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THE LAW OF BELLIGERENT OCCUPATION IN THE AMERICAN COURTS

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". . . there is at present a new wave of unrest which seems about to engulf the world again in wars. Our armed forces are now in many foreign lands and those of enemy nations, before long, might

occupy some part of our own territory. The principles of the law of belligerent occupation assume a larger importance in this view of events, and might become of quite considerable moment."

So Judge Ritter concludes his exhaustive opinion in the recent case of *Aboitiz & Co. v. Price*,[1] thereby directing our attention to the many enigmas and subtleties of the law of belligerent occupation.

The case involved an action on several promissory notes executed by the defendant, an American citizen, while he was a prisoner of war in the Philippine Islands during their occupation by the Japanese armies in World War II. These notes were delivered to the plaintiff in exchange for Japanese occupation currency which was then used by the defendant to obtain food and other privileges by bribing the Japanese guards, thereby alleviating somewhat the sufferings and starvation conditions existing in the Japanese prisoner of war camps. All negotiations leading to the promissory notes and the delivery of the occupation currency had necessarily been carried out in secret because of a Japanese Army edict forbidding such currency traffic, on pain of death, with American prisoners of war.[2]

By way of defense, the defendant urged the following: (1) the Japanese invasion and occupation of the Philippines had been declared criminal and in violation of at least nine different treaties by international and military tribunals sitting at Nuremberg and Tokyo. This criminality went to the entire Japanese enterprise, including the issuance of military occupation currency. Thus, the currency received by the defendant was an illegal consideration, and thereby rendered these contracts unenforceable. (2) In the alternative, the Japanese occupation government was a valid de facto one set up by a military conqueror, whose acts must therefore be accorded recognition everywhere. Thus, the Japanese decree forbidding this type of transaction with American prisoners of war rendered these notes invalid where made. Accordingly, under usual theories of Conflict of Laws, a contract illegal where made will not be enforced anywhere.

Despite this apparent dilemma, the court, nonetheless, enforced the notes and rendered judgment for the plaintiff. The decision was placed

[1] (D.C. Utah 1951) 99 F. Supp. 602 at 629. It is sincerely hoped that this prophecy by Judge Ritter proves in fact to be erroneous; that the wars feared never, in fact, materialize; that, concomitantly the law of belligerent occupation becomes of lesser, rather than greater moment; and accordingly that this study proves to be a mere venture into legal fantasy of little practical use or advantage.

[2] This Japanese edict was not actually proved by the defendant, but the court assumed it to be in existence for the purposes of its decision.

on one of four alternative grounds. (1) There is common law authority that contracts of necessity, even if made in enemy territory, are enforceable after the war.[3] (2) Under the rules of Conflict of Laws, these notes were to be performed in the United States, where performance is not illegal.[4] (3) The Japanese decree forbidding these notes was a penal one and will not be enforced in a foreign forum. Further, this decree is obnoxious to the public policy of the United States and thus will not be enforced here.[5] (4) The international law of belligerent occupation is recognized by the American courts and determines the extent to which a military occupant may lawfully act. Under that law, the issuance by the Japanese of occupation currency was valid and will be recognized after the war, while the penal decree was invalid and will not be recognized after the war.

It is clear that this last ground was much relied on by the court in reaching its decision. Accordingly, this comment will investigate the extent to which the law of belligerent occupation has actually become a part of the American municipal law,[6] and thereby attempt to determine whether it was properly applied in this case.

I. *The Peculiar Status of the Belligerent Occupant*

It is important to recognize that the status of the belligerent occupant is peculiarly distinctive in both international and American municipal law. It arises when an enemy invades, seizes, and firmly governs territory against the authority of the rightful sovereign. Legal consequences resulting from belligerent occupation are strictly local, and cannot extend in any manner to territory or things not actually under

[3] Antoine v. Morshead, 6 Taunt. 237, 128 Eng. Rep. 1025 (1815); Daubuz v. Morshead, 6 Taunt. 332, 128 Eng. Rep. 1062 (1815); Crawford and McLean v. The William Penn, (C.C. Wash. 1819), Fed. Cas. No. 3,373; Nelson v. Trigg, 3 Tenn. Cas. 733 (1877); MCNAIR, LEGAL EFFECTS OF WAR, 3d ed., 114 et seq. (1948).

[4] It is seriously questioned whether the usual rules of Conflict of Laws are even applicable to the situation of the belligerent occupant. See infra, Part I. Even if applicable, it may be queried whether the court correctly applied them in this case; or by the rule here stated, satisfactorily answered defendant's allegation that the essential validity of a contract is determined by the place of its making. See note 65 HARV. L. REV. 527 (1952); STUMBERG, CONFLICT OF LAWS 266 (1951).

[5] See supra note 4. Occasional English authority permits the enforcement in the British courts of contracts usually considered void under its "proper" law on the grounds that British public policy so requires, Banco de Vizcaya v. Don Alfonso De Borbon y Austria, [1935] 1 K.B. 140; DICEY, CONFLICT OF LAWS, 6th ed., 604 (1949). However the usual American view rarely permits the public policy of the forum to invalidate a defense, 65 HARV. L. REV. 527 (1952).

[6] A caveat is in order. The law of belligerent occupation is yet in its formative stages in the American courts. Many conceivable fact situations have never been specifically dealt with by our courts. In this study, more reliance has been placed on dictum and other generally enunciated propositions appearing in the cases than might otherwise be sanctioned.

the control of the military occupant. As a legal phenomenon, such a status can be only temporary, and ceases ipso facto with the termination of the occupation.[7]

Thus, the position of the belligerent occupant is sui generis in American law. It is something less than full sovereignty, yet obviously more than a completely illegal and void venture.[8] In *Thorington v. Smith*,[9] the Supreme Court aptly described the belligerent occupant as a de facto government of paramount force, one whose existence is maintained by active military power within the territories and against the rightful authority of an established and lawful government.

The actual effect of belligerent occupation of a territory has not always been clear. Until the middle of the eighteenth century, much prominence was accorded to the view that military occupation by an enemy actually resulted in a change of sovereignty.[10] In effect, it was held that the allegiance of the inhabitants of the occupied territory to the ejected sovereign was dissolved, and transferred to a new sovereign represented by the enemy occupant. Occasionally, this view has found some support in the common law courts. Such was the holding of *The Fama*.[11] Later, this case was expressly approved by our Supreme Court in *Leitensdorfer v. Webb*[12] which dealt with the American military occupation of New Mexico in 1846.

Present views seem to reject this position and recognize, instead, that the sovereignty of the legitimate government is merely suspended during belligerent occupation. However, it is equally recognized that the inhabitants of the occupied territory, nonetheless, owe temporary obedience and allegiance to the hostile government during the period that it remains. Accordingly, for that period of time, the territory and its inhabitants will be treated as enemies, even by the legitimate sovereign.[13]

[7] McNAIR, LEGAL EFFECTS OF WAR, 3d ed., c. 7 (1948); RECTO, THE LAW OF BELLIGERENT OCCUPATION, cc. 15, 16 (1946); Stein, "Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation," 46 MICH. L. REV. 341 (1948); Ireland, "The Jus Postliminii and the Coming Peace," 18 TULANE L. REV. 584 (1944).

[8] Ibid.; 2 OPPENHEIM, INTERNATIONAL LAW, by Lauterpacht, 6th ed., §167 (1940).

[9] 8 Wall. (75 U.S.) 1 (1868).

[10] McNAIR, LEGAL EFFECTS OF WAR, 3d ed., c. 7 (1948); RECTO, THE LAW OF BELLIGERENT OCCUPATION, c. 15 (1946); HALL, INTERNATIONAL LAW, 7th ed., 462 (1917).

[11] 5 C. Rob. 106, 165 Eng. Rep. 714 (1804).

[12] 20 How. (61 U.S.) 176 at 177 (1857).

[13] See authorities cited at notes 7 and 8. In Laurel v. Misa, (P.I. 1947) 3 DECISION L.J. 32, it was held that upon enemy military occupation, the sovereignty of the legitimate government cannot be suspended; but, rather, that the ability to exercise the rights of sovereignty merely passes to the belligerent occupant.

Such a view was recognized as part of the common law by Justice Marshall as early as 1815.[14] Later, Justice Story, in discussing the British military occupation of Castine, Maine, during the War of 1812, succinctly held the law to be as follows:[15]

> "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. The sovereignty of the United States over the territory was, of course, suspended, and the 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. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period . . . to be deemed a foreign [enemy] port."

Throughout our history, this view has gained consistent recognition. It was followed by our courts during the American military occupation of Tampico, Mexico,[16] in the military occupations arising from the Civil War,[17] during the American occupations arising from the Spanish-American War,[18] and more recently in the Japanese occupation of the Philippines during the recent World War.[19] It has also been recognized as the correct approach by the highest courts of England,[20] and the Philippine Republic.[21, 22]

[14] Thirty Hogsheads of Sugar, Benzton v. Boyle, 9 Cranch (13 U.S.) 191 (1815).

[15] United States v. Rice, 4 Wheat. (17 U.S.) 246 at 253 (1819). See also United States v. Hayward, (C.C. Mass. 1815) Fed. Cas. No. 15,336.

[16] Fleming v. Page, 9 How. (50 U.S.) 602 (1846).

[17] Thorington v. Smith, 8 Wall. 1 (1868); New Orleans v. S.S. Co., 20 Wall. (87 U.S.) 387 (1874); Ford v. Surget (concurring opinion), 97 U.S. 594 (1878); Coleman v. Tennessee, 97 U.S. 509 (1878); Isbell v. Farris, 5 Cold. (45 Tenn.) 426 (1868).

[18] MacLeod v. United States, 229 U.S. 416, 33 S.Ct. 955 (1912); Ho Tung & Co. v. United States, 42 Ct. Cl. 213 (1907). See also Shanks v. Dupont, 3 Pet. (28 U.S.) 242.

[19] Application of Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946).

[20] V/O Sovfracht v. N.V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij, [1943] A.C. 243, discussing the German occupation of Holland.

[21] Co Kim Cham v. Valdez Tan Keh et al., 41 Philippine O.G. 779, 75 Phil. 113 (1945), discussed in 22 PHIL. L.J. 17 (1947); Peralta v. Director of Prisons, 42 O.G. 198, 75 Phil. 285 (1946); cf. Laurel v. Misa, (P.I. 1947) 3 Decision L.J. 32. Other Philippine cases are discussed and collected in 30 J. COMP. LEG. & INT. L., part 3, 11, 17, et seq. (1949). This article also deals with the recognition accorded enemy occupation acts in the liberated countries of Burma, the Philippines, Greece, and France.

[22] Technically, the Republic of the Philippines is now a foreign country. However, many of the important decisions dealing with the effect of the Japanese occupation during

It seems also that this view is at least implicitly recognized by the Executive branch of our government,[23] and has probably gained legislative force in the United States by our ratification of the Hague Convention dealing with the regulations concerning the Military Authority of an Occupant over the Territory of a Hostile State.[24]

This distinctive status of the belligerent occupant needs to be reemphasized. For to it is attached a body of law peculiar to it alone. Attempts by some courts to deal with the acts of the belligerent occupant by application of principles of law designed to govern the acts of a de jure or sovereign government overlook this fundamental fact and result in much confusion.[25] Thus, where the court in the *Aboitiz* case sought to justify its decision invalidating the Japanese Army penal decree by applying the usual theories of Conflict of Laws,[26] it is seriously contended that the court failed to meet the prime issue: whether this act was valid under the law of belligerent occupation.

II. *Competence of the Belligerent Occupant to Act*

An attempt will be made here to determine the legal limits which the American courts have imposed on the belligerent occupant to govern and exploit an occupied territory. While these limitations are not always precise and well-defined, yet they give rise to significant legal consequences after the occupation has ended. At least there is some authority that acts surpassing such limits will be considered "ultra vires" and completely void by our courts.[27] Further, recent pronouncements have indicated that even criminal liability may be imposed on the officers of the belligerent government who ordered such acts.[28]

World War II were promulgated while the Philippines were yet a part of the United States, and therefore bound by our Constitution and laws. Further, all of these decisions are based on decisions of the United States Supreme Court. Accordingly, it is felt that these Philippine decisions would be very persuasive authority in our own courts, and they have been freely used and cited in making this study.

[23] 9 Op. Atty. Gen. 140 (1909); Paragraph 26, Instructions for the Government of the Armies of the United States in the Field, G.O. No. 100 (1863), Adj. General's Office, 7 MOORE'S DIGEST OF INTERNATIONAL LAW 265 (1906) quoted in RECTO, THREE YEARS OF ENEMY OCCUPATION, Appendix H, 163 at 166 (1946);BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW, 3d ed., c. 3 (1914).

[24] 36 Stat. L. 2295, 2306 (1910).

[25] MCNAIR, LEGAL EFFECTS OF WAR, 3d ed., 348 et seq. (1948). See supra notes 4 and 5, and authorities there cited.

[26] At page 623 et seq. In using this analysis, the court was much influenced by the English case of Ogden v. Folliet, infra note 70, which seemed to have made the same error. See note 25 supra.

[27] Aboitiz & Co. v. Price, (D.C. Utah 1951) 99 F. Supp. 602; 30 J. COMP. LEG. & INT. L., part 3, 11, 17 et seq. (1948).

[28] See infra this section.

Actually any military invasion and subsequent belligerent occupation is merely one facet of a broader war effort on the part of some government. Thus, the commander in charge of the belligerent occupation appears in the occupied territory primarily as an agent of a warring government. His first responsibility is to that government to carry out the military operations with which he has been charged. To the occupant, the persons in the occupied territory are enemies who have just been defeated. He rules them by force of arms. Accordingly, he may subject them and their property to what laws he wills, and from him there can be no redress as long as the occupation continues.[29]

This position is still fully accepted by our own government in sending our armies into war.[30] Thus, the United States Army Rules of Land Warfare, although professing adherence to the recognized international rules of warfare, point out that the principal object of a military occupation is to provide ". . . for the security of the invading army, and to contribute to its support and efficiency and success of its operations."[31] It is further stated that "all functions of the hostile government—legislative, executive or administrative . . . cease under military occupation or continue only with the sanction . . . of the occupier."[32]

Shocking as it may seem, this absolute right of a belligerent to control an occupied territory, unlimited by any rule of law, was long recognized by our courts. Dealing with the British occupation of Castine, Maine, during the war of 1812, Justice Story readily conceded that the ". . . enemy [occupant] acquired . . . the fullest rights of sovereignty. . . . The inhabitants . . . were bound by such laws, and such only, as it chose to recognize. . . ."[33] Even after the Civil War, significant authority adhering to this view can be found. In *Young v. United States*,[34] Justice Waite summarized as follows:

> "As war is necessarily a trial of strength between belligerents, the ultimate object of each, in every movement, must be to lessen the

[29] DAVIS, ELEMENTS OF INTERNATIONAL LAW 334 (1901); RECTO, LAW OF BELLIGERENT OCCUPATION, c. 7 (1946); MCNAIR, LEGAL EFFECTS OF WAR, 3d ed., c. 17 (1948).

[30] Paragraph 26, Instructions for the Government of the United States Armies in the Field, G.O. No. 100 (1863), supra note 23; BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW, 3d ed., 23 (1914); See also United States v. Best, (D.C. Mass. 1948) 76 F. Supp. 138, 857.

[31] United States Army Rules of Land Warfare, art. 285 (1940).

[32] Id., art. 283. See also Stein, "Application of Law of Absent Sovereign in Territory under Belligerent Occupation," 46 MICH. L. REV. 341 (1948), which also points out that this is the prevailing British Army view; Schwenk, "Legislative Power of Military Occupant to Act," 54 YALE L.J. 393 (1945).

[33] United States v. Rice, 4 Wheat. (17 U.S.) 246 at 253 (1819). See also United States v. Hayward, (C.C. Mass. 1815) Fed. Cas. No. 15,336.

[34] 97 U.S. 39 at 60 (1873).

> strength of his adversary, or add to his own. As a rule, whatever is necessary to accomplish this end is lawful; and between the belligerents, each determines for himself what is necessary. . . . An aggrieved enemy must look alone for his indemnity to the terms upon which he agrees to close the conflict."

However, this extreme view was not generally shared by our courts in dealing with the Civil War cases. Although it was consistently recognized that the occupant had the right to organize a government over the subdued territory,[35] it was also generally recognized that this government was not absolute, and that some limitations existed beyond which that government could not lawfully act. For example, it was held that the belligerent occupant could not freely engage in "marauder and assassin."[36] In dealing with immovable property, it was held that the belligerent occupant was limited to the right to its use during the occupation, but could not gain an absolute title to such property so as to authorize its alienation.[37] Further, some recognition was given to the rule that municipal laws of the occupied territory continued in effect even after the appearance of the belligerent occupant, at least until superseded by actual decree from the occupying power;[38] and even such laws as were so displaced would be revalidated with the conclusion of the occupation.[39]

Significant changes in American thinking were crystallized during the period leading to and immediately following the Spanish-American War. From an attitude which had formerly emphasized the absolute power of a belligerent to act evolved a theory that international custom and usage had placed very real limitations on the methods of waging war. Indeed, some acceptance was being accorded the view that a belligerent occupant might well be under certain *duties* which he was bound to perform in governing an occupied territory.

Much of this thinking was eventually embodied in the Hague Conventions, particularly the annex to Hague Convention IV regarding the Rules on Land Warfare to which the United States became a party

[35] Isbell v. Farris, 5 Cold. (45 Tenn.) 426 (1868); Texas v. White, 7 Wall. (74 U.S.) 700 (1868); Thorington v. Smith, 8 Wall. (75 U.S.) 1 (1868); Baldy v. Hunter, 171 U.S. 388, 18 S.Ct. 890 (1898).

[36] Coleman v. Tennessee, 97 U.S. 509 at 519 (1878).

[37] United States v. Hayward, (C.C. Mass. 1815) Fed. Cas. No. 15,336; New Orleans v. S.S. Co. (dissenting opinion), 20 Wall. (87 U.S.) 387 (1874).

[38] Coleman v. Tennessee, 97 U.S. 509 (1878); Ketchum v. Buckly, 99 U.S. 188 (1878); Wingfield v. Crosby, 5 Cold. (45 Tenn.) 241 (1867).

[39] Isbell v. Farris, 5 Cold. (45 Tenn.) 426 (1868). But see Co Kim Cham v. Valdez Tan Keh et al., 41 O.G. 779, 75 Phil. 113 (1945), which holds that non-political laws promulgated by the belligerent occupant remain in force even after the occupation until actually repealed by legislative acts of the returning sovereign.

in 1907.[40] Most significant of these rules was that embodied in Article 43 which stated: "The [belligerent occupant] . . . 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."

Other sections of these rules forbade the occupant to force the subdued inhabitants to furnish information about their army, or means of defense,[41] forbade the occupant to compel an oath of allegiance to him,[42] required the occupant to recognize family honor and private property,[43] forbade confiscation of private property except when necessary and properly compensated for,[44] forbade pillage,[45] limited the type and manner in which the occupant could lay and collect taxes,[46] forbade general penalties on the general population for acts of individuals,[47] limited the requisitions in kind and service which could be required by the occupant,[48] strictly regulated the confiscation of public property,[49] and regulated the confiscation of religious, charitable, and educational property.[50]

President McKinley, although recognizing that the powers of a military occupant were absolute and supreme, actually endorsed these rules in the orders which he issued to his military commanders during the Spanish-American War.[51] It was not long thereafter that the courts followed his lead.[52]

Most significant of the cases is that of *Ochoa v. Hernadez y Morales*.[53] There the question considered was whether the commanding general of the United States forces occupying Puerto Rico had validly issued a decree changing the prescriptive period of adverse possession

[40] 36 Stat. L. 2295, 2306 (1910).
[41] Id., art. 44.
[42] Id., art. 45.
[43] Id., art. 46.
[44] Id., arts. 46, 53.
[45] Id., art. 47.
[46] Id., arts. 48, 49.
[47] Id., art. 50.
[48] Id., art. 52.
[49] Id., arts. 53, 54, 55.
[50] Id., art. 56.
[51] Quoted in Ochoa v. Hernandez y Morales, 230 U.S. 139, 33 S.Ct. 1033 (1913); Other orders of the executive to this same effect are collected in MacLeod v. United States, 229 U.S. 416 at 426, 33 S.Ct. 955 (1912).
[52] Occupying force is bound by international law, and thus has the duty to respect the municipal laws until validly changed because of military necessity, Ho Tung v. United States, 42 Ct. Cl. 213 (1907); Occupying force can lay and collect taxes only as prescribed by Hague Convention, MacLeod v. United States, 229 U.S. 416, 33 S.Ct. 955 (1912).
[53] 230 U.S. 139, 33 S.Ct. 1033 (1913).

necessary to gain title to land. The Supreme Court held that our occupation forces were bound by international law to secure public safety, social order, and private property and, by issuing this decree, had overstepped these limits. The decree was held void and of no force whatsoever.

Thus, our courts became committed to the proposition that while a belligerent occupant could lawfully use its military power to carry on its war effort and protect the security of its army,[54] there were very definite limits beyond which no military occupant could act, and to surpass these limits, which are embodied in the Hague Convention and other accepted international usages, would result in a complete nullity.

Recent American decisions not only affirm this position but carry it much farther. It has been held that the international law not only creates limitations beyond which the belligerent occupant may not act but also imposes affirmative duties on him to govern properly and to insure public order within the occupied territory, and that failure to recognize these limitations and duties may now result in criminal liability on the responsible occupation officials.[55]

Of much interest are recent decisions of the Supreme Court of the Philippine Republic, which has had to deal with the question of belligerent occupation at some length since the conclusion of World War II.[56] That court has succinctly stated the law as follows:[57]

> "All law, by whomsoever administered, in an occupied district is martial law. . . . The words 'martial law' are doubtless suggestive of the power of the occupant to shape the law as he sees fit. . . . The only restrictions or limitations imposed upon the power of the belligerent occupant to alter the laws or promulgate new ones . . . so far as it is necessary for military purposes, that is, for his control of the territory and the safety and protection of his army, are those imposed by the Hague Regulations, the usages established by civilized nations, the laws of humanity and the requirements of public conscience."[58]

[54] Aboitiz & Co. v. Price, (D.C. Utah 1951) 99 F. Supp. 602 at 612; 65 HARV. L. REV. 527 (1952).

[55] Application of Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946); Madsen v. Kinsella, (4th Cir. 1951) 188 F. (2d) 272, affd. (U.S. 1952) 72 S.Ct. 699, which holds that there is a duty on the occupation authorities to provide for the security of persons, property, and administration of justice. Cf. United State v. Best, (D.C. Mass. 1948) 76 F. Supp. 138, 857.

[56] Co Cham v. Valdez Tan Keh et al., 41 O.G. 779, 75 Phil. 113 (1945); Peralta v. Director of Prisons, 42 O.G. 198, 75 Phil. 285 (1946); 22 PHIL. L.J. 17 (1947); 30 J. COMP. LEG. & INT. L., part 3, 11, 17, et seq. (1949).

[57] Peralta v. Director of Prisons, 42 O.G. 198, 75 Phil. 285 at 300 and 298 (1946).

[58] Applying these principles, the Philippine courts have made the following holdings: that according to the Hague Regulations, a belligerent occupant gains the use to real prop-

III. *Recognition of Belligerent Occupant's Acts and Decrees after the Occupation Has Terminated*

It is now settled that the municipal laws in existence at the time of an enemy invasion continue to bind the inhabitants[59] and are not ipso facto displaced merely because of the appearance of the belligerent occupant government.[60] Until actually superseded by an order or decree of the occupant, criminal prosecutions, contracts, settlement of estates, marriages, and other transactions carried on during the occupation under the authority of these municipal laws are valid and will be fully recognized and enforced after the return of the legitimate sovereign.[61]

A difficult problem is raised, however, where the belligerent occupant has actually altered or superseded the municipal laws, or otherwise taken action to exploit the occupied territory to his advantage; and the validity of these acts are challenged after the war. Just how far the American courts will recognize such acts and transactions consummated thereunder has given rise to a complicated and seemingly confused body of law.

Conceivably, this problem might be decisively determined by the terms of the armistice or peace treaty which brings the struggle between

erty only during his occupation, but cannot authorize its alienation thereafter, Banaag v. Encarnacion, (P.I. 1949) 5 DECISION L.J. 414; that in accordance with Rule 56 of the Hague Convention, public property of the legitimate sovereign devoted to religious, charitable, cultural, and educational purposes must be treated by the belligerent occupant in the same manner as private property, ibid; that present holders of goods and securities which were stolen or confiscated by the Japanese authorities in violation of the Hague convention are not regarded as having title thereto, which, instead, is still deemed to be in the original owners, Saavedra v. Pecson, (P.I. 1946), G.R. No. L-260 quoted in 30 J. COMP. LEG. & INT. L., part 3, 17 at 25 (1949); Enriquez v. Manuel, (P.I. 1946) 43 O.G. 104; that confiscation by the Japanese of a bank account in violation of the Hague Convention was void, Milne v. Philippine National Bank, Civil Case No. 71,200, Court of First Instance of Manilla, Feb. 4, 1946, cited in 30 J. COMP. LEG. & INT. L., part 3, 17 at 25 (1949).

[59] However, the occupation government and its soldiers are not bound by these laws, but only by the military laws of their own country. Coleman v. Tennessee, 97 U.S. 509 (1878); Ruffy v. Chief of Staff, Philippine Army, 43 O.G. 855, 75 Phil. 875 (1946); Peralta v. Director of Prisons, 42 O.G. 482, 75 Phil. 275 (1945).

[60] Ibid. Madsen v. Kinsella, (4th Cir. 1951) 188 F. (2d) 272, affd. (U.S. 1952) 72 S.Ct. 699; Ketchum v. Buckly, 99 U.S. 188 (1878); Wingfield v. Crosby, 5 Cold. (45 Tenn.) 241 (1867); Ho Tung v. United States, 42 Ct. Cl. 213 (1907).

[61] Ibid. MCNAIR, LEGAL EFFECTS OF WAR, 3d ed., 114 (1948); Baldy v. Hunter, 171 U.S. 388, 18 S.Ct. 890 (1898); Peralta v. Director of Prisons, 42 O.G. 198, 75 Phil. 285 (1945). Alcantara v. Director of Prisons, 42 O.G. 482, 75 Phil. 494 (1945) and Indac v. Director of Prisons, (P.I. 1946) 3 DECISION L.J. 96 uphold the validity of criminal prosecutions for violation of municipal laws carried out by the belligerent occupant. The validity of occupation period private contracts is upheld in Rono v. Gomez, (P.I. 1949) 5 DECISION L.J. 590 and discussed in 30 J. COMP. LEG. & INT. L., part 3, 17 at 20 (1949).

the belligerents to a close.[62] However, our courts have rarely been given the advantage of such definitive authority. Often no such treaty exists; and even when existing, much is not specifically covered by its terms. It is this problem—absence of any treaty provision controlling the extent to which the belligerent occupant's acts are to be recognized following the conflict—which is discussed in this section.

One large area of this law has already been developed, viz., that the legal competence of the belligerent occupant to act is governed by the Hague Regulations and the laws of war accepted by international usage. Any enemy act taken beyond these limitations will be deemed by our courts to be void ab initio. Such acts will probably give rise to a claim for damages or reparations by those aggrieved by such action, and may, indeed, create a criminal liability on the officers of the enemy who ordered them.[63]

Some authority has suggested that this test be the sole one: that any act of the belligerent occupant beyond his competence be considered completely invalid by the returning sovereign while those acts within his competence be accorded full recognition thereafter.[64] Such, however, is not the approach of our courts. Rather, our courts seem to validate fully certain acts, while others, admittedly within the competence of the belligerent occupant, are granted limited recognition, or none at all, after the war.

One of the earliest rules accepted by the American courts required the returning sovereign to give full recognition to all taxes and import duties assessed by the belligerent occupant.[65] Thus, suits by our government to reimpose these assessments after the termination of hostilities on the ground that they were invalidly paid to the enemy have been consistently denied.[66]

As it was the belligerent occupant who had the actual military power to rule an occupied territory, similarly, it is the returning sovereign who has the actual judicial power to determine the extent to

[62] Ireland, "The Jus Postliminii and the Coming Peace," 18 TULANE L. REV. 584 (1944); Stein, "Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation," 46 MICH. L. REV. 341 (1948).

[63] See Part II of this comment. See also 30 J. COMP. LEG. & INT. L., part 3, 17 (1949), discussing the Philippine cases to this effect, particularly Milne v. Philippine National Bank, Civil Case No. 71,200, Court of First Instance of Manilla, Feb. 4, 1946.

[64] Ford v. Surget (concurring opinion), 97 U.S. 594 (1878); Fraleigh, "Validity of Acts of Enemy Occupation Authorities Affecting Property Rights," 35 CORN. L.Q. 89 (1949), who quotes several international writers to this same effect; Ireland, "The Jus Postliminii and the Coming Peace," 18 TULANE L. REV. 584 (1944).

[65] United States v. Rice, 4 Wheat. (17 U.S.) 246 (1819).

[66] Ibid., Ho Tung & Co. v. United States, 42 Ct. Cl. 213 (1907); MacLeod v. United States, 229 U.S. 416, 33 S.Ct. 955 (1912).

which it will accord recognition to the decrees of its erstwhile enemy.[67] Understandably, any decree emanating from an enemy, just defeated in a life struggle by the government under whom a court is sitting, necessarily carries to that court a high degree of odium and revulsion.[68] Particularly is this true when that enemy was an insurgent attempting to usurp the very authority of the government now dealing with its decrees. It is unfortunate from the point of view of this analysis that so much of our law on belligerent occupation stems from periods of rebellion. It has added a factor which has often caused much confusion in the thinking of the courts.[69]

This was well illustrated following the American Revolution in the celebrated English case of *Ogden v. Folliet.*[70] This case dealt with the validity of a New York act confiscating certain property of a loyal British subject who resided in New York during the war. Barely considering the rights of a belligerent occupant to take such action, the court laid down the rule that any act by a rebellious enemy was a complete nullity in the British courts.[71] Thus, Grose, J.,[72] described the New York act as "mere waste paper . . . an act of treason."

The same problem was faced by our courts following the Civil War. An individual reading of any particular case might indicate a full acceptance of the above English rule;[73] however, when all are read together, it is clear that no such stringent policy was generally followed by our courts.

[67] Aboitiz & Co. v. Price, (D.C. Utah 1951) 99 F. Supp. 602 at 623; FEILCHENFELD, INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION, §457 et seq. (1942).

[68] Aboitiz & Co. v. Price, (D.C. Utah 1951) 99 F. Supp. 602 at 610.

[69] MCNAIR, LEGAL EFFECTS OF WAR, 3d ed., 348 et seq. (1948).

[70] This case was argued three times: in the Common Pleas, 1 H. Bl. 123, 126 Eng. Rep. 75 (1789); in the King's Bench, 3 T.R. 726, 100 Eng. Rep. 825 (1790); and the House of Lords, 4 Bro. P.C. 111, 2 Eng. Rep. 75 (1792).

[71] The more narrow proposition for which this case is generally cited is that an English court will not enforce a penal law of a foreign state. The fact that this happened to be such a law is unfortunate since it confused the fundamental question of the validity of a belligerent occupant to promulgate it, MCNAIR, LEGAL EFFECTS OF WAR, 3d ed., 349 (1948). However, in Dolder v. Lord Huntingfield, 11 Ves. Jr. 283 at 294, 32 Eng. Rep. 1097 (1805), the court made the specific holding stated.

[72] In the Kings Bench, 100 Eng. Rep. 825 at 830.

[73] Almost every Civil War case had language suggestive of the following which is quoted from Horn v. Lockhart, 17 Wall. (84 U.S.) 570 at 580 (1873): ". . . the invalidity of any transaction . . . originating [from a Confederate source] ought not to be a debatable matter in the courts of the United States. No legislation of Alabama, no act of its convention, no judgment of its tribunals, and no decree of the Confederate government, could make such a transaction lawful."

This was first indicated immediately after the Civil War in *Texas v. White.*[74] There the Supreme Court pointed out that acts of the Confederate government necessary to peace and good order among citizens if not in furtherance or support of the rebellion were valid, and would be accorded recognition by the courts. Within a year, the Court went even farther and held that even though the Confederate government was a rebel one, nonetheless, it was the government of paramount power in the South. Accordingly, it was to be treated in the same manner as a foreign belligerent temporarily occupying a portion of the United States.[75]

Our courts have since consistently recognized that some sort of civil society must continue in an occupied territory, even if under the authority of a particularly distasteful or criminal government.[76] Our courts will not investigate the criminality of the occupant's venture in engaging in war when determining the validity of its acts and decrees but will apply the laws of the belligerent occupant indiscriminately if, in fact, that status has arisen.[77] The rationale for so holding was summarized in *Baldy v. Hunter*[78] as follows:

> "That, within such [occupied] territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate States;
>
> "That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held to be invalid *merely* because those governments were organized in hostility to the Union . . .; this, because the existence of war . . . did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws. . . .

[74] 7 Wall. (74 U.S.) 700 at 733 (1868).

[75] Thorington v. Smith, 8 Wall. (75 U.S.) 1 (1868).

[76] Fraleigh, "Validity of Acts of Enemy Occupation Authorities Affecting Property Rights," 35 CORN. L.Q. 89 at 92 (1949).

[77] Ibid.; Thorington v. Smith, 8 Wall. (75 U.S.) 1 (1868); Aboitiz & Co. v. Price, (D.C. Utah 1951) 99 F. Supp. 602.

[78] 171 U.S. 388 at 400-401, 18 S.Ct. 890 (1898).

"[Accordingly] judicial and legislative acts in the . . . Confederate States should be respected by the courts if they were not 'hostile *in their purpose* or mode of enforcement. . . .'"

The Civil War cases,[79] and others which have arisen since the conclusion of World War II (particularly the Philippine cases),[80] represent the bulk of the American law on this subject. From them may be deduced two general propositions which are used by our courts in determining the effect of a belligerent occupation act after the war.

First. Acts promulgated by the belligerent occupant which are necessary to public order and the ordinary operation of civil society are valid, and will be fully recognized after the conclusion of the occupation. Indeed, there is authority that such acts continue in force even with the return of the rightful sovereign until actually altered or repealed by him[81] and further, such a repeal can operate only prospectively, and an attempt to make the repeal operate retroactively would be invalid.[82]

Following this theory, the courts have fully validated the following transactions: issuance of special currency by the occupation government;[83] payment of debts or taxes in such special currency by the inhabitants of the occupied territory;[84] issuance of occupation government securities and the investment therein by the inhabitants;[85] creation of special courts by the occupation government;[86] leasing of public land by the occupation authorities;[87] building of a hospital for wounded soldiers of the occupation government.[88]

[79] Many of these cases are collected and discussed in Aboitiz & Co. v. Price, (D.C. Utah 1951) 99 F. Supp. 602. Others will be cited infra.

[80] Many of these Philipipne cases are collected and discussed in 30 J. COMP. LEG. & INT. L., part 3, 17 (1949), and 22 PHIL. L.J. 17 (1947). Others will be cited infra.

[81] Co Kim Cham v. Valdez Tan Keh et al., 41 O.G. 779, 75 Phil. 113 (1945); Baptista v. Castaneda, (P.I. 1947) 42 O.G. 3186 holds that a divorce law promulgated by the Japanese occupation authorities was invalidated by a decree of General MacArthur when the Philippine Islands were liberated by his forces.

[82] Ibid.; 30 J. COMP. LEG. & INT. L., part 3, 17 (1949).

[83] Thorington v. Smith, 8 Wall. (75 U.S.) 1 (1868). This rule has gained universal acceptance throughout the world. See Haw Pia v. China Banking Corp., (P.I. 1948) 4 DECISION L.J. 274 dealing with Japanese occupation of the Philippines; Hangkam Kwingtong Woo v. Liu Lan Fong, (House of Lords 1951) 2 All E.R. 567 dealing with Japanese occupation of Hong Kong. Other authorities collected in Aboitiz & Co. v. Price, (D.C. Utah 1951) 99 F. Supp. 602 at 615 and 30 J. COMP. LEG. & INT. L., part 3, 17 et seq. (1949).

[84] Ibid.; Sixto Carlitos v. Fidelity and Surety Co. of the Philippines, (P.I. 1947) 3 DECISION L.J. 292 (1947); Philippine Trust Co. v. Marenta, (P.I. 1949) 5 DECISION L.J. 202; Everett Steamship Company v. Bank of Philippine Islands, (P.I. 1949) 5 DECISION L.J. 586. *Contra,* Nordlinger v. Vaiden, (D.C. Miss. 1867) Fed. Cas. No. 10,296.

[85] Baldy v. Hunter, 171 U.S. 388, 18 S.Ct. 890 (1890); Cf. Horn v. Lockhart, 17 Wall. (84 U.S.) 570 (1873).

[86] Peralta v. Director of Prisons, 42 O.G. 198, 75 Phil. 285 (1945).

[87] New Orleans v. Steamship Co., 20 Wall. (87 U.S.) 387 (1874) dealing with the

Second. Acts of a political nature promulgated by the belligerent occupant which directly aid his war effort will not be recognized as valid following the conclusion of hostilities. Further, the burden of establishing that an act contributed directly to the enemy war effort is on the person alleging the same.[89]

Following this theory, the Civil War cases held that the following acts were direct aids to the political effort of the South and therefore invalid:[90] confiscation of United States bonds by the State of Texas in order to provide supplies for the rebellion;[91] investment by an executor of an estate of its proceeds in Confederate bonds;[92] sequestration by the Confederate government of a debt owned by a loyal federal citizen;[93] purchase of cotton from the Confederate government;[94] payment to the State of Mississippi of a debt owed to it under the authority of a war statute designed to provide funds for military supplies.[95]

While this second proposition was constantly reiterated in the American Civil War cases, some instances arose where it seems not to have been fully applied. Particularly was this deviation noticeable in cases where the enemy occupant had taken steps to further its war effort, which had been completely or partially executed during the period of occupation, and whose validity was being challenged after the war.

Ford v. Surget[96] is a good illustration of this anomaly. There, cotton, belonging to a resident of Mississippi had been burned by a Confederate soldier, acting under orders, to prevent it from falling into the hands of approaching federal troops. After the war, the owner brought a civil suit for damages against the Confederate soldier responsible for the destruction. Correctly, it is believed, the plaintiff

Union occupation of New Orleans during the Civil War. However, there is much authority that this holding was erroneous, and that it is beyond the power of the belligerent occupant to alienate the title to immovable property. See ibid., dissenting opinion, and Banaag v. Encarnacion, (P.I. 1949) 5 DECISION L.J. 414.

88 Fottrel v. German, 5 Cold. (45 Tenn.) 580 (1868).

89 Branch v. Mechanics Bank, 52 Ga. 525 (1874).

90 Some of these acts might at the present time be considered beyond the competence of the belligerent occupant as determined by international law, and therefore void ab initio, Part II supra. However, this idea was not yet fully developed at the time of the Civil War.

91 Texas v. White, 7 Wall. (74 U.S.) 700 (1868).

92 Horn v. Lockhart, 17 Wall. (84 U.S.) 570 (1873). However, this case was probably overruled in result by Baldy v. Hunter, 171 U.S. 388, 18 S.Ct. 890 (1890).

93 Williams v. Bruffy, 96 U.S. 176 (1877).

94 Sprott v. United States, 20 Wall. 459 (1874). The actual holding of this decision was that the purchaser of this cotton could not later recover in the Court of Claims for its value because of its capture and later confiscation by federal troops.

95 New Orleans, St. L. & C. R. Co. v. State, 52 Miss. 877 (1876).

96 97 U. S. 594 (1878).

alleged that this act of destruction was a direct contribution to the Southern war effort and could not therefore be recognized as valid by the courts. According to the broad terms of the above second proposition, it would appear that a good cause of action had been stated. The Supreme Court fully reaffirmed its previous holdings regarding the validity of Confederate acts and seemed also to grant that this was an act directly connected with the prosecution of the war. Yet, it held that the action would not lie, pointing out that "acts of legitimate warfare" taking place within the territory of the belligerent and during his occupation were immune from later suit.

How, then, does this case fit into the broad general rule enumerated in the second proposition? Actually, it appears that the correct rule must be restated thus: that legitimate enemy political acts of warfare will be given full effect and validity in so far as they are executed prior to the end of the belligerent occupation; but in so far as they are not executed by that time, they will not be recognized thereafter by the courts of the returning sovereign.

No American cases of recent origin have arisen to test this hypothesis or elaborate upon it, although it seems to be implicitly sustained by our adherence to the Hague rules and other international law which concede to a belligerent the right to engage in some forms of "lawful" warfare.[97] However, much help can be gotten from recent Philippine decisions dealing with the validity of Japanese occupation acts during World War II.

The Supreme Court of the Philippines has aptly described enemy political acts as those which are "not defined in the municipal laws [of the ejected sovereign] . . . incident to a state of war and necessary for the control of the occupied territory and the protection of the army of the occupier. They are . . . acts which tend, directly or indirectly, to aid or favor the enemy and are directed [toward] the welfare, safety, and security of the belligerent occupant."[98] These acts are held to be ". . . good and valid, since [they are] within the . . . power or competence of the belligerent occupant to promulgate . . . [but] ceased to be good and valid *ipso facto* upon the reoccupation of these islands."[99]

Such a thesis may well be tested by the problem faced by the court in the *Aboitiz* case in dealing with the validity of the Japanese Army

[97] Parts I and II supra.

[98] Alcantara v. Director of Prisons, 42 O.G. 482, 75 Phil. 494 (1945).

[99] Peralta v. Director of Prisons, 42 O.G. 198, 75 Phil. 285 at 303 and 305 (1945). Because of this rule, the court in this case directed the release of a prisoner who had been sentenced to prison under a Japanese occupation edict designed primarily to protect the security of its armies during the occupation.

penal decree forbidding currency traffic with American prisoners of war.[100] This decree seems precisely the type of political act defined by the Philippine courts: one incident to a state of war and necessary for the security of the enemy occupant.[101] Had persons been convicted of violating that decree during the Japanese occupation and either executed or sentenced to prison, it seems highly doubtful that our courts, following the rule of *Ford v. Surget,* would declare this act invalid and allow a suit for damages or reparations after the war.[102] Yet, where, as in the *Aboitiz* case, the decree was not applied prior to the end of the occupation, it ceased to have validity and could, accordingly, be disregarded by the American courts. It is submitted that this reasoning more logically and easily explains the result actually reached by the court in disregarding this decree, consistent with the law of belligerent occupation, than the Conflict of Laws theory actually used by the court.[103]

Summary

The law of belligerent occupation is sui generis in American law. When applicable, it pre-empts the field, and other principles of law, designed for sovereign or de jure governments, ought not be considered. By that law, the competence of the belligerent occupant to act is determined by the Hague Regulations and other internationally accepted rules of war. Acts taken beyond the competence of the belligerent occupant will be considered as void ab initio by the American courts.

Acts within the competence of the belligerent occupant will be accorded recognition by the American courts according to two propositions. First, if necessary to public order and the ordinary operation of civil society, they are valid, and will be fully recognized even after the occupation has ended. Second, if of a political nature, incident to furthering the war effort of the occupant, such acts will be valid in so far as they are completely executed during the occupation, but will cease to have validity, ipso facto, with the end of the occupation.

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[100] See Introduction supra.

[101] See 65 HARV. L. REV. 527 (1952).

[102] This is also the view of the Philippine courts. See 30 J. COMP. LEG. & INT. L., part 3, 17 at 25, ¶9 (1949).

[103] See notes 100 and 101.