

AD-A050 504

AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OHIO
THE PROTECTION OF NATURAL RESOURCES DURING BELLIGERENT OCCUPATI--ETC(U)
1977 R L DIAZ
AFIT-CI-78-39

F/6 5/4

UNCLASSIFIED

NL

| OF |

AD
A050504



END
DATE
FILMED

4 -78

DDC

AD A 050504

78-39

① SC

AD No. DDC FILE COPY

THE PROTECTION OF NATURAL RESOURCES
DURING BELLIGERENT OCCUPATION

DDC
RECEIVED
FEB 28 1978
B

By Robert L. Diaz
Graduate Student
Harvard Law School
1976-77

DISTRIBUTION STATEMENT A
Approved for public release;
Distribution Unlimited

UNCLASSIFIED

SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

REPORT DOCUMENTATION PAGE		READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER CI 78-39	2. GOVT ACCESSION NO. 4 AFIT-CI-78-39	3. RECIPIENT'S CATALOG NUMBER
4. TITLE (and subtitle) 6 The Protection of Natural Resources During Belligerent Occupation.		5. TYPE OF REPORT & PERIOD COVERED Thesis
7. AUTHOR(s) 10 Captain Robert L. Diaz		6. PERFORMING ORG. REPORT NUMBER
9. PERFORMING ORGANIZATION NAME AND ADDRESS AFIT/CI Student Harvard Law School, Cambridge MA		8. CONTRACT OR GRANT NUMBER(s)
11. CONTROLLING OFFICE NAME AND ADDRESS AFIT/CI WPAFB OH 45433		10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
14. MONITORING AGENCY NAME & ADDRESS (if different from Controlling Office)		12. REPORT DATE 12 1977
		13. NUMBER OF PAGES 61 Pages 12 63p
		15. SECURITY CLASS. (of this report) Unclassified
		15a. DECLASSIFICATION/DOWNGRADING SCHEDULE
16. DISTRIBUTION STATEMENT (of this Report) Approved for Public Release; Distribution Unlimited		
17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)		
18. SUPPLEMENTARY NOTES 18 APPROVED FOR PUBLIC RELEASE AFR 190-17. JERRAL F. GUESS, Captain, USAF Director of Information, AFIT MSGT, USAF DEPUTY DIRECTOR OF INFORMATION		
19. KEY WORDS (Continue on reverse side if necessary and identify by block number)		
20. ABSTRACT (Continue on reverse side if necessary and identify by block number)		

I INTRODUCTION

The rights of a belligerent to the natural resources of occupied territory is governed by the law of belligerent occupation. Since World War II, interest within the United States in this body of law has been on the wane.¹ In part perhaps, this lack of interest is the result of provisions in the United Nations Charter,² which makes war itself difficult to justify.^{2a} Accordingly, it has been difficult to visualize a war in which the United States would become a belligerent occupant as that term is traditionally meant.³ Nevertheless, wars continue to exist where belligerent occupation occurs. Unfortunately, in such wars the belligerent occupant has few guidelines concerning its use and disposition of natural resources found in occupied territory.

Neither the literature nor judicial opinion has dealt satisfactorily with the issue of belligerent rights in the natural resources of occupied territory.⁴ Past analyses have proceeded on the assumption that natural resources are private rather than public property.⁵ This assumption fails to take account of the growing body of state practice treating natural resources as state property.⁶

Recently, the attention of the United States and the world has focused on the belligerent occupation of territory seized by Israel after the Six Day War in 1967. Most of this attention--at least that which has received the greatest publicity--has centered on Israeli practices relating to human

Site Section	<input checked="" type="checkbox"/>
if Section	<input type="checkbox"/>
	<input type="checkbox"/>
ADJUTY CODES	

Dist.	AVAIL.	and/or	SPECIAL
A			

(Sova)

(cont to 1)

-2-

while the major concern has been with Israeli practices relating to human rights,⁷ On the periphery, however, ^{there} has ^{also} been the broader problem of Israeli economic practices in the occupied territories. With the increased importance of oil in 1974, it was inevitable that Israeli practices relating to the oil fields of the occupied territory would be brought into sharp focus.⁸

This article focuses on the problem of protecting natural resources in territory held by force of belligerent occupation. ^{They} This problem is discussed in the context of the belligerent occupant's right to the use and disposition of such natural resources, without regard to the issue of the lawfulness of the occupation.⁹ This article assumes that the law of belligerent occupation applies in all cases.

It is hoped that this analysis will provide useful guidelines for judging present practices in belligerent occupied territory. More importantly, however, it is hoped that the present analysis will serve to focus world attention on several inadequacies existing under customary international law, and will lead to consideration of new treaty provisions to remedy them.^{9a}

II. APPLICATION OF THE LAW OF BELLIGERENT OCCUPATION TO NATURAL RESOURCES

Natural resources situated in a belligerently occupied territory are afforded limited protection under customary international law, which embodies the Hague Regulations of 1907.¹⁰ These regulations were formulated at a time when it was thought that wars should work as little hardship as possible on the civilian inhabitants of occupied territory.¹¹ Conceptions of

property were crude, and ideas of natural resources were mostly limited to coal and timber.¹² Oil, if it was conceived of at all, was considered in much the same way we do today, for light and heat, but on a smaller scale. Oil as a major source of energy for industry and transportation was unknown.¹³

As often happens when the law is codified and thereby frozen, the underlying rationale and assumptions are superseded in time by new ones. In this case, the conception of laissez-faire economics which the Hague Regulations embraced were replaced by new concepts embracing a need for greater state control.¹⁴ Distinctions between public and private property became blurred in the capitalist societies, and abrogated to a large extent in the socialist ones.¹⁵ And principles for the protection of natural resources ascended to a position of great importance.¹⁶

As the emerging nations, which found themselves resource rich and industry poor, came to realize the enhanced importance enjoyed by the natural resources which they possessed, they began to seek ways to safeguard and protect them. In general, such protection has taken two forms. First, natural resources were declared to be state property, not subject to private ownership.¹⁷ Second, methods were instituted to assure that a large percentage of the profits reaped from the sale of natural resources remained in the country where the resource was situated.¹⁸

The result of these changed conceptions is that today, the problem of the protection of natural resources under the law of belligerent occupation takes on the character of trying to force square pegs into round holes--much of the old body of

law simply does not fit. And where it does fit, it fits badly. Perhaps the best illustration of this problem can be seen when one attempts to analyze a belligerent occupant's rights in natural resources under the law set forth in the Hague Regulations.

A. Traditional Analysis

There is seldom any difficulty in ascertaining rights and obligations under the Hague Regulations when the belligerent occupant takes possession of traditional kinds of property, such as automobiles and livestock. However, when the property is in the form of natural resources, a different result follows. The analysis then requires a convoluted and often tortured journey through the Hague Regulations.

At the outset, a distinction should be made between developed and undeveloped natural resources.¹⁹ By "developed" is meant resources which are in the process of being mined, extracted or otherwise exploited. "Undeveloped resources" refers to undiscovered natural resources such as oil and mineral deposits.

As to the former, the mere act of territorial possession by a belligerent occupant may alter or affect three interrelated rights. First, there is the right of ownership of the resource itself. This right normally is expressed in terms of title. Second, there may be a right granted by a concession for the exploitation of the natural resource. This right may be exclusive in some cases but not in others. Finally, there may be rights of ownership in whatever plant and equipment has been devoted to exploration

and development of the resource.

As to undeveloped resources, the act of territorial occupation will affect the existing possessory rights of the ousted sovereign as well as certain inchoate rights such as rights of future exploration and development. The question of a belligerent occupant's right to seek and exploit new resources is crucial and will be discussed elsewhere herein.²⁰ First, however, this article focuses on the issue of a belligerent occupant's rights in the developed resources of occupied territory.

Traditional analysis of the protection afforded developed resources under the Hague Regulations requires that the belligerent occupant ascertain first whether the resource is publicly or privately owned, and second, whether the resource should be treated as movable or immovable property. In determining the character of ownership, traditional analysis has tended to view concession rights as changing the character of ownership in the underlying resource, at least in some instances, from public to private.²¹ The validity of this analysis will be discussed elsewhere herein.²²

(1) Publicly Owned Resources

Where a natural resource is held under state ownership, the extent of the protection afforded it under the Hague Regulations is determined by the characterization of the resources as movable or immovable property. In general, public movable property is afforded less protection than public immovable property.²³

The initial question which arises in trying to characterize property as movable or immovable is one involving choice of law. Is it the law in force in the occupied territory at the time of occupation which determines a resource's status, as some have claimed?²⁴ Is it the belligerent's own law? Or is it international law? Judicial precedent is scant.

(a) The concept of movable and immovable property

In French State v. Etablissement Monmousseau,²⁵ France argued that it had a right to recover from the defendant twenty metal wine vats which had formerly been owned by the French army but which had been sold by the German occupation authorities. The French argued that the vats had taken on a status similar to permanent fixtures and, in support of this proposition, cited the wine vats classification as "immeuble par destination" under French law. Therefore, France submitted, the German occupation authorities could not have acquired title to them during the occupation, and France, which still held good title, had a right to recover them from the subsequent purchaser.²⁶

The Court of Appeals of Orleans, France, rejected the French argument, stating:

The concept of "immeuble par destination" is a creation of French law....It does not exist in a number of legal systems. In particular, German law does not recognize it. None of the Articles of the Hague Convention refer to it. It cannot figure in the Convention without the formal consent of the contracting parties whose municipal law does not recognize it. Consequently the Hague Convention, in speaking of the movable and immovable property of the occupied State and its

inhabitants, must be considered to use these terms in the customary sense attached to them by the law of all states.²⁷

The court's analysis in Monmousseau makes sense. Moreover, there is much evidence within the internal body of the Hague Regulations to suggest that the concept of movable and immovable property is to be decided, not on the basis of national law, but rather on the basis of international law. In this regard, the court's opinion is in accord with the majority of cases construing the Hague Regulations.²⁸

The Hague Regulations uniformly treat natural resources as immovable property.²⁹ Accordingly, it is difficult to conclude that natural resources could ever be classified as movable property under the Hague Regulations even where natural resources are classified as movable property by the law of the occupied territory.³⁰ Since this is true, there is no need to follow traditional analysis at this point which would require a determination of whether natural resources qualify under Article 53 as property^{which} may be used for military operations."³⁰

Since state owned natural resources are immovable property they can never be exploited by the belligerent occupant under Article 53. Thus the sole method by which a belligerent occupant can acquire rights to the enjoyment of such resources is under the provisions of Article 55. This article provides in part:

The occupying State shall be regarded only as administrator and usufructuary of public building, real estate, forests, and agricultural estates belonging to the hostile State, and situated in

occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.³¹

By providing the belligerent occupant with only vague standards for the use of state owned natural resources, Article 55 leaves the law of natural resource protection in occupied territory in an unsatisfactory state from the vantage point of both belligerents. For instance, what is meant by the phrase "safeguard the capital of the properties" as applied to a natural resource? And what are the "rules of usufruct" which the belligerent occupant is required to apply? Unfortunately, there are no easy answers.

(b) The concept of usufruct

It is an easy task to apply concepts of usufruct to public buildings and land, whose very capital is not consumed through their use and enjoyment. Natural resources, on the other hand, especially where they consist of oil or mineral deposits are something quite different. To enjoy their benefits, one must extract them from the land and eventually consume them. Does Article 55, therefore, on its face prohibit a belligerent occupant from exploiting the natural resources of the occupied territory, even where these resources have already been developed under the ousted sovereign? Historically, this has not been the case.³² It now seems to be undisputed that a belligerent occupant does acquire certain limited rights to the continued exploitation of developed resources in occupied territory.³³ The nature and extent of these rights, however, is

in dispute. This dispute centers on the concept of usufruct.

The concept of usufruct, like the concept of movable property, poses the initial problem of choice of law. It now is clear, however, that the "rules of usufruct" are not a body of law specified in any separate legal system, as some have suggested,³⁴ but rather the general principles of law which the civilized nations share in common.³⁵ The problem, therefore, has been one of ascertaining the meaning of usufruct shared by the civil and common law systems.

All legal systems seem to recognize that a belligerent occupant has a right to continue exploiting natural resources in substantially the same quantities or levels that such resources were exploited prior to occupation.³⁶ Beyond that, however, a substantial body of disagreement exists concerning the meaning of the term "usufruct" in relation to three issues. First, there is the issue whether production of the natural resource can be increased by the belligerent occupant. Second there is the issue whether the belligerent occupant can explore for and develop new resources in the occupied territories. Third, there is the issue whether any of the resource can be exported from occupied territory.

Some authors have argued that production may never be increased, on the theory that to do so would constitute waste.³⁷ Historically, however, the concept of waste as applied to the exploitation of natural resources relates to the methods of extraction and exploitation rather than to the mere act of increased production.³⁸ For example, when the Russians occupied

the MAORT^{38a} oil fields in Rumania after World War II, they instituted methods of forced production which the United States protested as not being the best method for continued long term production.³⁹ The forced production permitted a greater volume of oil to be extracted from the fields in a shorter time, but only at the expense of damaging the capacity of the fields to sustain production well into the future.

The problem with the argument that production can never be increased is that it fails to consider the reasons for the level of production which existed in the occupied territory at the time of its occupation. The argument proceeds on the assumption that production levels had been previously pegged to some "proper" level based on concepts of good husbandry or conservation. However, this may not be the case at all.^{39a} Production levels may have been set arbitrarily and pegged to motives or profit or tax avoidance instead of conservation. Moreover, the resource itself may have been in the process of development. Perhaps only one oil well had been placed in production, and others were contemplated.

It is submitted that the proper rule to be applied in such a situation is the one which evolved out of United States occupation practices in Germany after World War II. That rule would not prohibit production increases, but would require that the use of all public immovable property be neither negligent nor wasteful in character.⁴⁰ Production practices which violate this principle can be said, per se, to damage the capital of the natural resource and to constitute a violation of the Hague Regulations. In cases of fully developed resources, a presumption

should exist that whatever level of production had been normal prior to occupation, it is only that level which is proper after occupation.⁴¹ A belligerent occupant which increases production beyond such levels should be forced to demonstrate that preoccupation levels were arbitrarily set or development of the resource incomplete.

The issue of whether a natural resource can be exported from the occupied territory for use in the belligerent occupant's home economy has arisen recently in the Middle East conflict.⁴² Arguments against such a right seem to be based on a misreading of the precedents.⁴³ If such a prohibition exists, it must have originated from the pronouncements of the Nuremberg Military Tribunals.⁴⁴ Unfortunately, these cases seem only to have added to the confusion surrounding the Hague Regulations rather than reduced it. Illustrative of this point is the famous Krupp case.^{44a}

There, Krupp and eleven others who were affiliated with Krupp's enterprises, were charged with various war crimes. Count two of the indictment alleged that Krupp and nine others had

committed war crimes and crimes against humanity ... in that they participated in the plunder of public and private property, exploitation, spoliation, devastation, and other offenses against property and the civilian economies of countries and territories which came under the belligerent occupation of Germany. ...^{44b}

The particulars of the indictment alleged that in France, Krupp had "acquired rights and interests in mines, including the Wolfram ore mine 'Montbelleux'" and had "founded jointly

with other German concerns the Erzgesellschaft, , for joint exploitation of French ore deposits, both colonial and European."^{44c} In Yugoslavia, Krupp was alleged to have attempted to gain "control of the ChromAsseo, A.G., and its Jesserina chrome mines" and was alleged to have eventually "succeeded in obtaining a share of the chrome ore".^{44d} In Greece, Krupp was alleged to have taken advantage of the fears of the Greek owners of the "Lokris" nickel ore mine that the mine might be confiscated and was able thereby to acquire a controlling interest.^{44e} And in the Soviet Union, Krupp was alleged to have participated in the spoliation of "all Soviet economic resources".^{44f}

The tribunal found Krupp and five others guilty of count two.^{44g} The problem however is what significance to give this finding. Despite some wonderfully overbroad language in the judgement, the truth is Krupp and the others were acquitted of the specific acts of spoliation which related to natural resources.^{44h} The bulk of the acts which were found to violate the Hague Regulations related to seizure, operation, and dismantling of factories and machinery. However, the tribunal did specify the defendant's involvement in the German Raw Materials Trading Company (ROGES) as one of the specific acts of spoliation. The problem with this finding is that it is difficult to ascertain what the crime was.

ROGES was founded at the Request of the Germany Army High Command, the Economic and Armaments Office and the Reich

Ministry of Economics.⁴⁴ⁱ Its purpose was "to utilize the raw materials in the occupied countries of western Europe and to accelerate their use in the German war economy".^{44j} Despite these references to raw materials, the crime of Krupp and the others seems to have been the purchase from ROGES of "certain items such as machines and materials" with knowledge that such goods "were confiscated in the occupied territories and were so called booty goods".^{44k} Thus, Krupp and the others were never convicted of exploitation of the natural resources of the occupied territories, despite compelling evidence, in one case, that they had caused production to increase from zero to 50 tons of ore and that they had continually exported the raw materials to Germany for use there.^{44l}

What then does Krupp mean? The best answer seems to be not that it is a violation of the Hague Regulations to increase production or to export natural resources, but that it is a crime to do so as part of deliberate and premeditated design and policy. In other words, the findings of spoilation are really an adjunct to the findings of guilty to waging aggressive wars.

Such a position seems the only way--at least on a legal plane--to reconcile the decision with the attitude of the United States concerning Soviet practices in the MAORT oil fields. There, the United States' protest note to the Soviets over the Soviets' takeover and operation of the MAORT oil fields in Rumania did not even raise the point of illegal exports yet

it was known that this was a Soviet practice.⁴⁵ Certainly, international law can be made by acquiescence to a state's known practices as well as by positive involvement.⁴⁶

Although it is not clear, it seems that a belligerent occupant which is carefully exercising its rights of usufruct so as not to do material injury to the capacity for continued production, may export, sell or otherwise dispose of the publicly owned natural resources of occupied territory. The argument to the contrary focuses on the denial to the belligerent occupant of the right to alienate public real property.^{46a} The argument however ignores the belligerent occupant's historical right to

"work the mines." This practice indicates that the prohibition has been modified in the case of natural resources to the extent of permitting a transfer of possession of such resources to occur. Title, if any, however, would seem to be a defeasible one in light of allied practice after World War II which allowed natural resources to be returned to their country of origin.⁴⁷

Although the point seems never to have been raised, an argument can be made that the requirement to safeguard the capital of the property imposes a duty on the belligerent occupant to pay for what it takes.⁴⁸ Historically, however, this has not been the case.⁴⁹

Of all the issues, the one of the belligerent occupant's right to new development is the most problematical. The major legal systems don't agree, and unfortunately, there is little historical precedent.⁵⁰

The earliest (and only) case recognizing the right of a belligerent occupant to develop new resources in occupied territory arose during the United States occupation of Cuba after the Spanish American War.⁵¹ While Cuba was occupied, several persons (apparently U.S. nationals) applied to the War Department for permission to open mining claims there. Previously, it had been determined that the United States was exercising the rights of a belligerent occupant in Cuba.⁵² On this occasion, the Attorney General of the United States reaffirmed the prior determination that the United States enjoyed the status of a belligerent occupant and concluded that the United States could grant the mining claims.⁵³ However, for

considerations of policy which were not made manifest, the Attorney General advised against such a course.⁵⁴ Whether the claims were ever granted is unknown and this appeared until recently to be the sole opinion on the question.⁵⁵

During World War I, Germany did increase production of captured oil fields but it is unclear whether this was a result of new exploration and development or other means.⁵⁶

The experience arising out of World War II is also not well documented, perhaps due in part to loss of records through bombing raids.⁵⁷ It is known that new oil production fields were opened in Rumania.⁵⁸ The only recently documented case of new exploration is that of Israel in the Sinai Peninsula.⁵⁹

Most arguments which refuse to recognize a right of the belligerent occupant to develop new natural resources are based on analogy to both the common law and civil law conception of usufruct as applied to landlord-tenant relationships.⁶⁰ Under this conception, a tenant is permitted to work and exploit resources which have already been developed, under the theory that the right to do so was reflected in and formed part of the consideration for the setting of rent.⁶¹ This, of course, is not true in the case of belligerent occupation, where the "tenant" has acquired rights by the use of force. One wonders, therefore, whether a better formulation of the relationship would be that of trustor-trustee rather than landlord-tenant.⁶² The trustee relationship carries with it stronger conceptions of corpus preservation and therefore a higher standard of care on

the belligerent occupant. Moreover, a trustee relationship carries with it what seems to have been an underlying conception of the Hague Regulations: the belligerent occupant should do as little as possible to alter the character of the land prior to acquisition of sovereignty.⁶³

Although it is unclear, it seems reasonable to conclude that a belligerent occupant is precluded from exploring for undeveloped resources in occupied territory with a view to their development.⁶⁴ However, this rule does not prevent a belligerent occupant from seeking to increase the production of existing developed resources so long as the rules for such increased production are followed.⁶⁵ Accordingly, in the case of oil deposits, it would be reasonable to sink development wells, even though such wells have an exploratory nature to them, but it would not be permissible to sink true exploratory wells in areas where no production has occurred previously.⁶⁶

(2) Privately owned resources

Under the Hague Regulations, private property can never be confiscated.⁶⁷ This does not mean, however, that a belligerent occupant can acquire no rights in private property, for the term "confiscate" is a term of art which should be defined as "to acquire valid title without payment of compensation." Certain kinds of private movable property may be "seized" (another term of art) under Article 53,⁶⁸ and the use of all types of private property may be requisitioned under Article 52.⁶⁹

As discussed earlier, the Hague Regulations treat all publicly owned natural resources as immovable property.⁷⁰ The status of privately owned natural resources, however, is not as easily ascertained. Nevertheless, the only judicial precedent had no difficulty in classifying one natural resource, oil, as immovable property.⁷¹

In the Bataafsche Petroleum case,⁷² the appellants contended that oil in situ could never be considered movable property subject to seizure as "munitions-de-guerre" under Article 53. The court agreed, holding apparently as a matter of international rather than local law, that oil in situ was immovable property not subject to seizure under Article 53.⁷³ Thus Bataafsche Petroleum rejects, albeit subsilentio, the contention which is sometimes put forth that it is the law of the occupied territory which governs a property's status as movable or immovable.⁷⁴ In this respect, the decision is in accord with judicial precedent concerning state owned property.⁷⁵ Thus, it now seems clear that all natural resources, whether publicly or privately owned, are to be characterized as immovable property.

The sole way in which a belligerent occupant can acquire rights in privately owned natural resources is through the right of requisition granted in Article 52. However, this article places two limitations on the belligerent occupant's right to requisition. First, the requisition must be for the needs of the army of occupation. Second, the requisition must

be in proportion to the resources of the country. These two concepts have proved to be the source of confusion in the past.⁷⁶

(a) The concept of proportionality

Unfortunately, there are no cases where the concept of proportionality is analyzed separately from the concept of occupation needs. In the case of Administration of the Waters and Forests v. Falk,⁷⁷ a case dealing with publicly owned immovable property, the concept of proportionality was discussed in the context of a belligerent occupant's right to cut trees. It was held that to permit the cutting of trees in excess of the proportion considered normal under good forestry practices constituted waste and a violation of the concept of usufruct. In Bataafsche Petroleum,⁷⁸ the concept of proportionality was discussed in the context of plunder. There the court said that the International Military Tribunal had indicated

that to exploit resources in occupied territories in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws of war.⁷⁹

The operative principle appears to be consideration of the needs of the local economy. In addition, the concept seems to embrace the idea of good husbandry found under the doctrine of usufruct.^{79a}

What these cases indicate is that the concept of proportionality is used to determine the amount or level of production permitted the belligent occupant. The concept of proportionality alone, however, does not imply any restrictions on the

use which may be made by the belligerent occupant of the resource once its right to a certain level has been established.

Thus for example, where the entire prewar production of a country's privately owned natural resource had been exported prior to the time of occupation, it seems logical to conclude that the belligerent occupant would be entitled to requisition up to at least that same level of production. What use the belligerent occupant is entitled to make of the natural resource is to be determined by the concept of occupation needs.

(b) The concept of occupation needs

There has been a strong tendency on the part of most authors⁸⁰ and many courts⁸¹ to construe the phrase "for the needs of the army of occupation" to mean "for the direct or immediate use of the occupation army." Apparently, this interpretation stems from the travaux preparatoires of the First Hague Peace Conference in 1899 which dealt with the forerunner of Article 52.⁸² This tendency, however, ignores the way this concept has been interpreted since World War II.

During the military occupation of Germany, the Allies placed controls on the German economy under the authority of the Potsdam Agreement⁸³ and JCS Directive 1067.⁸⁴ Admittedly, these controls were not synonymous with the restrictions in the Hague Regulations. Nevertheless, the United States did feel bound to apply the principles of the Hague Regulations to its occupation and there are many legal opinions stemming from the Office of Military Government and its successor, HICOG,^{84a} construing them.

Under Article 15(b) of the Potsdam Agreement, there was a Hague-like formulation that the Allied controls of the German economy should only be to the extent "necessary to meet the needs of the occupying forces."⁸⁵ JCS Directive 1067 on the other hand, contains the more restrictive language: "essential to meet the needs of the Occupation Forces."⁸⁶

During the occupation, the concept of "needs of the occupation forces" was quickly translated into the concept of occupation costs. The question then arose as to whether the Potsdam Agreement and JCS Directive 1067 permitted certain costs incurred outside Germany to be passed back on the German economy as occupation costs. The answer was a resounding "yes".

The legal advisor to the Allied High Commission held that the phrase "'needs of the occupying forces' as used in...

the Potsdam Agreement..means all the expenses and costs of occupation, including [the expense of] goods brought into Germany for use of the occupation forces as well as goods acquired for that purpose in Germany, clothing and pay of the occupying forces."⁸⁷

While this opinion is authoritative only in so far as it purports to interpret the Potsdam Agreement, nevertheless it can be argued that in light of past United States recognition of the guiding character of the Hague Regulations,^{87a} the opinion should be given weight as evidence of their meaning as well.

There are similarities between the Potsdam Agreement and the Hague Regulations which support such an argument. First, both purport to impose limitations on the right of the belligerent to take action within the occupied territory. Second, both impose

this limitation in language which is virtually identical. There would seem to be no reason for interpreting the phrase differently in each instance, unless the purpose of the two instruments was at variance. Here, the purpose is the same: to limit the right of the belligerent to take unlimited action.

Under either the restrictive view of the concept of occupation needs or the more expansive view which was used in post-war Germany, the right to requisition the substance of the natural resource for use by the army of occupation is recognized.⁸⁸ Thus an army of occupation could requisition timber for the construction of buildings or bridges needed by occupation forces. The problem with the restrictive view arises when it is not the substance of the resource itself which is sought, but rather the proceeds from its sale.

For example, under the restrictive view it would not be permitted the occupation army to sell the resource in order to raise funds for construction costs, since such action would not be for the army's immediate use. Under the restrictive view, one wonders how immediate the use has to be. Suppose the resource is requisitioned in one portion of occupied territory for use by the army of occupation elsewhere in the same territory. Would the fact that the resource requires several days in shipment negate the concept of immediacy? If not, then why shouldn't the belligerent occupant, even under the restrictive view, be permitted to sell the resource and immediately

apply the proceeds to the occupation needs elsewhere within the occupied territory?

The best case for the application of a rule which would permit the belligerent occupant the limited right to export a resource would seem to be the case of crude oil. If there are no refineries in the occupied territory, such oil is of little value. Nevertheless, its potential as a fuel is tremendous. It would seem logical, therefore, to permit the belligerent occupant a limited right to export the crude oil to a refinery and then to require that the distilled products thereof, such as gasoline, be returned to the army of occupation for use in the occupied territories. Under a formulation of the term "needs" which includes the concept "immediate", the belligerent occupant would be precluded from accomplishing this. However, it is submitted that the belligerent occupant would be permitted to follow such a course under the Hague Regulations. If this can be done, then why can't the oil be sold and the proceeds used to defray occupation cost? Certainly, such a rule would make sense especially when the belligerent occupant's right is limited by the concept of proportionality discussed earlier.⁸⁹ Nevertheless, such a rule has never been adopted.^{89a}

Unfortunately, the ownership of natural resources does not always lend itself to as easy an analysis as the above illustrations might imply. As is often the case, substantial private rights are affected regardless of the character of ownership in the underlying resource. Historically the trend seems to be to treat the entire package of rights as property of mixed ownership and to sift through the respective rights to determine which

predominates.⁹⁰

(3) The concept of mixed ownership

When speaking of mixed ownership, it is necessary to differentiate between two distinct situations where this term is used. First, there is the situation where property is held under private ownership, but because of some special relationship which exists between the property and the state, it is considered mixed. Normally, such property is described as being of a "mixed character." Included in this category are bank accounts in state owned banks, and private concerns or industries receiving large measures of state subsidies or control.⁹¹ Second, the term "mixed ownership" has more properly been used to describe the situation where the property itself is jointly owned by the state and private interests. Unfortunately, the failure of most authorities to make these distinctions has led to a serious misunderstanding of the rules.⁹²

The purpose of classifying property as mixed is to permit a closer examination of its public character. Where that character is public, the property may be treated as public property despite the fact that it is privately owned. The concept of mixed character originated in judicial decisions and state practice.⁹³

Several tests have been proposed for ascertaining the true character of private property which enjoys a special relationship to the state. The most famous of these tests is that proposed

by Feilchenfeld in 1943:

[I]t would seem legitimate to regard property of a private owner as public if it is used for public purposes, if it is directed and supervised by the state, and if these relations are formally fixed for a considerable period of time.⁹⁴

Feilchenfeld's test has come to be known as the "pre-dominant interest" test because it permits private property to be classified as public or private based on whichever interest predominates.⁹⁵ Although this test was originally promulgated for the classification of private property, it has since come to have relevance to situations of joint ownership.

There are no reported cases involving true joint ownership, but there is one instance where property was owned by a corporation whose stock was owned jointly by state and private interests. This case also arose out of post war occupation practices in Germany.

In a 1950 opinion, the General Counsel to HICOG purported to reject the "predominate interest" test in favor of an apportionment test in a case involving a claim for rent for the use of the airport facilities at the air base at Rhein Mainz. At the time of commencement of the allied occupation, the airport was owned by a private German corporation, Suedwestdeutsche Flugbetriebe, A.G. Ownership in Suedwestdeutsche had been apportioned between the Nazi state (15%) and various local municipalities, which are treated as private persons under the Hague Regulations.⁹⁶ The opinion stated the rule as follows:

Where real property which is taken for use of the Occupation Forces and Authorities

is owned by a corporation which in turn is beneficially owned partly by the state and partly by private or municipal interests, the Occupation Authorities should compensate for such use to the extent of the private and municipal interests involved.⁹⁷

Unlike some previous opinions, this one clearly purported to be an authoritative interpretation of the Hague Regulations. Accordingly, it would be evidence of state practice interpreting them.

What is curious about the opinion is that it purports to reject the "predominant interest" test in favor of the apportionment test but fails to consider the effect this rejection might have on the overarching issue of the belligerent occupant's right to use the property in the first instance. This seeming anomaly can be explained by a careful reading of the opinion. Such a reading reveals that the opinion relates only to the question of compensation and not to the issue of the belligerent occupant's right to treat the property as public for purposes of use or disposition.⁹⁸ The underlying right to treat the property as public is found to spring from Military Government Law No. 52, not from the Hague Regulations.⁹⁹ Nevertheless, the argument can be made that the opinion recognizes a right to treat any property as state property so long as there is some degree of state ownership. Certainly, this is the position taken in Military Government Law No. 52.¹⁰⁰

Despite the above analysis, it is doubtful that any natural resource should ever be treated as property of mixed ownership absent clear evidence of such fact in a concession

agreement. The analysis of rights to ownership in the underlying resource should be influenced only by express grants in the concession instrument of such ownership rights, rather than by grants which must be implied therefrom. However, this is not the position which the court took in Bataafsche Petroleum.¹⁰¹

There curiously enough, the court first analyzed the question of ownership of oil in situ as if it were one of local law.¹⁰² The issue, as the court saw it, was whether the concession created ownership rights to the oil or a mere right to a profit-a-prendre. The court concluded that the concession rights had effected a transfer of ownership in the underlying resource from public to private.¹⁰³ However, the court then proceeded to disregard this conclusion, stating it made no difference how the concession was viewed. The sole issue was whether the possession of the oil in situ was in private hands at the time of the occupation. The court ruled that the concession agreements coupled with the subsequent development of the oil deposits was sufficient to show that possession had been in private hands at the time of occupation.¹⁰⁴ A close reading of the case, however, indicates that possession was equated with title, which certainly isn't correct.¹⁰⁵ Accordingly, the case can be viewed as purporting to announce a new rule of international law: the granting of concession rights in a state owned natural resource coupled with subsequent development transforms the ownership of the resource from public to private.

A better approach would have been to separate the ownership

interest in the underlying resource from the myriad of other rights effected. Such an analysis would recognize and protect each right individually rather than lumping them together for purposes of treatment.

B. A NEW ANALYSIS: THE EFFECT ON PRIVATE RIGHTS

Where a publicly owned natural resource has been developed privately, the belligerent occupant should not be free to classify the entire enterprise as ^{one}/of a public mixed character and thereby avoid the responsibility for compensating the private rights which are taken. For example, where a private enterprise has an exclusive right to exploit a particular resource, can it be said that the belligerent occupant has not taken that right, when it continues to exploit the resource after occupation? Historically, the right to exploit has been viewed as intangible property which the belligerent is free to ignore.¹⁰⁶ Feilchenfeld questioned this position as early as 1943:

Under the Hague Regulations requisitioning is not expressly restricted to tangible property. There is no inherent reason why intangible property, such as contracts and patents, should not be requisitioned, as long as the rules of requisitions are observed. The ancient argument that an occupant can only appropriate tangible assets covers in reality only attempts to succeed to debts or to engage in extra-territorial measures. It may be doubtful in many cases whether requisitioning is needed for the occupation army and whether it is really required in order to obtain

the desired benefits for the occupant. For instance...where patents are concerned, the occupant may be able to use the patented process without acquiring patent rights....¹⁰⁷

It seems logical to treat the issue of concession rights like the issue of patent rights. As to the latter, it is now clear that they are subject to requisition.

In 1950, the General Counsel to HICOG concluded that the United States Occupation Forces could lawfully requisition certain patents and copyrights from their German owners. The opinion specifically concluded that such a practice is authorized under the Hague Regulations.¹⁰⁸ The opinion differentiated between patents under which an exclusive license had been granted and those where no such license had been issued. As to the latter, the opinion, apparently borrowing from antitrust law, stated that the method of requisition was forced licensing. As to the former, however, it was recognized that the licensee's rights would also be infringed by forced licensing, and the opinion implies that the belligerent occupant has an obligation to seek fulfillment of its needs from the exclusive licensee before resorting to the device of forced licensing.

Recently the question of concession rights has arisen in relation to Israel's practice in the occupied Sinai. The Department, of State has analyzed the issue in terms of state successor and the right to legislate in the occupied territory.¹⁰⁹ The Department takes the position that Israel must respect all concessions granted by Egypt whether or not the concessions were granted before, or after the 1967 war.¹¹⁰ The position

for after-granted concessions seems the most doubtful, since this position would require the belligerent occupant to recognize and respect property rights which were not in existence at the time of the initial occupation. However, the Department's position that pre-war concessions existing in the occupied territory must be respected by the belligerent occupant is probably correct, even if the analogy to state succession isn't.¹¹¹

The analogy is as follows: if rights acquired by a concessionaire must be respected by a successor state, then a fortiori such rights must also be respected by the belligerent occupant which enjoys under international law a lesser status. This argument neglects the fact that ^{both} the belligerent occupant and the successor state may exercise a right granted by law: the right of requisition. It is submitted that the proper analysis, therefore, is to view these rights, not in the context of concessions under the law of state succession, but rather as private property under the law of belligerent occupation.

If concessions are treated as private property, then the belligerent occupant must respect them. However, it may requisition them under Article 52. Requisition carries with it the duty to pay compensation. Unfortunately, Article 52 is silent on the amount of compensation.¹¹² The practice of the United States Army is to try to fix the amount due by agreement.¹¹³ Absent this, some other method must be found.

In addition to the concession, other property may be affected as well by belligerent occupation. For example, there may be substantial plant and equipment devoted to the exploitation of the resource. This property would also be subject to requisition under Article 52 and would require compensation.

C. POLLUTION AND RELATED PROBLEMS

The question of the extent to which a belligerent occupant can alter the permanent character of the land is a difficult one. Clearly the belligerent may erect fortifications within the occupied territories. But whether it may erect dams and divert streams and rivers is unclear. And what if anything is the belligerent occupant's liability for pollution of natural resources as lakes and streams? There simply is no judicial precedent.

(1) Herbicides and defoliants

Although the Hague Regulations have never been construed to prohibit the use of herbicides and defoliants in occupied territory, they might well be read to impose such a restraint. It can be argued that the right of usufruct which implies an obligation to safeguard the corpus, prevents the belligerent occupant from destroying trees and other natural resources. Certainly, it can be argued that the belligerent occupant, in destroying such natural resources, is causing waste. The problem with this argument, however, is that it must be reconciled with

the concept of military necessity, under which destruction of even private property is permissible.¹¹⁴

Whether or not the Hague Regulations prohibit the use of defoliants and herbicides, it now seems clear that world opinion is against their use for whatever reasons. Nevertheless, it is doubtful that the use of such chemicals is at present prohibited by the Hague Regulations.¹¹⁵

(2) Alteration of rivers and streams

There is no international precedent on the issue of whether a belligerent occupant may change the course of freely flowing water to suit its needs. Certainly, as long as the alteration is of a temporary nature and for the benefit of the occupied territory, there would seem to be no ground for complaint. If however the course of a stream were diverted so that it flowed through the territory of the belligerent occupant rather than through the territory of the occupied state, then a good argument can be made that the usufructary privileges of Article 55 have been violated. A similar argument might be made where a river was dammed up and the captured water taken off by conduits and used in the belligerent occupant's own territory.¹¹⁶

D. THE SEARCH FOR NEW NORMS

Application of customary international law to the problems of modern warfare has shown that the Hague Regulations are deficient in several respects. First, the substantive norms used for the treatment of natural resources has failed to keep

abreast of the times. By lumping natural resources together for treatment with land and buildings, the Regulations fail to take account of emergent values which accord natural resources a more elevated status. Second, the Regulations are deficient in that they fail to articulate more precisely the scope of the limited protections afforded. For example, there are three recurrent themes which the regulations could have given more precise answers for but didn't: (1) the right of a belligerent occupant to increase production, (2) the right to develop new resources, and (3) the issue of resource exportation from occupied territory. Finally, the Hague Regulations leave unanswered questions of whether offshore resources lying in and beneath the sea are protected at all. This portion of this article focuses on these issues and tries to articulate the norms which may be emerging out of the conflict in the Middle East.

(1) On the issue of substantive protection

Recently at the Third Session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva, the major oil producing nations submitted a draft article entitled "General Principles for the Protection of Oil and of Installations for its Extraction, Storage, Transport and Refining."¹¹⁷ The thrust of this draft article is to protect, in the event of war, oil fields and the means of oil production. At present, such facilities are legitimate targets.¹¹⁸

Although the draft article deals primarily with affording protection to such property from an armed attack, one of the provisions is sufficiently broad to be read as changing the right of usufruct granted by the Hague Regulations.

The provision in question reads:

[O]il and its means of extraction, together with related installations including storage, transport and refining, should be protected against the effects of armed conflict.¹¹⁹

The meaning of the words "protected" and "effects of armed conflict" is unclear. The language itself sounds much like a restatement of the Rousseau-Portales Doctrine. This doctrine is considered to be a basic tenant in the formulation of private property protections found in the Hague Regulations.¹²⁰ Under this doctrine, "[w]ar is conceived as an exclusive relation between belligerent States and, therefore, ought to affect private property as little as possible."¹²¹ Thus the language of the draft article seems to be an attempt to extend the Rousseau-Portales doctrine to state owned natural resources.

Whether or not the draft article is adopted, it seems fair to say, both from it and numerous other pronouncements of international importance, that a new protective principle is emerging.¹²² Under this principle, natural resources are conceived as a kind of collective private property deserving of higher protections than ordinary types of public property. If this is true, then this principle needs to be defined and given direction, especially in regard to the scope of protection, for

it is in this area that the toughest problems lie.

(2) The scope of protection

As discussed earlier, the concept of usufruct in the Hague Regulation is vague and subject to various interpretations. In the Middle East, this vagueness allowed Israel to engage in several practices which have caused serious disagreement between it and the United States. Specifically, Israel has taken the position that it is entitled not only to increase production from the old^{oil}/wells but that it is entitled also to seek out and develop new oil deposits. In addition, Israel maintains that as the belligerent occupant, it is entitled to export oil from the occupied territories for use in its home industry. Each of these contentions has been officially reputed by the United States.¹²³

(a) Production Increases through New Development

The Department of State has taken the official, although unpublicized position that "[a]n occupant's rights under international law does not include the right to develop a new oil field."¹²⁴ Israel's position, on the other hand, is that, in searching for and developing new oil deposits, it has enhanced the value of the land, rather than decreased it and therefore it would not be guilty of impermissible waste.¹²⁵ Lurking behind these legal arguments are considerations of policy; would it be easier to induce Israel to withdraw from several thousand square miles of desert than to induce it to withdraw from several

lucrative oil fields which it ^{had} discovered and developed.¹²⁶

The United States' position is bottomed on three premises. First, the meaning of the word "usufruct" is to be extracted from the sense in which the term is used in common and civil law countries and from international practice regarding enemy property.¹²⁷ Second, under the most common formulation of the principle, the term "usufruct" includes only a right to work existing developed resources; it does not include a right to develop new ones.¹²⁸ Finally, the United States asserts that Israel's attempt as a belligerent occupant to exercise a right to new development is unprecedented in international practice.¹²⁹ This third point is untrue.¹³⁰ Nevertheless, the other two points appear to be valid. Thus rather than recognizing a new norm which would reduce substantially the scope of protection presently existing under customary international law the United States' position has been to push for the most conservative stance. In effect, the United States position seems to afford natural resources more protection than now seems presently required and can be viewed as an attempt to formulate new norms on the scope of protection.

(b) The right of export

The United States has taken the position that the Hague Regulations prohibit Israel from exporting any oil from territory occupied by it as a result of the Middle East War.¹³¹ The position of the United States is based on an attempt, whether conscious or not, to engraft a body of law which has arisen in

matters relating to private movable property onto the law relating to state owned immovable property.¹³² In essence, the United States argues that this body of law limits the belligerent occupant to the use of the natural resource within the occupied territory. As pointed out earlier, the doctrine of usufruct does not contain such a limitation. If one is to be found, it must be located elsewhere. One possible source of such a limitation might be the Nuremberg Tribunal.

At Nuremberg, the International Military Tribunal articulated the principle that

[Article 49 and Article 52] together with Article 48 ... 53, 55 and 56 ... make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.¹³³

On its face, this language seems to add a new limitation on the doctrine of usufruct: proportionality.

Most of the military tribunals which considered the meaning of the above language in reference to the crime of plunder and spoilation had no difficulty with it.^{133a} However, the tribunal in the Flick case^{133b} seems to have been the only one which really paused in an attempt to find the hidden meaning if any, in the sweeping language:

Following this lead [from the language of the International Military Tribunal] the prosecution in the first paragraph of count two says that defendants' "acts bore no relation to the needs of the army of

occupation and were out of all proportion to the resources of the occupied territories." A legal concept no more specific than this leaves much room for controversy when an attempt is made to apply it to a factual situation.^{133c}

The Flick tribunal then proceeded to attempt to apply the concept first, to the privately owned steel works at Rombach in Lorraine, France, and second, to state owned plants in the Soviet Union. As to the former, the court found that the seizure of the plant had been justified by military necessity. "If after seizure the German authorities had treated their possession as conservatory for the rightful owner[s] ..., little fault could be found with the subsequent conduct of those in possession."^{133d} The tribunal found that Flick had managed the plant in a conservative way and found "no exploitation either for ... personal advantage or to fulfill the aims of Goering."^{133e} Thus, the court turned its attention to the only remaining part of the transaction, the distribution of steel.

Since there were no figures in the record showing the need of the army of occupation nor the effect of production and distribution on the French economy the tribunal found that criminal liability had to be tested by a different rule. The rule it chose was Article 46 of the Hague Regulation prohibiting confiscation of private property. Under the standard, the tribunal found Flick guilty.^{133f}

The seizure of the state owned steelworks of the Soviet Union were found to "stand on different legal basis from

those at Rombach, since "[b]oth properties belonged to the Soviet Government."^{133g} For reasons which are not manifest, the tribunal found no single provision in the Hague Regulations applicable. Nevertheless, the tribunal stated:

"adopting the method used by IMT, we deduce from all of [the Hague Regulations] the principle that state-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. ... Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the government itself could have operated for its benefit could also legally be operated by a trustee. ... We have already expressed our views as to the evacuation of movables from this plant. ... We conclude, therefore, that there was no criminal offense for which any of the defendants may be punished in connection with Vairogs and Dnjepr Stahl.^{133h}

One way the Flick decision can be explained in light of the sweeping language in the judgment of the International Military Tribunal is to say that two separate offenses are involved. One is the offense of plunder and spoilation, which is created from the aggregate of several articles of the Hague Regulations. The other offense, of course, is the one created by Article 55. This interpretation seems correct in light of the practice which evolved during the Nuremberg Military Tribunal of charging spoilation and plunder as a single separate offense.

The essence of this new offense seems to reside in the concept of "systematic plunder," a concept which the Flick tribunal found "not very helpful."¹³³ⁱ Nevertheless, when

viewed in context of the other war crimes, it would seem that the new offense is simply an adjunct to the offense of aggressive war. What the tribunals are really saying is that it is an offense, which is implied from all the Hague Regulations, to plan and systematically carry out economic plunder, which by definition means that the economy is forced to bear expenses in excess of those which it can reasonably be expected to bear.

In the final analysis, it is unclear whether the Nuremberg Military Tribunals introduced new limitations on the right of usufruct under Article 55.¹³⁴ Certainly, the Flick tribunal did not think so. Nevertheless, it would be wise for a belligerent occupant to impose limitations on its use of natural resources in occupied territory along the lines of proportionality mentioned in the judgment of the International Military Tribunal, for such a rule seems to be emerging, if it has not yet fully emerged.

(3) The problem of offshore resources

Prior to passage into customary international law, the Hague Regulations were thought to be applicable, with minor exceptions, only to property which existed on land.¹³⁵ Recently, however, again in the context of the Middle East conflict, the question of their applicability to offshore resources has arisen.

On at least two occasions, Israeli warships have interfered with an Amoco oil exploration ship operating under Egyptian license in the Gulf of Suez.¹³⁶ The problem is further complicated by the refusal of the United States to recognize Egypt's claimed twelve mile territorial sea. Accordingly, the area of the dispute is viewed by the United States as high seas, whereas both parties to the conflict view it as something else. Unfortunately, there is little guidance under the Hague Regulations for the resolution of this problem.

At the time the Hague Regulations were formulated, little if anything was known of the vast wealth lying offshore in the continental shelf. The technology to exploit undersea resources was unknown. Nevertheless, the Hague Regulations were expressly made applicable to certain types of submarine property,¹³⁷ and the view was expressed that "the Powers may apply, as far as possible, to war by sea the principles of this convention."¹³⁸

In light of this expressed intention and in light of the Hague Regulations passage into customary international law, it seems reasonable to conclude that natural resources lying off the coast of belligerently occupied territory are to be governed by customary international law embodied in the Hague Regulations. A contrary conclusion would dictate that the belligerent's powers over the seabed resources were limited only by its will rather than by international law.

The Department of State has taken a slightly outmoded approach to this problem. Its position is that

[t]he concept of belligerent occupation is exclusively one of land warfare. While the notion of occupation of the territorial sea may be somewhat problematic, it is clear that the high seas are not subject to belligerent occupation and that neither party to the Egyptian-Israeli dispute at present enjoys any right to belligerent activity on the high seas.¹³⁹

This approach ignores the concept of an economic zone which has emerged from the Law of the Sea Conference.¹⁴⁰ Moreover, it ignores the economic interests which Egypt asserted it possessed in the seabed when it issued licenses for exploration in virtually the entire Gulf.

The problem of extending the Hague Regulations to seabed resources is of interest, not just for the issue it presents but also for new legal concepts of occupation which are emerging. Normally, the question of occupation is one of fact and is based on the concept of "effective occupation."¹⁴¹ This concept has three principles.¹⁴² First, the belligerent must

possess the capacity to exercise effective control anywhere within the territory. Second, the belligerent occupant must have succeeded in denying the ousted sovereign the exercise of its authority within the territory. Finally, the belligerent occupant must have succeeded in setting up its own form of administration within the occupied territory. When these three things occur, a territory has been effectively occupied. In the case of occupation of coastal waters, a new concept seems to be emerging. This concept extends territorial occupation into coastal waters to the extent of the ousted sovereign's economic interest or to some other point.

Israel has taken the position that its occupation of the Sinai extends up to a median line in the Gulf of Suez.¹⁴³ This assertion is unprecedented in international practice. The United States apparently has taken the position that Israel cannot belligerently occupy the Gulf of Suez.¹⁴⁴

The Israeli position does not appear unreasonable provided the other requirements for effective occupation are maintained. For example, it would seem reasonable for a belligerent occupant of a country such as Great Britain to seek to extend its occupation to the outlying oil platforms in the North Sea. The issue basically is one of identity of interests. Where the economic interests of a state are recognized by international law as extending into offshore areas, then such areas may be belligerently occupied so long as the principle of effective occupation is maintained. Accordingly, there is no reason for treating natural resources located within a state's delimited continental shelf differently than land based resources. Cer-

tainly such resources as well as other economic rights located there should receive some measure of protection. The Hague Regulations would seem to be the most likely source for such protection.

III CONCLUSION

The question of protection of natural resources during belligerent occupation is one which has been neglected too long by scholars of international law. Whether this neglect has resulted from feelings that wars of occupation are no longer of major concern, or whether it has resulted from the press of more important concerns is unclear. Perhaps too, there is a stigma of colonialism attached to the concept of belligerent occupation, and one wonders whether this stigma has not prevented the major powers from considering the problem. Regardless of the reason, the time for neglect is past.

Customary international law, in many respects, has proved inadequate to protect the natural resources of occupied territory. First, it has failed to recognize that natural resources are unlike other real property of a state. Use of the former carries with it the idea of consumption; use of the latter does not. Second and equally important, customary international law has failed to perceive that all natural resources, whether owned by the state or by individuals are treated by states in their relationships inter se as state property.¹⁴⁵ Thus, on a state-to-state level the distinction between public and private

property has no validity in attempting to characterize the ownership of natural resources.

State practice seems to have been groping towards rules which recognize the fundamental difference between natural resources and other forms of state property through the only available device--the concept of "usufruct." Here for example, one sees that distinctions have been made between the treatment of natural resources and other property. Nevertheless, the concept of "usufruct" is an imperfect and imprecise device for this purpose because it fails to afford sufficient guidelines by which the primary conduct of the belligerent can be judged. Thus, it provides little benefit as a deterrent for unlawful acts. What is needed, then, is for international law to provide the belligerent occupant with precise standards by which to judge its primary conduct in occupied territory. Hopefully, states will soon perceive this problem and move to remedy it through a new multinational treaty.

APPENDIX

DRAFT ARTICLES FOR A MULTILATERAL
TREATY ON THE PROTECTION OF
PROPERTY IN OCCUPIED TERRITORY

Definitions

As used herein, the following terms shall have the meaning indicated:

1. "Developed natural resources" or "developed resources" shall mean resources, the location of which is known, and, in the case of subsurface resources, the exploitation of which has commenced at the time of occupation. Exploitation shall be deemed to have commenced only when physical facilities for resource extraction have been erected and placed in operation.

2. "Natural resources" shall mean the rivers, lakes, streams and forests of a state as well as deposits of oil and other minerals.

3. "Occupation" shall mean belligerent occupation.

4. "Occupied territory" shall mean the territory of a state which has been effectively occupied by a belligerent, and shall include the land, sea, territorial sea, continental shelf and all other areas in which the occupied state has an economic interest recognized by international law.

5. "Rules of usufruct" shall mean, with respect to developed resources:

- a. The right to continue production at the level existing prior to occupation;
- b. The right to increase production, but only where it can be demonstrated that preoccupation levels were arbitrarily set and have no relation to good management practices;

provided, however, that in no event may levels of production exceed that which is required to support the cost of operations of the army of occupation within the occupied territory. In determining the cost of operations for the army of occupation, the belligerent occupant must consider the value of all natural resources produced in the occupied territory. It must not fix the costs of occupation in an arbitrary or capricious manner. Likewise, in fixing the valuation of a resource for determining the appropriate level of production, the belligerent occupant should be guided by the valuation of such resource in the world market. In no event may such resource be valued in an arbitrary and capricious manner.

The term "rule of usufruct" shall not apply to undeveloped resources.

6. "Undeveloped natural resources" or "undeveloped resources" shall mean all natural resources, the location of which is unknown to anyone at the time of occupation.

CHAPTER

PROTECTION OF NATURAL RESOURCES
IN OCCUPIED TERRITORY

Article 1

The provisions of this chapter shall apply to all natural resources situated in occupied territory.

Article 2

Except as hereinafter provided, a belligerent occupant shall not be entitled, under this Chapter, to exercise any rights not expressly set forth herein.

Article 3

A belligerent occupant may exercise the following rights with respect only to developed natural resources:

- a. The right to possession of the resource and its means of extraction, processing and development;
- b. The right to extract the resource from its natural location;
- c. The right to use, transport, sell and consume the resource, without restriction as to its destination.

Article 4

In exercising the rights granted in Article 3 of this Chapter, a belligerent occupant shall observe the rules of usufruct as more fully defined herein.

Article 5

A belligerent shall exercise no rights with respect to undeveloped natural resources, except the right to prohibit all exploration within occupied territory. This provision shall not be construed to prohibit a belligerent from increasing production of developed resources when such increased production is permitted under Article 4 of this Chapter.

Article 6

In any final peace settlement, a belligerent occupant may be required to make compensation for the damage done to private rights and interests which existed in any natural resource situated in occupied territory. Where this has been done, in no event shall interference or deprivation of such rights and interest be the subject of a claim in any state or before an international judicial or arbitral body.

1. The decline in interest about matters relating to military occupation in general is perhaps illustrated best by the case of the publication Military Government Journal. This magazine reached its zenith after World War II, stumbled but regained its balance during the Korean War, began to lose momentum before it changed its emphasis from military government to matters of more general military interest. It too, however, seems to have been a casualty of the war in Vietnam, not by bullets but by the rising spirit of anti-militarism. A review of the recent literature also amply illustrates the lack of interest. The only articles of recent vintage on the economic aspects of belligerent occupation are Cole Property and the Law of Belligerent Occupation: A Re-examination, 137 WORLD AFF. 66 (1974) and Cummings, Oil Resources in Occupied Arab Territories under the Law of Belligerent Occupation, 9 J. INT'L TRADE AND ECON. 533 (1974). To see what the past situation was like, consult the extensive bibliography contained in G. VON VLAHN, THE OCCUPATION OF ENEMY TERRITORY 313-340 (1957).

2. U.N. CHARTER, Article 2, paragraph 4; id., Article 51.

2a. See I CONFERENCE OF EXPERTS ON THE REAFFIRMATION AND OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 33-34 (1971) (Conference held at Geneva, 24 May - 12 June 1971) [hereinafter cited as CONFERENCE OF GOVERNMENT EXPERTS]. The pages cited discuss the interrelationship of the U.N. Charter and the Hague regulations. But see Armed Conflict, 67 AM. J. INT'L L. 122, 124 (1973) (where DOD General Counsel Buzhardt rejects a portion of a resolution proclaiming that the use of force is prohibited in international relations.)

3. See infra, pp. 36-37 for a discussion of what constitutes belligerent occupation. A mere invasion or temporary excursion onto the territory of another state is not belligerent occupation for purposes of the Hague Regulations. See E. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 6-8 (1942). Recently, however, there has been speculation that the United States might, under certain circumstances, institute military action against the Middle East oil cartel to assure the continued flow of oil to the United States. Secretary Kissinger termed such speculation "very dangerous," but refused to rule out the possibility entirely. See United States Policy in the Middle East: November 1974-February 1976, in [No. 4] THE DEPARTMENT OF STATE, SELECTED DOCUMENTS 113 (1976). Senator Fullbright termed the suggestion that the United States "go into the Persian Gulf and take the oilfields" as "another disaster." N.Y. TIMES, Jan. 1, 1975, p. 3, col. 1. One wonders how the United States, should it ever resort to such a course, would reconcile its right to export oil from the occupied territories with the position it presently is taking in the Arab-Israeli dispute. See pp. 33-34 infra.

4. Representative of the recent literature are G. VON GLAHN, LAW AMONG NATIONS (2nd ed., 1970) who treats the issue with the statement, "Thus an occupant may use, for the duration of his stay, public buildings, real estate, forests, farmlands, docks, barracks and all other immovable property of the enemy state," id. at 680; 2 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICTS 311-312 (1968) (slightly better treatment); see also W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 815-827 (1962). Judicial or arbitral authorities are the Guano case (France v. Chile), 15 R. INT'L ARB. AWARDS 125 (1901) discussed in 2 G. SCHWARZENBERGER, supra, at 312; In Re Falck, 3 ANN. DIG. 480 (No. 367) (Court of Nancy, 4th Chamber, France, 1926) (cutting of trees in state forest); N.V. de Bataafsche Petroleum Maatschappij v. The War Damage Comm'n, 23 I.L.R. 810 (Court of Appeal, Singapore 1956) [hereinafter "Bataafsche Petroleum"] (treats oil in situ as private property despite provision of local law vesting title in state) discussed in Lauterpacht, The Hague Regulations and the Seizure of Munitions de Guerre, 32 BRIT. Y.B. INT'L L. 218 (1955-56); Note, 71 HARV. L. REV. 568 (1958); for a discussion of the lower court's unpublished decision, see The Case of the Singapore Oil Stocks, 5 INT'L & COMP. L.Q. 84 (1956). The Nuernberg Tribunals have also been unhelpful. See pp. 11-12 infra.

5. See, Cummings, Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation, supra, note 1, at 566, n. 139 (assumes oil in situ in Sinai is private property). Contrast this position with G.A. Res. 3175, 28 U.N. GAOR, Sup. (No. 30) 55, U.N. DOC. A/Res/3175 (1973) (permanent sovereignty over natural resources in the occupied Arab territories) and with the position taken by the Department of State: "The occupant's right to state-owned oil in the ground is that of a usufructuary under Article 55" (Oct. 1, 1976) Memorandum of Law, DEPARTMENT OF STATE, subject: Israel's Right to Develop New Oil Fields in Sinai and Gulf of Suez at 4 [hereinafter cited as DEPARTMENT OF STATE MEMO]. The Department was considerate enough to make the memorandum available upon my request. See also Bataafsche Petroleum, 23 ILR 810, 824, holding oil in situ was private property.

6. See, e.g., G.A. Res. 3171, 28 U.N. GAOR, Sup. (No. 30) 55, U.N. DOC. A/Res/3171 (1973) on the permanent sovereignty of states over their natural resources. Paragraph 1 of the Resolution "[s]trongly reaffirms the inalienable rights of states to permanent sovereignty over all their natural resources,...." See also G.A. Res. 3175, supra, note 5 (permanent sovereignty over natural resources in occupied Arab territories); G.A. Res. 3281, 29 U.N. GAOR--, U.N. DOC. A/Res/3281 (1975) (Charter of Economic Rights and Duties of States)

reprinted in 69 AM. J. INT'L L. 484 (1975) and 14 ILM 251 (1975), discussed note 16, infra. See also, note 145, infra.

7. See, Problems of Protecting Civilians Under International Law in the Middle East Conflict: Hearing Before the Subcommittee on International Organizations and Movements of the Committee on Foreign Affairs, House of Representatives, 93rd Cong., 2d Sess. (1974).

8. See Cummings, Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation, supra, note 1; N.Y. TIMES, Sep. 8, 1976, p. 5, col. 1; BOSTON GLOBE, March 11, 1977, p. 1, col. 2.

9. See, Lauterpacht, Rules of Warfare in Unlawful War in LAW AND POLITICS IN THE WORLD COMMUNITY 89 (Lipsky ed. 1953); Lauterpacht, The Limits of the Operation of the Law of War, 30 BRIT. Y.B. INT'L L. 206 (1953); J. MORIN, SHOULD AN UNLAWFUL BELLIGERENT BE DEPRIVED OF HIS RIGHTS, AS CONTAINED IN THE HAGUE REGULATIONS, WITH RESPECT TO PROPERTY IN OCCUPIED TERRITORY (Student paper, Harvard Law Library, 1958); cf. The Legal Consequences Case, [1971] I.C.J. Rep. 16: "By maintaining the illegal situation, and occupying [Namibia] without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation.... The fact that South Africa no longer has any title to administer the territory does not release it from its obligations and responsibilities under international law...." Id. at 54.

9a. See Appendix.

10. Articles 42-52, REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, annexed to CONVENTION NO. IV OF THE HAGUE, signed Oct. 18, 1907, 36 Stat. 2306, T.S. No. 539 [hereinafter "The Hague Regulations"]. The official text is in French. Since Nuremberg, the Hague Regulations have been recognized as part of customary international law. See Judgment, 22 TRIAL OF GERMAN MAJOR WAR CRIMINALS 411, 467 (1950); accord The Krupp Case, IX TRIALS OF WAR CRIMINALS 1327, 1340 (1950). Perhaps these decisions explain why new accessions to the Hague Convention have not been forthcoming despite General Assembly Resolution 2677 inviting states to do so. See I CONFERENCE OF GOVERNMENT EXPERTS, note 2a, supra at 33-34.

11. See, E. FEILCHENFELD, supra, note 3, at 12; 2 G. SCHWARZENBERGER, supra, note 4, at 259-260; see also, note 12, and p. 31, infra (The Rousseau Portales Doctrine); see also Smith, The Government of Occupied Territory, 21 BRIT. Y.B. INT'L L. 151 (1944).

12. At the Tenth meeting of the Second Commission of the Hague Conference of 1899, forerunner of the Conference of 1907, mineral rights were discussed in terms of their relationship to neutral states and railroad rolling stock. In speaking about the precursor of Article 54 of the Hague Regulations (railroad rolling stock) it was said:

"It often occurs that highly important relations exist between two industrial basins situated in contiguous countries, as, for instance, where coal is situated on one side and minerals on the other. In this case an exchange of several thousand [railroad] cars is made each week. It also happens that a certain part of a country is dependent upon a seaport situated on neutral territory whose commerce in the first country compels it to send a considerable amount of rolling stock there. The maintenance of all these peaceful and fruitful relations should be assured during war."

J. SCOTT, PROCEEDINGS OF THE HAGUE PEACE CONFERENCES (1899) 543 (Translation of the Official Text, Oxford Univ. Press 1920). Usually, however, conceptions of property were more basic: "[T]he poor peasant is asked for the only cow he possesses...." *Id.* at 528. Or consider the proposed Austro-Hungarian amendment to Article 53: "After the words 'vehicles of all kinds' insert the words 'as well as teams, saddle animals, draft and pack animals.'" *Id.* at 137. Timber, of course, was thought of as real property and specifically made part of Article 55.

13. The first commercial oil well was sunk near Titusville, Pennsylvania, by Edwin L. Drake in 1859. However, it was not until the early 1900s that the advent of the automobile created a growing demand for refined crude oil, i.e., gasoline. Between 1915-1920 the demand was met through new technology which permitted thermal cracking, and oil as a major source of fuel arrived. See, *Petroleum*, 17 *ENCY. BRITANNICA* 656- (1961). During World War I, the importance of oil was swiftly realized by all sides. See P. DE LA TRAMERYE, *THE WORLD STRUGGLE FOR OIL* 81 (C. Leese translation 1924); L. FANNING, *FOREIGN OIL AND THE FREE WORLD* 266-269 (1st ed.).

14. See generally, E. FEILCHENFELD, *supra*, note 3, at 17-21.

15. See generally, *id.*

16. See G.A.Res. 3171, supra, note 6; Charter of Economic Rights and Duties of States, adopted by G.A.Res. 3281, supra, note 6:

"Every state has and shall truly exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities."

Id., Chapter II, article 2.

17. See, G.A.Res. 3171, supra, note 6; G.A.Res. 3281, supra, note 6. This trend also can be seen in the concession agreements. See Smith and Wells, Mineral Agreements in Developing Countries: Structures and Substance, 69 AM. J. INT'L L. 560, 561-562 (1975); see generally Lillich, The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack, 69 AM. J. INT'L L. 359, 360-361 (1975).

18. Normally, such methods take the form of nationalizations. See Lillich, The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack, supra, note 17 at 359, n. 1.

19. The Hague Regulations do not expressly require such a distinction. Nevertheless, some state practice under Article 55 has dictated that such a distinction be made. See p. 32 infra.

20. See pp. 11-12, 32 infra.

21. See Bataafsche Petroleum, 23 ILR 810, 816-817; Cummings, Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation, supra, note 1. Mr. Cummings apparently applies the analysis of Bataafsche to conclude that the ownership of the oil in situ is in private hands despite a contrary provision in the Egyptian constitution. Id. at 533. The Department of State, on the other hand, views the oil in situ as Egyptian immovable property. See DEPARTMENT OF STATE MEMO, supra, note 5 at 4.

22. See pp. 24-25 infra.

23. See Articles 52, 53 and 55, Hague Regulations.

24. See J. SPAIGHT, WAR RIGHTS ON LAND 416 (1911).

25. 37 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 311, 15 Ann. Dig. 596 (No. 197) (Court of Appeals of Orleans, France).

26. Id.
27. Id. at 15 Ann. Dig. 597.
28. See also Bataafsche Petroleum, 23 ILR 810, 824 (holding oil in situ to be immovable as a matter of law).
29. See Hague Regulations, Article 55 (treating timber as immovable). Article 53 was designed for only movable property, not real property or raw materials. See E. Lauterpacht, The Hague Regulations and the Seizure of Munitions de Guerre, 32 BRIT. Y.B. INT'L L. 218, 226 (1955).
30. Hague Regulations, Article 53 (first paragraph). The phrase "may be used for military operations" has come to mean "susceptible to use in military operations," or "capable of use in military operations." See DEP'T OF ARMY FM 27-10, THE LAW OF LAND WARFARE, para. 404 at 151-152 (1956). During the occupation of Germany, the United States, in interpreting Article 53, promulgated a rule that "any [movable] property which was in the possession of, or owned by, the German armed forces must be presumed to have been for use in the operation of war." Opinion from the Legal Advice Division, HICOG, Subject: Appropriation of Captured Enemy Materials by the Occupation Powers, Sept. 18, 1950, XIX SELECTED OPINIONS 13, 14 (1950). Accordingly, if oil in situ were movable property, the strongest case for seizure under Article 53 would be a situation where the oil was in the possession of the armed forces, such as the U.S. Naval Oil Reserves.
31. Hague Regulations, Article 55. The official text is in French.
32. See pp. 9-10 infra.
33. See, e.g., DEPT. ARMY FM 27-10, note 30, supra, at para. 402, p. 151; THE WAR OFFICE, MANUAL OF MILITARY LAW, PART III: THE LAW OF WAR ON LAND, para. 610 at 169 (1958) [hereinafter BRITISH MANUAL OF MILITARY LAW] (the "right to work the mines" provisions); see also DEPT. OF STATE MEMO, supra, note 5 at 9. (recognizing such a limited right).
34. See Cummings, note 1, supra, at 560-561.
35. See DEPT. OF STATE MEMO, supra, note 5 at 5-9. Contra, Administration of Waters and Forests v. Falk, 4 Ann. Dig. 563 (No. 383) (Court of Cassation, Criminal Chamber, France, 1927), facts reported in 2 Ann. Dig. 480.
36. For a comparative analysis of the concept of usufruct under the common law and several civil law systems, see DEPT. OF STATE MEMO, supra, note 5, at 5-9; see also Cummings, Oil

Resources in Occupied Arab Territories Under the Law of Belligerent Occupation, supra, note 1, at 561-565.

37. See VON GLAHN, supra, note 1 at 177; see also Cummings, Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation, supra, note 1, at 566-567, n. 139.

38. See note 40 infra.

39. MAORT is the acronym for Magyar Amerikai Olajipari Reszvenytársasag (Hungarian American Oil Company). See letter from Frank W. Abrams, Chairman of the Board, Standard Oil Co., to The Secretary of State, Nov. 23, 1948, in STANDARD OIL CO. (NEW JERSEY) AND OIL PRODUCTION IN HUNGARY BY MAORT xii (1949) [hereinafter OIL PRODUCTION BY MAORT].

39. See OIL PRODUCTION BY MAORT, supra, note 38, at 5-9. Cf. Judge Wilken's dissent in The Krupp Case, IX TRIALS OF WAR CRIMINALS at 1464 (1950): "The system of mining used -- that of stripping -- was designed to obtain the maximum quantity of ore within the shortest period of time and without regard to future mining operations." (emphasis added).

39a. See, e.g. id. at 1461-1464 (the case of the Montbelleux Mine, which had been uneconomical to mine before the start of the war).

40. See Opinion from the Legal Advice Division, HIGOG, in XVII SELECTED OPINIONS 130 (1950):

It is a well established principle, recognized under international law, that the public buildings and real estate of the hostile state (exclusive of property dedicated to religion, charity and education, and the arts and sciences) may be seized and used, but not alienated, by the occupying state. This principle extends also to the profits, as for example, rents, accruing from such buildings and real estate. Article 55 of the Hague Regulations prescribes, however, that "the occupying state shall be regarded only as administrator and usufructory" and "must safeguard the capital of [such] properties, and administer them in accordance with the laws of usufruct." The latter precept requires that the occupying state refrain from alienating, damaging or destroying the substance of the capital of such property in a negligent or wasteful manner. [emphasis added]

This rule seems to have been recognized by some writers. See J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 714 (1954). The removal of coal (for reparation purposes) was not considered alienation because it "would not affect title to the real estate." I SELECTED OPINIONS, OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.) 45 (15 July 1945 - 28 Feb. 1946).

41. A similar presumption was created after World War II as to the ownership of property found in possession of the German Army. See note 30 supra.

42. See DEPT. STATE MEMO, supra note 5; Cummings, supra, note 1, at 566-567, n. 139.

43. See, e.g., Jessup, A Belligerent Occupant's Power Over Property, 38 AM. J. INT'L L. 457, 460 (1944); Cummings, supra, note 1, at 585, n. 185; DEP'T OF STATE MEMO, supra note 5 at 17. These articles use as precedent cases on requisition decided under Article 53 and have nothing to do with interpretation of the term "usufruct." The closest one can come to this position is found in the judgment of the Nuremburg Tribunal, discussed pp. 11-12 infra.

44. Japanese practices regarding oil are found in Bataafsche Petroleum, 23 I.L.R. 810, 816 (1956). Some German practices from World War I are discussed in DE LA TRAMERVE, supra, note 13 at 81; Administration of Waters and Forests v. Falk, [1927-1928] Ann. Dig. 563 (No. 383) (Court of Cassation, Criminal Chamber, France 1927); In Re Falk, 3 Ann. Dig. 480 (No. 367) (4th Chamber, Court of Nancy, France 1926). One of the best discussions of German practices regarding natural resources during World War II is found in The Krupp Case, IX TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1461-1484 (J. Wilkin's dissent) [hereinafter cited as TRIALS OF WAR CRIMINALS]. See also id. at 1338-1348 (on Count II of the indictment: plunder and spoilation); Judgment of the International Military Tribunal, 22 TRIAL OF MAJOR GERMAN WAR CRIMINALS 411, 457-458 (1950) reprinted in 6 F.R.D. 69, 120-121 (on the issue of plunder); see also p. 34 infra. It is recognized that violations do not create international law. Nevertheless, it is submitted that the reason charges of exploitation of natural resources either were never made, see IX TRIALS OF WAR CRIMINALS, supra at 1341, or were unsuccessful, see id. at 1461-1484, is because it was unclear that the acts complained of were in fact violations of international law.

44a. IX TRIALS OF WAR CRIMINALS (1950).

44b. Id. at 23, para. 33.

44c. Id. at 26, para. 39.

- 44d. Id. at 28, para. 42.
- 44e. Id. at para 43.
- 44f. Id. at para. 44.
- 44g. Id. at 1373.
- 44h. See Id. at 1455 (J. Wilkins' dissent).
- 44i. Id. at 1361.
- 44j. Id.
- 44k. Id. at 1363.
- 44L. Id. at 1463
45. See OIL PRODUCTION BY MAORT, supra, note 38, at 6-7.
46. Fisheries Case (United Kingdom v. Norway) [1951] I.C.J. 116, 139.

47. For a discussion of this practice, see Italy v. Germany (No. 70) III DECISIONS OF THE ARBITRAL COMMISSION ON PROPERTY, RIGHTS AND INTERESTS IN GERMANY 253, 259-277 (1960).

48. The argument would be that the only way the requirement to safeguard the capital of the resource can be reconciled with the right of exploitation would be to require compensation, either in the form of credits against occupation costs or in the form of direct reimbursement in any settlement. Apparently, Germany followed such a practice since in the Krupp case, one of the allegations was that "[a]t times a pretense was made of paying for the property" but "[t]his pretense merely disguised the fact that the . . . raw materials . . . sent to Germany from . . . these occupied countries were paid for by the occupied countries themselves by [the device of] excessive occupation charges." IX TRIALS OF WAR CRIMINALS 24 (1950). However, the indictment suffers from such multiplicity that it is difficult to ascertain whether the excerpts above correctly state what was alleged.

49. See e.g., note 40 supra. This represents the normal statement of the rule.

50. The only documented case, prior to 1967, in which a legal opinion is available dates from 1900. See Mining Claims and Appurtenant Privileges in Cuba, Puerto Rico, and the Philippines, (Case No. 1525, Division of Insular Affairs, War Department) in C. MAGOON, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY

FORCES OF THE UNITED STATES 351 (1903) [hereinafter cited as MAGOON'S REPORTS]; see also pp. 11-12, supra, and note 62 infra.

51. See MAGOON'S REPORTS, supra note 50 at 351.

52. See The Effect of the Treaty of Peace Upon the Character and Extent of the Authority of the Military Government in Puerto Rico, Cuba, and the Philippine Archipelago (Case No. 1102, Division of Insular Affairs) in MAGOON'S REPORTS, supra, note 50 at 31.

53. See Opinion of the Attorney General, dated September 8, 1900, MAGOON'S REPORTS, supra, note 50 at 372-373.

54. Id.

55. Recently, the Department of State has rendered an opinion on this issue in the context of Israel's refusal to permit an American oil company, Amoco, to explore for oil in the Gulf of Suez. See DEPT OF STATE MEMO, supra, note 5. A similar issue arose after World War I in British occupied Mesopotamia (Palestine). Oddly enough, it was Standard Oil which wanted to continue exploration under licenses granted by Turkey. Great Britain refused. For the interesting exchange of diplomatic correspondence in this case, see Oil Concessions in Palestine and Mesopotamia, II FOREIGN RELATIONS LAW OF THE U.S. 250-262 (1919) continued in II FOREIGN RELATIONS LAW OF THE U.S. 649 (1920). The question of the applicability of the Hague Regulations appears never to have been raised officially, despite the fact that Palestine was under British military administration as a belligerent occupant prior to the Mandate from the League of Nations. A good discussion of the importance of political and economic milieu of this exchange is found in DE LA TRAMERYE, supra, note 13, at 123, 127-130.

56. See A. MOHR, THE OIL WAR 154 (1927).

57. See OIL PRODUCTION BY MAORT, supra, note 38, at 3. It is known that Germany increased production of an abandoned Tungsten mine in France. See The Krupp Case, IX TRIALS OF WAR CRIMINALS, supra note 44, at 1461-1464.

58. See OIL PRODUCTION BY MAORT, supra, note 38 at 3.

59. See DEPT OF STATE MEMO, supra, note 5 at 4.

60. See, e.g., id. at 5-9. Cummings, supra, note 1, at 563-566.

61. See W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK 2, Ch. 18, 282 (E. Christian ed., 1818).

62. This was the formulation used by the United States in deciding its right to issue mining claims there: "[T]he questions involved relate to the inchoate rights of the non-existing independent government of Cuba and the duties and obligations of the United States resulting from the relation of trustee and cestui que trust." MAGOON'S REPORTS, supra, note 50, at 367. This seems to have been the position taken by Great Britain in Palestine prior to the Mandate: "[T]he provisional character of the military occupation does not warrant the taking of decisions by the occupying [power] in matters concerning the future economic development of the country. Accordingly, our policy has been to prohibit the initiation of any new undertakings or the exercise [by] concessionaires of rights which they may have acquired [before?] the war.

"This view has equally governed our attitude in regard to investigations and surveys which private individuals or firms may wish to [undertake in] occupied enemy territories and our action ... has been further ruled by the principle that nothing should be done which might in any way compromise the future authorities of the country to whom we consider should be left the decision as to the methods and measures ... to be adopted for ... the development of the mineral resources of the territory. ..." Letter from the Ambassador of Great Britain (Davis) to the Secretary of State, dated November 22, 1919, in II FOREIGN RELATIONS OF THE U.S. 260 (1919) [most bracketed material in original]. Later the United States called Great Britain a "quasi trustee." II FOREIGN RELATIONS OF THE U.S. 650 (1920). However, these formulations may have been expressions of the "sacred trust" provisions of the expected mandate, which came in May 1920. See The Legal Consequences Case, [1971] I.C.J. Rep. 16, 28 (discussing the "sacred trust" provisions of Article 22 of the Covenant of the League of Nations).

63. See pp. 28-29 infra.

64. This conclusion flows from two ideas underpinning the Hague Regulations. First, occupation was viewed only as a temporary state of affairs. J. SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 538-539 (1909). Accordingly, the occupant was forbidden to make substantial changes in the character of the land. See p. 28 infra. Second, the occupant could only exploit existing resources. See DEPT OF STATE MEMO, supra, note 1, at 9. Thus, an occupant would have no need to explore since it was forbidden to exploit.

65. See pp. 10-11 supra.

66. The Department of State takes a more restrictive view: "[A]n occupant may not open wells in areas where none existed at the time the occupation began, since the prior or

normal rate of exploitation was zero." DEPT OF STATE MEMO, supra, note 5, at 10. The difference between the State Department's view and that of the author is over the issue of increased production within an area of developed resources. The author concludes production can be increased provided that production was not at capacity under recognized standards of capital preservation. See pp. 10-11 supra.

67. Hague Regulations, Article 46.

68. "Seized" is used in the sense "to take possession of." It only applies to property which a belligerent can use for waging war. See Hague Regulations, Article 53; E. FEILCHENFELD, supra, note 3 at

69. Hague Regulations, Article 52.

70. See p. 7 supra; see also note 90, infra (Statement by Feilchenfeld).

71. Bataafsche Petroleum, 23 ILR 810, 823-824.

72. Id.

73. Id.

74. See note 24 supra.

75. See note 25 supra.

76. One can trace the confusion over the concept of "needs of the army of occupation" directly to the Hague Conference of 1899. Although the concept went undiscussed during the debate on Article 52, it was mentioned during the debate on Article 49. The Swiss delegate, Mr. Odier, had been given formal instructions from his government to vote in favor of the draft Article only if it contained a definition of necessity, which it didn't. In addition, Mr. Odier reportedly observed

"The expression 'the needs of the army' is deemed too vague. ..."

The German representative rejoined that the vague character was chosen intentionally as the only way to achieve a compromise on what rights the belligerent occupant had. J. SCOTT, PROCEEDINGS OF THE HAGUE PEACE CONFERENCE, CONFERENCE OF 1899 (Translation of Official Text) 537 (1920). See generally pp. 17-21 infra.

77. 3 Ann. Dig. 563 (No. 383) (Court of Cassation, Criminal Chamber France, 1927).

78. 23 ILR 810.
79. Id. at 822.
- 79a. See p. 10 supra; Cummings, supra, note 1 at 562, n. 128.
80. See, e.g., 2 G. SCHWARZENBERGER, supra, note 4 at 220.
81. See, e.g., Ralli Brothers v. Germany, 4 Tribunaux Arbitraux Mixtes 41, 44 (1925); Zurstrassen et Cie v. Germany id. at 326, 328-329 (1925); Roman et Cie v. Germany, id. at 753, 756 (1925).
82. See 2 G. SCHWARZENBERGER, supra, note 4 at 259-260.
83. Report of Tripartite Conference on Berlin, 3 TREATIES AND OTHER INT'L AGREEMENTS OF THE U.S. 1224 (Bevans ed.); 13 DEPT STATE BULL. 153-161 (1945) [hereinafter cited as The Potsdam Agreement] The agreement takes its name from the fact that the meetings were held at the Cecilienhof near Potsdam.
84. J.C.S. Directive 1067 is reprinted in CERTAIN INTERNATIONAL AND U.S. POLICY DOCUMENTS REGARDING GERMANY 7-16 (1949).
- 84a. "HICOG" was the acronym for Office of the U.S. High Commissioner for Germany. See E. PLISHKE, THE ALLIED HIGH COMMISSION FOR GERMANY (1953). It was created upon termination of the Military Government in 1949. Thus in a sense it was the successor of OMGUS, which is the acronym for Office of Military Government for Germany (US). See id. at iv and at 3, n. 4.
85. Article 156, POTSDAM AGREEMENT, supra, note 83.
86. J.C.S. Directive 1067, supra, note 84.
87. I SELECTED OPINIONS, supra, note 40 at 7.
- 87a. Perhaps the best statement of the United States position is found in the Memorandum Opinion of January 28, 1952, Subject: Hague Regulations, Applicability to Germany after Termination of Hostilities XVII SELECTED OPINIONS 19.
88. This would be true under the restrictive view assuming the resource was applied to the immediate use of the army.
89. See p. 16 supra.

89a. But see note 48, supra.

90. See Bataafsche Petroleum 23 ILR 810. Feilchenfeld points out:

Where railroads are state-owned there is, under the Hague Regulations, a distinction between real estate and chattels. In regard to ... real estate, it is clear that the belligerent occupant acquires only the usufruct... Appurtenances such as rails would share the legal fate of the real estate ... It has been argued, probably correctly, that ... municipal distinctions [between fixtures and personal property] cannot effect international law, and that for international purposes all things permanently connected with the soil must be treated as real estate.

E. FEILCHENFELD, supra, note 2 at 55. (footnotes omitted).

91. Id. at 57-61.

92. See, e.g., FM 27-10, supra, note 30, para. 394 at 149 (which fails to make this distinction).

93. See E. FEILCHENFELD, supra, note 2 at 57-58.

94. Id. at 61.

95. XIX SELECTED OPINIONS, supra note 30 at 22.

96. Id. at 18.

97. Id. at 23.

98. See id. at 20.

99. Id.

100. M.G. Law No. 52 paragraph 1, reprinted in W. FRIEDMAN, THE ALLIED MILITARY GOVERNMENT OF GERMANY 303 (1947). This is the same argument made earlier with regard to the meaning of "needs of the army of occupation." See p. 17 supra. One problem with this argument is that after World War II, the Potsdam Agreement and other agreements were interpreted as leges speciali taking precedence over the Hague Regulations. See Greece ex rel. Apostolidis v. Germany (No. 78), III DECISIONS OF THE ARBITRAL COMMISSION ON PROPERTY RIGHTS AND INTERESTS IN GERMANY 329, 334 (1960).

101. 23 ILR 810, 816-817 (lease vs. profit-a-prendre).

102. Id.

103. Id.

104. Id. at 819.

105. "[P]ossession of the oil ... combined with the sole right to dispose of it, gave the appellants as complete a title to the oil as ... was possible for anyone to have during the ... concessions." Id. (emphasis added)

106. See FEILCHENFELD, supra, note 2 at 38-39.

107. Id. Patent rights apparently were seized by the Germans in World War II. See Count Two of the Indictment in the Krupp case, IX TRIALS OF WAR CRIMINALS 23 at para. 35 (1950).

108. XIX SELECTED OPINIONS, supra, note 30 at 1.

109. DEPT OF STATE MEMO, supra, note 5 at 19, n. 21.

110. Id.

111. Note the position taken by Britain when it was a belligerent occupant of Palestine after World War I, discussed at note 62, supra.

112. See Hague Regulations, Article 52. One peculiarity of Article 52 is that it speaks of "[r]equisitions in kind" and "contributions in kind." The term "contribution" normally implies a cash contribution by the occupant. See Art. 51, Hague Regulations. At the 1899 Hague Peace Conference, the Swiss delegate proposed to add the words "giving right to a just indemnity" after the phrase "a receipt shall be given." The Swiss proposal was defeated. One delegate pointed out that it is difficult to determine in advance the amount of compensation due. C. SCOTT, supra note 12 at 539.

113. See FM 27-10, supra note 30 at 154, para. 416.

114. See, e.g., Dunbar, Military Necessity in War Crimes Trials, 29 BRIT. Y.B. INT'L L. 442 (1952); Hague Regulations, Article 23g.

115. For the present DOD position, see 10 I.L.M. 1300-1306. Unfortunately, the issue is analyzed only in terms of Article 23 of the Hague Regulations; Article 55 is not discussed.

116. One wonders, however, if the result would attend if the captured water were returned to occupied territory after use, much like the way the water of the South Platte is

used for irrigation in Colorado and eventually returned, for use in Nebraska. See Compact (Colorado-Nebraska), 44 Stat 195.

117. See REPORT OF THE UNITED STATES DELEGATION TO THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 128 (Third Session, April 21 - June 11, 1976) [hereinafter cited as U.S. REPORT ON GENEVA CONFERENCE].

118. Which is why the oil producing states seek such protection.

119. U.S. REPORT ON GENEVA CONFERENCE supra, note 112, at 129.

120. 2 G. SCHWARZENBERGER, supra, note 4 at 259.

121. See id.

122. See notes 6 and 16, supra.

123. DEPT. OF STATE MEMO, supra, note 5 at 2.

124. Id.

125. The State Department Memo sets forth its understanding of the Israeli position but contains the caveat that its understanding "does not, necessarily, constitute the considered legal view of the Israeli government." DEPT. OF STATE MEMO, supra, note 5 at 1.

126. During the visit of Secretary of State, Vance, to Israel in mid-February, 1977, Egyptian gun boats again threatened Amoco's exploration ship operating in the Gulf of Suez. The full story was not leaked till one month later. One Washington correspondent wrote:

American officials were concerned about the development for a number of reasons. But foremost among them was apprehension that if Israel successfully discovered a large oil field, it would be more reluctant than otherwise to give up control of the southern tip of the Sinai peninsula in a peace settlement.

BOSTON GLOBE, March 11, 1977, p. 11, col. 1 (story continued from front page).

127. See DEPT. OF STATE MEMO, supra note 5 at 4-10.

128. See p. 12 supra.

129. DEPT. OF STATE MEMO, supra note 5 at 10.

130. See pp. 12-13, supra.

131. DEPT. OF STATE MEMO, supra note 5, at 2, 11-16.

132. Id.

133. Judgment, 22 TRIAL OF THE MAJOR GERMAN WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 457-458 (1947). See also note 44 supra.

133a. See, e.g., United States v. Kranch, VIII TRIALS OF WAR CRIMINALS 1128-1133 (1952).

133b. United States v. Flick, VI TRIALS OF WAR CRIMINALS (1952).

133c. Id. at 1204-1205.

133d. Id. at 1206.

133e. Id. at 1207.

133f. Id. at 1208.

133g. Id. at 1210.

133h. Id.

133i. Id. at 1203.

134. See pp. 11-12 and note 44, supra.

135. This apparently is the position taken by the Department of State. See DEPT. OF STATE MEMO, supra note 5 at 13-14.

136. See N.Y. TIMES, Sept. 8, 1976, at 5, col. 1; BOSTON GLOBE, March 11, 1977, at 1, col. 2.

137. See Art. 55, Hague Regulations, which reads in part: "All appliances, whether on land, at sea or in the air, adopted for the transmission of news, or for the transport of persons or things ... may be seized"

138. I J. SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 689 (1920), reproduced in II J. SCOTT, THE HAGUE PEACE CONFERENCES 289 (1909).

139. DEPT. OF STATE MEMO, supra note 5 at 18-19.

140. The doctrine apparently first emerged at the 1960 Geneva Conference on the Law of the Sea. See FISHERIES JURISDICTION CASE (United Kingdom v. Iceland) [1974] I.C.J. Reports (at 23 of original).

141. See II L. OPPENHEIM, INTERNATIONAL LAW 434 (7th ed. Lauterpacht 1952).

142. Id.

143. See BOSTON GLOBE, March 11, 1977, at 11, col. 1; DEPT. OF STATE MEMO, supra note 5 at 18-19.

144. Id. at 22.

145. See N.Y. TIMES, April 27, 1977 at 44, col. 4. The western states in the U.S. reacted to President Carter's energy proposals in protective fashion, even though many of these resources are privately owned. Typical of the comments was one from a Texas Democrat calling Carter's proposals "economic colonialism." Id. at col. 5.