).

84 *United States v. Von Leeb*, 11 Trials of War Criminals 462.

85 An exception is made to the rule that private property may not be confiscated by permitting confiscation of certain items of private property found on the battlefield (FM 27–10, para. 59 *b*). With the depth and fluidity of modern battle zones it is sometimes difficult to determine when an area becomes or ceases to be a "battlefield" thereby increasing the danger that this exception may partly undermine the Hague prohibition. Such private property is called "booty of war." See JAGW 1956/8832 (9 Nov. 1956 wherein the opinion is expressed that Goering's heavily armored car equipped with bullet proof glass taken on the battlefield could be confiscated. In JAGW 1957/5906 (15 July 1957) the question arose whether or not expensive Hungarian horses now in the United States were "found on the battlefield." An extension of this idea of "booty" may be observed in JAGA 1947/5986, JAGW 1957/2121, and JAGW 1957/1052, wherein the opinion is expressed that field marshals' batons could be confiscated in cases where they were adorned with swastikas and were generally symbolic of the Nazi Party.

All enemy public movable property captured or found on a battlefield may be confiscated.[86] However, only certain categories of public movable property may be confiscated in occupied areas. *H.R.*, Art. 53(1) lists the items which can be confiscated in occupied territory.

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

Such public movable property need not be directly usuable for military operations, as ammunition, but includes property indirectly serving the same purpose. In modern total war military value can be found in a great many items. However, if the property cannot be used either directly or indirectly for military operations it cannot be confiscated.

3. *Seizure*

a. *Its nature and limitations.* Seizure is the taking of certain types of enemy *private* movable property for use of the capturing State. Such use is not confined to the needs of the occupying army. Items seized may be employed outside as well as within the occupied territory. The items seized must be returned or compensation fixed when peace is made. This is one of the principal differences between seizure and confiscation.

The concept of seizure does not apply to public property because movable public property of a military value may be confiscated. Public immovable property can only be administered, title remaining always in the enemy State.

The concept also does not apply to private immovable property. "Immovable private property may under no circumstances be seized."[87] This general rule, which appears absolute, is however modified in the case of railway plants, port facilities, airfields, and telephone and telegraph plants, all of which are closely connected with communication and transportation systems.[88]

Article 53 (2), *H.R.* lists the types of private movable property which may be seized. They are (1) appliances adapted to the transmission of news; (2) transportation; (3) depots of arms and all kinds of ammunition of war. The seizure of this property is not based, as in the case of requisitions, on the needs of the army of occupation but on the danger of permitting property

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86 FM 27-10, para. 59 a. Public property so found is also termed "booty of war." On "booty" generally see Fitzmaurice, "General Note on the Law of War Booty," 40 *AJIL* 795; and Smith, "Booty of War," 23 *Brit. Year Bk. of IL* 227 (1946).

87 FM 27-10, para. 407.

88 FM 27-10, para. 410 a.

susceptible of direct military use to remain at the disposal of private individuals.

Appliances adapted to the transmission of news include cables, radios, television and telecommunications equipment.[89]

Appliances adapted as a means of transportation include motor vehicles, railways, ships in port, barges and other watercraft, and aircraft.

Arms and munitions of war include all varieties of military equipment, including that in the hands of manufacturers, component parts of or material suitable only for use in the foregoing, and in general all kinds of war materials.[90] It will be noted that many items that could be extremely useful to a State at war are not included. Such items in occupied areas are heavy industry not yet converted to war production, crude oil, and other petroleum products. Efforts to interpret broadly the term of the Hague Regulations "ammunition of war" have not been successful.[91] Private property subject to seizure remains limited by the 1907 Hague Regulations.

(b). *Cases growing out of seizures in World War II.*

(1) *United States v. Krupp*[92]

In the early part of 1941 the German High Command instituted a new submarine building program, which was participated in by the Krupp subsidiary of the Krupp Stahlban in Reinhausen. One of the managers of this plant was sent to France in the company of a naval officer of the Armament Inspectorate of the Navy High Command in order to find bending roll machines of greater dimensions than were available at the Krupp plants. They immediately placed "seized" signs upon the machines. The director of the Alsthom plant objected on the ground that the machines were the only ones suitable for the construction of boiler drums and high pressure tubes. Neither had been used for military purposes. The objections raised to the seizure were of no avail and shortly afterwards the machines were dismantled by Krupp workmen and carried off to Germany. They were used in the submarine building program until the end of the war when they were found and finally brought back to the Alsthom plant. The removal and detention of those machines was considered a violation of Article 46 of the Hague Regulations.

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89 Id.

90 Id.

91 See Lauterpacht, "Hague Regulations and the Seizure of Munitions de Guerre." 32 *Brit. Year Bk. of IL* 218 (1955).

92 10 *Law Reports of Trials of War Criminals*, pp. 68, 89., IX *Trials of War Criminals*, pp. 1358–1361.

(2) *United States v. Flick et al*[93]

Flick was the principal proprietor and active head of a large group of industrial enterprises including coal and iron mines and steel producing plants. He and some of his associates were tried after World War II for the unlawful seizure and exploitation of public and private property in occupied territory. Excerpts from the judgement of the court are as follows:

". . . Flick and his assistants Weiss, Burkart and Kaletsch are accused of exploiting properties which for convenience during the trial have been called Rombach in Lorraine; Vairogs in Latvia; and Dnjepr Stahl [Dnepr Steel], in the Ukraine. . . .

* * * * * * *

"Prior to the First World War when Lorraine was German, a large plant was built by German capital near the town of Rombach. After that war it was expropriated by France from whom the title was acquired by a French corporation dominated by the Laurent family. The enterprise consisted in 1940 principally of blast furnaces, Thomas works, rolling mills and cement works. . . . When the German Army invaded Lorraine in 1940, the management fled but many of the workers including technicians remained. . . . In any event a public commissioner or administrator was appointed for the Rombach plant and ultimately executed a contract with the Friedrich Flick Kommanditgesellschaft called 'use of enterprise conveyance agreement' dated 15 December 1942 but effective as of 1 March 1941 when the Flick group took possession. . . . Flick, had the hope of ultimately acquiring title to the respective properties and this trusteeship was sought to that end. . . . At no time, however, was there any definite sale commitment and of course the hope of its realization was frustrated by the fortunes of war. . . . A corporation called Rombacher Huettenwerke, G.m.b.H., was organized by Flick to operate the plant. . . . All the profits were invested in repairs, improvements and new installations. . . . The evidence satisfied us that the trustee left the properties in better condition than when they were taken over. . . .

"The seizure of Rombach in the first instance may be defended upon the ground of military necessity. The possibility of its use by the French, the absence of responsible management and the need for finding work for the idle population are all factors that the German authorities may have taken into consideration. Military necessity is a broad term. Its interpretation involves the

93 VI *Trials of War Criminals*, pp. 1187–1223, at pp. 1202–1212. *Annual Digest 1947*, pp. 266–274; IX *LRTWC* 1–59. See also *U.S. v. Krauch* (I. G. Farben Inc.) VIII *Trials of War Criminals* pp. 1128–1167 for the seizure of private chemical industries in occupied areas.

exercise of some discretion. If after seizure the German authorities had treated their possession as conservatory for the rightful owners' interest, little fault could be found with the subsequent conduct of those in possession.

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". . . Flick saw the possibilities resulting from the invasion and sought to add the Rombach property to his concern. But governmental policy was otherwise. It does not appear upon what grounds this decision was based. There may have been thought of the Hague Regulations under which private property must be respected and cannot be confiscated. But we recall no hint in the evidence that Flick or his associates gave any thought to the international law affecting the transaction. The Flick management of Rombach was conservative, not, however, with the intent of benefiting the French owners. . . . His expectation of ownership caused him to plow back into the physical property the profits of operation. . . .

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"While the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful. For this and other damage they may be compensated. . . .

". . . In this case Flick's acts and conduct contributed to a violation of Hague Regulation 46 that is, that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to contribute to a program of 'systematic plunder' conceived by the Hitler regime and for which many of the major war criminal have been punished. . . .

". . . They [Hague Regulations] were written in a day when armies traveled on foot, in horse-drawn vehicles and on railroad trains; the automobile was in its Ford model-T stage. Use of the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of imagination. Concentration of industry into huge organizations transcending national boundaries had barely begun. Blockades were the principal means of 'economic warfare.' 'Total warfare' only became a reality in the recent conflict. These developments make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically, or abstractly. Reasonable and practical standards must be considered.

". . . The Tribunal will find defendant Flick guilty in respect to the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted.

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"Vairogs and Dnjepr Stahl have similar factual situations. The former was a railroad car and engine factory in Riga, once owned by a Flick subsidiary, sold to the Latvian State about 1936 and expropriated in 1940 as the property of the Soviet Govern ment. Dnjepr Stahl was a large industrial group—three foundries, two tube plants, a rolling mill, and machine factory—also owned by the Russian Government. These plants had been stripped of usuable movables when the Russian Army retreated eastward and further steps had been taken to render them useless to the Germans. Dnjepr Stahl particularly had been largely dismantled and immovables seriously damaged or destroyed. Over one million Reichsmarks of German funds at Vairogs and 20 million at Dnjepr Stahl were spent in reactivating the plants. They were in the possession of Flick subsidiary companies as trustees, the former for less than 2 years, beginning in October 1942, the latter for the first 8 months of 1943.

". . . When the German civilians departed all plants were undamaged and in the absence of evidence to the contrary we may assume so remained when the Russians returned.

"The only activity of the individual defendants in respect to these industries was in negotiating the procurement of trustee contracts. . . .

"These activities stand on a different legal basis from those at Rombach. Both properties belonged to the Soviet Government. The Dnjepr Stahl plant had been used for armament production by the Russians. The other was devoted principally to production of railroad cars and equipment. No single one of the Hague Regulations above quoted is exactly in point, but, adopting the method used by IMT, we deduce from all of them, considered as a whole, the principle that state-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. The attempt of the German Government to seize them as the property of the Reich of course was not effective. Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the government itself could have operated for its benefit could also legally be operated by a trustee. We regard as immaterial Flick's purpose ultimately to acquire title. To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime. We have already expressed our views as to the evacuation of movables from these plants. Weiss congratulated the manager of Vairogs upon his success in moving out machinery and equip-

ment. In this we see nothing incriminating since Weiss neither had nor attempted to exercise any control of the evacuation and learned of it only after it was accomplished. We conclude, therefore, that there was no criminal offence for which any of the defendants may be punished in connection with Vairogs and Dnjepr Stahl."

(3) *Singapore Oil Stocks.*[94] When the Japanese occupied the Netherlands East Indies in 1942 they seized the crude oil stocks of private oil companies. This oil, which had to be pumped out of the ground and refined, was transferred out of the occupied area and used to further the Japanese war efforts in other parts of Asia. After the war, some of this refined oil was found stored in Singapore. The British confiscated it as "booty of war." The private oil companies contested this act on the part of Britain on the ground that the Japanese had no title to this oil which the British could obtain. The Court concluded as follows:

"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 court also held that any Netherlands Indies law which operated to vest title in the refiner, here the Japanese could not purge the Japanese of their original violation of the Hague Regulations. Therefore judgment was given to the private owners.

4. *Requisition.* Requisition is the method of taking private enemy movable *and* immovable property for the needs of the army of occupation. It differs from seizure in four respects. (a) The items taken by requisition may be used only in the occupied territory. (b) Practically everything may be requisitioned that is necessary for the day-to-day maintenance of the army of occupation. The power to requisition is not limited to certain classes of property as is seizure. (c) Private immovable as well as private movable property may be requisitioned. Only private movable property may be seized. (d) The owners are to be compensated as soon as possible. They do not have to wait for the restoration of peace.[95]

The wording of both *H.R.*, Art. 52, and *GC*, Art. 55, omit to specify who should *ultimately* pay for the requisitioned goods. The initial payment is usually made by the occupant. However, this payment may be made with occupation currency,[96] or with local currency raised through contributions levied on the local

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94 *N.V. De Bataafsche Petroleum Maatschappli and Ors. v. The War Damage Commission*, reproduced in 51 *American Journal of International Law* 802 (1957).

95 *H.R.*, Art. 52, and *GC* Art. 55, define the powers of the occupation authorities in regard to requisitions.

96 Nussbaum, *Money in the Law* (1950), p. 159; Feilchenfeld, *Economic Law of Belligerent Occupation* (1942), p. 70.

population.[97] In either event ultimate payment is not being made by the occupant, but by the local population. This is not unreasonable, because under the rules of war, the economy of an occupied country can be required, if it is able, to bear the expenses of the occupation.[98]

There is no fixed or prescribed method of requisition.[99] An Occupying Power may use either a direct or indirect method to obtain the required goods. If practicable all requisitions should be accomplished indirectly through the local authorities by systematic collection in bulk.[100] Such a system not only saves manpower but also insures a more equitable distribution of the burden among the civil inhabitants and eases the natural discontent aroused if armed soldiers personally take the property.

The army of occupation may have need for many items that do not exist but that can be produced by local manufacturers. To obtain such items at a "reasonable price" a procedure resembling somewhat the procurement of items in the United States was adopted in the postwar occupation of Germany. Occupation costs were first obtained from the German Government. The United States forces would then advertise their needs to the local manufacturers. These manufacturers would submit bids based upon the advertisements. A "requisition demand" would then be placed with the lowest responsible bidder, payment to him being made out of the occupation costs already advanced by the German Government.

In such a procedure disputes naturally arose over the interpretation of the advertisement and the bid, particularly where the actual cost of production exceeded the bid price. Even if the specifications contained in the advertisements and the bids are clear, it may be argued that a fair price has not been paid if unforseen legitimate costs exceed the agreed price. It became necessary to appoint a "requisition demand appeal board" to settle the disputes. Counsel for the occupation authorities and counsel for the manufacturer would appear. The hearings, therefore, were in the nature of adversary proceedings.

5. *Control.* All property within occupied territory may be controlled by the occupant to the degree necessary to prevent its use for the benefit of the enemy or in a manner harmful to the occupant.[101] Property control is temporary in nature. The property must be returned to the owners when the reason for the control

97 *H.R.* Art. 49.

98 *Opinion and Judgment*, The International Military Tribunal, Nuremberg, Germany, p. 68; *U.S. v. Flick op. cit.*, p. 1204.

99 FM 27-10, para. 415.

100 FM 27-10, para. 415.

101 FM 27-10, para. 399.

no longer exists. Therefore, the control must not extend to confiscation, whether such confiscation is accomplished by outright taking, or by subtler methods such as forced sales and depletion.

Control may also be exercised over property of unknown ownership or over property of individuals who are not present to care for it themselves.

The authority of the occupant to impose such controls does not limit its power to confiscate, seize or requisition certain property. The power to control is broader than these three concepts.[102]

B. Property Requiring Special Protection

1. *Real Property of the State.* Article 55 of the Hague Regulations provides as follows:

> The occupying state shall be regarded only as administrator and usufructuary of public buildings, landed property, forests and agricultural undertakings belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of such properties and administer them in accordance with the rules of usufruct.

The term "usufruct" means literally "to use the fruit." The occupant can therefore enjoy the benefits of public real property, but he cannot interfere with the substantive rights still possessed by the displaced sovereign.

2. *Municipal Property.* Under Article 56, Hague Regulations, municipal property is treated as private property. Therefore, it may be requisitioned or seized. However, it cannot be confiscated. The reason for the separation of municipal property from other public property is not altogether clear.[103]

3. *Archives and Public Records.* The traditional view had been that state archives and public records, though a part of a government's movable property, were immune from seizure.[104] Their importance in the orderly running of a country is obvious. They are evidence of innumerable relationships and property rights which can often be found in no other manner. However, they can be of immediate and vital importance to an occupant. Therefore, the custom has grown to permit their seizure, while still requiring the occupant to exercise every means to prevent their loss or destruction while in his possession.

4. *Cultural Property.* Besides protecting property of municipalities Article 56 of the Hague Regulations also extend the pro-

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102 See Military Government Law No. 52, "Blocking and Control of Property," (Military Government Gazette, Germany, 1 June 1946, pp. 24–27) for a comprehensive attempt to control property transactions in an occupied area. German Supreme Court held on 24 June 1957 that MG Law 52 was designed to protect the property interests of the owner as well as the security of the occupant (Case digested in 58 *Am. J. Int'l L.* 457 (1957)).

103 See Franklin, "Municipal Property and Belligerent Occupation," 38 *Am. J. Int'l L.* (1944) pp. 383–396, for a study of the origin of this exemption.

104 Von Glahn, *The Occupation of Enemy Territory* (1957), p. 188.

tection afforded private property to institutions dedicated to religion, charity and education, and the arts and sciences. This article further provides that—

> . . . the wilful damage done to institutions of this character, historic monuments, works of art and science is forbidden, and should be made the subject of legal proceedings.

The allusion to the criminal nature of such acts in Article 56 is unique in the Hague Regulations and indicates the feeling of the drafters of the 1907 Convention on the matter.[105]

5. *Property of Unknown Ownership.* If it is unknown whether or not certain property is owned publicly or privately, it should be treated as public property until its ownership is ascertained.[106]

6. *Religious Buildings and Shrines.* The practice of the United States has been to use religious buildings, shrines, and consecrated places of worship only for aid stations and medical installations provided that a situation of emergency requires such use. A specific reference to this practice has been inserted in FM 27–10 at paragraph 405*c* at the recommendation of the Chief of Chaplains in order to indicate that the authority granted by international law is not exercised to the full by the United States in the case of religious buildings.

C. Determination Whether Property is Public or Private

The 1907 Hague Regulations, which govern the treatment of property in occupied areas, were enacted at a time when the nineteenth century laissez faire philosophies still excluded governments from most of the economic life of the country. However, with the rise of socialism and communism in the twentieth century state ownership of property, particularly the means of production, increased considerably.

The basic distinction made in the Hague Regulations as to property is that between public and private property.[107] Upon this distinction most of the rules operate. Therefore, in order to apply realistically these rules to present day warfare the inquiry into ownership should not stop with the holder of the strict legal title. The latest edition of FM 27–10, *The Law of Land Warfare* (1956), has recognized this problem and has sought to answer it by the criteria of beneficial ownership[108] and apportionment.[109]

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105 There are two additional treaties which protect cultural property. The Roerich Pact (49 Stat. 3267; Treaty Series 899) of April 15, 1935 was concluded between the United States and a number of Latin American Republics. The most comprehensive treaty on the subject is the Hague Convention of May 1954 on the protection of Cultural Property in the Event of Armed Conflict. The United States is not as yet a party to this latter treaty. For the protection of cultural property during combat, see paragraph 46, FM 27–10.

106 FM 27–10, para. 394*c*.

107 *HR*, Arts. 23*g*, 46, 52–56.

108 FM 27–10, para. 394*a*.

109 FM 27–10, para. 394*b*.

IV. CURRENCY IN OCCUPIED AREAS

Two closely related currency problems are in need of solution by the military commander in occupied territory. The first concerns the currency used by the inhabitants; the second, the currency used by the foreign military forces.

A. Currency Used by the Inhabitants

Article 43 of the Hague Regulations requires that the occupant respect, "unless absolutely prevented, the laws in force in the country." This would seem to require that the currency of the inhabitants remain unchanged. However, this might not be possible because of the disappearance of the backing for this currency. For example, the printing plates may be in the hands of the expelled sovereign, part of the gold reserves or other governmental assets may have been seized by the occupant,[110] or the expelled sovereign may have greatly depreciated the value of the currency by inflationary printing prior to its departure. In such cases the occupant may be forced to create a new legal tender for the country.[111]

B. Currency Used by the Military Forces

There are three courses open to the military occupant of foreign territory. (1) He may use the local currency. (2) He may print special scrip for his own use and the use of his troops. (3) He may use his own national currency in the occupied region.

1. *Local Currency.* The use of local currency may not be feasible for the reasons stated in A above. There also may not be enough local currency in circulation to satisfy the needs of the Occupant. There certainly will not be sufficient quantities available during the invasion and in the early stages of the occupation.

2. *Military Scrip.*[112] The use of military scrip immediately raises the question of the backing for such currency. The Allies faced this problem when they issued Allied Military Currency denominated in the currency of the occupied territory (lire, reich-

110 The legality of the seizure of gold reserves is unsettled. They are movable property of the state. However, the value of money in the hands of the civilian population may depend upon such gold (See Mann, "Money in Public International Law," 26 *British Year Book of International Law*, 259, at p. 273).

111 For example the value of the German mark had depreciated in the final days of National Socialism. It was necessary for the Occupation authorities to withdraw it and to issue an entirely new local currency. This was done by Military Government Law No. 61, "The First Law of Monetary Reform."

112 On September 23, 1943, the General Counsel of the Treasury Department prepared a legal memorandum justifying the issuance of AMG currency in Sicily. On 18 June 1947, this memorandum was introduced by the then General Counsel, Mr. O'Connell, in a joint hearing on occupation currency transactions conducted by the Senate Committees on Appropriations, Armed Services, and on Banking and Currency. (United States, Senate, *Hearings on Occupation Currency Transactions*. 80th Congress, First Session, June 18, 19, 1947, pp. 77–84.)

marks, schillings). To back up the invasion lire the United States and British Governments set up credits in dollars and sterling in special accounts to provide for the contingency of the lire becoming a charge against the Occupying Powers.[113] Once the Allies were victorious these contingency credits were not necessary because the Treaty of Peace imposed upon Italy the duty of redeeming them.[113a] In order to assist Italy in its task of redemption the United States transferred to Italy dollars equivalent to the military lire personally expended in Italy by American troops.[113b]

If military scrip is used, the ultimate backing must be found in the deposed sovereign. This sovereign must either redeem the scrip upon his return or be in a position to see that the occupant does so.

3. *Occupant's Own National Currency*

Often the occupant must of necessity use his own money during the early stages of the occupation. The United States used the so-called "yellow seal" dollar in World War II. Such a practice is discontinued as early as possible because it is a drain on the occupant's finances. The occupant is serving as backer for such currency rather than transferring such a burden to the deposed sovereign.

C. General Legal Norms Applicable

While many facets of currency control require the expert opinion of an economist rather than lawyer, some general rules of proper conduct may be deduced.

1. The occupant must remember that he is an administrator and trustee, who, within the limits of military needs, acts for the public benefit of the inhabitants.

2. Military scrip may be issued only to the extent that it is necessary to satisfy military needs or to supplement an inadequate supply of local currency.[114]

3. Conversion rates between the occupation scrip and the local currency must be set so as not to overvalue the occupant's scrip.

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113 The use of an account consisting of the occupant's own currency as backing is not altogether satisfactory. If the occupant loses the war its own financial structure will probably not be in a sound state. Such was the case at the end of World War I when Belgium attempted to draw on the German currency account established during the war to ensure the redemption of German military scrip issued in Belgium.

113a Art. 76, para. 4, 61 *Stat.* 1247, at 1402.

113b Mann, *op. cit.*, n. 110, citing Southard, *The Finances of European Liberation* (1946), p. 80.

114 Upon entry into Germany the Allies promulgated Occupation Law No. 51, entitled "Currency." Its principle objective was to establish the Allied Military Mark as legal tender.

Such overevaluation is an easy method of exploiting the local economy.[115]

4. Strict control of the local money issued and military scrip issued is necessary to prevent a depreciation of the currency in circulation.[116]

115 If the conversion rate is set at the beginning of occupation the actual value of the military occupation scrip will fluctuate with the fortunes of war. In Burma Japanese scrip lost value toward the end of the war. Debts hurriedly paid in occupation scrip at a 1 for 1 rate resulted in losses to creditors (See Taik v. Ariff Moosajee Dooply and Another [Burma], *Annual Digest 1948, op. cit.*, p. 476 wherein the court disallowed the payment of debts with occupation scrip worth 5% of its face value).

116 Control is obviously difficult if two occupation authorities are both printing the same scrip. Such a situation occurred in the early stages of the German occupation. The Soviets asked for and obtained from the United States an exact duplicate of the plates that were to be used to print the allied scrip. The Soviets printed these occupation marks by the billions. Their soldiers were paid salary accumulations up to six years in these marks. Because the occupation scrip was worthless in the Soviet Union it was necessary to convert it into hard commodities in Germany. Therefore Russian purchasing missions with satchels filled with these bills roamed the country buying anything salable. Under Mil. Gov. Law 51 the German seller had to accept this currency. The American soldier also became a seller. He could sell to the Russians at an enormous profit such items as watches, pens, etc. The American could then convert this scrip into dollar money orders to be sent back to the United States. Before this practice could be stopped American soldiers and War Department civilian employees had remitted to the United States through Army facilities more than 200 million dollars in excess of that which had been paid to them in Allied scrip by the U.S. Army. (Bennett, "The German Currency Reform," *The Annals*, Vol. 267 [Jan. 1950], p. 44; United States, Senate, *Hearings, op. cit.*, n. 112, pp. 96, 97, 175–193.)

CHAPTER 7

NONHOSTILE RELATIONS OF BELLIGERENTS

Introduction

Traditionally, war has had the effect of terminating all normal relations between enemy belligerents.[1] Diplomatic relations are carried on, if at all, through neutral nations. Trade and communications between nationals of enemy countries normally are forbidden by positive legislation of the nations themselves.[2] Nevertheless, such a disruption of contact cannot be complete. Situations have and will always arise where belligerents must speak to each other directly.

During the past centuries there have come into being accepted methods by which the armed forces of one nation can officially contact the armed forces of another. These methods and the subject matter with which they deal have become, through custom and codification, a part of international law. The white flag, the truce for the burying of the dead, and overtures requesting a termination of fighting in a particular region have all been encountered in almost every war. A long tradition of usage and acceptance has formalized the methods by which these communications are carried on.[3] However, modern war has presented certain problems in regard to their adaptability to present day conditions. The first of these problems creating conditions is the fact that the law surrounding these nonhostile relations was developed to handle situations involving much smaller operations and much simpler command structures than are characteristic of the present day. The law was developed in order to govern the relationship between a few belligerents, not the mass grouping of States characteristic of modern global wars. Second, the lack of communications necessarily gave the local military commander of the past a great deal of autonomy. Nevertheless, such auto-

1 FM 27-10, *The Law of Land Warfare* (1956), para. 499. Whether this inhibition arises from the strictures of domestic law or of international law has continued to be a matter of controversy in the United States, although the tendency has been to regard the prohibition as being one imposed by the law of nations (*United States v. Lane*, 8 Wall. 185 [1868]; *Kershaw v. Kelsey*, 100 Mass. 561 [1868]; see 3 Hyde *International Law Chiefly as Interpreted and Applied by the United States*, 2d rev. ed. [Boston: Little, Brown and Company, 1945], p. 1701, and II Lauterpacht, *Oppenheim's International Law*, 7th ed. [London: Longman's, 1952] p. 318).

2 For example the "Trading with the Enemy Act," Public Law 91, 65th Congress, October 6, 1917, 40 Stat. 411.

3 Arts. 32-41 of the Annex to the IV Hague Convention Respecting the Laws and Customs of War on Land (36 Stat. 2277; Treaty Series No. 539; Malloy, *Treaties*, Vol. II, p. 2269) have codified the customary law concerning parliamentaries, capitulations and armistices.

nomy was restricted solely to military matters. Today, a commander is often in a position where his anticipated actions can be reviewed quickly at the highest military and civilian levels of his government.

The methods of communication established by the customs and conventions of the past never held themselves out as being the only methods permitted. The methods of the contact are secondary. The meaning of the contact was and is still paramount. Technological advances of radio, television, and telephone have simplified the manner of contact.[4] Now with the radio, the thoughts and the proposals of one side at any level can easily be made known to the other.[5] Further advances, such as television, may make possible face to face meetings without exposure to enemy fire by either party. The radio has also made ratification of actions of a commander and the extent of his authority easier to obtain and to verify.

Not only are the methods of intercourse becoming revolutionized, but also are the subjects which may be discussed. Previously these subjects have been restricted to strictly military matters. With the presence of civilian political advisers on the staffs of most major commands and with the close coordination between the Departments of Defense and State, military-political matters often enter into agreements subjecting such agreements to the final approval of the governments concerned.[6] Because of this change in subject matter and in the parties to the agreements such historic terms as "armistice," "truce," "capitulation," etc., may in some instances no longer represent clear-cut concepts. Nevertheless, it is important that these teams be understood in their traditional meaning because they illustrate the scope of the apparent authority of a military commander. This authority may be summarized by the phrase "Military men speak only to opposing military men and then only about military things."

Two types of nonhostile relations will be discussed in this chapter. Section I will deal with nonhostile relations of a major nature, such as capitulation, armistices, surrenders, etc. Section II covers matters of lesser importance, but nevertheless, of common occurrence such as safe conducts, passports, etc., which are required by the 1949 Geneva Conventions.

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4 For example, FM 27–10, *Rules of Land Warfare* (1940), at para. 227 contained the following statement: "*No communication at night.* No provision is made for opening communication with an enemy during the hours of darkness when a white flag cannot be seen. . . ."

5 FM 27–10, Law of Land Warfare at para. 452 reflects this change by acknowledging that one belligerent may communicate with another by radio as well as by parliamentaries.

6 See paras. 473, 483, and 488, FM 27–10 (1956).

I. NONHOSTILE RELATIONS OF A MAJOR NATURE

A. Capitulations and Unconditional Surrenders

1. *Meaning.* A capitulation has three essentials. It is first of all an agreement. There is an exchange of promises. It is not a one sided or unilateral undertaking. Secondly, this agreement is entered into between commanders of opposing belligerent forces. Lastly, the purpose of the agreement is the surrender of a body of troops, a fortress, or other defended locality or of district of the theater of operations.[7]

In return for the surrender, the opposing commander promises certain things. The distinguishing feature then between a surrender and a capitulation is this exchange of promises.[8] This is the reason that FM 27–10, the *Law of Land Warfare*, after defining a capitulation, points out that "a surrender may be effected without resort to a capitulation".[9] For example, General Grant's demand for unconditional surrender at Fort Donaldson in 1862 rejected the Confederate commander's offer to capitulate. Conversely, General Lee's surrender to Grant three years later was effected through a capitulation.

A commander may give certain promises to a surrendering enemy commander for many reasons. He may wish to induce the surrender as rapidly as possible. He may be moved by motivations of chivalry if the opponent has fought honorably and bravely. He may also wish to cause other surrenders by the liberality of the terms offered.

The Hague Regulations which form the annex to Hague Convention IV of 1907 contain one short provision dealing with capitulations:

> Capitulations agreed upon between the contracting parties must take into account the rules of military honour. Once settled, they must be scrupulously observed by both parties.[10]

2. *Examples of Capitulations and Unconditional Surrenders.*

The definition of a capitulation is deceptively simple. The three essentials are (1) on agreement, (2) between opposing commanders, and (3) for the surrender of certain troops, material, or locality under their control. Difficulties have arisen in the past when commanders have entered into agreements which either do not contain these essentials or which contain other matter. The following historical examples will illustrate the problems that may arise.

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7 *Ibid.*, para. 470.
8 II Lauterpacht, *op. cit.*, no. 1, p. 543.
9 FM 27–10 (1956) *op. cit.*, para. 470.
10 Art. 35, Annex to the IV Hague Convention Respecting the Laws and Customs of War on Land, *op. cit.*, n. 3.

a. *Burgoyne at Saratoga (1777).*[11]

Burgoyne's expedition from Canada in the Fall of 1777 ran into difficulty. He failed to form a junction with the British forces to the south. He could not go back the way he had come. The American forces under Gates were at hand. Starvation or defeat and capture by the Americans seemed to be his only alternative. On October 14, Burgoyne made contact with Gates in order to open negotiations. Gates sent back six terms for a capitulation. One required that the British Army should surrender as prisoners of war. Another provided that the British should ground their arms in the entrenchments where they stood and then march to their destination. Gates agreed to a suspension of arms until evening in order to permit Burgoyne time to consider the proposal.

Burgoyne rejected the terms and sent a proposal of his own. His troops would not be surrendered to anyone but would march off the field "with all the honors of war" and would be transported to England, never again to be used in North America during the present war. Gates promptly rejected the terms and the suspension of arms came to an end.

The next day, October 15, Gates changed his mind. Fearing that Burgoyne was going to be reinforced by British troops marching up from the south he sent a parlementaire to Burgoyne bearing a copy of the Burgoyne's counter-proposal, signed by Gates. Gates made an important addition, that the port of imbarkation for the British troops be Boston. Boston was controlled by the Americans. Burgoyne had hoped on using a port controlled by the British. This would have meant that his army would pass out of the American lines and their eventual departure to Europe controlled by the British themselves.

Burgoyne accepted this addition of Gates. Even with it Gates had not made a good bargain. Great Britain maintained several garrisons in Europe. There was nothing in the agreement that would prevent her from exchanging Burgoyne's troops for a unit in Europe, thus having available undiminshed forces for the spring offensive.

That Burgoyne was entirely aware at the time of what he was doing is evident from his insistence that Gates substitute the word "convention" in the agreement for "capitulation." A capitulation implies the surrender of something. Burgoyne intended

[11] For an account of the negotiations at Freeman's Farm between Burgoyne and Gates and the aftermath thereof, see W. M. Dabney, *After Saratoga: The Story of the Convention Army*, (Albuquerque: The University of New Mexico Press, 1954) pp. 7–80. For an account of the negotiation, see Walworth, *Battles of Saratoga (1891)*, pp. 35–40; and Commager Morris, *The Spirit of Seventy-Six* (N.Y. Bobbs-Merrill, 1958) pp. 598–606.