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APPLICATION OF THE LAW OF THE ABSENT\*  
SOVEREIGN IN TERRITORY UNDER BELLIGERENT  
OCCUPATION: THE SCHIO MASSACRE

*Eric Stein* †

I

THE SCHIO MASSACRE

ON July 6, 1945, in the village of Schio, a small community in the northern Italian Province<sup>1</sup> of Vicenza, fifty-four persons confined in the Schio jail were shot to death by masked men who had forced their way into the prison. A large majority of the persons held in the Schio jail at the time of the shooting were suspected of collaboration with the Germans, and other political crimes. No formal charges were pending against one-third of the prisoners. At the time of the massacre the area was under the rule of the Allied Military Government.

Seven former partisans were arrested and charged before an Allied Military Court with the premeditated murder of the fifty-four prisoners and the attempted murder of thirty-one others.

The court acquitted two of the accused for lack of evidence and sentenced two to life imprisonment and other penalties. The remaining three, whose confessions to the shooting had been corroborated by other evidence, were sentenced to death, in application of the Italian Penal Code.

A formal petition for review was filed by the defendants, arguing lack of corroboration of the confessions, claiming that there had been no premeditation and stressing that the accused had been merely carrying out orders. Above all, the petition pleaded for clemency on the basis of the defendants' record as partisans.

On review, the judgment of the court was confirmed as to the two life sentences and the acquittals by the Chief Legal Adviser to the Chief Civil Affairs Officer of the Allied Military Government for

\* For the purpose of brevity the term "absent" sovereign shall be used to indicate the governmental authority holding the legal sovereignty of the occupied territory and functioning outside of such territory.

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<sup>1</sup> A "Province" is the basic administrative geographic sub-division of the national administrative system in Italy.

Italy.<sup>2</sup> The three death sentences brought before the Chief Civil Affairs Officer himself, as prescribed by the appropriate provisions of the Allied Proclamation,<sup>3</sup> were commuted to sentences of life imprisonment. This final decision was made public in the form of a statement to the press issued by the Allied Commission Public Relations Office in Rome on December 20, 1945. After briefly recapitulating the facts of the case, the press release proceeded as follows:

"2. The three death sentences were brought before me as Chief Civil Affairs Officer of Occupied Territory under Allied Military Government, Italy, for confirmation in pursuance to the established procedure. On review of the record of the trial, I am fully satisfied that the accused have received a full and fair trial, and that the sentences imposed were well founded.

"3. The massacre committed at Schio was of such a nature as to put those responsible beyond consideration of clemency.

"4. However, I felt bound to take into consideration the following facts:

(a) The fifty-four men and women murdered in the Schio jail were Italian men and women.

(b) The convicted murderers were Italian men.

(c) The law which they outraged and under which they were charged and sentenced by the Allied Military Court was Italian law.

(d) The crime they committed was a crime against Italian sovereignty.

(e) The accused were not sentenced to death for violation of any order of the Military Governor.

"5. Italy in 1889 was among the first nations of the world to abolish the death penalty. The abolition of the death penalty is not exclusively an Italian legal concept. In Switzerland, and even in the United States in certain states where the law is purely of Anglo-Saxon origin, the death penalty cannot be imposed. The banishment of capital punishment became a firmly established principle in Italian pre-fascist legislation. It remained so until the advent of fascism. The Penal Code of 1930 enacted during fascist rule re-introduced the death penalty as a typical innovation serving the new regime, thus breaking the tradition of pre-fascist

<sup>2</sup> Col. John K. Weber, U. S. Army, of San Antonio, Texas, held the position of the Chief Legal Advisor at the time of the final disposal of the Schio case.

<sup>3</sup> Proclamation No. 1, Art. XII, sec. II: "Sentence of Death.—No sentence of death shall be executed unless and until confirmed in writing by me, [i.e., Chief Civil Affairs Officer] or by a specified officer not below the rank of Brigadier General or Brigadier to whom I may have delegated such power in writing."

Italy. The first Bonomi Government passed the Decree of 10 August 1944 once again abolishing capital punishment as a general form of punishment under the Penal Code.

"6. At that time Allied military operations in Italy were in full progress, most of Northern Italy was in enemy hands, and this Decree was therefore not implemented by Allied Military Government in Northern Italy. As a result, the three accused in the present case were correctly charged and sentenced to death under the original and unamended text of the Penal Code. However, had the accused been charged with the same offence in territory restored to the Italian Government, they could not have been so sentenced, even in an AMG court. Similarly, the death sentence in this case could not have been confirmed by me had the northern regions been restored to Italian Government administration by this date.

"7. In deference to the pre-fascist concepts of punishment under Italian law, which the present Italian Government has reaffirmed, because I consider that military authorities governing under the law of occupation in a civilized state are but custodians of its fundamental legal institutions, and because I do not conceive it to be Allied policy toward Italy to override Italian basic concepts of justice with respect to a civil crime committed by Italians against Italians, regardless of how such a crime would be dealt with in Allied countries, the death sentences against FRANCESCHINI Renzo, FOCHE SATO Antonio and BORTOLOSO Valentino are modified to sentences of imprisonment for life. Because of the nature of the crime, it is my intention to request of the Italian Government that no future general or individual amnesty be applied to these prisoners."

(s) Ellery W. Stone  
Rear Admiral, USNR  
Chief Civil Affairs Officer<sup>4</sup>

## II

### DID A. M. G. HAVE A LEGAL DUTY TO COMMUTE THE DEATH SENTENCES?

In commuting the death sentences, the Chief Civil Affairs Officer purported to and in fact did give effect to the Italian Decree 224 of August 10, 1944 abolishing capital punishment under the Italian Penal Code.

<sup>4</sup> Quoted from the text released by the Public Relations Branch, Allied Commission, Rome, on December 20, 1945.

A perusal of his statement reveals, however, that he did not consider himself legally bound to do so but was merely exercising a discretionary power of pardon motivated by the Allied public policy in Italy. Moreover, in paragraph 6 of the statement, he expressly affirmed the legality of the death sentences imposed by the Vicenza court under the unamended text of the Penal Code and in disregard of Decree 224 which had not been "implemented" by Allied Military Government in territory administered by that government.

A question arises whether, in the light of international law, the Allied Military Government acted within its powers in refusing to "implement" Decree 224 in occupied Italian territory. The legality of the death sentences imposed by the Court of Vicenza depended on the answer to this question.

A brief exposition of the general practice adopted by the Allied Military Government concerning the legislation of the post-fascist Italian governments appears necessary for an adequate understanding of the issue under consideration.

Shortly after the signing of the surrender to the Allied Armies in the fall of 1943 the King of Italy, exercising his powers under the Italian constitution, appointed a cabinet of undersecretaries with its seat at Brindisi.

While the rest of liberated southern Italy was made subject to Allied Military Government, the four provinces of the Puglie Region were left to the exclusive jurisdiction of the new Italian Government.<sup>5</sup> In these provinces the King with the new government exercised legislative power in accordance with Italian law. The laws thus enacted were published in the Italian Official Gazette. At that time, Allied authorities took the position that this new legislation could not have any effect and would not be given any force in that part of Italy which was occupied by Allied troops and administered by Allied Military Government. No announcement to this effect or any other formal act of Allied Military Government was made or deemed necessary.

When in June, 1944 a politically more representative Italian government was established in Rome,<sup>6</sup> the Allied Military Government laid down the following policy: (a) While the new legislation of the Italian Government did not become automatically effective in the

<sup>5</sup> For a more detailed account of A.M.G. organization and functioning and its relationship with the Italian Government see REVIEW OF THE ALLIED MILITARY GOVERNMENT AND ALLIED COMM. IN ITALY, Allied Comm., pp. 8-12 (1945).

<sup>6</sup> REVIEW OF THE ALLIED MILITARY GOVERNMENT AND ALLIED COMM. IN ITALY, ALLIED COMM., pp. 41 et seq. (1945).

Allied Military Government territory it would be extended to occupied areas to the rear of the zone of operation upon the order of a responsible Allied Military Government officer; only those laws or parts thereof inconsistent with Allied Military Government legislation or policy would be excluded from this "implementation" procedure. (b) The "implementation" was to take place by means of Allied Military Government orders, to be published from time to time on the last page of the Italian Gazette.<sup>7</sup>

There were relatively few instances where the Allied Military Government found it necessary either to exclude any such new law from "implementation" or to implement it in a modified form. Among the laws which the Allied Military Government excluded from "implementation" was Decree 224. The question is whether the Allied Military Government acting for the Allied occupying powers had the right to do so without violating the obligations of these powers under international law.

### III

#### POWERS OF A. M. G. TO DENY IMPLEMENTATION TO LEGISLATION OF THE ABSENT ITALIAN SOVEREIGN

##### *A. Under Documents of Surrender*

The rights of a power occupying enemy territory subsequent to the conclusion of an armistice with the enemy are primarily determined by the clauses of the armistice agreement. Thus the powers of the Allied Military Government in Italy after the signing of the documents of surrender<sup>8</sup> were primarily defined by the provisions of these instruments embodying the armistice agreements concluded between the governments of the United States, the United Kingdom and the Soviet Union, "acting on behalf of the United Nations" on one side and the Italian government on the other side. It is therefore to these documents that we look for the answer to the question under consideration.

<sup>7</sup> Each order of implementation provided that all decrees contained in a specified issue of the Official Gazette, with the exception, if any, of the objectionable legislation, should come into effect in each Province in the Allied occupied territory on the date on which the Prefect (the highest administrative official in the Province) of such Province shall officially receive from the A.M.G. a copy of the Gazette containing the order. The order of "implementation" could provide that the laws shall be "implemented" in occupied territory with certain specified modifications.

<sup>8</sup> For the text of the documents of surrender see UNITED STATES AND ITALY, 1936-1946, DOCUMENTARY RECORD, Department of State, Publication 2669, European Ser. 17, pp. 51-66 (1946).

Article 10 of the so-called "short armistice" document signed in Sicily on September 3, 1943, provides:

"The Commander in Chief of the Allied Forces reserves to himself the right to take any measure which in his opinion may be necessary for the protection of the interests of the Allied Forces for the prosecution of the war, and the Italian Government binds itself to take such administrative or other action as the Commander in Chief may require, and in particular the Commander in Chief will establish Allied Military Government over such parts of the Italian territory as he may deem necessary in the military interests of the Allied Nations."

The remaining clauses of the document fall into two groups. One group contains provisions ensuring the capitulation of the Italian Armed Forces as usually provided in an armistice agreement.<sup>9</sup> The second group of clauses grew out of the necessity for Italian territory to serve as an operational base in the war against Germany.<sup>10</sup>

Again, it was stipulated in the "Additional Conditions of Armistice with Italy" or "Long Terms" signed at Malta on September 29, 1943 that "The Forces of the United Nations will require to occupy certain parts of Italian territory" (Article 18). Article 20 provides that:

"Without prejudice to the provisions of the present instrument the United Nations will exercise *all the rights of an occupying power*<sup>11</sup> throughout the territories or areas referred to in article 18, the administration of which will be provided for by the issue of proclamations, orders or regulations. Personnel of the Italian administrative, judicial, and public services will carry out their functions under the control of the Allied Commander-in-Chief unless otherwise directed."

Other clauses of the document specify in detail the measures to be taken by the Italian authorities for the purpose of carrying out the military capitulation<sup>12</sup> and making available installations and facilities to the Allied Forces in their war against the German enemy.<sup>13</sup> Other provisions reserve certain rights to Allied Armies in non-occupied Italian territory<sup>14</sup> and impose upon the Italian Government economic,

<sup>9</sup> Arts. 1, 3, 4, 8, 9, 11.

<sup>10</sup> Arts. 2, 5-7.

<sup>11</sup> Italics supplied.

<sup>12</sup> Arts. 1-13, 32A, 27, 28, 34, 37.

<sup>13</sup> Arts. 14, 15, 16, 17, 19.

<sup>14</sup> See Art. 21.

financial and political obligations as well as duties to take certain administrative and legislative steps.<sup>15</sup>

Article 10 of the "short armistice" and Articles 18 and 20 of the "Long Terms" are the only ones to refer specifically to the status of Allied Military Government in Italy. Consequently, any power claimed by Allied Military Government and not provided for in these articles, must fall within the categories of "*rights of an occupying power*" in accordance with Article 20 of the "Long Terms." Therefore the question at issue assumes the following form: can it be said that the right of the Allied Military Government to exclude Italian legislation enacted by the Italian Government subsequent to the signing of the documents of surrender (and specifically Decree 224) is included among the "*rights of an occupying power.*" The answer to this question must be sought in the international law of occupation.

### B. *Under International Law*

Although there exist various forms of occupation, the international law of today provides rules, in the technical sense, for the belligerent occupation only. The main body of rules was codified in the Regulations Respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907, and specifically in Section III thereof, entitled "Military Authority over the Territory of the Hostile State." The rules were supplemented by decisions of tribunals, international practice and writings of leading authorities.

Admittedly, Section III appears to apply expressly only to the typical case of a belligerent occupation where one belligerent has overrun a part of the territory of the opposing enemy belligerent, where the fighting is still in progress and no armistice agreement has been concluded. Section III did not give rise to any generally accepted rules which would govern other types of occupation, such as the occupation continuing after or effected by virtue of an armistice agreement. Special rules purporting to regulate these types of occupation and propounded by certain authors and tribunals are controversial, as will be shown below, and all are in fact based on deductions and modifications of Section III.<sup>16</sup>

In these circumstances, the following would appear an appropriate

<sup>15</sup> Arts. 22-26, 29-33, 35-36.

<sup>16</sup> FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 6-7 (1942); Czybichowski, 18 *ZEIT. F. VÖLKERRECHT* 295 (1934); HEYLAND, *DIE RECHTSTELLUNG DER BESETZTEN RHEINLANDE* 68 (1923).



method for an inquiry whether the provisions of Section III are applicable in determining the rights and duties of an occupant in the case of an armistice occupation:

(a) to examine the intent of the parties to the armistice agreement in the light of its text and surrounding circumstances;

(b) to consider the practice of governments, decisions of tribunals and views of authors, with due weight given to the rationale of the provisions of Section III and to such practical factors as might lead in the future to the establishment of a generally accepted regime governing an armistice occupation.

1. *Hague Regulations and the Allied armistice occupation in Italy*

a. *Application of Section III.* Hostilities in the territory of the defeated belligerent are usually terminated as a result of a general armistice.<sup>17</sup> In Italy, however, it was apparent at the time of the signing of the documents of surrender that operations against German forces would continue without interruption even though the extent of the operations could perhaps not be estimated. Although hostilities *with* Italy had ended, hostilities *in* Italy were far from an end.

At the time of the signing of the documents of surrender, Sicily with adjacent islands and portions of southern Italy were being administered by the Allied Military Government under the regime of belligerent occupation governed by Section III of the Regulations. In view of the continuing hostilities, it was obviously the intention of the parties to the documents that the powers held by the Allied occupant under this regime should continue after the signing of the documents. In fact, the documents of surrender conferred upon the Allied occupant additional new power in areas occupied before the signing and to be occupied thereafter. Moreover, for reasons of military necessity, the documents granted the Allied Commander in Chief important powers, even in *unoccupied* Italian territory, such as the right of transit, and use of Italian facilities.

The applicability of Section III is further supported by the already mentioned clause in the "Long Terms" granting to the Allied occupant the "rights of an occupying power," for Section III is the only gener-

<sup>17</sup> For definitions of a "general" and "local" armistice see Article 37 of the Regulations annexed to the Fourth Hague Convention of October 18, 1907, Respecting the Laws and Customs of War on Land. For further classification of armistice agreements, see 2 OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., by Lauterpacht, 433-441 (1944).

ally accepted source of international law defining such rights with a degree of certainty.

b. *The new Italian laws and the "laws in force" under Article 43 of the Hague Regulations.* The only relevant rule of Section III is contained in Article 43 which provides as follows:

*"The authority of the legitimate power having in fact passed into the hands of the occupant the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."*<sup>18</sup>

The express obligation to respect the laws of the occupied country imposed upon the occupant by the last clause of this article refers only to those laws which were "*in force*" in the occupied territory at the time of the commencement of the occupation. This interpretation follows naturally from the language used and has been generally accepted by legal scholars.<sup>19</sup>

The new Italian laws enacted after the signing of the documents of surrender could not be considered as "*laws in force*" in any of the occupied portions of Italy. In northern Italy, where the Schio case occurred, the "*law in force*" at the time of the establishment of Allied Military Government, was the Penal Code of 1930 under which the defendants were sentenced to death by the Court of Vicenza. Decree 224 amending the code could not become applicable in that area at the time of its enactment in the summer of 1944 nor at any time thereafter prior to the liberation of northern Italy because until then the territory had been under the *de facto* rule of the so-called Government of the Social Italian Republic, the fascist rebel group operating with the blessing of the Commander in Chief of the German Armies in Italy.<sup>20</sup>

<sup>18</sup> Italics supplied. Quoted from TM 27-251, U. S. War Dept. Technical Manual, Treaties Governing Land Warfare, p. 31 (1944). The phrase "public order and safety" used in the English translation does not adequately represent the meaning of "*vie publique*" which describes the entire social and commercial life of the country. 2 WESTLAKE, INTERNATIONAL LAW, 2d ed., 95 (1913).

<sup>19</sup> See, e.g., *Cillekens v. De Haas*, District Court of Rotterdam, May 14th, 1919, ANN. DIG. OF PUB. INT. L., 1919-1922, p. 471, Case No. 336 (1932); FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 135 (1942); Loening, "L'administration du Gouvernement-General de l'Alsace durant la Guerre de 1870-1871," 4 REV. DE DR. INT. 622 at 652 (1872); 2 GARNER, INTERNATIONAL LAW AND THE WORLD WAR, § 365, p. 63 (1920).

<sup>20</sup> This so-called Social Republican government claimed to be the only legitimate Italian government and of course did not permit the new legislation of the King's Government to be promulgated in territory under its control. In fact, the Republican

At the time of the liberation it was the Allied Military Government, not the Italian government, which assumed the de facto control in northern Italy.<sup>21</sup> As indicated in Part II, no "new" law enacted by the Italian Government after the signing of the documents of surrender

neo-fascists had regularly promulgated their own new legislation in this territory. It could be argued that the entire legislation of the legitimate government including Decree 224 did come into effect in northern Italy despite this de facto obstacle and notwithstanding the fact that it had not been promulgated and had even been entirely unknown in that area. This argument would be based on the proposition that it was the legitimate government of the King which at all times had retained legal sovereignty with full legislative powers over the entire territory; that such powers could not be curtailed by a de facto rebel group. Obviously, the question involving legal effects in Italian law of de facto existence and acts of the so-called Social Republic will ultimately be resolved in accordance with Italian municipal law. However, irrespective of this question, it appeared entirely permissible for the Allied Military Government to take the realistic view that for its purposes the King's Government, although the only recognized sovereign of Italy, could legislate with immediate effect only in that part of Italy which was effectively under its control. Thus, as far as the Allied Military Government was concerned, the King's Government could not legislate directly either in the Allied Military Government territory or in northern Italy while the latter was being administered by the fascist Republican rebel group. This group, although not recognized by the United Nations governments, did in fact exercise considerable governmental authority and its armed units were even accorded some privileges of a belligerent under international law. Certain analogy between the de facto status of a belligerent enemy occupant and that of a belligerent rebel group fighting the legitimate government had in fact been recognized. See McNair, "Municipal Effects of Belligerent Occupation," 57 L. Q. REV. 33 at 55 (1941). If, however, we accept the assumption that northern Italy had in fact been occupied and administered by the German Commander in Italy as an occupant with the rebel authorities simply acting as his tool, the question would then present itself whether the German occupant was warranted to exclude from German occupied Italy the new laws of the legitimate government of Rome. The German government had not recognized in any way the Italian government of Rome as the "absent" sovereign. On the other hand the German government granted full recognition as Italian sovereign to and considered itself allied with the fascist republican rebel government.

<sup>21</sup> It could perhaps be argued that in certain areas of northern Italy Italian partisans, directed by the National Committee of Liberation for Upper Italy (CLNAI), had assumed the reins of government from the fleeing fascists several days before the arrival of the Allied Forces and before the establishment of Allied Military Government. Consequently, the argument would proceed, CLNAI acting as it did in the capacity of an agent of the legitimate government of Rome had brought the area under effective control of this government with the result that the entire legislation of this government, including Decree 224, became effective therein before the establishment of Allied Military Government. To this view one might retort that CLNAI as agent of the legitimate government was bound by the undertaking of this government to consent to the setting up of Allied Military Government as an exclusive de facto authority immediately succeeding the rule of the fascists. Such undertaking may readily be construed both from the armistice agreement and from the prolonged coordinated planning of the Allied and Italian authorities for the steps to be taken upon the liberation of northern Italy, based throughout on the assumption that northern Italy was to be occupied and administered by the Allies.

was permitted to come into effect in any part of the Allied Military Government territory without an appropriate order from this government. As a result, Decree 224 could not be considered as a "law in force" in the occupied territory within the meaning of Article 43 and the Allied occupant was not bound under this clause to "respect" the provisions of the decree.

2. *A. M. G. as de facto holder of "the authority of the legitimate power" under Article 43 of the Hague Regulations*

Let us now turn to the first clause of Article 43 providing that "the authority of the legitimate power having in fact passed into the hands of the occupant" the latter should take all measures to ensure public order and safety. A question arises as to the scope of "the authority of the legitimate power" which has "in fact" passed into the hands of the occupant. Is the occupant, by virtue of such authority, entitled to exclude from occupied territory the new laws of the "absent" legitimate sovereign? Specifically, could the Allied Military Government by virtue of such authority, as a necessary measure for the restoration and maintenance of public order and safety exclude Decree 224 from occupied territory?

Widely varying definitions of the occupant's status under Article 43 were offered by courts and writers of various nationalities.

a. *Anglo-American doctrine and practice*

(1) *The doctrine.* Oppenheim, the leading British author in the field, suggested the following "platform" which expresses adequately the prevailing modern Anglo-American view:

1. "... Through military occupation the authority over the territory and the inhabitants only de facto, and not by right, and only temporarily and not permanently passes into the hands of the occupant.

2. "... Since the occupant is de facto in authority, he has a right of administration over the territory, with the consequence that all administrative acts which he carries out in accordance with the laws of war and the existing local law must be recognized by the legitimate government after the occupation. . . ." <sup>22</sup>

<sup>22</sup> Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants," 33 L. Q. REV. 363 at 363, 364 (1917). For other authority on belligerent occupant's status under Article 43 see HALL, TREATISE ON INTERNATIONAL LAW, 7th ed., 496, 497 (1917); Baty, "The Relations of Combatants to Insurgents," 36 YALE L. J. 966 (1927) ("it makes little difference whether the occupant's power

The authoritative *United States Army Field Manual on Rules of Land Warfare*<sup>23</sup> issued in pursuance of Article I of the Fourth Hague Convention<sup>24</sup> contains the following provision relating to the specific question of the occupant's power to deny effect to the "absent" sovereign's legislation:

"All the functions of the hostile government—legislative, executive, or administrative— . . . cease under military occupation, or continue only with the sanction . . . of the occupier. . . ."<sup>25</sup>

In Hyde's opinion "the possession by the belligerent occupant of the right to control, maintain or modify laws that are to obtain within the occupied area is an exclusive one"<sup>26</sup> and "the occupant must regard the exercise by the hostile government of legislative . . . functions . . . as in defiance of his authority, except in so far as it is undertaken with his sanction or cooperation."<sup>27</sup>

According to the British and United States doctrine the provisions of Section III apply not only to a belligerent occupation *stricto sensu* but also to any type of armistice occupation, except of course as modified by the clauses of the armistice agreement.

Thus, for instance, the official *British Army Manual of Military Law* provides:

is called 'quasi-sovereignty' or if the limits of his power be characterized as "the military exigencies of an occupying force"); LAW OF BELLIGERENT OCCUPATION, J.A.G.S. Text 11, p. 35 (1944) ("It is believed that the better view is that the legitimate sovereign is deprived of the power to legislate for the occupied territory by the promulgation of new laws or decrees. According to the American view, the sovereignty of the legitimate government is suspended during occupation . . ."); TM 27-250, U.S. WAR DEPT. TECHNICAL MANUAL, TREATIES GOVERNING LAND WARFARE, pp. 7, 13 (1944); SPAIGHT, WAR RIGHTS ON LAND 322, 366-7 (1911); *Ochoa v. Hernandez*, 230 U.S. 139, 33 S.Ct. 1033 (1913). For a less recent and pre-Hague authority see *United States v. Rice*, 4 Wheat. (17 U.S.) 246 at 253 (1819) (with the statement of Justice Story that the occupant had the right to exercise "all civil and military authority over the place"); TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 584, 588, 591, 596, 615 (1901); *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch (13 U.S.) 191 (1815); *Fleming v. Page*, 9 How. (50 U.S.) 603 (1850); also *Privy Council in Gerasimo*, 11 Moo. P. C. 88 (1857); *British Prize Courts, The Fama*, 5 C. Rob. 106 (1804); *Courts of Common Law, Donaldson v. Thompson*, 1 Camp. 429 (1808) and *Hagedorn v. Bell*, 1 M. & S. 450 (1813).

<sup>23</sup> 1940 ed.

<sup>24</sup> "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention."

<sup>25</sup> Par. 283.

<sup>26</sup> 3 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 2d ed., 1886 (1945).

<sup>27</sup> *Id.* 1883.

"The situation in occupied territory remains the same [that is, during an armistice] as during hostilities."<sup>28</sup>

The *United States Army Field Manual on Rules of Land Warfare* follows the same view.<sup>29</sup>

British and American authors place emphasis upon the fact that although hostilities between the belligerents have been brought to an end by a general armistice, a state of war continues and with it the application of the laws of war. Both the occupation "flagrante bello" and the armistice occupation "nondum cessante bello" are types of a belligerent occupation; both arise from the state of war and are "founded upon force." The armistice agreement itself—as distinguished from the peace treaty—is called "a belligerent act" concluded between military commanders. Thus conceived, the armistice occupation would have the same effect as the belligerent occupation *stricto sensu* in suspending the legislative powers of the "absent" sovereign in the occupied territory.<sup>30</sup>

(2) *The practice.* Section III of the Hague Regulations was applied during the armistice occupation of Germany by the Allied and United States Forces under the armistice agreement of November 11, 1918.<sup>31</sup> Unlike the Italian situation, the hostilities in Europe had in fact ceased by virtue of this armistice. Yet early in 1919 Marshal Foch, the Allied Commander in Chief, made it known that until further notice, no law issued by the Prussian or German Central Government after the date of the armistice should be deemed to apply in occupied

<sup>28</sup> BRITISH ARMY MANUAL OF MILITARY LAW, AMENDMENTS (No. 12) ¶ 286 (1929).

<sup>29</sup> FM 27-10, U.S. WAR DEPT. BASIC FIELD MANUAL, RULES OF LAND WARFARE, ¶ 265d (1940).

<sup>30</sup> 2 WHEATON'S ELEMENTS OF INTERNATIONAL LAW, 6th Eng. ed. by Keith, 771 (1929); SPAIGHT, WAR RIGHTS ON LAND 245-247 (1911); Colby, "Occupation under the Laws of War," 25 COL. L. REV. 904 at 905, 911 (1925); FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 110-114 (1942); Report of the Second Sub-Commission of the Hague Conference of 1899, Hague I.B.B. 148 in SPAIGHT, *id.* 245-247 (1911); LAW OF BELLIGERENT OCCUPATION, J.A.G.S. Text 11, pp. 8-9 (1944); similarly, Cavaglieri, "La condizione giuridica delle nuove provincie italiane prima dell'annessione," 88 ARCHIVIO GIURIDICO 66-67, 73 (1922); 2 OPPENHEIM, INTERNATIONAL LAW, 6th ed. by Lauterpacht, p. 434 (1944); American Military Government of Occupied Germany, 1918-1920. Report of the Officer in Charge of Civil Affairs 358 (1943); see also French Army Manual in SPAIGHT, *id.* p. 247 stating that in the absence of a provision in the armistice agreement each belligerent has "absolute right to settle the question as he chooses on the territory held by him."

<sup>31</sup> Basic Instruction No. 561/CR of Nov. 15, 1918 issued by Marshal Foch. Also Nast, "L'occupation des territoires rhénans par les troupes Alliés et des États-Unis pendant l'armistice," 28 REV. GEN. DE DR. INT. PUB. 39 at 144 (1921).

territory.<sup>82</sup> No provision to this effect was contained in the armistice protocol itself.<sup>83</sup>

Again, the British Military Administration of Tripolitania, administering this Italian colony as occupied territory from the time of the defeat of the Axis forces in North Africa, issued a Proclamation in May, 1945<sup>84</sup> which reads as follows:

“WHEREAS it is desirable *that the inhabitants should be left in no doubt*<sup>85</sup> as to the applicability in the occupied territory of legislation enacted by or under the authority of the Italian State since the British Military Occupation;

NOW THEREFORE, I, Charles Henry Gormley, Colonel, Officer of the Most Excellent Order of the British Empire, HEREBY PROCLAIM:—

#### ARTICLE I

As from the 23rd day of January 1943 no Law, Decree Law or other legislative enactment of any kind made or passed by or under the authority of the Italian State on or after the said date shall be deemed to have applied or to apply to the occupied territory or any part thereof unless expressly proclaimed by the Chief Administrator to be applicable thereto.”<sup>86</sup>

The proclamation was published almost two and a half years after the commencement of the occupation and almost two years after the date of the signing of the Italian documents of surrender. It was obviously designed to reaffirm the existence of a situation which came into effect at the outset of the occupation by operation of international law.

A number of “new” Italian laws enacted by the Italian Govern-

<sup>82</sup> ZITELMAN, *ZWISCHENPRIVATRECHT IM BESETZEN GEBIETE IN FESTGABE FUER OTTO LIEBMAN*, Abt. I, p. 130, quoted in HEYLAND *DIE RECHTSTELLUNG DER BESETZTEN RHEINLANDE* 73 (1923) and criticized on the ground that there had not been an effective occupation before December, 1918.

<sup>83</sup> After the conclusion of the Rheinland Agreement in June, 1919 the Inter-allied Rheinland Commission was given power to examine, and if necessary to veto the new German legislation, before it could become effective in occupied Germany. Arts. 7 and 8 of the Ordinance No. 1 relating to the legislative power of the Inter-Allied High Commission were held illegal by the German Reichsfinanzhof decision of Dec. 7, 1926 in so far as restricting the right of the German Reich to legislate with immediate effect in the Allied occupied territory of Germany. *ANN. DIG. OF PUB. INT. L.*, 1925-1926, Case No. 7, p. 9.

<sup>84</sup> Proclamation No. 93, issued at Tripoli on May 2d, 1945.

<sup>85</sup> Italics supplied.

<sup>86</sup> The Tripolitania Gazette, Published by British Military Administration of Tripolitania, Under the Authority of the Chief Civil Affairs Officer, No. 10 of 1945, 15th May 1945, Part II.

ment after the commencement of the British occupation, such as those abolishing the fascist anti-Jewish legislation, were made applicable in Tripolitania in the form of proclamations of the British occupant. However, the procedure of "implementation" of new Italian laws used by Allied authorities in occupied Italy was not employed in Tripolitania and would have been impracticable under the given circumstances. Furthermore, the "implementation" procedure if used in Tripolitania might possibly have been construed as prejudicing the ultimate disposal of this colony in accordance with the final peace settlement.

### b. *The German doctrine and practice*

(1) *The doctrine.* In the view of an important school of German jurisprudence, the power of the belligerent occupant *stricto sensu* is a legal and not merely a factual power, since Section III of the Hague Regulations could not possibly lay down limitations on such power without recognizing its legal character.<sup>37</sup> "The authority of the legitimate power" within the meaning of Article 43 is put entirely out of operation by the occupation. While the legitimate power still retains the sovereignty, it is the occupant who exercises in the occupied area all the rights emanating from the sovereignty.<sup>38</sup> The laws of the "absent" sovereign have no effect in occupied territory and their ob-

<sup>37</sup> MEUER, *DIE VÖLKERRECHTLICHE STELLUNG DER VOM FEIND BESETZTEN GEBIETE* 4 (1915); Max Huber, "Völkerrecht," 2 *JAHRBUCH DES ÖFFENTLICHEN RECHTS* 470 at 570 (1908); HEYLAND, *DIE RECHSTELLUNG DER BESETZTEN RHEINLANDE* 7 (1923); Stauffenberg, "Vertragliche Beziehungen des Occupanten zu den Landeseinwohnern," 2 *ZEIT. F. ÖFFENTLICHES RECHT U. VÖLKERRECHT*, Nr. 1/2, pp. 86 ff., 102 (1931); ANHOLT, *DIE DEUTSCHE VERWALTUNG IN BELGIEN* 6-7 (1917).

<sup>38</sup> HEYLAND, *id.* 5-6. Some argue that the occupant's power is not derived from national law (*Staatsrechtliche Gewalt*) but is a power derived from international law (*die höchste völkerrechtliche Gewalt*, Loening, in HEYLAND, *id.* 8). Others agree that the occupant exercises in occupied territory an authority derived from national law but disagree in the purported consequences of this view: while some say that the occupant acquires the sovereignty on condition subsequent (*Gebietshoheit mit auflösender Bedingung*) over the occupied territory (Kohler, Frisch) others believe that no change in the sovereignty takes place by the occupation. According to one school of thought the occupant's authority is derived from the national law of the "absent" sovereign of the occupied territory. (HEYLAND, *id.* 8 ff.) See also LISZT, *DAS VÖLKERRECHT*, 12th ed. by Fleischmann (1925) giving on page 488 abundant references. Liszt himself appears to follow the last mentioned school of thought in that he believes that "the occupying State takes over the exercise of the 'Staatsgewalt'" (the sovereign power derived from national law) of the occupied State not, however, as the latter's agent but by virtue of a right granted to him by international law (p. 490). Cf. STRUPP, *GRUNDZUEGE DES POSITIVEN VÖLKERRECHTS* 206 (1922).



servance may expose the population to a punishment by the occupant for breach of the "duty of obedience."<sup>39</sup>

However, the situation according to this German view, is entirely different in the case of an armistice occupation which is considered as an occupation *sui generis* and called "*occupatio mixta*." Further distinction is made between a "genuine" armistice occupation of territory occupied by virtue of the armistice, and a "non-genuine" armistice occupation where a belligerent occupation established before the armistice is continued after the armistice. Unless otherwise provided in the armistice agreement the territory subject to a "non-genuine" armistice occupation continues to be governed by Section III and the "legitimate authority" which had passed to the occupant by an "act of force" (*Gewaltsakt*) remains in his hands after the armistice. Contrariwise, Section III does not apply in the territory occupied by virtue of an armistice (that is, by virtue of a "Konzession") and administered under a "genuine" armistice occupation; the sovereign retains the legitimate authority in occupied territory including the legislative power<sup>40</sup> unless the armistice agreement provides to the contrary.<sup>41</sup>

With a touch of Latin irony an Italian jurist pointed out that the German armistice theory was spun principally in connection with the Allied occupation of German territory after the cessation of hostilities in World War I.<sup>42</sup> In fact, the German Supreme Court held that the Allied occupation of the Rheinland by virtue of the armistice agreement of November 11, 1918, was not a belligerent occupation in the sense of the Hague Regulations.<sup>43</sup>

(2) *The practice.* The Franco-German armistice agreement of June 22, 1940 provided that certain territory of France was to be occupied by German troops. Like the Allied occupant in Italy, the Ger-

<sup>39</sup> HEYLAND, *id.* 12. Cf. The decision in the Cavalla case, Court of Thrace, *Thémis* 41, p. 417 and *ANN. DIG. OF PUB. INT. L.*, 1929-1930, Case no. 292 p. 496 (1935).

<sup>40</sup> See note 32, *supra*.

<sup>41</sup> HEYLAND, *DE RECHTSTELLUNG DER BESETZTEN RHEINLANDE* 67 (1923); KAMPS, "Internationales Staats- und Verwaltungsrecht im besetzten Gebiet," 24 *JURISTEN-ZEITUNG* 306 at 310 (1919). Kamps considers an armistice occupation a "servitude of international law," a mere new name considering the absence of accepted rules of law for "international servitudes." Strupp, "Das Waffenstillstandabkommen zwischen Deutschland und der Entente vom November 1918 im Lichte des Völkerrechtes," 11 *ZEIT. F. VÖLKERRECHT* 252 at 265 ff. (1920).

<sup>42</sup> Ferrari, "Dell'occupazione di territorio austro-ungarico," 19 *RIVISTA DI DIRITTO INTERNAZIONALE* 460 (1927).

<sup>43</sup> *FONTES JURIS GENTIUM*, Ser. A, Secio II. Tom. I, No. 253, p. 214.

man Reich reserved to itself the privilege "to exercise all the rights of the occupying power" in occupied France.<sup>44</sup> Although the armistice agreement contained no provision on this subject, actually the Vichy government was permitted by the Germans to enact legislation which would be effective automatically in all of France including the German occupied territory.<sup>45</sup> However, in occupied France the laws of the occupant were to prevail over any French legislation.<sup>46</sup> From the material on hand it is not clear whether the Vichy laws were subject to German censorship before publication or whether each and every such law was permitted to become effective in occupied France.<sup>47</sup>

In reviewing the German practice in France<sup>48</sup> it should be noted that, unlike the Italian situation of 1943, the ground operations in France were almost at an end at the time of the Compiègne armistice in 1940. Therefore, whatever difference might have existed between the Allied and German concepts of armistice occupation, the important factual dissimilarities in the circumstances surrounding the conclusion of the armistice and reflecting upon the intention of the parties must be given due weight.

It will be for the historian to determine to what extent the attitude of the German occupant towards the new Vichy laws was due to the German domination of the Vichy government. Furthermore, such laws, produced on a fantastic scale,<sup>49</sup> accomplished for the occupant all the

<sup>44</sup> For a synopsis of the Franco-German armistice agreement of 1940 see 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 426-428 (1943).

<sup>45</sup> LEMKIN, AXIS RULE IN OCCUPIED EUROPE 174 (1944). The "Gazette du Palais" had published periodically a collection called "Législation de l'occupation" with the subtitle "Recueil des lois, décrets, ordonnances, arrêtés et circulaires des Autorités Allemandes et Françaises, promulgués depuis l'occupation." The collection reprinted most (not all) of the legislation published in the official Vichy French "Journal Officiel de l'Etat français," in the "Verordnungsblatt" of the German Governor of occupied territory and in the "Bulletin municipal officiel de la Ville de Paris." Similarly, the "Bulletin Législatif" published by Dalloz contains also "Lois, décrets, arrêtés, circulaires, etc. et ordonnance des autorités d'occupation."

<sup>46</sup> Verordnungsblatt fuer das besetzte Gebiet der franzoesischen Departments Seine, Seine-et-Oise, und Seine-et-Marne No. 3, June 21, 1940, p. 13. See also LEMKIN, id. 389.

<sup>47</sup> It was pointed out above in note 46 that the volume of "Législation d'occupation" did not contain *all* Vichy laws.

<sup>48</sup> There is no evidence that the German Military Governor, following the German theoretical distinction between the "genuine" and "non-genuine" armistice occupation, established two different regimes in occupied France. See FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 112 (1942).

<sup>49</sup> PAUL JACOB, LES LOIS DE L'OCCUPATION EN FRANCE 22 (1942).

purposes which he could not have obtained by his own proclamations without violating the international law of occupation, such as the forced deportation of Frenchmen to war factories in the Reich and the transformation of the French Republic into a totalitarian state to Germany's liking.<sup>50</sup>

c. *The Belgian jurisprudence.* A view differing from both the Anglo-American and German concepts on the status of the belligerent occupant is reflected in a considerable body of judicial precedents which developed in Belgium as a result of the German belligerent occupation during World War I. However, in these cases the question before the court presented the so-called "postliminy" aspect of the problem:<sup>51</sup> a Belgium court sitting after the war had ended and after the German occupant had evacuated Belgium, passed upon the question of whether a specific law enacted by the Belgian legitimate sovereign during the war and outside of occupied Belgium became effective in occupied Belgium at the time of its enactment. This question is only related and is by no means identical to the issue under consideration.<sup>52</sup>

The weight of the Belgian judicial authority, seconded by writers, denied that by virtue of Article 43 of the Hague Regulations the exercise of the legal authority of the "absent" sovereign would be suspended and that in general the Hague Regulations would bestow any legal status whatever upon the occupant and its acts. According to this view the Regulations simply established circumscribing rules on the de facto powers of the occupant obtained by a "triumph of force" without impairing the legal power of the "absent" sovereign to determine the effects of his own new legislation in the occupied territory.<sup>53</sup>

<sup>50</sup> JACOB, *id.* 21 ff.

<sup>51</sup> On the concept of "postliminium" see 2 OPPENHEIM, *INTERNATIONAL LAW*, 6th ed., by Lauterpacht, 480 ff. (1944).

<sup>52</sup> While the latter presents a problem in international law requiring an interpretation of the Hague Regulations the former is determined primarily by municipal (in this case Belgian) law and public policy, the question of the legality of an occupant's act under international law being only one element, sometimes even entirely neglected, in the deliberations of the court. Cf. Decisions of the Court of Cassation of Belgium, Dec. 4, 1919, *Pasicrisie Belge*, 1920. I. 1, also in *ANN. DIG. OF PUB. INT. L.* 1919-1922, p. 459 (1932); April 29, 1919, *Pasicrisie Belge*, 1919. I. 132 and of Jan. 21, 1918 *Pasicrisie Belge*, 1918. I. 177 and Oct. 16, 1919, *Pasicrisie Belge*, 1919. I. 225.

<sup>53</sup> Court of Cassation, June 4, 1919, *Pasicrisie Belge*, 1919. I. 153-4; Ch. De Visscher, "L'occupation de guerre d'après la jurisprudence de la Cour de Cassation de Belgique," 34 *L. Q. REV.* 72 (1918). The view expressed by the highest Belgian court in this and in the other cases cited in note 53, *supra*, constitutes a complete reversal of the position taken by the court during the early stages of the occupation

The Belgian courts found that there existed no constitutional obstacle for the "absent" Belgian King to enact legislation with effect in German occupied Belgium and that the insertion of such legislation in the official Belgian journal "Moniteur Belge" published outside of occupied Belgium and not regularly distributed therein, must be taken to constitute the type of publication required by Belgian law.<sup>54</sup> This view, the court maintained, must prevail "notwithstanding the obstructions which the occupying authority might have placed in the way of the relations between the various parts of the country. . . ."<sup>55</sup>

In speaking of obstructions, the court might have had in mind a notice issued by the German occupant on January 4, 1915 providing that "in those parts of Belgium which are subject to the German Government and from the day of the institution of this government, only the ordinances of the Governor General and of his subordinate authorities shall have the force of law. Orders issued from this day onward by the King of Belgium and the Belgian Ministers do not have the force of law within the domain of the German Government of Belgium."<sup>56</sup> A Belgium Court Martial, again in a "postliminy" case held this notice void as contravening the "rights of the Belgian sovereignty."<sup>57</sup> Undoubtedly the notice, not unlike the announcement of Marshal Foch and the British Proclamation in Tripolitania (the latter two, however, issued during an armistice regime) was considered by the German occupant as merely declaratory of a condition prevailing from the commencement of the occupation by operation of international law.<sup>58</sup>

to the effect that by reason of the ratification of the Fourth Hague Convention by the Belgian Law of May 25, 1910, orders of the occupying power made in virtue of Art. 43 of the annexed Regulations derived from the law the same obligatory force as Belgian laws. (Pasicrisie Belge, 1915-1916. I. 375). Cf. also Court of Appeal, Liege, June 25, 1919 and Feb. 28, 1920 in Pasicrisie Belge, 1920. II. 298. For further authority see OPPENHEIM, INTERNATIONAL LAW, 6th ed. by Lauterpacht, 342, note 5 (1944). Cf. SPAIGHT, WAR RIGHTS ON LAND 355 (1911).

<sup>54</sup> Court of Cassation, June 4, 1919, Pasicrisie Belge, 1919. I. 97. However, compare decision of the same court, Nov. 13, 1916, Pasicrisie Belge, 1917. I. 54. See also decision of Feb. 11, 1919, Pasicrisie Belge, 1919. I. 9 and decision of the Court of Appeal of Liege, Feb. 26, 1917, Pasicrisie Belge, 1918. II. 182.

<sup>55</sup> Court of Cassation, June 4, 1919, Pasicrisie Belge, 1919. I. 97 at 109-110.

<sup>56</sup> Quoted in *Auditeur Militaire v. G. Van Dieren*, Council of War (Court Martial) of Brabant, Jan. 31, 1919, Pasicrisie Belge, 1919. III. 1.

<sup>57</sup> Quoted from the decision in the case cited in the preceding note. The sweeping dictum of the not entirely authoritative Court Martial should be taken "with a grain of salt."

<sup>58</sup> In order to "avoid confusion" (Court of Cassation in the aforementioned decision of June 4, 1919, Pasicrisie Belge, 1919. I. 97 at 109) the "absent" Belgian Govern-

What would be the effect of this radical Belgian "postliminy" theory if extended so as to apply during the occupation and within the occupied territory? Very little was said by the Belgian courts on this point which is of vital importance for our inquiry. That in such case the theory would not be carried to the limits, is indicated by a dictum of the Court of Appeal of Brussels asserting that only those laws of the "absent" sovereign "which do not pertain to the conflict of the belligerents" should apply in occupied territory during the occupation; however, "*the new laws promulgated by the legal power [that is, "absent" sovereign] in order to combat the occupant and hamper his rule are not applicable in those regions where a belligerent occupation had been established.*"<sup>59</sup>

The Belgian doctrine has been followed in other jurisdictions, such as Poland and the former Latvia.<sup>60</sup>

d. *Political motives behind the doctrines.* It has been said with some justification that the Anglo-American, German and Belgian doctrines were at least to some degree influenced by the history of the respective countries in international relations. Belgium has shown the tendency to restrict to a minimum the powers of the occupant and to construe broadly the powers of the "absent" sovereign in occupied territory because she has repeatedly been the victim of enemy occupations.<sup>61</sup> The German doctrine, on the other hand, has favored the widest possible interpretation of the powers of the belligerent occupant while cutting down to the bone the authority of the occupant under an armistice occupation. This attitude may have been influenced by the

ment published Decree-Law of April 8, 1917 providing that "subject to any express provision to the contrary, the decree-laws, orders and regulations of the legal authority are obligatory throughout the Kingdom. The administrative and judicial authorities will apply them concurrently with the liberation of the country and without further publication." (Recueil des lois et arrêtés royaux 1917, p. 204). This law was obviously enacted in the anticipation of the liberation of Belgium and, as was correctly pointed out, when read closely, provided merely for a type of "postliminy." [Rapport au Roi in Recueil des lois arrêtés royaux 1917, p. 200. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 137 (1942)].

<sup>59</sup> Court of Appeal, Bruxelles, April 23, 1919, Pasirisie Belge, 1919. II. 83 at 84. Italics supplied.

<sup>60</sup> Stanskiuk v. Klewec, Polish Supreme Court, 3d Div., May 11, 1927, ANN. DIG. OF PUB. INT. L., 1927-1928, Case No. 380, p. 560. Kulturas Balss Co-operative Society v. Latvian Ministry for Home Affairs, Latvia, The Senate, 1920, ANN. DIG. OF PUB. INT. L. 1919-1922, Case No. 321.

<sup>61</sup> FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 15 (1942).

fact that the Germans have repeatedly engaged in the catastrophic game of invading and occupying territories of other nations; in World War I they were eventually defeated and a part of their own territory occupied under an armistice.<sup>62</sup> Great Britain and the United States were said to have assumed an "in-between position" because in the past they "had not been afraid of occupation for their own territory and had themselves engaged in occupations" but on the other hand had been "friends and allies of past and prospective victims."<sup>63</sup>

#### IV

### PRACTICAL CONSIDERATIONS WITH RESPECT TO THE EFFECTS OF "ABSENT" SOVEREIGN'S LEGISLATION IN OCCUPIED TERRITORY

#### A. *During Hostilities*

It will be noted that no instance has been given in the foregoing analysis, of a belligerent occupant giving consideration to the "absent" sovereign's legislation while hostilities were in progress. It is doubtful that any such instance exists.

While the hostilities are in progress the occupant probably would be unaware of the exact content of the "absent" enemy government legislation. The present practice of non-hostile relations between the belligerents does not provide for the transmittal of the official texts of such legislation from the "absent" sovereign to the occupant.

The prevailing practice would not be likely to cause difficulties during short wars and short belligerent occupations, where an immediate need for extensive legislative reforms in occupied territory would not usually arise and where the occupant would be faced with other more pressing tasks. The lawmaking powers granted to the occupant by Article 43 of the Hague Regulations for the purpose of ensuring public order and safety would normally meet the requirements of the occupied territory during this brief period.<sup>64</sup>

Furthermore, as was brought out by the Allied experience particularly in the Sicilian and South Italian campaigns, the occupant's military government would be kept busy by internal administrative questions and by problems of a local character and could not divert

<sup>62</sup> The Allied occupation of Germany following the surrender of German armies in World War II and the total defeat of Germany cannot be termed an armistice occupation and is therefore not considered in this article.

<sup>63</sup> FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 15 (1942).

<sup>64</sup> See note 18, *supra*.

part of its manpower to the study of the new enemy legislation, assuming that it would be available.

The problem, however, is bound to become acute in cases of a protracted belligerent occupation. During such occupation the "absent" sovereign might undertake useful legislative reforms which are in no way directed against the occupant's war effort, and which the latter could not effect on his own initiative without exceeding the limits imposed upon his lawmaking powers by Article 43 of the Regulations. These Regulations were drafted in the "laissez faire" era which did not envisage the modern industrial state with its complex economic, social and administrative problems and with a more or less broad government control requiring a continuous flow of legislation, particularly in time of war.

A partial remedy might be found in the readjustment or reinterpretation of the Hague Regulations, which have proved antiquated in many respects.<sup>65</sup> Another way, which might moderate the tendencies toward excessive exercise of lawmaking powers by the occupant would be for him to give effect, whenever military and political conditions permit, to the legislation of the "absent" enemy sovereign.

This approach was envisaged by an American author writing in the second year of American participation in World War II. While admitting that the Hague Regulations do not impose upon the belligerent occupant a legal obligation to give effect to the "absent" sovereign's new laws, he states:

"Nevertheless, one would go too far in assuming, as has been done by various authorities, that an absent sovereign is absolutely precluded from legislating for occupied areas. The sovereignty of the absent sovereign over the region remains in existence and, *from a more practical point of view, the occupant may and should have no objection to timely alterations of existing laws by the old sovereign*<sup>66</sup> in those fields which the occupant has not seen fit to subject to his own legislative power. . . . The situation is different, however, where the occupant and the sovereign would be likely to issue conflicting instructions. It has usually been argued that the inhabitants should not be exposed to such a conflict involving their consciences and lives; that the actual power of the occupant

<sup>65</sup> For criticism of Hague Regulations see FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 14, 28-29 (1942); OPPENHEIM, *INTERNATIONAL LAW*, 6th ed. by Lauterpacht, 345 (1940).

<sup>66</sup> Italics supplied.

cannot be eliminated; and that therefore the power of the occupant should prevail over that of the absent sovereign. The occupant certainly has the physical power to prevent laws and decrees of the absent sovereign from being enforced, and, indeed, even from being duly promulgated. Quite apart from the international rights or wrongs of the situation it is not certain whether a law that cannot be enforced and promulgated can at all be treated as a positive law."<sup>67</sup>

### B. *Under Armistice Occupation*

As shown on the preceding pages, according to the German view the occupant must, as a matter of law, in the absence of a provision in the armistice agreement, allow the "absent" sovereign to legislate in territory occupied after the conclusion of the armistice. The occupant's lawmaking authority in such territory is confined to the narrow field required for the protection of the occupying troops. The weight of the British and United States authority, on the other hand, denies the existence of any such legal duty.

A fundamental principle of the law of occupation demands that an occupant, in exercising any of his rights in occupied territory should do so within the limits of the exigencies arising out of the two factors which lie at the basis of his status in the occupied territory: (1) his interest in the success of his military operations, and (2) his right and duty to maintain public safety and order under Article 43 of the Regulations, for the protection of his own troops and of the population.<sup>68</sup> Even under the Anglo-American view that *in the present state of the law* there exists no fundamental difference between the pre- and post-armistice occupation, it is believed that the decrease in the intensity of these exigencies upon the conclusion of an armistice agreement should cause the occupant to narrow proportionately the scope of his powers in the occupied territory. This consideration has not been ignored in the Anglo-American practice relating to the lawmaking

<sup>67</sup> FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 135-136 (1942). Compare McNair, "Municipal Effects of Belligerent Occupation," 57 L. Q. REV. 33 at 73 (1941): "Principle seems to demand that, assuming the new law [enacted by an "absent" sovereign] to fall within the category of that large portion of national law which persists during the occupation and which the enemy occupant cannot lawfully change or annul, it ought to operate in occupied territory."

<sup>68</sup> SPAIGHT, *WAR RIGHTS ON LAND* 322 (1911); *LAW OF BELLIGERENT OCCUPATION*, J.A.G.S. Text 11, p. 64 (1944); U.S. FM 27-10, ¶¶ 283, 285; U.S. FM 25-5, § 3.



procedures in occupied territory after the signing of the armistice. In fact, it was pointed out by an American author that "there is usually no attempt completely to prevent the absent government from legislating for such regions as become or remain occupied during an armistice."<sup>69</sup>

The extent to which the occupant gives effect to the "absent" sovereign's legislation in occupied territory after the armistice varies with the varying factual picture. During the initial stages of the armistice occupation or where this occupation lasts a few months only, such legislation might not be considered by the occupant. Once, however, the occupant's administrative machinery is consolidated, some if not all, of such laws would be given effect in occupied territory either in their original form sanctioned by the occupant or in the form of the occupant's own proclamations. The selection of such laws would depend primarily on the military interests of the occupant, on the legislative requirements of the occupied territory and on the political relationship between the governments of the occupant and of the "absent" sovereign.

Nevertheless the "absent" sovereign will not be permitted to enact legislation with an automatic effect in occupied territory. This position is in accord with the Anglo-American view that the ultimate administrative responsibility in occupied territory continues to rest with the occupant after the conclusion of the armistice. It might perhaps be argued in support of this position that a simultaneous operation of two legislative sources in the occupied territory might create a conflict envisaged by the already quoted American author or might be otherwise prejudicial to an effective administration or to the political relationship between the occupant and the "absent" government.

The doubts, if any, as to the powers of the occupant with respect to the legislation of the "absent" sovereign during an armistice occupation could be dispelled by inserting an appropriate clause in the armistice agreement. This, however, has not been the practice thus far despite the modern tendency to enlarge the scope of armistice agreements beyond the traditional provisions for the cessation of hostilities. The insertion of such a clause would admittedly solve the legal aspect of the problem. Nevertheless, the occupant would still be faced with the question whether and to what extent he should permit, as

<sup>69</sup> FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 115 (1942).

a matter of policy, the "absent" government's legislation to become effective in occupied territory. In this connection a responsible occupant, conscious of his enlightened self-interest and of his moral obligations as a member of the community of nations, will take into account a number of military, political and social factors, some of which are suggested in this article.

Recent developments in international law, such as the adoption of the United Nations Charter and of the Charter of the International Tribunal at Nuremberg, as well as the sentences rendered by this tribunal, profoundly affected the function of war in the modern law of nations.<sup>70</sup> Once firmly established these developments will of necessity lead to a revision in the concept of the belligerent occupation.

Nevertheless, the problems which the belligerent occupant faced in the past and the past practice in general, will have to be taken into account if and when, for instance, rules are designed for the conduct of such "action by air, sea, or land forces of Members of the United Nations" as ordered by the Security Council of the United Nations "to maintain or restore international peace and security" under Article 42 of the United Nations Charter or for the exercise of the right of self-defense by a member of the United Nations in accordance with Article 51 in case of an armed attack. Furthermore, should an aggressor nation in the course of an aggression violate an established rule of international law of belligerent occupation it would be held answerable for such violation, in addition to its general responsibilities arising out of its waging an aggressive war.

## V

### THE SCHIO CASE AND THE ANGLO-AMERICAN DOCTRINE

The Anglo-American view on the armistice occupation is clearly reflected in the already quoted statement of the Allied Chief Civil Affairs Officer pertaining to the *Schio* case, and with the practice of the Allied occupant in Italy in general.

According to this view Allied Military Government was justified in the assumption that it did not have a legal duty to "implement" in occupied Italian territory Decree 224 eliminating capital punishment from the Penal Code, or for that matter any other law enacted by the "absent" Italian Government. However, soon after the signing of

<sup>70</sup> See Jessup, "Force under a Modern Law of Nations," 25 FOREIGN AFFAIRS 90 (1946).

the armistice agreement with Italy, in consideration of the Italian declaration of war against Germany and of the cooperation offered by the Italian Government and by the majority of Italian people, the Allied powers initiated a policy aimed at the reduction of Allied Military Government functions in Italy within the limits of military necessity and at an active support of the Italian Government. The procedure of "implementation" whereby almost all of the new Italian laws were made applicable in occupied territory was only one manifestation of this policy.<sup>71</sup>

Nevertheless, when Decree 224 was enacted by the Italian Government in the summer of 1944 the Allied Military Government refused to "implement" it in Allied occupied territory as potentially harmful to Allied military interests because, as the Chief Civil Affairs Officer pointed out in paragraph 6 of his statement, "at that time," (1) Allied military operations in Italy were in full progress, and (2) most of northern Italy was in enemy hands.

There is little doubt that the Allied authorities appreciated the desire of the Italian Government in Rome to return at the earliest possible moment to the fundamental pre-fascist concept in Italian criminal law rejecting the capital penalty as a general form of punishment. Yet the Allied Military Government apparently felt "at that time" that its task of preserving public order and safety behind the lines during a campaign marked by an unparalleled bitterness and containing elements of civil war, did not permit the elimination in occupied territory of the death penalty from the Italian Penal Code where it had existed for the last fourteen years. In this conflict between the Allied military interests and the policy of assisting the Italian Government in repealing fascist inspired legislation, the first prevailed.

With the end of hostilities in Italy in the spring of 1945, the Allied occupation assumed the character of a post-armistice occupation in the usual sense of the word. By that time

(1) the Allied military operations in Italy were reduced to a non-combatant routine and the military interests of the Allied occupant comprised only the maintenance of public order and safety for the protection of the Allied troops and installations in Italy, of the lines of communications for the Allied Armies in Austria, and of the Italian population itself;

<sup>71</sup> See UNITED STATES AND ITALY, 1936-1946, DOCUMENTARY RECORD, Dept. of State, Pub. 2669, European Ser. 17 (1946).

(2) the territory of northern Italy was wrested from the enemy and came under the Allied control.

With the pressure of the military exigencies reduced, the two reasons given by the Chief Civil Affairs Officer as underlying the refusal of the Allied Military Government to implement Decree 224 at the time of its enactment, had in substance disappeared.

On the other hand, the Allied policy toward the Italian Government mentioned at the beginning of this section became gradually more effective. Even before the termination of hostilities it acquired an added impetus from the important developments in the course of the second part of 1944 and early in 1945: notable concessions of a financial and political nature were made to the Italian Government mitigating in fact the rigor of the terms of surrender; the Allied occupation was lifted in the rear areas of the Italian theater of operations and important sectors of the national administration were restored to the Italian Government.<sup>72</sup>

Notwithstanding these considerations of policy, the Allied Military Government apparently still felt at the time of the Schio trial in the fall of 1945, several months after the end of hostilities in Italy, that it could not modify its stand on Decree 224. The reason for this position may perhaps be found in the wave of increased criminality and tense atmosphere prevailing at that time in the liberated areas of northern Italy. In addition to common offences, many crimes, such as repeated attacks on jails, were being committed for political reasons. In these circumstances, the Allied Military Government may have believed that the power to impose the death penalty in "civil crimes" such as that of Schio, under the unamended text of the Penal Code, was still indispensable for the maintenance of public safety and order for which the Allied occupation authorities were responsible in accordance with Article 43 of the Hague Regulations.

Crime was rampant even in the unoccupied territory of Sicily and of central and southern Italy all of which had been returned to the administration of the Italian Government. In order to combat the in-

<sup>72</sup> On the 25th of October 1944, Allied Governments announced the exchange of diplomatic representatives with the Italian Government; on January 30, 1945 the Combined Chiefs of Staff issued a directive outlining a new status for Italy; this directive was communicated to the Italian Government by the Acting President of the Allied Commission Mr. MacMillan in an "Aide-mémoire" of February 24, 1945; Allied Commission officers were withdrawn from southern Italy on April 1, 1945. See REVIEW OF ALLIED MILITARY GOVERNMENT AND ALLIED COMM., Allied Comm., p. 67-69 (1914).

creased activities of the traditional Sicilian organized banditry, the Italian Ministry of Interior prepared and the Italian Government approved in May, 1945 an emergency measure restoring the death penalty, as a temporary exception, for certain offences such as armed robbery and the organization of armed bands.<sup>73</sup> This decree was "implemented" in the occupied territory by the usual order of the Allied Military Government and became effective in the Province of Vicenza, where the Schio massacre took place, on July 12, 1945, six days after the date of the massacre. Had this decree been in force in the Province of Vicenza on the date of the crime, perhaps one or more of the defendants might have been charged and sentenced to death under its provisions, assuming that the prosecution would have been able to gather enough evidence to prove that they had "organized" the armed band of Schio assassins and assuming further that the Court would have followed the language of the decree rather than the legislative intent. However, the Allied prosecutor being limited as he was to the law prevailing in Vicenza Province at the time of the massacre, drafted the charges under the unamended text of the Penal Code without any reference either to the emergency decree or to Decree 224.

The final action was taken on the *Schio* case in December, 1945, less than two weeks before the termination of the Allied Military Government in Italy.<sup>74</sup> At that time the Chief Civil Affairs Officer announced that he had commuted the death sentences to life imprisonment by an act of pardon based on consideration of the above described Allied *public policy*<sup>75</sup> and specifically on the desire of the Allied Military Government

(a) to preserve the uniformity and continuity of the Italian legal system,<sup>76</sup>

<sup>73</sup> Legislative Decree of the Lieutenant General of Realm, No. 234 of May 10, 1945.

<sup>74</sup> After December 31, 1945, Allied Military Government continued only in the disputed Venezia Giulia area.

<sup>75</sup> The Chief Civil Affairs Officer did not base the pardon on grounds relating to the persons of the defendants who placed themselves "beyond the consideration of clemency." He also declared that there was no reason *at law* for the reversal of the judgment.

<sup>76</sup> See ¶ 6 of the statement as quoted in Part I. "Had the accused been charged with the same offense in territory restored to the Italian Government, they could not have been so sentenced even in an A.M.G. court. Similarly, the death sentences could not have been confirmed by me had the northern [Allied occupied] Regions been restored to Italian Government administration by this date."

(b) to facilitate the return in Italian law to the pre-fascist concepts,<sup>77</sup>

(c) not "to override Italian basic concepts of justice" even though they might differ from the corresponding ideas in the Allied legal systems.<sup>78</sup>

The policy, heretofore subordinated to the Allied military interests in the preservation of public safety was finally permitted to prevail and Decree 224 was in effect applied, if only indirectly, through the medium of a pardon and for the sole purpose of the Schio sentences.

Had the Chief Civil Affairs Officer intended to pass an act of a more general character than a mere pardon he might have given instructions, before taking action on the death sentences, for an Allied Military Government order to be issued which would provide that Decree 224, previously excluded from application in occupied territory by an Allied Military Government Order, should henceforth apply therein. The death sentences would then have been modified by operation of law pursuant to article 2 of the Italian Penal Code which states as follows:

" . . . If the law of the time when the offence was committed and the subsequent laws are different, that law shall be applied whose provisions are more favorable to the offender unless an irrevocable sentence has been pronounced. . . ." <sup>79</sup>

As it was, Decree 224 became effective in northern Italy upon the termination of Allied Military Government on Jan 1, 1946.

## VI

### CONCLUSION

The decision in the *Schio* case presents a conflict facing an occupant under the armistice occupation, between a "new" law of the "absent" sovereign affecting a fundamental legal institution of the occupied

<sup>77</sup> See §§ 5 and 7 of the Statement of the Chief Civil Affairs Officer.

<sup>78</sup> See § 7 of the Statement of the Chief Civil Affairs Officer.

<sup>79</sup> By virtue of Art. 1 of Decree 224 which would thus have become effective in occupied territory the death sentences would have been commuted to life imprisonment with hard labor. However, the legislative adjustment requiring a publication of a formal A.M.G. order in the Italian Official Gazette and delivery thereof to the Prefect of each Province in occupied territory (see footnote 7, supra) would have hardly been completed in the 11 days period remaining between the date of the final decision in the *Schio* case (December 20, 1945) and the termination of the Allied occupation in northern Italy (December 31, 1945).

country and the occupant's own decision based upon his refusal to apply such law in occupied territory.

While reaffirming the legality of such refusal the occupant nevertheless modified his original decision and in the final disposal of the case followed in effect the provisions of the "new" law.

The decision will no doubt strengthen those modern tendencies in the British and American doctrine which require the occupant to give the widest possible application in occupied territory, within the limits of his legitimate military interests, to "absent" sovereign's "new" laws.