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NORTH CAROLINA LAW REVIEW

Volume 40 | Number 4

Article 3

6-1-1962

Military Government-The Supreme Court Speaks

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Recommended Citation

Seymour W. Wurfel, *Military Government-The Supreme Court Speaks*, 40 N.C. L. REV. 717 (1962).

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MILITARY GOVERNMENT—THE SUPREME COURT SPEAKS

SEYMOUR W. WURFEL*

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THE PROBLEM

Lastly, among the other obligations connected with war, Cicero includes this: not to be excessively severe to the conquered¹

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¹2 AYALA, *DE JURE ET OFFICIIS BELLICI ET DISCIPLINA MILITARI LIBRI III*, at 102 (Bate transl. 1912).

Seeing that there is not less virtue in preserving what we have gained than in acquiring it, and in the right use of victory than in victory itself—for as Ovid rightly says: Chance controls the one, but in the other there is a need for skill—and seeing that the object of war is to live in peace, our whole thought, after the enemy has been crushed, should be by what best means to restrain him forever from making war again.²

² *Id.* at 163. In 1823 Chief Justice Marshall came to thorny grip with this problem in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). Speaking for the Court, the Chief Justice opined: "The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized in the Courts of the United States? . . ." *Id.* at 571-72.

"Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them. The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers. When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power. But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence. . . . Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indian necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out accordingly to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies. The law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application

Thus in 1582 did Jurisconsult Balthazar Ayala, Judge Advocate General of the Royal Army in the Low Countries, pose this fundamental problem of all government and the immediate problem of military government. He attributed the first observation to book 37 of Livy³ and the second to book 25 of Justin.⁴ This imperative enigma, never quite solved by the Romans, and now infinitely more complicated, is today the foremost concern of all mankind. Whether it may be at last resolved by the rule of law, or otherwise, remains to be seen. The progression of the lot of the conquered from certain death, to slavery, to toleration, to humane treatment, to legal rights has been painfully slow and uncertain, but progress there has been, attributable largely to the emergence of a law of belligerent occupation.

A current appraisal of the American law of military government conceivably might prove to be of more than academic interest in these turbulent times. Events in Berlin, Algeria, Cuba, Cashmir, Angola, the Dominican Republic, Vietnam, Laos, Goa, Argentina and elsewhere bespeak the continued use of military force to achieve political objectives, the present *de facto* existence of military government of one kind or another in many areas and the necessity that these and all other military governments be restrained by law. At best, the restoration of law may possibly be achieved in some circumstances by establishing transitional international military government under control of the United Nations or regional international organizations.⁵ The examples of World War II quadripartite military government and the limited United Nations operations in Korea, the Gaza strip and the Congo afford precedents which might be followed. At worst, provocative situations around the world may eventuate in traditional unilateral national imposition of military government, in which event the need for clear and binding law will be even more imperative.

to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. . . ." *Id.* at 589-91.

Thus the Chief Justice concluded, "[T]he Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States. . . ." *Id.* at 604.

³ LIVY, *AB URBE CONDITA LIBRI* bk. 37, at 286 (Sage transl. 1935).

⁴ JUSTIN, *HISTORIAE PHILIPPICAE* bk. 25, at 198 (Watson transl. 1886).

⁵ See Taubenfeld, *International Armed Forces and the Rules of War*, 45 *AM. J. INT'L L.* 671 (1951).

The efficacy of international law in this area, as elsewhere, is somewhat dependent upon the extent to which it has been recognized in and made a part of the domestic law of individual nations. The position of the United States in its recognition of the legal foundations of military government is pertinent.

SCOPE OF ARTICLE

In the exploding American periodic literature of general military law⁶ the portion thereof devoted to the law of military government is relatively modest.⁷ Nevertheless, the total of legal writings on military government law, foreign and domestic, textual and periodic, encompasses hundreds of items.⁸ Much of this deals with details of specific military government operations.⁹ The limited purpose of this article is to assemble those principles of military government law which have been enunciated by the Supreme Court of the United States.

In most areas of public law the approach to its substance through the decisions of the United States Supreme Court would be considered impeccable. Here it is open to question since the law of military government derives primarily from international law and not from national law. To most American lawyers and laymen a Supreme Court decision seems to impart to "law" an infallible certi-

⁶ INDEX TO LEGAL PERIODICALS (Jan. 1909-Jan. 1962). In the thirty-two years from 1909 to 1940 about 250 articles were written which in some way pertained to military law. This was an average of eight a year. In the twenty-one years from 1940 through 1961 the total output of legal articles and notes pertaining to military subjects reached the astounding figure of more than 3200 for an average of more than 150 a year. The indexing has been changed from time to time, but the principal headings are, Army and Navy, Courts-Martial, Military Law, National Defense, Soldiers and Sailors, Veterans, and War, the latter with numerous subdivisions.

⁷ There are slightly more than one hundred articles on the law of military government, practically all of which may be found under the heading War VIII, Military Occupation of Territory and Governments in Exile in INDEX TO LEGAL PERIODICALS (1940-55).

⁸ VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY (1957). This work contains an excellent bibliography of writings on belligerent occupation and war crimes which lists some 184 treatises and 358 items of periodic literature plus monographs and official documents.

⁹ Representative of this material, which beckons those with a desire to concentrate on particular American experiences in military government, are: ALLEN, THE RHINELAND OCCUPATION (1927); BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW (3d ed. 1914); LITCHFIELD, GOVERNING POST-WAR GERMANY (1953); MAGOON, REPORT ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY MILITARY

tude and eternal rightness which they are unwilling to ascribe to international law and international tribunals, and which the dissenting Supreme Court Justices themselves refuse to accord to the views of their own brethren in a given case. In any event, the use of Supreme Court cases should serve to emphasize that international law is an integral part of the law of the United States, and that the fundamentals of military government law have been extensively recognized and declared by the United States Supreme Court.

DEFINITION

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the

FORCES OF THE UNITED STATES (3d ed. 1903) (primarily Spanish-American war experiences); MEADE, *AMERICAN MILITARY GOVERNMENT IN KOREA* (1951); ZINK, *AMERICAN MILITARY GOVERNMENT IN GERMANY* (1947). See also Borton, *Occupation Policies in Japan and Korea*, 255 *Annals* 146 (1948); Braibanti, *The Ryukyu Islands: Pawn of the Pacific*, 48 *AM. POL. SCI. REV.* 972 (1954); Carpenter, *Military Government of Southern Territory, 1861-1865*, in *THE ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION* 465 (1900); Fairman, *Some Observations on Military Occupation*, 32 *MINN. L. REV.* 319 (1948); Fisher, *Allied Military Government in Italy*, 267 *Annals* 114 (1950); Ford, *Occupation Experiences on Okinawa*, 267 *Annals* 175 (1950); Lauterbach, *Hodge's Korea*, 23 *VA. Q. REV.* 349 (1947); McCloy, *American Occupation Policies in Germany*, 21 *ACAD. POL. SCI. PROC.* 540 (1946); McCune, *The Occupation of Korea*, 23 *FOR. POLICY REP.* 186 (1947); Rosinger, *The Occupation of Japan*, 23 *FOR. POLICY REP.* 50 (1947); Taylor, *The Administration of Occupied Japan*, 267 *Annals* 140 (1950); Thackrey, *Military Government in the Pacific: Initial Phase*, 60 *POL. SCI. Q.* 90 (1945); Thompson, *Guam: A Study in Military Government*, 13 *FAR EASTERN SURVEY* 149 (1944); Useem, *American Pattern of Military Government in Micronesia*, 51 *AM. J. SOC.* 93 (1945); Weiss, *U.S. Military Government on Okinawa*, 15 *FAR EASTERN SURVEY* 234 (1946); Zimmerman, *The Occupation of Iceland by American Forces*, 62 *POL. SCI. Q.* 103 (1947).

second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

This classic definition given by Chief Justice Chase in 1866 in his separate opinion in *Ex parte Milligan*¹⁰ is valid today.

NOT COURTS-MARTIAL JURISDICTION

We are not here concerned with what Chief Justice Chase called military law, now usually referred to as military justice, which deals with the trial by courts-martial of persons subject to the criminal jurisdiction conferred by the Uniform Code of Military Justice,¹¹ and which has developed a vast literature of its own.¹²

It is important to observe that the Supreme Court decisions which struck down the jurisdiction of courts-martial conferred by Congress over civilians accompanying or serving with the armed forces of the

¹⁰ 71 U.S. (4 Wall.) 2, 141-42 (1866).

¹¹ 64 Stat. 108 (1950), 10 U.S.C. §§ 801-940 (1958), as amended, 10 U.S.C.A. §§ 802, 858a, 958a, 923a, 936 (Supp. 1961). The Uniform Code of Military Justice is the most recent exercise by Congress of its constitutional power "to make Rules for the Government and Regulation of the land and naval forces." U.S. CONST. art. I, § 8. It has exercised this power from the foundation of the government commencing with its enactment of September 29, 1789, which, with some amendments, adopted the provisions of the Articles of War enacted by the Second Continental Congress in 1776. See WINTHROP, *MILITARY LAW AND PRECEDENTS* 23 (2d ed. 1920).

¹² In the thirty years before the Uniform Code became effective (May 31, 1951), the decisions of the Boards of Review, the intermediate appellate tribunals of the military justice system, aggregated more than 141 large volumes. In less than eleven years under the Uniform Code, Board of Review opinions combined with decisions of the United States Court of Military Appeals have been published in thirty volumes designated as *Courts-Martial Reports* totalling some 27,000 pages. The eleven volumes of the reports of the United States Court of Military Appeals alone exceed 8200 pages. In the same period the articles listed under Courts-Martial in the INDEX TO LEGAL PERIODICALS are close to five hundred in number. Gaynor,

United States in foreign countries *in time of peace*¹³ did not purport to divest,¹⁴ and have been judicially evaluated as not divesting, the jurisdiction of military commissions to try civilians, even though they are American citizens, where such commissions sit as military government courts in occupied areas.¹⁵

The problems of the exercise of courts-martial jurisdiction over

Military Law Source Material, 55 LAW LIB. JR. 16 (1962), gives a good general bibliography. For a textual treatment of military justice, see AYCOCK & WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* (1955).

¹³ *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (non-capital offenses committed by civilian employees); *Grisham v. Hagen*, 361 U.S. 278 (1960) (capital offense committed by civilian employee); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (non-capital offense committed by dependant); *Reid v. Covert*, 354 U.S. 1 (1957), *reversing on rehearing Kinsella v. Kruger*, 351 U.S. 470 (1956), and *Reid v. Covert*, 351 U.S. 487 (1956) (capital offenses committed by wives of military personnel).

¹⁴ As pointed out by the dissenting Justices in the second *Reid v. Covert*, 354 U.S. 1, 78 (1957): "[I]n substitute therefor [for the previous decisions] it enters no opinion whatever for the Court. It is unable to muster a majority opinion. Instead, there are handed down three opinions." In this same case Justice Black, joined by three Justices in voting to overrule the prior *Reid* decision, stated: "There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces 'in the field' during *time of war*. . . . In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." *Id.* at 33. (Emphasis is the Justice's.) Justice Frankfurter, who joined with the majority, concluded: "What has been urged falls . . . short of proving a well-established practice . . . of court-martial jurisdiction, certainly not in capital cases, over such civilians in time of peace." *Id.* at 64.

¹⁵ *Madsen v. Overholser*, 251 F.2d 387 (D.C. Cir.), *cert. denied*, 356 U.S. 920, *petition for rehearing denied*, 356 U.S. 920 (1958). The petitioner, Madsen, killed her Air Force lieutenant husband in Frankfurt, Germany, in 1949, was convicted by a United States military government court in Germany for this offense, and on habeas corpus attack, the jurisdiction of that tribunal was upheld in *Madsen v. Kinsella*, 343 U.S. 341 (1952). Petitioner's contention in the later habeas corpus proceeding against Overholser was that the last ruling of the Court in *Reid v. Covert*, *supra* note 14, divested the military government court of jurisdiction over her. The court of appeals denied this contention, stating that it was bound by the *Madsen* decision. This ruling the Supreme Court refused to review. It is elementary that a denial of certiorari does not bind the Supreme Court to the rule announced in a lower court. It is probable that some, but less than a majority, of the present members of the Supreme Court will take every opportunity to strike down military jurisdiction. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962). It is foolhardy, for even a devoted follower of the Supreme Court, to predict what it may do next. With all these qualifications it does seem accurate to say that, as of the present, *Covert* has not detracted from the authority of *Madsen*. The *Madsen* decision will be hereafter considered in more detail.

forces stationed in friendly foreign countries is also to be excluded from our inquiry.¹⁶ The NATO Status of Forces Agreement¹⁷ now elaborately divides up this jurisdiction between the host and guest states and provides for joint political determination as to which state shall exercise jurisdiction in a particular case where either state so requests.¹⁸ The Supreme Court has held that this arrangement, since it comes within the sphere of international relations, is not subject to its judicial review.¹⁹ Such jurisdiction when exercised in friendly allied countries is a special application of military justice, or what Chief Justice Chase defined as military law.²⁰ It is not a function of military government.

A distinction should be made here between types of military courts, which is as valid today as when made by the Supreme Court in 1864.

[M]ilitary jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. "Military offences, under the statutes, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war." . . .

In the armies of the United States, the first is exercised by courts-martial, while cases which do not come within the . . . jurisdiction conferred by statute on court-martial, are tried by *military commissions*.²¹

¹⁶ The original international law rule on this question was enunciated by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), to the effect that exclusive jurisdiction over visiting forces remains vested in the guest sovereign whom they serve. This rule, either with or without national legislation, was generally followed until after the Second World War. Since then it has been replaced by detailed treaty provisions and implementing agreements.

¹⁷ North Atlantic Treaty, June 19, 1951, [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846.

¹⁸ *Id.* art. VII, para. 3(c), at 1798-1802.

¹⁹ *Wilson v. Girard*, 354 U.S. 524 (1957). See also *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 952 (1955).

²⁰ The special problems of exercising jurisdiction over visiting forces are considered in SNEE & PYE, *STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION* (1957).

²¹ *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249 (1864). (Emphasis is the Court's.) This statement the Court adopted almost verbatim from section 679 of General Orders No. 100, Adjutant General Office, 1863, pre-

It is safe to say, as a practical matter, that where a court-martial exercises jurisdiction the cause is not one within the scope of military government. While article 18 of the Uniform Code of Military Justice expressly gives concurrent jurisdiction to courts-martial in all cases cognizable by military commissions,²² it is not the practice to convene courts-martial in situations where it has been customary to use military commissions.²³ This may in part be the case because of the simpler procedures applicable to military commissions. Furthermore courts-martial have no civil jurisdiction, except as this might conceivably be held to be granted by the concurrent jurisdiction provision just mentioned. It seems clear that only criminal and not civil jurisdiction was intended. There are no courts-martial procedures by which civil, as distinguished from criminal, litigation may be conducted. Frequently military commissions sitting as military government courts are confronted with the necessity of trying civil cases.

Congress, in article 21 of the Uniform Code of Military Justice, has been careful to preserve the established jurisdiction of military commissions, but did not extend to them courts-martial jurisdiction.²⁴

NOT MARTIAL LAW

Also to be distinguished from military government is what Chief Justice Chase denominated martial law proper. This is instituted by Congress, or temporarily in great emergency by the President, placing *domestic territory* under military control in time of invasion or insurrection of such magnitude that normal civil government is unable to function.²⁵ Quite properly, the Supreme Court has engaged

pared by Francis Lieber and published by President Lincoln for the guidance of the Union forces.

²² 10 U.S.C. § 818 (1958), in pertinent part provides: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

²³ It has occasionally been done. *E.g.*, *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952) (negligent homicide by an American civilian in occupied Japan).

²⁴ 10 U.S.C. § 821 (1958), reads: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." See *Madsen v. Kinsella*, 343 U.S. 341, 350 (1952).

²⁵ A definitive text is FAIRMAN, *THE LAW OF MARTIAL RULE* (2d ed. 1943). See especially *id.* at 41-43, where the author is careful to distinguish

in strict judicial review of the exercise of martial law and in at least three instances has declared such exercise invalid.²⁶

NOT WAR CRIMES

There remains for exclusion the large and important field of war crimes, which is concerned with the prosecution of all persons, both military and civilian, who commit violations of the laws of war. Such offenses may arise out of combat operations and have no connection at all with military government²⁷ or may be law of war violations by an enemy military governor or his subordinates in an occupied area and so have a direct relation to military government.²⁸ In either case the American practice has been to establish separate agencies for the prosecution and trial of war crimes. This function has not normally been performed by military government personnel nor have war crimes cases been tried by military government courts.²⁹

The prosecution of the major war criminals of the Second World War were conducted before specially convened international military tribunals at Nuremberg, Germany and Tokyo, Japan. Both civilians and military personnel were used by the United States as its members of, and prosecutors and defense counsel for, these courts.³⁰

between martial law and military government. See also Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942), and *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833 (1946); Holdsworth, *Martial Law Historically Considered*, 18 L.Q. REV. 117 (1902).

²⁶ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (martial law improper where civil courts closed only because area military commander so ordered); *Sterling v. Constantin*, 287 U.S. 378 (1932) (martial law declared by governor improper where purpose is to prevent enforcement of federal court order); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (martial law improper where civil courts are open). See also *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

²⁷ *Ex parte Quirin*, 317 U.S. 1 (1942). The Court here upheld the jurisdiction of a military commission to try unlawful belligerents of enemy forces for law of war violations committed in the continental United States.

²⁸ *In re Yamashita*, 327 U.S. 1 (1946). The Court here upheld the jurisdiction of a military commission to try a Japanese military governor of the occupied Philippines for law of war violations committed by his subordinates. *Accord*, *Homma v. Patterson*, 327 U.S. 759 (1946) (per curiam).

²⁹ However, flexibility in this regard is possible. U.S. DEP'T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE para. 505d, at 180 (1956) [hereinafter cited as FM 27-10], which is authoritative so far as the United States army practice is concerned, provides: "War crimes are within the jurisdiction of general courts-martials (UCMJ, Art. 18), military commissions, provost courts, military governments courts, and other military tribunals (UCMJ, Art. 21) of the United States, as well as of international tribunals."

³⁰ JACKSON, THE NUREMBERG CASE (1947); INTERNATIONAL MILITARY

Other war crimes tribunals were convened by the United States at Nuremberg under the international authority of Allied Control Council Law No. 10.³¹ Although these latter courts in each case consisted exclusively of three American judges drawn from civilian life they were held to be international, and not national courts.³² The Supreme Court has held it has no jurisdiction whatever to inquire into the proceedings of international tribunals in which the United States is a participant.³³

Still other war crimes trials were conducted in Germany, the Philippines, Japan and elsewhere by American military commissions composed of United States Army Officers. Trial and defense counsel for these tribunals were drawn from both officer and civilian attorneys.³⁴

As to non-resident enemy aliens who are captured, held in military custody, tried and convicted by an American military commission and imprisoned, all these events occurring outside the United States for offenses against the law of war committed outside the

TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947-49); *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, in 39 AM. J. INT'L L. 257 (Supp. 1945); *International Military Tribunal (Nuremberg)—Judgment and Sentences*, in 41 AM. J. INT'L L. 172 (1947); *The Legal Basis for Trial of War Criminals*, 19 TEMP. L.Q. 133 (1946).

³¹ TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949); TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949).

³² *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir.), cert. denied, 338 U.S. 879 (1949), rehearing denied, 338 U.S. 940 (1950). The case reviews the authority under which the Allied Control Council Law No. 10 Tribunals were convened.

³³ *Hirota v. MacArthur*, 338 U.S. 197 (1949) (per curiam). The Court here stated: "We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers. Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, to set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied." *Id.* at 198. *Accord*, *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir.), cert. denied, 338 U.S. 879 (1949), rehearing denied, 338 U.S. 940 (1950), where the ruling in *Hirota* was applied to cases tried in Germany by war crimes tribunals convened by the United States under the authority of Allied Control Council Law No. 10.

³⁴ Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AM. J. INT'L L. 299 (1948).

United States, the Supreme Court has held it has no jurisdiction whatever.³⁵ Only where some of these significant events have occurred within United States territory will the Supreme Court review American war crimes tribunal proceedings,³⁶ and then only for the limited purpose of determining whether the American military commission had jurisdiction.³⁷

The prosecution of war crimes offenses committed by American personnel either military or civilian is not normally the responsibility of military government. Usually United States military personnel are tried by courts-martial for such offenses. American civilians, for law of war offenses, at least those committed within the United States, are tried by the civil courts.³⁸ American civilians who commit war crimes in American occupied foreign territory may be tried there by military government courts or by specially convened military commissions.

³⁵ *Johnson v. Eisentrager*, 339 U.S. 763, 768 n.1 (1950), where the Court cites more than two hundred cases involving motions for leave to file habeas corpus petitions made by German enemy aliens confined by American military authorities abroad pursuant to war crimes sentences pronounced by American military commissions. The status of all but nonresident enemy aliens in this regard is probably still open to debate.

³⁶ In *Johnson v. Eisentrager*, *supra* note 35, at 779, the Court pointed out that these conditions existed in both *Ex parte Quirin*, 317 U.S. 1 (1942), and *In re Yamashita*, 327 U.S. 1 (1945).

³⁷ "The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established. By the Treaty of Versailles, 'The German government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.' Article 228. This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war.' *Duncan v. Kahana-moku*, 327 U.S. 304, 313-314. And we have held in the *Quirin* [317 U.S. 1 (1942)] and *Yamashita* cases [327 U.S. 1 (1945)] . . . that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war. It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. As we observed in the *Yamashita* case, 'If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.' . . . 'We consider here only the lawful power of the commission to try the petitioner for the offense charged.' . . ." *Johnson v. Eisentrager*, 339 U.S. 763, 786-87 (1950).

³⁸ FM 27-10, para. 507b, at 182, provides: "The United States normally

From the foregoing discussion it becomes apparent that while military commissions are a typical form of military government court, other well established and distinct uses are also made of military commissions. Conversely, we shall see that great flexibility in the composition of military government courts is permissible.

NOT CIVIL AFFAIRS

One more distinction remains to be made. Civil affairs administration is on occasion established in friendly territory by express or implied agreement with the regular government of that area which, for the time being, is unable or unwilling to assume full responsibility. This situation may arise in friendly territory liberated from enemy occupation. Examples are the civil affairs activities of the United States Army in France in 1944, and in the Philippines, in conjunction with the Osmena government, in 1944 and 1945. These were not occupations. Civil affairs agreements were concluded with the lawful government; military government operations by American forces were kept to the minimum and were terminated as soon as the domestic governments were able to function fully.³⁹ The continued presence of United States forces in West Germany is no longer an occupation. It is now controlled by extensive intergovern-

punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law. Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished." Supreme Court precedent for this method of disposing of offenses committed by our own military personnel was established in *Coleman v. Tennessee*, 97 U.S. 509 (1878), and in *Dow v. Johnson*, 100 U.S. 158 (1879).

³⁹ While the degree and emphasis may vary widely, the same general activities which in friendly countries are designated as civil affairs are known in occupied enemy territory as military government. The authoritative manual applicable alike to the United States Army, Navy, Air Force and Marine Corps operations, by its very title indicates this. U.S. DEPT'S OF THE ARMY, NAVY & AIR FORCE, FM 41-5, OPNAV P 21-1, AFM 110-7, NAVMC 2500, JOINT MANUAL OF CIVIL AFFAIRS/MILITARY GOVERNMENT (1958) [hereinafter cited as JOINT MANUAL]. The manual provides: "The same military organization employed to conduct military government is used to conduct civil affairs." *Id.* para. 4b, at 8. It also points out that the standard abbreviation "CAMG" refers to either or both civil affairs and military government. *Id.* para. 2a, at 2.

mental agreements⁴⁰ which almost completely equate the situation there to the Status of Forces arrangements pertaining in other North Atlantic Treaty Organization areas.⁴¹ These NATO mutual arrangements are certainly not occupations, nor are they civil affairs administrations.

THE LEGAL SOURCE OF MILITARY GOVERNMENT POWERS

Military government for some period, in some area, in some form, seems to occur with the same regularity as war itself. It has been called into use in every war in the national history of the United States. Military government problems have been regularly in litigation before the United States Supreme Court since 1819.⁴² What then is the legal basis for military government?

Military government is the form of administration by which an occupying power exercises executive, legislative, and judicial authority over occupied enemy territory or domestic territory recovered from rebels treated as belligerents, or allied or neutral territory liberated from the enemy and which is not yet the subject of a civil affairs agreement. Both customary and conventional international law impose a duty upon an occupant to take all measures in his power to restore, and ensure, as far as possible, public order and safety.

This customary law of war was first applied by the Supreme Court to a situation arising in the War of 1812. Mr. Justice Story, speaking for the Court, said:

The single question arising on the pleadings in this case is, whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. During this period the British government exercised all civil and military author-

⁴⁰ THE STATUS OF NATO FORCES IN THE FEDERAL REPUBLIC OF GERMANY (1959) (supplementary agreement of August 3, 1959).

⁴¹ North Atlantic Treaty, June 19, 1951, art. VII, [1953] 2 U.S.T. & O.I.A. 1792, 1798, T.I.A.S. No. 2846.

⁴² United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

ity over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. . . .

[T]he claim for duties cannot be sustained. . . .⁴³

Similar Supreme Court recognition of the basic principle was accorded while upholding the validity of customs duties imposed by American military government in California during the Mexican War. The Court said:

California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward the United States had military possession of all of Upper California. Early in 1847 the President, as Constitutional Commander-in-Chief of the Army and Navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. . . . No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. . . .⁴⁴

During the Civil War, New Orleans was held in occupation by Union forces from May 1, 1862 until March 18, 1866. During the military occupation, the city was governed by a mayor, a board of finance and a board of street landings, appointed by the commanding general. In July 1865 these officials leased a landing to a steamship company for a ten year term. In upholding this lease, the Supreme Court through Justice Swayne declared:

Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the

⁴³ *Id.* at 253.

⁴⁴ *Cross v. Harrison*, 57 U.S. (16 How.) 164, 190 (1853).

supremacy of the National government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject.⁴⁵

By the time Spanish American War litigation reached the Supreme Court it was no longer confined to citing in support of the legal basis of military government its own previous decisions which recognized the customary rule of international law. It then could cite, and did, conventional international law to which the United States was a party. The Court said in *MacLeod v. United States*:⁴⁶

What should constitute military occupation was one of the matters before the Hague Convention in 1899 respecting laws and customs of war on land, and the following articles were adopted by the nations giving adherence to that Convention, among which is the United States. (32 Stat. II (1821)) : . . .

⁴⁵ *New Orleans v. Steamship Co.*, 87 U.S. (20 Wall.) 387, 393 (1874). The legal foundation of military government power in Louisiana during the Civil War is discussed in some detail in *United States v. Reiter*, 27 Fed. Cas. 768 (No. 16146) (1865). The rationale by which the Supreme Court consistently viewed Federal military operations in Confederate States territory as occurring in enemy, and not domestic territory, and hence as being in the exercise of military government, is set forth at length in *Dow v. Johnson*, 100 U.S. 158, 164 (1879).

⁴⁶ 229 U.S. 416, 425-26 (1913). The identical language of article 43 of the Hague Convention of 1899 is carried forward into article 43 of the Annex to Hague Convention No. IV of October 18, 1907, Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295, T.S. No. 539 [hereinafter cited as *The Hague Convention No. IV Annex*, T.S. No. 539], and in this latter form is officially prescribed in pertinent field manuals as binding on American forces. FM 27-10 para. 363, at 141; JOINT MANUAL para. 7d, at 17.

Article XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

When military government powers exercised in West Germany following the Second World War were challenged, the Supreme Court, speaking through Justice Burton, tersely observed: "The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms."⁴⁷

WHEN AND WHERE MILITARY GOVERNMENT PREVAILS

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself."⁴⁸

This test boils down to the practical recognition of effective military possession at the time and place in question. An entire country, nor even a whole political subdivision thereof, need not be occupied before military government may be exercised. The Supreme Court approved acts of military government by the British in 1814 at the port of Castine, Maine, when the rest of Maine and of the United States was under United States control;⁴⁹ by a federal commissioner in Memphis, Tennessee in 1864, when active military lines were within a mile of the city;⁵⁰ and by a short-lived native insurgent

⁴⁷ *Madsen v. Kinsella*, 343 U.S. 341, 348 (1951), citing article 43 of The Hague Convention No. IV Annex, T.S. No. 539.

⁴⁸ *MacLeod v. United States*, 229 U.S. 416, 426 (1913), quoting and applying Article 42 of the Hague Convention of 1899. Its successor, Article 42 of The Hague Convention No. IV Annex, T.S. No. 539, changes the last sentence to read: "The occupation extends only to the territory where such authority has been established and can be exercised." FM 27-10 para. 351, at 138.

⁴⁹ *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819) (customs collection).

⁵⁰ *Keely v. Sanders*, 99 U.S. 441 (1878). In upholding a tax sale conducted by the United States commissioner on June 24, 1864, the Court stated: "The city of Memphis, it is conceded, was in full and undisputed possession of the Federal army. All that is proved is that the military lines were around the city, at a distance of a mile or so from its corporate limits, and that the remaining part of the county was not in Federal occupation. All that is quite consistent with the fact that Federal military authority was established

government which styled itself the Philippine Republic in 1899 at Cebu City, Philippines, when most of the ports of the Philippines were already under United States military control.⁵¹ Nor are acts of military government invalidated simply by reason of the fact that such government survives only briefly. The British military government at Castine existed from September 1814 until February 1815, and that of the insurgent Philippine Republic at Cebu from December 25, 1898 to February 22, 1899. Effective control is essential to the status of occupation.⁵²

WHO EXERCISES MILITARY GOVERNMENT

Normally the military commander of the occupying force becomes the military governor and is the immediate responsible head of the military government.⁵³ Usually an executive directive regarding military government is provided for the military commander,⁵⁴ but not necessarily so. Flexibility of organization is a basic principle.⁵⁵ Thus in the occupation of Japan, General MacArthur was not only the Supreme Commander of Allied Forces of the Far East but Military Governor as well. In Europe General Eisenhower, Supreme Commander of the Allied Powers of Europe, elected to appoint General Clay American Military Governor initially. Later

over the whole county. No conquering army occupies the entire territory conquered. Its authority is established when it occupies and holds securely the most important places, and when there is no opposing governmental authority within the territory. The inability of any other power to establish and maintain governmental authority therein is the test." *Id.* at 447.

⁵¹ *MacLeod v. United States*, 229 U.S. 416 (1913).

⁵² FM 27-10 para. 356, at 139.

⁵³ In *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177 (1857), the Supreme Court, in speaking of military government in New Mexico, said: "General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, . . . ordained, under the sanction and authority of the United States, a provisional or temporary Government for the acquired country." The Court referred to the first American statutory laws of New Mexico as "Kearney's Code." And in *United States v. Diekelman*, 92 U.S. 520, 526 (1875), the Court had this to say: "New Orleans was . . . the theater of . . . military operations. . . . General Butler, in command, was the military ruler. His will was law, and necessarily so."

⁵⁴ President Lincoln's executive order of October 20, 1862, establishing military government courts in Louisiana, is set out in *Burke v. Miltenberger*, 86 U.S. (19 Wall.) 519-20 (1873). The order of President McKinley to the Secretary of War on July 18, 1898, on the occupation of Cuba, is reprinted in 7 MOORE, *DICTIONARY OF INTERNATIONAL LAW* § 1143, at 261 (1906).

⁵⁵ JOINT MANUAL para. 3f, at 6, provides: "The military governor is the military commander or other designated person who, in an occupied territory, exercises supreme authority over the civil population subject to the laws and usages of war and to any directive received from his government or from his superior."

Mr. McCloy, a State Department civilian, succeeded General Clay in this post, by presidential designation, under the title of United States High Commissioner for Germany.⁵⁶

The military commander exercises this power, "under the direction of the President, with the express or implied sanction of Congress."⁵⁷

FUNCTIONS OF MILITARY GOVERNMENT

The functions of a military government may be as varied as those performed by any civil government.⁵⁸ This has been repeatedly recognized by the Supreme Court in unequivocal terms. A terse judicial statement to this effect is found in *New Orleans v. Steamship Co.*⁵⁹

[T]he conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war.

And in *United States v. Rice*⁶⁰ Justice Story (later Chief Justice)

⁵⁶ Exec. Order No. 10062, 14 Fed. Reg. 2965 (1949), cited in Madsen v. Kinsella, 343 U.S. 341, 356-57 (1951).

⁵⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 142 (1866) (Opinion of Chase, C.J.).

⁵⁸ JOINT MANUAL para. 23, at 41, states the functions of military government: "(1) Governmental Functions—(a) Legal, (b) Public Safety, (c) Public Health, (d) Public Welfare, (e) Public Finance, (f) Public Education, (g) Labor. (2) Economic Functions—(a) Economics, (b) Commerce and Industry, (c) Food and Agriculture, (d) Price Control and Rationing, (e) Property Control, (f) Civilian Supply. (3) Public Facilities Functions—(a) Public Works and Utilities, (b) Public Communications, (c) Public Transportation. (4) Special Functions—(a) Civil Information, (b) Displaced Persons, (c) Arts, Monuments, and Archives."

⁵⁹ 87 U.S. (20 Wall.) 387, 394 (1874). See also *United States v. Diekelman*, 92 U.S. 520, 526 (1875): "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed"; *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9 (1868); *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177 (1857); 1 MOORE, *op. cit. supra* note 54, § 20.

⁶⁰ 17 U.S. (4 Wheat.) 246, 254 (1819). It should be noted that current

said: "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place."

While the Supreme Court has consistently declared⁶¹ the practically unlimited legal powers of a military government, United States military authorities have uniformly imposed self-restraints upon the exercise of this power. General Order No. 287, promulgated by General Winfield Scott in Mexico City on September 17, 1847,⁶² presumably without benefit of legal precedent, not only evidenced

doctrine does not extend to a claim that "sovereignty" vests in a military government though Justice Story used broad language to that effect here. An interesting case is *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952), which reaches the conclusion that the United States military occupation of the Ryukyu Islands in 1948 did not vest "de jure sovereignty" thereof in the United States but only "de facto sovereignty," that since Okinawa was "a foreign country" the Federal Tort Claims Act was inapplicable there, and that a person injured in an accident involving a government crane could not maintain a suit against the United States. *Cobb* is followed in *Burna v. United States*, 240 F.2d 720 (4th Cir. 1957), which decided that even after the treaty of peace with Japan, tort claims arising in the Ryukyus were not actionable against the United States. *Callas v. United States*, 253 F.2d 838 (2d Cir. 1958), reaches the same result regarding torts occurring on Kwajalein, which, under the United Nations, the United States now administers as trust territory.

⁶¹ *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 195 (1815). Here Chief Justice Marshall in delivering the opinion of the Court upholding a capture and condemnation of enemy property which occurred during the War of 1812 said: "Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark. Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property?" The Chief Justice concluded: "In condemning the sugars of Mr. Bentzon as enemy property, this Court is of opinion that there was no error." *Id.* at 199. In the last case before the Supreme Court in which this problem was considered, *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court stated: "[T]he President, as Commander-in-Chief of the Army and Navy, in 1945 established, through the Commanding General of the United States Forces in the European Theater, a United States Military Government for Germany within the United States Area of Control." *Id.* at 356. The official steps by which this was done are set forth in an appendix to its opinion. *Id.* at 362.

⁶² This classical document of American military government is reprinted in BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 541 (3d ed. 1914). In part it provided: "14. For the ease and safety of both parties in all cities and towns occupied by the American Army, a Mexican police shall be established, and duly harmonized with the military police of said forces. 15. This splendid capital, its churches and religious worship, its convents and monasteries, its inhabitants and property are, moreover, placed under the special safeguard of the faith and honor of the American Army." General Order 287 is discussed further *infra*.

this restraint but was substantially in accord with current military government practice.

In 1863, section 15 of General Order 199 of the United States forces stated "men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."⁶³ This was preceded on April 24, 1863 by General Order 100, usually referred to as the Lieber Code. That famous document, issued to govern the conduct of Union forces in the Civil War, was the first real codification of the laws of war. At the direction of President Lincoln the War Department issued orders that this code be written by Francis Lieber and a board of generals. Lieber, a German born and trained lawyer, who for many years was a professor of law at the University of South Carolina, was chairman of the board and the actual author. His code devoted twelve sections specifically to military government and in its over-all treatment of the laws of war contained one hundred and fifty one sections.⁶⁴ General Order 100 was the direct ancestor of the Hague Conventions of 1899 and 1907. It is not too much to say that this American product of the Civil War set the pattern for the whole later development of the conventional international law of war embracing not only military government but also the conduct of fighting, the rights of civilians, the treatment of prisoners of war, the sick and wounded and the status of guerilla warfare.⁶⁵

The Lieber Code in its entirety was republished by the United

⁶³ GEN. O. 199, § 15 (1863), quoted in Colby, *Occupation Under Laws of War*, 25 COLUM. L. REV. 904, 918 (1925).

⁶⁴ GEN. O. 100 (1863), in BIRKHIMER, *op. cit. supra* note 64, at 633-34. Section 671 thereof reads, "Military Government simply is military authority exercised in accordance with the laws and usages of war. Military oppression is not military government; it is an abuse of the power which the law of war confers. As military government is carried on by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed."

⁶⁵ GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914*, at 13-36 (1949), presents an interesting detailed account of the vast influence of the Lieber Code upon not only the international law of war but the national manuals of most nations published for the guidance of their military forces. Davis, *Dr. Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907), gives a biographical account of Dr. Lieber and discusses the importance of his work. Bivens, *Restatement of the Laws of War as Applied to the Armed Forces of Collective Security Arrangements*, 48 AM. J. INT'L L. 140 (1954), espouses the formulation of an up to date code for collective enforcement forces, comparable to Lieber's Code.

States War Department in 1898 and its provisions were followed in the Spanish American War. In 1914 it was in part reproduced in the Rules of Land Warfare manual then issued by the War Department.⁶⁶

The current United States military government manual, with increasing refinement, continues to insist upon moderation in the exercise of military government. It provides:⁶⁷

War is not an excuse for ignoring established humanitarian principles. To a large extent these principles have been given concrete form in the law of war; but because all of these principles have not become legal rules, a military commander must consider whether a proposed course of action will be humane even though not expressly prohibited by international law. . . .

Subject to the requirements of the military situation, the principle of governing for the benefit of the governed should be observed.⁶⁸

The duties of military government personnel should be confined wherever possible to supervision over existing or re-established civilian authorities, thereby affecting [*sic*] economy of personnel.⁶⁹ . . .

[T]he occupant may need to assume only a minimum of military government functions if the local government is effective and not hostile to the occupant.⁷⁰

It will normally be the ultimate objective of an occupation to leave behind government oriented in Western democratic principles and which will not be a threat to future peace and world stability. This may best be accomplished through the establishment of an efficient and popularly accepted government, stable economic and financial conditions, and respect for law and order. Normally it will be the policy of an occupant to allow the maximum political freedom consistent with military security and public order.⁷¹

These principles of military government seem to reflect the philosophy that that government is best which governs least. This is

⁶⁶ GRABER, *op. cit. supra* note 65, at 19.

⁶⁷ JOINT MANUAL para. 6b, at 13.

⁶⁸ *Id.* para. 6c, at 13.

⁶⁹ *Id.* at para. 6c, at 14.

⁷⁰ *Id.* para. 17b, at 32.

⁷¹ *Id.* para. 7b, at 15.

perhaps surprising in view of how little influence that philosophy seems to have on most civil governments at the present time.

It is only natural that some aspects of military government have been more frequently subjected to judicial review by the Supreme Court than others. A few of these merit separate consideration.

LAW ENFORCEMENT

It is not surprising that law enforcement areas of military government have frequently been subjected to Supreme Court scrutiny. The original concept was that there was practically no limit upon the discretion of the military commander as to what law should be enforced in an occupied area. Thus, in the British occupation of Castine, Maine, the Court declared:

[T]he laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose.⁷²

That the power of the military governor extended not only to the suspension and promulgation of laws, but to the establishment of a whole judicial system as well, was recognized by the Court as early as the Mexican War. In upholding the action of General Kearney in New Mexico, the Court said:

[T]here was ordained by the provisional Government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned. . . . [T]he jurisdiction of the Circuit Courts . . . was . . . to embrace, 1st, all criminal cases that shall not be otherwise provided by law; and, 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. . . . Of the validity of these ordinances . . . there is made no question . . . and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must

⁷² United States v. Rice, 17 U.S. (4 Wheat.) 246, 254 (1857).

have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them.⁷³

In this same case the Court noted that there were limits to this power of the military governor :

“The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed.”⁷⁴

The fundamental power to establish courts was consistently reaffirmed in reviewing litigation conducted in military government courts in various areas of the Confederacy in Civil War times. In the basic case of this era, which upheld the jurisdiction of the Provisional Court for the State of Louisiana, the Court noted that the administration of justice was a duty as well as a right of a belligerent occupant :

The object of the National government in the Civil War indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization . . . and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National government, wherever the insurgent power was overthrown, . . . to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

The duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief . . .⁷⁵

⁷³ *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 178 (1857).

⁷⁴ *Id.* at 177-78, quoting from *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86-87 (1833).

⁷⁵ *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132 (1869). In *Pennywit v. Eaton*, 82 U.S. (15 Wall.) 382, 384 (1872), the Court said: “The second

The Civil War produced the first case in which the Supreme Court rejected a purported judicial act of a military governor. In 1868 a court of common pleas in South Carolina granted a mortgage foreclosure decree and directed a commissioner's sale. Shortly thereafter General Canby issued an order annulling this decree. The commissioner, however, conducted the sale and the foreclosure was ultimately upheld by the Supreme Court of South Carolina. The United States Supreme Court affirmed, stating that General Canby's order was a wholly "arbitrary stretch of authority, needful of no good end that can be imagined."⁷⁶ This result is undoubtedly correct in finding there was no jurisdiction to engage in this capricious intervention.

Civil and criminal jurisdiction of military government courts was again upheld by the Supreme Court in litigation resulting from the Spanish American War.⁷⁷ The most recent occasion for the Supreme Court to consider the legal status of a military government court arose from the conviction in 1950 of an Air Force lieutenant's wife for the murder of her husband. The petitioner had been convicted by a United States Court of the Allied High Commission for Germany and brought a writ of habeas corpus, contending that she should have been tried by a courts-martial and that the occupation court was without jurisdiction. The Supreme Court denied the petition, stating that "since our nation's earliest days, such commissions have been constitutionally recognized"⁷⁸ and that in the absence of congressional limitations the President, as Com-

question relates to the validity of the appointment of the judge who presided in the court of the Fourth District of New Orleans. His commission came from the military governor, who was appointed by the President during the late war. We have already decided that such appointments were within the power of such a governor." *Accord*, *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466, 468 (1874); *Mechanics' & Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276 (1874), upholding the exercise of civil jurisdiction by a provost court established by General Butler at New Orleans, as commander of the occupying army, without express authority from the President; *Burke v. Miltenberger*, 86 U.S. (19 Wall.) 519 (1873); *Handlin v. Wickliffe*, 79 U.S. (12 Wall.) 173 (1870), upholding the authority of a military governor not only to appoint judicial officers but also to revoke such appointments. The Court here, in rejecting a claim for additional judicial compensation, stated: "[T]he appointment of the relator as judge was purely military, authorized only by the necessities of military operation, and was subject to revocation whenever, in the judgment of the military governor, revocation, should become necessary or expedient."

⁷⁶ *Raymond v. Thomas*, 91 U.S. 712, 715-16 (1876). *Accord*, *Ochoa v. Morales*, 230 U.S. 139 (1913).

⁷⁷ *Santiago v. Nogueras*, 214 U.S. 260, 266 (1909).

⁷⁸ *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952).

mander-in-Chief of the armed forces, could establish and prescribe the jurisdiction and procedure of such commissions "in territory occupied by Armed Forces of the United States."⁷⁹

In this procession of cases the Supreme Court has made it abundantly clear that a military governor may, and must, provide an adequate court system for the occupied area; that he may use the existing local courts if this is practicable, or may establish his own or use a combination of the two; that he may enforce the existing law, modify it and supplement it with occupation law promulgated by proclamation and ordinance; that he may prescribe the procedure for military government courts; and that this power may not be used capriciously.

It is interesting to observe that the military government practices and policies of United States armed forces through the years have been more conservative than the views expressed by the Supreme Court. General Scott's military government order issued in Mexico City in 1847 displayed a genuine interest in preserving and maintaining in operation the Mexican courts.⁸⁰ That order, though issued sixty years before article 43 of Hague Convention existed, acknowledged the duty of the military commander to the local populace to restore law and order.⁸¹ It, with considerable care, specified the jurisdiction of offenses⁸² and persons⁸³ to be exercised by mili-

⁷⁹ *Ibid.*

⁸⁰ GEN. O. 287, para. 13 (1847), provided: "The administration of justice, both in civil and criminal matters through the ordinary courts of the country, shall nowhere and in no degree be interrupted by any officer or soldier of the American forces, except (1) in cases to which an officer, soldier, agent, servant, or follower of the American Army may be a party; and (2) in *political* cases—that is, prosecutions against other individuals on the allegations that they have given friendly information, aid, or assistance to the American forces."

⁸¹ *Id.* at para. 7, read: "That *unwritten* code is martial law, as an addition to the *written* military code prescribed by Congress in the Rules and Articles of War, and which unwritten code all armies in hostile countries are forced to adopt, not only for their own safety, but for the protection of unoffending inhabitants and their property about the theaters of military operations against injuries, on the part of the Army, contrary to the laws of war." (Italics in original.)

⁸² *Id.* at paras. 2 and 3, stated: "Assassination, murder, poisoning, rape, or the attempt to commit either; malicious stabbing or maiming; malicious assault and battery, robbery, theft; the wanton desecration of churches, cemeteries, or other religious edifices and fixtures; the interruption of religious ceremonies and the destruction, except by order of a superior officer, of public or private property, are such offences. The good of the service, the honor of the United States, and the interest of humanity imperiously demand that every crime enumerated above should be severely punished."

⁸³ *Id.* at paras. 9 and 10; these provided: "Accordingly, every crime

tary commissions and displayed a due process interest in the procedure to be followed.⁸⁴ As might be expected the provisions of Francis Lieber's General Order 100 of 1863 introduced refinements.⁸⁵ With this background, the mandate of article 43 of the Hague Convention of 1907 came not as an innovation, but as an old friend, to American military commanders.⁸⁶

GENEVA CIVILIAN CONVENTION OF 1949

The conventional law of war as to law enforcement has been further developed by article 64 of the Geneva Convention Relative

enumerated in paragraph No. 2 above, [see note 82 *supra*] whether committed—(1) by any inhabitant of Mexico, sojourner, or traveler therein, upon the person or property of any individual of the United States forces, retainer or follower of the same; (2) by any individual of the said forces, retainer or follower of the same, upon the person or property of any inhabitant of Mexico, sojourner or traveler therein; or (3) by any individual of the said forces, retainer or follower of the same, upon the person or property of any other individual of the same forces, retainer or follower of the same, shall be duly tried and punished under the said supplemental code. For this purpose it is ordered that all offenders, in the matters aforesaid, shall be properly seized, confined, and reported for trial before *military commissions . . .*" (Italics in original.)

⁸⁴ *Id.* at para. 11, which provided: "Every military commission, under this order, will be appointed, governed, and limited, as nearly as practicable, as prescribed by the 65th, 66th, 67th, and 97th of the said Rules and Articles of War, and the proceedings of such commissions will be duly recorded in writing, reviewed, revised, disapproved or approved, and the sentences executed—all, as near as may be, as in the cases of the proceedings and sentences of courts-martial; *provided*, that no military commission shall try any case clearly cognizable by any court-martial; and *provided*, also, that no sentence of a military commission shall be put in execution against any individual belonging to this Army which may not be, according to the nature and degree of the offence, as established by evidence in conformity with known punishments in like cases in some one of the States of the United States of America."

⁸⁵ Typical is paragraph 673 thereof which read: "All civil and criminal law of the places and territories captured from the enemy shall continue to take its usual course under military government, unless, in case of absolute impediment, the same be interrupted or modified by order of the occupying military power; but all the functions of the hostile government—legislative, executive or administrative—whether of a general, provincial, or local character, cease under military government, or continue only with the sanction, or, if deemed necessary, with the participation of the invader. The commander of the occupying forces may proclaim that the administration of all civil and criminal law shall, either wholly or in part, continue as in time of peace. The commanding officer may require the magistrates and other civil officials of the occupied territory to take an oath of temporary allegiance or an oath of fidelity to the victorious government or rulers, as a condition to the continuance of their functions. But whether such oath has been taken or not, the people and their officials owe strict obedience, at the peril of their lives, to the military government of the occupying power as long as it holds sway over the district or country."

⁸⁶ Art. 43, 36 Stat. 2277, T.S. No. 538 (1907), is set out as para. 363 of FM 27-10, at 141. It directs: "The authority of the legitimate power having

to the Protection of Civilian Persons in Time of War of August 12, 1949.⁸⁷ This basic article of that Convention provides:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offenses covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.⁸⁸

The Geneva Civilian Convention, as it is informally known, contains detailed provisions for the protection of civilians charged with penal offenses by an occupying power. Many of these were not previously a part of the law of war, either customarily or conventionally. To a large extent these bring to the law of military government courts Anglo-American ideas of due process and are designed to overcome deficiencies which extensive practical experience in the Second World War disclosed. The Senate, by unanimous vote on July 6, 1955, gave its consent to ratification, and the Convention became the law of the United States on February 2, 1956.⁸⁹

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."

⁸⁷ [1955] 3 U.S.T. & O.I.A. 3517, T.I.A.S. No. 3365 [hereinafter cited as The Geneva Civilian Convention, T.I.A.S. No. 3365].

⁸⁸ *Id.* at 3558.

⁸⁹ Baxter, *The Geneva Conventions of 1949 Before the United States Senate*, 49 AM. J. INT'L L. 551 (1955). The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 [1955] 3 U.S.T. & O.I.A. 3114, T.I.A.S. No. 3362, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, *id.* at 3217, T.I.A.S. No. 3363, and the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *id.* at 3317, T.I.A.S.

Articles 65 to 77, inclusive, contain the specific safeguards afforded to civilians charged with crime in military government courts. There has as yet been no occasion for the United States Supreme Court to consider these provisions. Accordingly, they fall beyond the strict scope of this present treatment of the subject. However, since they are now part of our domestic law, demonstrate the real development of international law in this respect, and probably will in the future be subject to Supreme Court litigation, these pertinent articles are given in Appendix I.

American military directives have been revised to implement the Geneva Conventions of 1949. In particular, the military government manual chapter on courts reflects a determination to insure compliance with the provisions of articles 64 through 77.⁹⁰ This is also true of the revised law of land warfare manual.⁹¹

JURISDICTION OF MILITARY GOVERNMENT COURTS

The jurisdiction of military government courts generally extends to the whole of the occupied territory and to all persons within the occupied area,⁹² except those treated as prisoners of war under the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.⁹³ Members of the United States and allied armed forces usually are not, as a matter of policy, made subject to the jurisdiction of military government courts except in civil suits.⁹⁴ However, persons serving with, employed by, or accompanying the armed forces are sometimes made subject to both the criminal and civil jurisdiction of such courts.⁹⁵

As to offenses, the jurisdiction of military government courts

No. 3364 were enacted into law at the same time. In 1956 when the Geneva Civilian Convention, T.I.A.S. No. 3365, became effective as the law of the United States, it had by ratification or accession become domestic law in forty-seven other countries, including the Soviet Union and the communist block, other than Albania and Red China. *Id.* at 3694-95, T.I.A.S. No. 3365. A few reservations were made, but these were of minor importance. Albania has since ratified this Convention. For a list of the seventy nations which had ratified all four Conventions by 1958, see DRAPER, *THE RED CROSS CONVENTION* 117-18 (1958). At the end of 1959, seventy-seven nations had ratified these Conventions; Canada and Red China had not. See INTERNATIONAL COMMITTEE OF THE RED CROSS, *ANNUAL REPORT* 45 (1959).

⁹⁰ JOINT MANUAL paras. 42-49, at 95-105.

⁹¹ FM 27-10 paras. 370-74, at 142-43, set out in Appendix II. Also pertinent are *id.* paras. 432-48, at 158-64.

⁹² JOINT MANUAL paras. 45(a), (b), at 97-98.

⁹³ [1955] 3 U.S.T. & O.I.A. 3317, T.I.A.S. No. 3364.

⁹⁴ JOINT MANUAL para. 45(b), at 98.

⁹⁵ *Ibid.*

extends to all offenses made punishable by any order, ordinance, or proclamation issued by the occupation authorities as well as to war crimes, if other tribunals are not established to try such cases.⁹⁶ Military government courts may also be given jurisdiction to administer the criminal and civil law of an area which is continued in force after the area has been occupied.⁹⁷

It should be noted that United States courts, including the Supreme Court, do not sit as appellate courts to review the merits of decisions, either criminal or civil, rendered by military government courts. Monitoring extends only to determining whether military government courts have acted without jurisdiction. This is limited to habeas corpus proceedings in criminal cases⁹⁸ and to collateral attack of civil judgments as being void for want of jurisdiction.⁹⁹

PUBLIC FINANCE

An activity of military government which has generated litigation is that of public finance. It has been held that a military occupant may levy and collect customs duties on goods imported into the occupied area,¹⁰⁰ and that such a duty once paid need not again be

⁹⁶ *Id.* para. 45(c), at 98.

⁹⁷ *Ibid.*

⁹⁸ *Madsen v. Kinsella*, 343 U.S. 341, 362 (1952). The Court concluded: "The jurisdiction of the United States Courts of the Allied High Commission for Germany to try petitioner being established, the judgment of the Court of Appeals affirming the discharge of the writ of habeas corpus for petitioners' release from custody is *Affirmed*." *Cf. Ex parte Ortez*, 100 Fed. 955 (1900); *United States v. Reiter*, 27 Fed. Cas. 768 (No. 16146) (Provisional Ct. La. 1865); *State v. Jarvis*, 63 N.C. 556 (1869).

⁹⁹ *Raymond v. Thomas*, 91 U.S. 712, 716 (1875): "[W]e hold that the order [of General Canby annulling a court decree of foreclosure] was void." *Cf. Santiago v. Noguerras*, 214 U.S. 260, 267-68 (1909): "The plaintiffs further contend that if the United States Provisional Court had jurisdiction of the case and the parties, in some way it had lost it, because in the course of its proceedings it disregarded certain provisions of the Code of Civil Procedure which were binding upon it. But clearly no such question is open on a collateral attack, such as this is, and we need delay no further upon that point." See also *In re Vidal*, 179 U.S. 126, 127 (1900): "This court is not . . . empowered to review the proceedings of military tribunals by certiorari"; *Scott v. Eaton*, 82 U.S. (15 Wall.) 382 (1872).

¹⁰⁰ *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1853). However, in *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850), it was held that although Tampico, Mexico was under the exclusive occupation and control of American troops in 1847 it was not a port of the United States and that a vessel which obtained a coasting manifest at Tampico from the United States acting collector was still obliged to pay import duties on its cargo upon discharge at the port of Philadelphia. It does not appear from the opinion that the master

paid to a government thereafter resuming¹⁰¹ or acquiring¹⁰² sovereignty over the same area. A military governor may withhold a customs house clearance as a means of enforcing port regulations.¹⁰³ Regular property taxes may be assessed and collected by a military government.¹⁰⁴

The Hague Regulations,¹⁰⁵ which are a part of United States law, require an occupant, if he collects taxes, to, so far as possible, do so according to existing rules of assessment and incidence and to defray therefrom the expenses of the administration of the occupied territory. In addition to these taxes the occupant may levy money contributions in the occupied territory for the needs of the army and the administration of the occupied territory,¹⁰⁶ but only under written order and on the responsibility of a commander-in-chief, and, as far as possible, in accordance with existing rules of assessment and incidence and every contributor must be given a receipt.¹⁰⁷

of the vessel actually paid duty at Tampico. The Court simply held that Tampico was a foreign port when the shipment was made.

¹⁰¹ United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

¹⁰² MacLeod v. United States, 229 U.S. 416 (1913).

¹⁰³ United States v. Diekelman, 92 U.S. 520 (1875).

¹⁰⁴ Keely v. Sanders, 99 U.S. 441 (1878); Clegg v. State, 42 Tex. 605 (1875).

¹⁰⁵ The Hague Convention No. IV Annex, T.S. No. 539, art. 48.

¹⁰⁶ *Id.* at art. 49.

¹⁰⁷ *Id.* at art. 51. For an account of contributions levied by Germany in the First World War, see FEILCHENFELD, *THE INTERNATIONAL LAW OF BELIGERENT OCCUPATION* 41-46 (1942).

General Scott by his General Order of September 17, 1841, issued at Mexico City, directed: "[A] contribution of \$150,000 is imposed on this capital, to be paid in four weekly installments of thirty-seven thousand five hundred dollars (\$37,500) each, beginning on Monday next, the 20th instant, and terminating on Monday, the 11th of October. The Ayuntamiento, or corporate authority of the city, is specially charged with the collection and payment of the several installments. Of the whole contributions to be paid over to this Army, twenty thousand dollars (\$20,000) shall be appropriated to the purchase of *extra* comforts for the wounded and sick in hospital; ninety thousand dollars (\$90,000) to the purchase of blankets and shoes for gratuitous distribution among the rank and file of the Army; and forty thousand dollars (\$40,000) reserved for other necessary military purposes." (Emphasis in original.) This seems to meet the present test of being "for the needs of the Army," assuming that the amount "reserved for other necessary military purposes" was in fact used for military purposes of the occupying force. However, Winthrop, in *MILITARY LAW AND PRECEDENTS* 807 n.23 (1920), in speaking of General Scott's contributions imposed on Mexico, said: "Scott states in his Autobiography (p. 582), that there actually came into his hands 'about \$220,000,' of which \$102,000 was expended for the benefit of the soldiers, and \$118,000 was sent to Washington for the purposes of the founding of any Army Asylum—the present 'Soldiers' Home.' Strictly,

The military manual provides that if the taxing authorities of the occupied state have fled or refuse to act the total tax may be allotted among districts and the municipal authorities required to collect it. Ordinarily the occupier does not control the collection of local, as distinguished from national, taxes but may supervise the expenditure of such local revenue and prevent its hostile use. Contributions may not be levied to enrich the occupant nor to pay the general war expenses of the occupant other than its occupation costs. Contributions must be first applied to the cost of administering the occupied territory if regular taxes do not suffice for this purpose, and only the balance may be used to pay occupation costs.¹⁰⁸

It is important to distinguish the occupant's right to collect contributions from his right to requisition¹⁰⁹ goods and services for the maintenance of the army. The occupant need not repay contributions, he must pay for items requisitioned.¹¹⁰

In the Second World War occupation of West Germany a more sophisticated and efficient method of procuring from the local economy, at least a part of the "needs of the army" of occupation, was developed. This system required a high degree of co-operation on the part of the domestic government, which might not always prevail in an occupation situation. Direct requisitioning in kind was terminated, as such, early in the occupation. The Potsdam Protocol of August 1, 1945, provided, "Allied controls shall be imposed upon the German economy but only to the extent necessary . . . to assure the production and maintenance of goods and services required to meet the needs of the occupying forces . . . in Germany." The German government was required to supply free of cost such German currency as the Allies required and to redeem in German

this latter, as being in the nature of an investment of the contribution for the *profit* of the Government, was not a legitimate use of the funds." (Emphasis in original.)

¹⁰⁸ FM 27-10 paras. 425-29, at 157. FEILCHENFELD, *op. cit. supra* note 107, at 48-50, considers the taxation rights of belligerent occupants.

¹⁰⁹ The Hague Convention No. IV Annex, T.S. No. 539, art. 52, provides: "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligations of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible." See also FM 27-10 paras. 415-17, at 154.

¹¹⁰ FEILCHENFELD, *op. cit. supra* note 107, at 41.

currency, free of cost, all holdings in German territory of currencies issued by the Allies during military operations or occupation and to defray the costs of provisioning, maintenance, pay, accommodation and transport of the forces and agencies stationed in Germany by the Allies. This was implemented, so far as the United States was concerned, by issuing writings which were designated "Requisition Order Demands" and were commonly known as "EC Form 6GAs." These were executed and delivered to suppliers of goods and services who took them initially to the local *Burgemeister*, and later on to the central government occupation cost offices where West German officials made payment in Deutsch Marks which had been budgeted for this very purpose. The form expressly provided: "The serving of EC Form 6GA . . . will not constitute a contract under U.S., international or German law." This whole procedure was judicially reviewed and approved by the United States Court of Claims in denying a German building contractor's claim for extra costs in constructing an ammunition storage facility. It was held that no contract right arose against the United States, and that the claimant was not entitled to more than the amount the United States architect-engineer had certified was due under the EC Form 6GA and which had been paid by the West German occupation cost office in Deutsch Marks.¹¹¹

This procedure, though the form used the word "requisition," technically was not requisitioning at all, but an effective means of providing occupation costs by a method of contribution which was completely integrated into the national tax system of the occupied country. It was both lawful and efficient, but certainly would not preclude, for the future in different circumstances, other methods of imposing contributions. The method adopted resulted in a high degree of co-ordinated co-operation. The title in fee to a real estate construction, of course, vested in the West German government, and possession of many facilities constructed under this system has reverted to that government.

¹¹¹ *Best v. United States*, 292 F.2d 274, 278 (Ct. Cl. 1961). The court here observed: "By 1953, a much greater degree of law and order had been established, and the German money to pay occupation costs was budgeted and allocated to the zonal authorities in a systematic way. However, any intelligent person knew that the Federal Republic of Germany was still paying occupation costs to the victorious Allies, though at the same time the United States, at least, was pouring billions of dollars into Germany, under the Marshall plan, to rebuild the German economy."

The Supreme Court has had occasion to approve the right of an occupant to exact contributions in an occupied area. Speaking of the United States occupation of Tampico in 1847 the Court declared:

The custom-house was established in an enemy's country . . . as a measure of hostility, and . . . a mode of exacting contributions from the enemy to support our army. . . . The duties required . . . were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country.¹¹²

Local currency may be left in circulation. The occupying power, however, may use its own regular currency or issue its own special occupation currency for use in occupied areas. The American practice of the Second World War was to continue the local currency for native use and to use occupation dollar currency for purchases made by American forces personnel in private transactions with United States sales agencies such as post exchanges and quartermasters sales stores. This was done primarily to curtail black market activities and to prevent the diversion of "green dollars," that is regular United States currency, into hostile hands for use in espionage and other activities inimical to American interests.

The Supreme Court in upholding the legality of Confederate notes as the medium of exchange in the Confederacy, had this to say:

[C]onfederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

¹¹² Fleming v. Page, 50 U.S. (9 How.) 603, 616 (1850). *Accord*, Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 97 (1874); Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1853).

It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. . . .

They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this use gave them a sort of value, insignificant and precarious enough it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency.¹¹³

The occupant may institute exchange controls to conserve the monetary assets of the occupied territory. Such measures cannot be taken however, for the purpose of debasing the local currency or enriching the occupant.¹¹⁴ These powers of the occupant to key taxes, finance the occupation and control the currency in the occupied area are based upon the fundamental duty to maintain law and order which article 43 of the Hague Regulations imposes.¹¹⁵

TREATMENT OF PUBLIC PROPERTY

The use to which an occupying military commander may put the property of the national government of the enemy state is, with some preciseness, stated in the conventional laws of war. These rules probably are more accurately classified as limitations on the conduct of hostility rather than the exercise of military government. However, since both areas are the responsibility of the military

¹¹³ *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 11, 13 (1869). *Accord*, *Baldy v. Hunter*, 171 U.S. 388 (1898); *Planters' Bank v. Union Bank*, 83 U.S. (16 Wall.) 483, 503 (1872). *Contra*, *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (1873), stating that investment in Alabama in Confederate bonds gave aid and comfort to the enemy and was illegal.

¹¹⁴ FM 27-10 para. 430, at 157.

¹¹⁵ FEILCHENFELD, *op. cit. supra* note 107, at 49, 62-85.

commander and the same subordinates on occasion engage in the performance of both functions, the two tend to become confused. Only a cursory treatment will be undertaken.

The initial problem is to determine what property is public and what private. All property of municipalities, and that of religious, charitable, educational, artistic and scientific institutions, even though state owned, must be treated as private property and its seizure, destruction or willful damage is forbidden.¹¹⁶ Such property may be requisitioned to quarter troops,¹¹⁷ store supplies and house vehicles, but must be secured against all avoidable injury. Religious buildings may be used only for medical installations and then only in emergency.¹¹⁸ Where the status of property is unknown it may be treated as public. The test of where the loss of beneficial ownership would fall in event of appropriation is applied to determine whether the property is public or private.¹¹⁹

If the property is public, that is government owned above the municipal level, it must not be destroyed except where rendered absolutely necessary by military operations.¹²⁰ The occupying state is only an administrator and usufructuary of public buildings, real estate, forests, and agricultural estates situated in and owned by the occupied country; it does not acquire title and must safeguard such capital assets.¹²¹ Forts, arsenals, dockyards, magazines, piers, wharves, barracks, railways, bridges, airfields and other state facilities of direct military use remain in the possession of the occupant until the close of the occupation unless sooner released, and may be destroyed or damaged if necessary to military operations.¹²²

Non-military state real property, such as public buildings, parks, forests, farms, mines and land, cannot be sold by the occupant; nor in their use may waste be committed. Crops, timber, and ore may

¹¹⁶ The Hague Convention No. IV Annex, T.S. No. 539, art. 56.

¹¹⁷ For a discussion of the domestic and international legal aspects of quartering of troops, see Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 TENN. L. REV. 723 (1951).

¹¹⁸ FM 27-10 para. 405, at 152.

¹¹⁹ *Id.* para. 394, at 149. The property of member states of a federation is treated as state and not municipal property. FEILCHENFELD, *op. cit. supra* note 107, at 57, 104. In *Bank of the Philippine Islands v. Rogers*, 281 F.2d 12 (D.C. Cir), *cert. denied*, 364 U.S. 927 (1960), currency discovered in a hiding place on the Island of Negroes was held to be public Japanese property in the absence of persuasive proof to the contrary.

¹²⁰ The Geneva Civilian Convention T.I.A.S. No. 3365, art. 53.

¹²¹ The Hague Convention No. IV Annex, T.S. No. 539, art. 56.

¹²² FM 27-10 para. 401, at 151.

be used or sold. Public buildings and land may be used or leased.¹²³ In *City of New Orleans v. Steamship Co.*,¹²⁴ the Supreme Court upheld the rights of a lessee steamship company under a ten-year lease of waterfront property granted in 1865 by the mayor, board of finance and board of street landings of New Orleans, all of whom had been appointed by the commanding general. Though a fair rental was stipulated and was in fact paid to the re-established city government, in the present state of the law it is doubtful that this precedent would be followed. The military manual flatly provides, "The term of a lease or contract should not extend beyond the conclusion of the war."¹²⁵

All movable property owned by the occupied state which may be used for war operations may be taken and utilized by the occupant. This extends to cash, realizable securities, arms, transport, stores and supplies; but state owned personalty not susceptible of military use cannot be appropriated.¹²⁶ However, all enemy public personal property captured by actual seizure on a battlefield or which has been abandoned and is reduced to possession becomes the property of the capturing power.¹²⁷

In case of a total conquest all public property has been held to vest in the conqueror.¹²⁸ By a treaty of peace public property is vested in the new sovereign in case of cession. If there is no change of sovereignty possession reverts in the original sovereign except to the extent the treaty otherwise provides.

¹²³ *Id.* para. 402, at 151.

¹²⁴ 87 U.S. (20 Wall.) 387 (1874).

¹²⁵ FM 27-10 para. 402, at 151.

¹²⁶ *Id.* para. 404, at 151; The Hague Convention No. IV Annex, T.S. No. 539, art. 53. Article 31 of the Lieber Code of 1863, in GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914*, at 312 (1949), provided: "A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete."

¹²⁷ *Oakes v. United States*, 174 U.S. 778, 786 (1899); FM 27-10 paras. 395-96, at 150; Downey, *Captured Enemy Property: Booty of War and Seized Enemy Property*, 44 AM. J. INT'L L. 488 (1950).

¹²⁸ *United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 434-35 (1872): "Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government, or in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or state. . . ." The Court was here speaking of an iron works which had been owned by the Confederate states.

TREATMENT OF INDIVIDUAL PROPERTY RIGHTS

The basic rule is that private property cannot be confiscated. Private property, both real and personal, may be requisitioned, but receipt must be given and payment made. If private property is a means of communication or transportation, or consists of arms or munitions of war, it may be seized, but must be restored and compensation fixed when peace is made.¹²⁹ Thus where three private steamers and their crews were taken by Union quartermaster officers for transport use on the Mississippi River under claim of imperative military necessity during the Civil War it was held that the owner could recover the reasonable value of their use which was in excess of what had already been paid.¹³⁰ Similarly, a railroad may collect its regular freight rates for military supplies transported in a combat zone.¹³¹

Other private property may be destroyed or damaged only if absolutely necessary to military operations. Thus where a military commander compelled a civilian sutler, against his will, to accompany the army from San Elisorio to Chihauhau, Mexico, where his stock of merchandise was captured by the Mexicans, the Supreme Court held that this taking of private property was not compelled by military necessity and that the officer who required it was personally liable for its value.¹³² This last situation is to be distinguished from the one where a military commander in combat, to prevent private property susceptible of military use from falling into

¹²⁹ The Hague Convention No. IV Annex, T.S. No. 539, arts. 46(2), 52-53. Article 46(2) of this Convention was cited and applied in *The Netherlands v. Federal Reserve Bank*, 201 F.2d 455, 463 (2d Cir. 1953). See generally Jessup, *A Belligerent Occupant's Power over Property*, 38 AM. J. INT'L L. 457 (1944).

¹³⁰ *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871). The Court stated: "Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice." *Id.* at 629. *Accord*, *Phelps v. United States*, 274 U.S. 341 (1927).

¹³¹ *United States v. Pacific R.R.*, 120 U.S. 227 (1887).

¹³² *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *cf.* *Planters' Bank v. Union Bank*, 83 U.S. (16 Wall.) 483 (1872). See generally Downey, *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251 (1953).

the hands of the enemy, destroys it. Under these circumstances the Supreme Court has held that the destruction of railway bridges,¹³³ petroleum bulk plant facilities¹³⁴ and petroleum supplies¹³⁵ is not compensable and that the owner suffers the loss as a fortune of war. Similarly, recovery was denied for the destruction of buildings in a combat area in Cuba ordered as a health measure to prevent the spread of yellow fever among American troops.¹³⁶ Conversely, where through military necessity structures are erected on private property, the government may not charge or offset the value thereof against the land owner.¹³⁷ Requisitioned real estate must be returned, after use, to the private owner.¹³⁸

The judicial rule which seems to emerge from these cases is that the government must pay for private property seized to prosecute the war, but need not pay for private property destroyed as a last resort to keep it from being of military use to the enemy.

CAPTURED ENEMY PROPERTY

The older term for captured enemy property was "war booty." Both private and public property actually captured on the battlefield or abandoned are according to the current military manual subject to seizure and become the property of the capturing government.¹³⁹ This is accomplished only by actual seizure, or posting of a guard immediately after successful combat in the case of bulky property, and does not apply to private property found in the possession of individuals.¹⁴⁰ It is most doubtful whether private property not of immediate military use may be captured even when found on a battlefield.¹⁴¹

At this juncture, some mention of the Civil War cotton seizure cases is necessary. In this particular area the federal government and its courts proceeded as though they were dealing with civil war rebels and not with the rights of civilian nationals of a lawful bel-

¹³³ *United States v. Pacific R.R.*, 120 U.S. 227 (1887).

¹³⁴ *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952).

¹³⁵ *Caltex (Philippines), Inc. v. United States*, 129 Ct. Cl. 605, 122 F. Supp. 830 (1954), *cert. denied*, 348 U.S. 926 (1955).

¹³⁶ *Juragua Iron Co. v. United States*, 212 U.S. 297 (1908).

¹³⁷ *United States v. Pacific R.R.*, 120 U.S. 227 (1887).

¹³⁸ FM 27-10 para 407, at 152.

¹³⁹ *Id.* para. 396, at 150.

¹⁴⁰ *Id.* para. 395, at 150.

¹⁴¹ FEILCHENFELD, *op. cit. supra* note 107, at 39; Downey, *supra* note 127, at 494; see BISHOP, *INTERNATIONAL LAW CASES AND MATERIALS* 792 (2d ed. 1962).

ligerent in an international war.¹⁴² Charles Cheney Hyde, in discussing the confiscation acts, aptly said, "it may be doubted whether the decisions interpreting acts of Congress serve as useful precedents respecting the extent of the rights of a belligerent occupant under the law of nations."¹⁴³

The Supreme Court, in upholding these seizures as a legitimate practice held that cotton was enemies' property liable to capture and confiscation by the adverse party as a special case because it "constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe," and that the capture was justified by legislation.¹⁴⁴ Ten years later, in 1875, the Court reaffirmed this view in holding that a former owner had no cause of action against the treasury agent who had received cotton from military authorities who seized it in Georgia in December 1865.¹⁴⁵ The Court then gave as an additional reason that the whole insurgent territory was a battlefield. Characterizing all Confederate territory as a "battlefield," particularly when resistance had collapsed, appears to have been an unwarranted fiction.

In view of the protection to private property now afforded by the law of war it is unlikely that in an international occupation these post Civil War decisions would be considered applicable precedents. However, the technique of appointing conservators to manage the property of absent or hostile persons in occupied areas is still valid, but such property must be accounted for and returned to the owner when the risk of its hostile use no longer exists.¹⁴⁶

It should be observed that the title to captured or seized enemy property, public or private, vests in the occupying government and not in any soldier or other individual person.¹⁴⁷ Pillaging, that is the forcible taking of private property by an invading army from

¹⁴² GRABER, *op. cit. supra* note 126, at 282.

¹⁴³ HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1893-94* (2d ed. 1945).

¹⁴⁴ *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404 (1865); *cf.* *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870).

¹⁴⁵ *Lamar v. Browne*, 92 U.S. 187 (1875); *accord*, *Ford v. Surget*, 97 U.S. 594 (1878).

¹⁴⁶ FM 27-10 para. 399, at 150; *cf.* *The Netherlands v. Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1953). See generally Freeman, *Military Government Property Laws in Occupied Germany*, 37 Ky. L.J. 45 (1948).

¹⁴⁷ FM 27-10 para. 396, at 150. This principle was stated in *Lamar v. Browne*, 92 U.S. 187, 195 (1875). See generally Downey, *supra* note 127, at 499.

enemy subjects, is forbidden by both the Hague¹⁴⁸ and Geneva Conventions.¹⁴⁹ The personal property of a prisoner of war, other than his arms, military equipment and military documents must not be seized. Prisoners of war must be permitted to retain gas masks and protective helmets until removed to areas where these are unnecessary. Where personal property is taken from prisoners receipts must be given and strict accounting made.¹⁵⁰

Any member of the armed forces who engages in looting or pillaging is subject to trial by court-martial.¹⁵¹ Persons engaging in such conduct, whether military or civilian, are guilty of a violation of the law of war and must be prosecuted therefor. This was clearly established at the Nuremberg trial,¹⁵² and had previously been declared to be the law by the United States Supreme Court.¹⁵³ Not only are the direct perpetrators criminally liable, but a military governor who permits such activities incurs personal criminal responsibility for such conduct.¹⁵⁴

The ultimate disposition of captured enemy property is a question of domestic law. The Constitution expressly provides that

¹⁴⁸ The Hague Convention No. IV Annex, T.S. No. 539, arts. 28, 47. Article 28 states: "The pillage of a town or place, even when taken by assault, is prohibited."

¹⁴⁹ The Geneva Civilian Convention, T.I.A.S. No. 3365, art. 33.

¹⁵⁰ The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. & O.I.A. 3317, T.I.A.S. No. 3364. See generally Levie, *Prisoners of War and the Protecting Power*, 55 AM. J. INT'L L. 374 (1961).

¹⁵¹ Uniform Code of Military Justice, 10 U.S.C. § 903 (1958), provides: "(a) All persons subject to this chapter shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control. (b) Any person subject to this chapter who—(1) fails to carry out the duties prescribed in subsection (a); (2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he received or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or (3) engages in looting or pillaging; shall be punished as a court-martial may direct."

¹⁵² Rosenberg Case, Judgment of Oct. 1, 1946, 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 539, 540-41 (1948).

¹⁵³ *In re Yamashita*, 327 U.S. 1, 14 (1946).

¹⁵⁴ *Ibid.* After pointing out that the bills of particulars alleged a series of deliberately planned acts of destruction of public, private and religious property by members of the forces under petitioner's command, the Court held that The Hague Convention No. IV Annex, T.S. No. 539, and the Geneva Civilian Convention, T.I.A.S. No. 3365, imposed upon the petitioner an affirmative duty to take such measures as were appropriate and within his power to protect prisoners of war and the civilian population from such depredations.

Congress shall "make rules concerning captures on land and water."¹⁵⁵ This applies to enemy property located in the United States and seized there in time of war, as well as to that taken in a foreign occupied area. Chief Justice Marshall, in declaring invalid a seizure of lumber, which was cargo from a vessel under charter to British merchants, taken in the United States during the War of 1812, stressed the fact that control of enemy property was committed primarily to the Congress and not to the courts. His lucid opinion set the pattern by which Congress has regulated this difficult matter. In part he said:

The modern rule, then, would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty, an article is inserted stipulating for the right to withdraw such property. This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right. . . .

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property, in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary. . . .

It appears to the court, that the power of confiscating

¹⁵⁵ U.S. CONST. art. I, § 8, cl. 11. *But see* Jessup, *Enemy Property*, 49 AM. J. INT'L L. 57 (1955), suggesting that the question is ultimately one for determination by international law by an international tribunal. However, in a *Trading with the Enemy Act* case the Supreme Court in 1947 said: "Unquestionably to wage war successfully, the United States may confiscate enemy property." *Silesian-American Corp. v. Clark*, 332 U.S. 469, 475 (1947).

enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The court is, therefore, of the opinion, that there is error in the sentence of condemnation pronounced in the circuit court in this case, and doth direct that the same be reversed.¹⁵⁶

The interesting problems arising under the Trading With the Enemy Act¹⁵⁷ are beyond the scope of military government. Suffice it to say this comprehensive statute endeavors to maintain the delicate political balance so astutely discerned by Chief Justice Marshall.

PERSONAL RIGHTS

The preservation of legitimate personal rights of the inhabitants of an occupied area is a task of military government as a part of its broad responsibility to re-establish and maintain law and order. Since it has been held a military governor himself becomes a war criminal if he permits the personal rights of civilian inhabitants to be violated¹⁵⁸ this is likely to be a matter of lively concern to future military governors and military governments. Other than the customary law of humanity applicable to the conduct of war, the basic rule is stated in article 46 of the Hague Convention that "family honour and rights, the lives of persons, and private property, as well as religious convictions and practices must be respected."¹⁵⁹

Based largely upon the experiences of the Second World War, and the war crimes trials resulting therefrom, the conventional international protection of personal rights in occupied territory was expressly stated at some length in the Geneva Convention of 1949.¹⁶⁰

¹⁵⁶ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125, 128-29 (1814). See also *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86 (1833).

¹⁵⁷ 40 Stat. 411 (1917), 50 U.S.C. §1 (1958), *Cummings v. Deutsche Bank & Discontogesellschaft*, 300 U.S. 115 (1937); *Stoehr v. Wallace*, 255 U.S. 239 (1921) (upholding constitutionality of the act); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921).

¹⁵⁸ *In re Yamashita*, 327 U.S. 1, 15 (1946). "[T]he purpose of the law of war to . . . protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of the war by commanders who are to some extent responsible for their subordinates." *Rosenberg Case*, Judgment of Oct. 1, 1946, 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 539 (1948).

¹⁵⁹ The Hague Convention No. IV Annex, T.S. No. 539.

¹⁶⁰ The Geneva Civilian Convention, T.I.A.S. No. 3365.

Succinctly, this Convention provides for protection against all acts of violence or threats thereof; especially in the case of women, against rape, enforced prostitution, or any form of indecent assault; for equal treatment without regard to race, religion or political opinion;¹⁶¹ for reasonable access to protected persons by delegates of protecting powers, the International Committee of the Red Cross and representatives of other organizations whose object is to give spiritual aid or material relief;¹⁶² the prohibition of the use of physical or moral coercion against protected persons, in particular to obtain information from them or from third persons;¹⁶³ and express prohibitions against punishment for offenses not personally committed, collective penalties, reprisals against person or property and the taking of hostages.¹⁶⁴ The prohibitions against reprisals and the taking of hostages mark definite affirmative progress in the expansion of the principle of humanity as a substantive part of the law of war.

Also expressly prohibited is the taking of any measure to cause physical suffering or extermination, not only murder, torture, corporal punishment, mutilation, medical or scientific experiments not necessitated by treatment, but also any measure of brutality whether applied by civilian or military agents.¹⁶⁵ The Buchenwald and other extermination center operations, which violated the law of humanity when perpetrated, have now emerged from the status of "common law" offenses and become "statutory" offenses at the international bar of justice. No possible doubt remains that such conduct is illegal. Even those who were most critical of war crimes prosecutions seem to have no quarrel with this salutary strengthening of the substance of international criminal law. We should be ever mindful that before Nuremberg, before the 1949 Geneva Conventions and long before the Eichman trial in Israel, the United States Supreme Court in the *Yamashita* case had given definitive civil judicial approval to the basic proposition that murder is murder without regard to the nationality of the perpetrator and victim and without regard to where it occurs.

¹⁶¹ *Id.* at art. 27.

¹⁶² *Id.* at art. 30.

¹⁶³ *Id.* at art. 31.

¹⁶⁴ *Id.* at arts. 33-34. See also JOINT MANUAL para. 7(c)(2), at 16.

¹⁶⁵ The Geneva Civilian Convention, T.I.A.S. No. 3365, art. 32. See also 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 494-96 (1948) (medical experiments).

Preserved to the belligerent occupant is the right to take control and security measures necessary to prevent acts of hostility by inhabitants from undermining the military position of the occupier.¹⁶⁶ This extends to the imposition of curfews, travel and business restrictions, censorship,¹⁶⁷ and as to particularly hostile or powerful individuals assigned residence or internment.¹⁶⁸ Where internment is resorted to the Convention prescribes in detail the humane treatment to be accorded internees.¹⁶⁹ These provisions are more liberal than the rights accorded under the Prisoners of War Convention.¹⁷⁰

The mere presence of civilians does not render an area immune from military operations.¹⁷¹ This simply means that civilians who present themselves in combat areas or remain in the immediate vicinity of military targets such as railroad yards or munitions plants do so at their peril. The death or injury of such persons incident to bona fide combat or efforts to destroy such military targets is not a violation of the law of war.

The litigation and criminal defense rights afforded to individual civilians in occupied territory have previously been discussed under the heading of Law Enforcement.

Special attention is given to the problem of enforced labor by inhabitants for the occupying force. The Convention states, "Individual or mass forcible transfers, as well as 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 their motive."¹⁷² This is, of course, directed against "slave labor" practices of the type prosecuted at Nuremberg as war crimes and crimes against humanity.¹⁷³ Temporary movement of non-combatants to evacuate an area for their own protection or for imperative military reasons is not prohibited, but cannot be beyond the occupied country, and the power undertaking such a

¹⁶⁶ The Geneva Civilian Convention, T.I.A.S. No. 3365, art. 27.

¹⁶⁷ FM 27-10 paras. 375-78, at 143-44.

¹⁶⁸ *Id.* para. 433, at 158; The Geneva Civilian Convention, T.I.A.S. No. 3365, art. 78.

¹⁶⁹ The Geneva Civilian Convention, T.I.A.S. No. 3365, arts. 79-135.

¹⁷⁰ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [1955] 3 U.S.T. & O.I.A. 3317, T.I.A.S. No. 3364.

¹⁷¹ Geneva Civilian Convention, T.I.A.S. No. 3365, art. 28.

¹⁷² *Id.* art. 49.

¹⁷³ Typical are Rosenberg Case, Judgment of Oct. 1, 1946, 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 539 (1948), and Sauckel Case, Judgment of Oct. 1, 1946, *id.* at 566.

movement is responsible that it be done under satisfactory conditions of hygiene, health, safety, sanitation and non-separation of families. The transfer of parts of its own civilian population into the occupied territory by the occupying power is prohibited.¹⁷⁴

Regarding labor the Convention provides :

The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.¹⁷⁵

¹⁷⁴ The Geneva Civilian Convention, T.I.A.S. No. 3365, art. 49. Article 23 of The Hague Convention No. IV Annex, T.S. No. 539, reads: "A belligerent is . . . forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country . . ."

¹⁷⁵ Geneva Civilian Convention, T.I.A.S. No. 3365, art. 51.

This prohibition extends to the construction of fortifications, entrenchments and military airfields, but not to the repair of existing road, bridge and rail facilities. It prohibits the transportation of ammunition or supplies in the zone of operations.¹⁷⁶ Also prohibited are all measures to create unemployment or restrict work opportunities in occupied territory to induce workers to work for the occupying power.¹⁷⁷ Bona fide volunteers may be employed. Voluntary employment for all purposes has been the normal method of obtaining local labor so far as United States occupation forces have been concerned.

Normally the best interests of the local inhabitants will be served if they continue their usual employment. Accordingly, the United States military government manual provides, "Inhabitants should be instructed that they must continue or resume their usual employment, unless specifically directed to the contrary. They will assist in the maintenance of law and order and restoration of normal economic conditions."¹⁷⁸

The Convention obligates the occupying power to co-operate with local authorities in facilitating the work of all institutions devoted to the care and education of children,¹⁷⁹ medical, hospital and public health establishments¹⁸⁰ and to permit ministers of religion to give spiritual assistance to their adherents.¹⁸¹ The occupying power shall co-operate with all relief operations for the benefit of the population of the occupied territory undertaken by the International Red Cross or comparable impartial humanitarian organizations or the protecting power.¹⁸²

Relief consignments shall be, in general, tax exempt and transported free of charge. They should also be subject to the right of inspection and distributed under the supervision and operation of impartial humanitarian organizations or the protecting power. Individual relief consignments shall be delivered to the intended recipients. Separate relief measures shall not relieve the occupying power of its humanitarian obligations to the inhabitants.¹⁸³

Article 55 of this Convention imposes an affirmative duty of

¹⁷⁶ FM 27-10 paras. 419-20, at 155.

¹⁷⁷ The Geneva Civilian Convention, T.I.A.S. No. 3365, art. 52.

¹⁷⁸ JOINT MANUAL para. 39(e)(6), at 92.

¹⁷⁹ The Geneva Civilian Convention, T.I.A.S. No. 3365, art. 50.

¹⁸⁰ *Id.* art. 55.

¹⁸¹ *Id.* art. 58.

¹⁸² *Id.* art. 59.

¹⁸³ *Id.* arts. 60-63.

care on the part of an occupying power not previously required by the law of war. It provides :

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

This brings the welfare state philosophy to the law of belligerent occupation. It sets a high standard. If taken seriously, as it should be, it imposes such a penalty on a military occupation of an underdeveloped area as to preclude such an undertaking.

One cannot deny that, in the eyes of the law, the application of the principle of humanity to the rights of civilians in time of war has made vast gains since the American Civil War, and even since the Second World War. It is ironical that just as the legal rights of civilians against war depredations reach a civilized status, the hazards of destruction as incidental victims of nuclear weaponry directed against massive military targets causes civilian jeopardy to be greater than ever before, and may possibly obliterate the traditional distinction between combatants and non-combatants. These progressive challenges to the rule of law must be accepted, and man's genius for achieving lawful solution of problems must outstrip man's self-destructive ingenuity.

It is to be hoped that United States and other courts will have little or no future occasion to apply legal sanctions for violations of personal rights of civilians by combatants or occupation forces. Im-

PLICIT in such cases is a background of aggressive war, oppressive occupation and lawless acts of violence against innocent persons which is unpleasant to contemplate. However, an adequate legal system must be prepared to cope with all possible contingencies. It should be a source of satisfaction that this area of personal rights vindication has progressed from self-help, through diplomatic representations, to effective penal sanctions. It is perhaps not too much to hope that ultimately the equivalent of an international wrongful death statute combined with the application to offending nations of the doctrine of respondeat superior will add civil penalties so heavy that such conduct will be not only inhuman and criminal but decidedly unprofitable. It is well that the basic norms are now specifically formulated in a body of law available to all courts, and definitively binding on most which may possibly be called to sit in judgment in such matters.

POLITICAL ACTIVITIES

The older view that the inhabitants of an area, upon its military occupation, were obliged to transfer their allegiance to the occupying power¹⁸⁴ no longer prevails. Article 45 of the Hague Convention of 1907 tersely states: "It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile power." The duty of the inhabitant is to refrain from acts of unlawful belligerency and to obey the proclamations and ordinances of the military government which conform to the laws of war.¹⁸⁵ The policy of United States military government operations is to announce by proclamation that a military governor has been appointed, that political ties with, and obligations to the enemy government are suspended, that the inhabitants will be required to obey the orders of the military government and to abstain from all acts or words of hostility or disrespect to the occupying forces, that those who commit offenses will be punished, and that the inhabitants will be protected in their persons, property, family rights, religion and employment.¹⁸⁶

Legal steps have been taken to insure that the protections given by the laws of war cannot be dissipated by interim political activity

¹⁸⁴ *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819).

¹⁸⁵ For a discussion of the obligation of inhabitants, see Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. YB. INT'L L. 235, 256 (1950).

¹⁸⁶ JOINT MANUAL paras. 39(e) (3), (5), at 91.

accomplished by coercion or otherwise. Article 47 of the Geneva Convention specifies that:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territory and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.¹⁸⁷

The occupying power may remove judges and other public officials from their posts, but if it does not do so, it may not alter their status, or apply sanctions, or coerce or discriminate against them if they abstain from fulfilling their functions for reasons of conscience.¹⁸⁸ Public utility, health, transportation and other employees of activities essential to the domestic economy may be required to function.

Each official continuing in office may be required to take an oath to perform his duties conscientiously. If he refuses he may be removed from office. In any event so long as such an official functions he owes a strict duty of obedience to the occupant. Those who are continued in office and perform actual duties will be paid from the public revenues of the occupied territory.¹⁸⁹ It is American policy to continue local as distinguished from national officials in office in the absence of specific reason for removal.¹⁹⁰ Officials, however, possess no vested interest in their office even where under the displaced government it was in perpetuity, and it is within the

¹⁸⁷ Geneva Civilian Convention, T.I.A.S. No. 3365, art. 47.

¹⁸⁸ *Id.* art. 54.

¹⁸⁹ FM 27-10 paras. 423-24, at 156.

¹⁹⁰ JOINT MANUAL para. 39(e)(4), at 91. In *Ketchum v. Buckley*, 99 U.S. 188 (1878), it was contended by the sureties on the bond of a general administrator for Mobile County, Alabama, that they were exonerated by reason of the appointment of a military governor in Alabama in 1865, and that this rendered void the letters of administration previously issued by Alabama under the Confederacy. In rejecting this contention, the Court declared: "The appointment by the President of a military governor for the State at the close of hostilities did not of itself change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf. It is not alleged that the governor after his appointment undertook by any positive act to remove McGuire from the position he occupied as general administrator." *Id.* at 190.

power of the military governor to abolish the office.¹⁹¹ The military governor may set aside individual official acts of a public officer or board.¹⁹²

The avowed ultimate objective of the United States in an occupation is not conquest but "to leave behind government oriented in Western democratic principles and which will not be a threat to future peace and world stability."¹⁹³ Maximum political freedom consistent with military security and public order will normally be allowed.

Judicial recognition has been given to the legality of political objectives of military government. In affirming a treason conviction and rejecting a contention that United States military occupation authorities in Austria made an unreasonable search of the quarters of an American civilian who had been engaged in treasonous broadcasting activities for Germany the Court of Appeals for the First Circuit said:

On August 1, 1945, the Joint Chiefs of Staff, acting under authority delegated by the President as Commander in Chief,

¹⁹¹ *Sanchez v. United States*, 216 U.S. 167, 175-76 (1910). The Court stated: "When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that Island and its inhabitants and their property was displaced, the United States, the new Sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of courts, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the Treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. . . . If, originally, the claimant lawfully purchased, in perpetuity, the office of Solicitor (Procurador) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done." The Court therefore held that abolition of the office of the petitioner violated no constitutional provision or any right of property which the petitioner could assert against the United States.

¹⁹² *State ex rel. O'Hara v. Heath*, 20 La. Ann. 518 (1868): "The entering into the [street cleaning] contract with the realtor by the city officials, was the exercise of official power. The military commander of the District, we have seen, was clothed with authority to suspend these officials from exercising official powers; and if so, he clearly had the right to control their official action, to suspend, modify or supersede it."

¹⁹³ JOINT MANUAL para. 7(b), at 15.

had issued a directive to General Mark W. Clark, as Commanding General of U.S. forces of occupation in Austria, investing him with "supreme legislative, executive, and judicial authority in the areas occupied by forces under your command. . . ." [P]aragraph 4*a* stated: "You will be chiefly concerned in the initial stages of military government with the elimination of German domination and Nazi influences. Consistently with this purpose, you will be guided in every step by the necessity to ensure the reconstruction of Austria as a free, independent and democratic state." In paragraph 4*b* General Clark was directed to make clear to the Austrian people that the military occupation was intended "to eliminate Nazism, Pan-Germanism, militarism, and other forces opposed to the democratic reconstruction of Austria" and "to cooperate with the Control Council for Germany in the application and enforcement of measures designed to prevent the recurrence of German aggression." Paragraph 5*a* directed that every effort be made to prevent the reconstitution of the Nazi party or affiliated associations "in underground, disguised or secret form." In paragraph 5*d* of the directive it was provided: "Property, real and personal, owned or controlled by the Nazi Party, its formations, affiliated associations and supervised organizations, and by all persons subject to arrest under the provisions of paragraph 7 below, and found within your zone will be taken under your control pending a decision by the Allied Council or higher authority as to its eventual disposition." Paragraph 7*b* of the directive ordered to be arrested and held in custody all persons "who if permitted to remain at large would endanger the accomplishment of your objectives", including any national of any of the United Nations or associated states "who is believed to have committed offenses under his national law in support of the German war effort."

It was under the foregoing authority that Best was taken into custody. The search of the Vienna apartment was not incidental to the arrest, which had occurred earlier and at another place, but was also conducted under authority of the directive of the Joint Chiefs of Staff.¹⁹⁴

¹⁹⁴ Best v. United States, 184 F.2d 131, 139 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951), *rehearing denied*, 341 U.S. 907 (1951).

There is no question that a military government has wide powers of "legislation" for the government of the occupied area which may be exercised by the direct issuance of proclamations and ordinances in the name of the military commander, or by a control council or a high commission and that such powers may be exercised jointly where two or more allied nations participate in an occupation.¹⁹⁵ Such powers were extensively exercised in Japan and to even a wider extent in West Germany following the Second World War.

However, when a military government becomes largely pre-occupied with legislation this is likely to be the harbinger of its early demise. By its very nature military government is not a permanent institution. One of its primary functions is to hasten its own liquidation. In the heat of combat one somehow rarely finds even an observer from the State Department or other civilian agency of the government present. Not until bullets no longer fly, and it becomes abundantly apparent that they will not fly again, and that all is safe, do our civilian contingents appear and take up the burden of government relieving the military from this responsibility. Such civilian take-overs have consistently been on the leisurely side. This has given rise to interesting litigation as to when military government legally terminates. So much so, in fact, that this subject merits separate consideration.

WHEN MILITARY GOVERNMENT TERMINATES

Everyone seems to agree that while combat rages, or threatens immediate resumption, military government prevails in the occupied area. The contention that military government jurisdiction ceases upon the surrender of the last general opposing the occupying power, that is upon the cessation of actual hostilities, has been judicially rejected.¹⁹⁶

¹⁹⁵ Ferguson, *Military Government Property Laws in Occupied Germany*, 37 Ky. L.J. 45 (1948); Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L.J. 393 (1945).

¹⁹⁶ *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 178 (1857). See also *Burke v. Miltenberger*, 86 U.S. (19 Wall.) 519, 524 (1873), where it was said: "The duration of the court was limited to the restoration of civil authority in the State, and it is insisted that this limitation expired when the last Confederate general, Kirby Smith, surrendered, which was on the 26th of May, 1865; but this position is inconsistent with the fact conceded on the argument, that military rule prevailed in the city of New Orleans, and the State of Louisiana, for a long time after this event, and after the sale in controversy was made. This in itself is conclusive proof that civil authority was not then restored, and that the Provisional Court was in the rightful exercise of its jurisdiction."

Historically wars have been terminated by treaties of peace which either ceded the territory in question to the conqueror or restored it to the vanquished upon certain terms such as the payment of indemnity. In theory, rights and status were all expressly determined in the treaty and its effective date would, at the latest, mark the close of military government. This was in an era when, though communications and travel were slow, peace treaties were achieved with considerable dispatch. In 1828, in upholding the jurisdiction of a civil court established in Florida by its territorial legislature, Chief Justice Marshall expressed the traditional view in these words:

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same Act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the State.¹⁹⁷

Mexican and Spanish war experience disclosed however that the stately pace of Congress in creating and implementing territorial governments did not meet the need of the inhabitants to have a functioning government in the interim period between a treaty of cession and the actual establishment of civil territorial government. The Supreme Court approved military government as the only practical solution. It reviewed and reaffirmed the validity of interim military government after a treaty of peace in *Santiago v. No-gueras*,¹⁹⁸ where it said:

¹⁹⁷ *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542-43 (1828).

¹⁹⁸ 214 U.S. 260, 263-66 (1909).

By the ratifications of the treaty of peace, Porto Rico ceased to be subject to the crown of Spain and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief.

In the present century, wars, so far as the United States is concerned, have terminated not by treaties of cession but by the gradual vesting of full governmental powers over the occupied areas in successor governments to the original sovereign state. Such return of governmental function has not necessarily coincided with a treaty of peace. In West Germany there has been no military government since the Bonn Conventions¹⁹⁹ became operative on May 5, 1955, but there is still no peace treaty due to the inability of the powers concerned to resolve the political problem of a divided Germany. The executive branch of government, in its conduct of international relations, has, with the approval of Congress, entered into conventions and agreements which have accomplished most of the things which would traditionally have been embodied in a treaty of peace.

NATO Status of Forces Agreements²⁰⁰ have completely replaced

¹⁹⁹ Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954 [1955] 4 U.S.T. & O.I.A. 4117, T.I.A.S. No. 3425.

²⁰⁰ North Atlantic Treaty, June 19, 1951 [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846.

any remains of military government both in Japan²⁰¹ and West Germany.²⁰² In Japan this followed a security treaty, in West Germany it came before any treaty. That military government may be terminated by agreement between an occupying power and a domestic government acceptable to it appears clearly to be a matter of political decision not necessarily tied to a treaty of peace and one in which the judiciary will not substitute its judgment for that of the other branches of government.

There remains the difficult status which exists where territory which continues to be occupied is neither ceded nor relinquished and the treaty of peace does not determine the matter. In rejecting a contention that the Federal Torts Claims Act²⁰³ is applicable in the Ryukyu Islands this situation has been judicially considered.²⁰⁴

²⁰¹ The sequence of these events is related in *Wilson v. Girard*, 354 U.S. 524, 527-30 (1957): "A Security Treaty between Japan and the United States, signed September 8, 1951, was ratified by the Senate on March 20, 1952, and proclaimed by the President effective April 28, 1952. Article III of the Treaty authorized the making of Administrative Agreements between the two Governments concerning '[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan' Expressly acting under this provision, the two Nations, on February 28, 1952, signed an Administrative Agreement covering, among other matters, the jurisdiction of the United States over offenses committed in Japan by members of the United States armed forces, and providing that jurisdiction in any case might be waived by the United States. This Agreement became effective on the same date as the Security Treaty (April 28, 1952) and was considered by the Senate before consent was given to the Treaty. . . . In the light of the Senate's ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under the Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses. . . . The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches."

²⁰² *THE STATUS OF NATO FORCES IN THE FEDERAL REPUBLIC OF GERMANY* (1959) (supplementary agreement of August 3, 1959).

²⁰³ 28 U.S.C. §§ 1346, 2671-80 (1958).

²⁰⁴ *Burna v. United States*, 240 F.2d 720, 722 (4th Cir. 1957). It is there said: "The Treaty cannot be considered as anything more than a transitional arrangement, and for our purpose it is not a conclusive test that under the Treaty attributes of sovereignty can be exercised for the time being by the United States. This may indeed be the arrangement effected in order to maintain public order until a final disposition of the islands shall have

The court held only that the Ryukyu Islands have not ceased to be foreign. Implicit in this determination is the corollary that the government functioning there is a military government. It seems probable that acts of that government if attacked in United States courts would be upheld if otherwise conforming to the laws of belligerent occupation.

The Supreme Court has decided that the United States as a belligerent occupant may conduct its occupation government through a civilian agency and civilians, as well as through military authorities and military personnel, if the executive so determines and the legislative branch does not intervene.²⁰⁵ It seems unlikely that the Supreme Court would strike down the authority of a United States military government in any foreign area until such time as full governmental powers were actually being exercised by a successor government which was approved by the President and Congress. The whole concept of military government is that it shall restore and maintain law and order until a disrupted civil government can

been made; it still does not provide the touchstone of our inquiry, which is whether or not Okinawa is a foreign country. That the United States could at any time set aside Japanese laws does not, as we see it, signify that Okinawa has lost its foreign character."

²⁰⁵ *Madsen v. Kinsella*, 343 U.S. 341, 343-44, 348-49 (1952). In upholding the jurisdiction of civilian composed United States occupation courts in Germany, the Court there stated: "October 20, 1949, following her fatal shooting of her husband at their residence at Buchschleg, Kreis Frankfurt, Germany, she was arrested there by the United States Air Force Military Police. On the following day, before a 'United States Military Government Court,' she was charged with the murder of her husband in violation of § 211 of the German Criminal Code. In February, 1950, she was tried by 'The United States Court of the Allied High Commission for Germany, Fourth Judicial District.' That court was composed of three United States civilians, two of whom had been appointed as district judges and one as a magistrate by or under the authority of the Military Governor of the United States Area of Control. The court adjudged her guilty and sentenced her to 15 years in the Federal Reformation for Women at Alderson, West Virginia, or elsewhere as the Secretary of the Army might direct. In May, the 'Court of Appeals of the United States Courts of the Allied High Commission for Germany,' composed of five United States civilians appointed by the Military Governor of the Area, affirmed the judgment. . . . In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities. The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms. The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate."

be effectively replaced by another civil government in the occupied area. The flexibility of military government makes it possible to perform this essential task under highly adverse circumstances when others cannot or will not discharge this responsibility. The civil courts have not been disposed to curtail this function in such a manner as to create a hiatus in time or place where there would be no responsible governmental authority.

JUS POSTLIMINII

Having first distinguished military government and its law from its relatives and then pursued it from birth to death one might suppose the subject closed. Technically this is so, but to disregard entirely the surviving legal progeny would be a disrespect to the deceased. Not least of the legal problems resulting from war are those encountered in adjusting the war-disrupted rights of individuals once peace is restored. This is not merely a latter-day refinement.

The *Institutes* of Justinian thus define the doctrine of postliminium as it existed in the Roman law :

5. If a father is taken captive, though he becomes the slave of his captors, none the less his power over his children continues to exist owing to the right of postliminium; because persons taken captive by the enemy, if they return from captivity, recover all their former rights. Accordingly, if he comes back he will have his children in his power, because the effect of postliminium is that the person who was taken captive is feigned never to have left the State; but if he dies in captivity the son is deemed to have been *sui juris* from the time when his father was taken captive. Similarly, if it is a son or a grandson who is taken captive we speak of the paternal power as in suspense. The word postliminium is derived from "post" and "limen", and a person who is taken captive and comes back within the limits of the Empire is correctly described as returning by postliminium. By "limen" (threshold) we mean the frontier of a house, and the old lawyers applied the word to the frontier of the Roman State; so that the word postliminium conveys the idea of re-crossing the frontier. If a prisoner is recovered from a beaten foe he is deemed to have come back by postliminium.²⁰⁰

²⁰⁰ *INSTITUTES* 1:12:5, as translated in LEE, *THE ELEMENTS OF ROMAN LAW* 81 (2d ed. 1949).

Vattel commences his chapter "Of the Right of Postliminium" with these words:

The right of postliminium is that in virtue of which persons and things taken by the enemy, are restored to their former state, when coming again under the power of the nation to which they belonged.

The sovereign is obliged to protect the person and goods of his subjects, and defend them against the enemy; therefore, when a subject, or any part of his substance, are fallen into the hands of the enemy, should any fortunate event bring them again into the sovereign's power, it is certainly incumbent on him to restore them to their former state; he is to re-establish the persons in all their rights and obligations, to give back the effects to the owners; in a word, to settle every thing as they were before they fell into the enemy's hands.²⁰⁷

Originally it seems the doctrine applied only to Romans who became prisoners of war and who had the successive good fortune not to be slaughtered on the spot, to escape or be released and thereafter to make their way back to Rome. Vattel extends it to any subject whose property has come under the control of the enemy. Hyde points out the general doctrine now applies to the sovereign as well as individuals. He says:

The doctrine of postliminium signifies broadly that the mere possession in the course of war of property or territory of the enemy does not suffice generally to transfer title or sovereignty as the case may be, as against the enemy owner or sovereign which regains possession during the conflict. It doubtless emphasizes the fact that the rights of that owner or sovereign as such are suspended rather than destroyed by temporary loss of possession. The principle involved finds frequent room for application, as where, for example, an invader is driven out of the territory which his forces have occupied, or when a vessel is recaptured from the enemy. Even where the enemy taker of possession has also acquired title, as in the case of movable public property seized by it as the occupant of a territorial area, the resumption of control thereof by the belligerent territorial sovereign enables it both

²⁰⁷ VATTEL, *THE LAW OF NATIONS* 458-59 (1805).

to regain possession and to re-acquire title to the property concerned. . . .

When in consequence of a treaty of peace there is a restoration of occupied territory or of other enemy property, that result must be taken as due to the agreement rather than to any principle described by the phrase borrowed from the Roman law.²⁰⁸

The present use of the term as applying to the body of private law employed to adjust between rights of individuals which have been affected by the intervening actions of a hostile belligerent occupant is substantially different from the original concept.²⁰⁹

Fortunately the jurisprudence of the United States does not present an abundant literature of the *jus postliminii*. A condition precedent to litigation of this nature is normally a substantial hostile occupation of the territory of the forum productive of the disruption of private rights for which redress is sought. For this reason the Philippine Supreme Court has had occasion to deal at some length with the *jus postliminii*.²¹⁰ These Philippine decisions, though an important contribution to international law,²¹¹ are beyond the scope of the present article.

The Civil War cases are of doubtful value here because of the dual legal status ascribed to the Confederacy of lawful belligerence on the one hand and sheer rebellion on the other. The acts of Congress which largely controlled this litigation also curtailed its precedent value where applied to international belligerent occupation.

Two federal court cases which arose out of the Second World War give only an inkling of what the United States Supreme Court

²⁰⁸ 3 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 2419-20 (2d rev. ed. 1947).

²⁰⁹ See Ireland, *The Jus Postliminii and the Coming Peace*, 18 TUL. L. REV. 584 (1944).

²¹⁰ The more important of these decisions are collected in SALCEDO, REYES & GLORIA, *THE ARMED FORCES AND THE LAW* 488-522 (1958).

²¹¹ These Philippine decisions are discussed in Lockwood, *The Philippine Supreme Court and Postwar Problems of International Law*, 3 STAN. L. REV. 3 (1950). No less an authority than Charles Cheney Hyde has disagreed rather vigorously with some conclusions reached by the Philippine Supreme Court. Hyde, *Concerning the Haw Pia Case*, 24 PHIL. L.J. 141 (1949). See also Agabayani, Gancayco & Zaballero, *The Validity of the Acts of the Government During the Japanese Occupation*, 22 PHIL. L.J. 17 (1947); Feliciano, *The Belligerent Occupant and the Returning Sovereign: Aspects of the Philippine Law of Belligerent Occupation*, 28 PHIL. L.J. 645 (1953); Fraleigh, *The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights*, 35 CORNELL L.Q. 89 (1949).

might do with the *jus postliminii*. In one²¹² of these, the defendant Price, a national bank examiner employee of the United States attached to the Philippine High Commission, was captured by the Japanese in 1942 in Manila and interned at Santo Tomas University. While there Price made underground arrangements to borrow from Aboitiz and Company, a banking concern, Japanese occupation currency, which he used to bribe guards and purchase food from outside sources to supplement the scant diet. For these funds, Price gave a series of unsecured non-interest bearing notes repayable, at the option of the payee, in Japanese pesos or United States dollars at a fixed exchange rate of two for one. Suit was brought on these notes in Utah in 1951. Price resisted payment asserting two inconsistent defenses: first, that since it was a war of aggression all Japanese occupation acts, including the issuance of currency, were illegal and occupation currency did not constitute a legal consideration for the notes; second, that if Japanese occupation acts were lawful, a Japanese occupation law made it illegal for persons outside to traffic in money with internees under penalty of death, and this made the transaction unenforceable. The federal district court enforced the notes. As to the defendant's contentions, it held that the issue of currency by a belligerent in occupied territory is legal, but that the prohibition against loans to internees was violative of the Hague Conventions and hence would not be enforced or given legal effect. It has been pointed out that as the international law then stood, the prohibition against intercourse with internees, though of a political nature in furtherance of the occupation, was not illegal while the occupation lasted, but that such law would be given no effect by the United States courts when asserted after the termination of the occupation.²¹³ This case was not appealed.

The other case²¹⁴ involved title to bearer bonds issued by United States railroad companies and held by private owners in the Netherlands. Immediately upon the German invasion, Queen Wilhelmina established the Netherland Government-in-exile which the United States recognized. That government by decree vested protective title in itself to all securities belonging to persons domiciled in the

²¹² *Aboitiz & Co. v. Price*, 99 F. Supp. 602 (D. Utah 1951).

²¹³ Comment, 50 *MICH. L. REV.* 1066, 1082 (1952). This view concurs with the decision reached by the Philippine Supreme Court in *Peralta v. Director of Prisons*, 75 Phil. 285, 42 O.G. 198 (1945), and *Alcantara v. Director of Prisons*, 75 Phil. 494, 42 O.G. 482 (1945).

²¹⁴ *The Netherlands v. Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1953).

Netherlands to conserve the owners' rights. Thereafter, in 1941, a German ordinance compelled Jewish residents to deposit their assets at a designated office. Agents of the German government liquidated these assets, including the bonds in suit, on the Paris black market. A Swiss firm acquired the bonds and in 1946 in Switzerland sold them to an American who brought them to the United States in violation of federal foreign fund regulations. Under Treasury regulations the bonds were deposited with the Federal Reserve Bank. Both the Netherlands government and the American purchaser asserted title to the bonds. After finding that the purchaser was not a holder in due course, the district court denied both claims and ordered the bonds returned to the Federal Reserve Bank for appropriate distribution. On appeal it was held that the decree of the Netherlands Government-in-exile did not conflict with any legitimate legislation or regulation of the belligerent occupant, nor with the public policy of the forum and so would be enforced. The court of appeals in awarding the bonds to the Netherlands government pointed out that article 46 of the Hague Convention prohibited confiscation of private property by the occupant and that the Netherlands' decree was directed to impeding such illegal seizure and implemented a legal restriction already imposed upon the occupant rather than interfering with his legitimate rule.

It is necessary for the forum in *jus postliminii* cases to characterize the laws of a belligerent occupant or of a government-in-exile before applying the international conflict of law rule of the forum. It seems reasonable in either case that the initial test should be, does the law in question comply with or violate the international law of belligerent occupation? If a violation it should not be given effect. If a compliance, but of a character designed primarily to aid the political objectives of the occupant, since it was valid law during the occupation its consequences at that time may well be recognized, while the forum as a matter of public policy may refuse to give such law any validity after the termination of the occupation. If the law in question, regardless of its source, was not violative of the international law of belligerent occupation and was nonpolitical in nature, the forum having so classified it should enforce it.²¹⁵ This approach

²¹⁵ Cf. *Texas v. White*, 74 U.S. (7 Wall.) 700, 733 (1868). The Court in holding Texas had not lost title to bonds conveyed in 1864 in furtherance of the war against the Union, said: "[A]cts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating

appears to be valid whether the forum is that of the original sovereign, the former occupant or a third nation. Repeated application of this technique would further strengthen the effectiveness of the existing body of the law of belligerent occupation.

THE FUTURE

The nineteenth century produced legally restrained military government by single nations. The first half of the twentieth century developed military government by allied nations which approached, if it did not achieve, true international stature. The 1950s ushered in rudimentary ad hoc United Nations security forces which terminated hostilities where civil governments could not or would not. Is it too much to hope that the 1960s may bring an integrated truly international United Nations security force which can provide not only police action and disarmament inspections where necessary, but interim United Nations military government in turbulent areas where civil governments are for the time being unable to maintain law and order?²¹⁶ Such action and such government should be available wherever necessary to preserve the peace, including the reaches of outer space²¹⁷ as well as the remotest corners of this earth.

Such controls and such government must certainly be ruled by law and not by men. The present, broad and widely accepted, legal base of military government combined with its flexibility and its characteristic of being able to function under abnormal stresses bespeak its suitability for emergency assignments to restore law and order. This potent aid to peace should be carefully perfected.

CONCLUSIONS

(1) Military government, though arising out of paramount force (as has practically every government), immediately becomes a government of law.

the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid."

²¹⁶ CLARK & SOHN, *WORLD PEACE THROUGH WORLD LAW* (2d ed. 1960); Taubensfeld, *International Armed Forces and the Rules of War*, 45 AM. J. INT'L L. 671 (1951).

²¹⁷ JESSUP & TAUBENSFELD, *CONTROLS FOR OUTER SPACE AND THE ANTARCTIC ANALOGY* (1959); Wurfel, *Space Law—Is There Any?*, 37 N.C.L. REV. 269 (1959).

(2) The present international law of military government to a very large extent has been shaped and developed by the military government practices of the United States.

(3) The international law of military government is an integral part of the domestic law of the United States and is enforced by the United States Supreme Court.

(4) The international law of military government is now accepted as positive binding law by practically all nations.

(5) The present body of law controlling the exercise of military government is sufficiently detailed and specific to exact from such governments a high standard of performance and legal accountability.

(6) Military government characteristically fills a gap when civil governments are unable to function, performs the vital duty of restoring and preserving law and order, and ceases to exist when normal civil processes are restored.

(7) Military government possesses a catholicity and flexibility which permits it to function under abnormal conditions which destroy or disrupt civil governments.

(8) Military government and its techniques possess high present potential as a means of collective preservation of the peace both on earth and in outer space.

APPENDIX I

Articles 65 to 77 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [1955] 3 U.S.T. & O.I.A. 3517, T.I.A.S. No. 3365, provide:

ARTICLE 65

The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive.

ARTICLE 66

In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

ARTICLE 67

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact that the accused is not a national of the Occupying Power.

ARTICLE 68

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The

courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

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.

In any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.

[The only reservation made by the United States to this entire convention pertains to Article 68. It reads: "The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins." *Id.* at 3694.]

ARTICLE 69

In all cases, the duration of the period during which a protected person accused of an offence is under arrest awaiting trial or punishment shall be deducted from any period of imprisonment awarded.

ARTICLE 70

Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State,

shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

ARTICLE 71

No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial.

Accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible. The Protecting Power shall be informed 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; it shall be enabled, at any time, to obtain information regarding the state of such proceedings. Furthermore, the Protecting Power shall be entitled, on request, to be furnished with all particulars of these and of any other proceedings instituted by the Occupying Power against protected persons.

The notification to the Protecting Power, as provided for in the second paragraph above, shall be sent immediately, and shall in any case reach the Protecting Power three weeks before the date of the first hearing. Unless, at the opening of the trial, evidence is submitted that the provisions of this Article are fully complied with, the trial shall not proceed. The notification shall include the following particulars:

- (a) description of the accused;
- (b) place of residence or detention;
- (c) specification of the charge or charges (with mention of the penal provisions under which it is brought);
- (d) designation of the court which will hear the case;
- (e) place and date of the first hearing.

ARTICLE 72

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel

of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

Failing a choice by the accused, the Protecting Power may provide him with an advocate or counsel. When an accused person has to meet a serious charge and the Protecting Power is not functioning, the Occupying Power, subject to the consent of the accused, shall provide an advocate or counsel.

Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement.

ARTICLE 73

A convicted person shall have the right of appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

The penal procedure provided in the present Section shall apply, as far as it is applicable, to appeals. Where the laws applied by the Court make no provision for appeals, the convicted person shall have the right to petition against the finding and sentence to the competent authority of the Occupying Power.

ARTICLE 74

Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held *in camera* in the interests of the security of the Occupying Power, which shall then notify the Protecting Power. A notification in respect of the date and place of trial shall be sent to the Protecting Power.

Any judgment involving a sentence of death, or imprisonment for two years or more, shall be communicated, with the relevant grounds, as rapidly as possible to the Protecting Power. The notification shall contain a reference to the notification made under Article 71, and, in the case of sentences of imprisonment, the name of the place where the sentence is to be served. A record of judgments other than those referred to above shall be kept by the court and shall be open to inspection by representatives of the Protecting Power. Any period allowed for appeal in the case of sentences

involving the death penalty, or imprisonment of two years or more, shall not run until notification of judgment has been received by the Protecting Power.

ARTICLE 75

In no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve.

No death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve.

The six months period of suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

ARTICLE 76

Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein. They shall, if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country.

They shall receive the medical attention required by their state of health.

They shall also have the right to receive any spiritual assistance which they may require.

Women shall be confined in separate quarters and shall be under direct supervision of women.

Proper regard shall be paid to the special treatment due to minors.

Protected persons who are detained shall have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143.

Such persons shall have the right to receive at least one relief parcel monthly.

ARTICLE 77

Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory.

APPENDIX II

The DEP'T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE paras. 370-74, at 142-43 (1956), implement article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [1955] 3 U.S.T. & O.I.A. 3517, T.I.A.S. No. 3365, as follows:

370. Laws in Force. In restoring public order and safety, the occupant will continue in force the ordinary civil and penal (criminal) laws of the occupied territory except to the extent it may be authorized by Article 64, *GC* (par. 369), and Article 43, *HR* (par. 363), to alter, suspend, or repeal such laws. . . . These laws will be administered by the local officials as far as practicable. Crimes not of a military nature and not affecting the occupant's security are normally left to the jurisdiction of the local courts.

371. Nature of Laws Suspended or Repealed. The occupant may alter, repeal, or suspend laws of the following types: *a.* Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms. *b.* Legislation dealing with political process, such as laws regarding the rights of suffrage [*sic*] and assembly. *c.* Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination.

372. Prohibition as to Rights and Rights of Action. It is especially forbidden . . . to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

373. Suspension of Ordinary Courts. The ordinary courts of justice should be suspended only if: *a.* Judges and magistrates abstain from fulfilling their functions . . . ; or *b.* The courts are corrupt or unfairly constituted; or *c.* Local judicial administration has collapsed during the hostilities preceding the occupation and the occupant must set up its own courts to ensure that offenses against the local laws are properly tried. In such cases, the occupant may

establish courts of its own and make this measure known to the inhabitants.

374. Immunity of Occupation Personnel from Local Law. Military and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to the local law or to the jurisdiction of the local courts of the occupied territory unless expressly made subject thereto by a competent officer of the occupying forces or occupation administration. The occupant should see to it that an appropriate system of substantive law applies to such persons and that tribunals are in existence to deal with civil litigation to which they are parties and with offenses committed by them.