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International Law Situations with Solutions and Notes
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SITUATION IV.

If, on August 20, 1898, a United States war ship had entered the harbor of Hongkong to take coal for San Francisco or Honolulu as might be permitted, and the commander had been informed that he could take only coal enough to carry the ship to Manila as that was the "the nearest port of her own country," should he protest, and why?

What constitutes a "port of a home country," and why?

SOLUTION.

The commander should protest against the decision that Manila, a port simply under the military control of the United States for the time being, was for the ship "the nearest port of her own country."

This protest should be upon the ground that military occupation does not transfer nationality.

He should state that the term "port of her own country" is one within the political sovereignty of the flag of the vessel and not any port temporarily occupied by the forces under the same flag.

NOTES ON SITUATION IV.

Basis of action at Hongkong.—As Hongkong is a crown colony the proclamation of neutrality issued by Great Britain becomes binding there. This proclamation, signed April 23, 1898, has appended a letter from the foreign office containing the general regulations for the observance of neutrality, to the effect that "the governor or other chief authority of each of Her Majesty's territories or possessions beyond the seas shall forthwith notify and publish the above rules." Of these rules the third provides that:

"No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, to take in any supplies, except provisions and such other

things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters aforesaid."

The provision of the rule "or to some nearer destination," does not apply in the case under consideration, as the vessel has no destination nearer than a port of her own country.

The first question is, then, whether the authorities at Hongkong were justified in interpreting "nearest port of her own country" to mean Manila, on August 20, 1898.

How was Manila related to the United States on August 20, 1898?—In the Legal Tender Cases, 1870, Mr. Justice Bradley announced the generally accepted position:

"The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all foreign relations of the country, war, peace, and negotiations, and intercourse with other nations."¹

It is therefore necessary to look to the Government of the United States to learn what relations exist between the United States and Manila.

By another decision "The President and Congress are vested with all the responsibility and powers of the Government for the determination of questions as to the maintenance and extension of our national dominion."²

The courts therefore maintain that the attitude taken by the political branches of the Government within the Constitution is final. In other cases, the courts have decided that the government of new territory belongs

¹ 12 Wall., 555, U. S. Supreme Court.

² 50 Fed. Rep., 110.

“primarily to Congress, and secondarily to such agencies as Congress may establish.”¹

On August 12, 1898, the competent agencies ordered a suspension of hostilities. It was not till four months later that the treaty of peace determined the final disposition of the Philippine Islands. On August 13, 1898, Manila was surrendered to Governor Merritt, who immediately proclaimed martial law.

In General Orders No. 3, on August 9, 1898, published in the “Official Gazette, Manila,” on August 20, 1898, by command of General Merritt, is the following statement of the position :

“In view of the extraordinary conditions under which this army is operating, the commanding general desires to acquaint the officers and men comprising it with the expectations which he entertains of their conduct.

“You are assembled upon foreign soil situated within the western confines of a vast ocean separating you from your native land, etc.”

This seemed to be foreign soil in the eyes of General Merritt on August 9, when the orders were issued, and presumable also at the time of printing the orders on August 20.

By an order issued by General Merritt to the people of the Philippines August 14, 1898, Article V, it was announced that:

“The port of Manila, and all the other ports of and places in the Philippines which may be in the actual possession of our land and naval forces, will be open, while our military occupation may continue, to commerce of all neutral nations as well as our own, in articles not contraband of war, and upon payment of the prescribed rates of duty which may be in force at the time of importation.”

A telegram from the Navy Department, August 12, 1898, says:

“The protocol, signed by the President to-day, provides that the United States will occupy and hold the city, bay, and harbor of Manila pending the conclusion

¹ 18 Wall., 319.

of a treaty of peace, which shall determine the control, disposition, and government of the Philippines. This most important.

“ALLEN, *Acting.*”

This was in accord with Article III of the protocol.

The telegram of August 17, 1898, read as follows:

“The United States in possession of city, bay, and harbor of Manila must preserve peace, protecting persons and property in territory occupied by the military and naval forces.”

On August 22, 1898, General Merritt issued General Orders No. 8, “For the maintenance of law and order in those portions of the Philippines occupied or controlled by the Army of the United States,” and on August 26, 1898, General Merritt by “direction of the President of the United States” assumed his duties as military governor of the Philippines.

The protocol of August 12, 1898, agreed that:

“Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each government to the commanders of its military and naval forces.”¹

The résumé in the instructions issued by President McKinley and addressed to the Secretary of War, December 21, 1898, gives the following statement:

“SIR: The destruction of the Spanish fleet in the harbor of Manila by the United States naval squadron commanded by Rear Admiral Dewey, followed by the reduction of the city and the surrender of the Spanish forces, practically effected the conquest of the Philippine Islands and the suspension of Spanish sovereignty therein. With the signature of the treaty of peace between the United States and Spain by their respective plenipotentiaries at Paris, on the 10th instant, and as a result of the victories of American arms, the future control, disposition, and government of the Philippine Islands are ceded to the United States. In fulfillment of the rights

¹ Article VI.

of sovereignty thus acquired, and the responsible obligations of government thus assumed, the actual occupation and administration of the entire group of the Philippine Islands becomes immediately necessary, and the military government heretofore maintained by the United States in the city, harbor, and bay of Manila is to be extended to the whole of the ceded territory."

In the case 1444, Division of Insular Affairs, War Department, it is stated that:

"At the time of the peace conference at Paris in 1898 all the rights of Spain in the islands above mentioned (Porto Rico, the Philippines, and Guam) had not been obliterated. The sovereignty of Spain therein had been displaced and suspended but not destroyed. Theoretically Spain retained the right of sovereignty, but the United States was in possession and exercising actual sovereignty. The rights of the United States were those of a belligerent and arose from possession and were dependent upon the ability to maintain possession. Under the doctrine of postliminy the sovereignty and rights of Spain would become superior to those of the United States, if by any means Spain again came into possession of one or all of said islands. The American commission therefore required, as a condition precedent to a peace, that Spain surrender this right of repossession."¹

By Article III of the treaty with Spain "Spain cedes to the United States the archipelago known as the Philippine Islands and comprehending the islands lying within the following lines, etc."

In *Flemming et al. v. Page*, speaking of the Mexican war, the Supreme Court says:

"The boundaries of the United States as they existed when war was declared against Mexico were not extended by conquest; nor could they be regulated by the varying incidents of war and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was without the limits of the United States, as previously established

¹ The Law of Civil Government under Military Occupation, p. 45, Magoon's Reports, U. S. Govt., 1902.

by the political authorities of the Government, was still foreign.”¹

“Military government is the authority by which a commander governs a conquered district when local institutions have been overthrown and the local rulers displaced, and before Congress has had an opportunity to act under its power to dispose of captures or govern territories. This authority in fact belongs to the President and it assumes the war to be still raging and the final status of the conquered province to be determined, so that the apparent exercise of civil functions is really a measure of hostility.”²

The claim of the United States to the territory now known as New Mexico was acquired by conquest, the treaty of peace with Mexico merely acknowledging the fact that said territory already had been conquered. On the other hand the Philippine Islands are specifically ceded to the United States, and furthermore, there is a money payment. In answer, then, to the first question, “How was Manila related to the United States on August 20, 1898?”, the courts, the administrative departments of the Navy and Army, the political branches of the United States, and the authorities of Spain agree that the “city, bay, and harbor of Manila” was simply occupied by the military and naval forces of the United States, and that the future of the Philippine Islands was to be determined by the treaty of peace.

Further, there was every reason to believe that this fact of military occupation without any further rights or powers on the part of the representatives of the United States was fully known to the British authorities at Hongkong.

What is the effect of such military occupation as the United States forces had established in Manila on and before August 20, 1898.—From the preceding discussion it is evident—

(1) That the British authorities at Hongkong were bound not to allow a United States vessel of war to take

¹ 9 Howard, 616.

² Pomeroy Const. Law, 595.

on coal beyond the limit required to reach "the nearest port of her own country."

(2) That the "city, bay, and harbor of Manila" were "occupied by the military and naval forces of the United States," and that this was military occupation only, commonly called belligerent or hostile occupation.

The question as to the effect of military occupation then follows.

In an early case¹ it is stated that:

"The holding of a conquered territory is regarded as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. * * * The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state."

Again the court says in regard to the military occupation of 1814:

"But, on the other hand, a territory conquered by an enemy is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession. Until such incorporation, it is entitled to the full benefit of the law of postliminy."²

"By reason of the victory of the fleet under Dewey's command in Manila Bay and the subsequent capture of the city of Manila by the military forces of the United States, under the law and usages of war the military occupation of territory creates an obligation to provide for the administration of the affairs of civil government in the occupied territory. This obligation is binding upon the military authorities of the United States, and the resulting duty may be discharged by them. (Cross

¹ American Ins. Co. v. Canter, 1 Peters, 511.

² United States v. Hayward, 2 Gall., 485.

et al. v. Harrison, 16 How., 164, 193; *Leitensdorfer v. Webb*, How., 176, 177.)

“Governments so created are intended to perform two services—promote the military operations of the occupying army and preserve the safety of society. (*Ex parte Milligan*, 4 Wall., 127.)

“For the accomplishment of these purposes such a government, to use the language of the United States Supreme Court, “may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exercised in such cases save those which are found in the laws and usages of war. * * * In such cases the laws of war take the place of the Constitution and laws of the United States as applied in the time of peace.”¹ (*New Orleans v. Steamship Company*, 20 Wall., 394.)

Chief Justice Marshall (in *The American and Ocean Insurance Company*) said:

“The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as mere military occupation until its fate shall be determined by a treaty of peace.”

The Laws of War on Land adopted at Oxford, September 9, 1880, and generally accepted by civilized states, and in accord with the rules of the Hague conference, define occupied territory:

“A territory is considered to be occupied when, as the result of its invasion by an enemy’s force, the state to which it belongs has ceased, in fact, to exercise its ordinary authority within it, and the invading state is alone in a position to maintain order. The extent and duration of the occupation are determined by the limits of space and time within which this state of things exists.” Rule 41.

“The sovereignty of the occupied territory does not pass to the occupying state, but only the right to exercise the authority necessary for safety and operations of

¹ Magoon’s Law of Civil Government under Military Occupation, p. 216.

war. * * * Belligerent occupation begins when an invaded territory is effectively held by a military force.”¹

“The occupation applies only to the territory where such authority is established and in a position to assert itself.”²

Therefore the sphere of occupation might change from day to day.

Hall says of the effect of military occupation :

“When an army enters a hostile country, its advance by ousting the forces of the owner puts the invader into possession of territory which he is justified in seizing under his general right to appropriate the property of his enemy. But he often has no intention of so appropriating it, and even when the intention exists, there is generally a period during which, owing to insecurity of possession, the act of appropriation can not be looked upon as complete. In such case the invader is obviously a person who temporarily deprives an acknowledged owner of the enjoyment of his property; and logically he ought to be regarded either as putting the country which he has seized under a kind of sequestration, or, in stricter accordance with the facts as being an enemy who in the exercise of violence has acquired a local position which gives rise to special necessities of war, and which therefore may be the foundation of special belligerent right. * * * Recent writers adopt the view that the acts which are permitted to a belligerent in occupied territory are merely incidents of hostilities; that the authority which he exercises is a form of the stress which he puts upon his enemy; that the rights of the sovereign remain intact (p. 487). * * * If occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war; in other words, he has the right of exercising such control, and such control only, within

¹ Wilson & Tucker, *Int. Law*, p. 251.

² Hague Convention, *War on Land*, Article XLII.

the occupied territory as is required for his safety and the success of his operations.”¹

Military occupation differs from conquest.

“Conquest in the technical sense of the status of a territory which has come permanently under the jurisdiction of the enemy is distinct from military occupation, which is a simple fact supported by force.

“Military occupation may pass into conquest (1) by actual occupation for a long period with intention on the part of the occupier to continue the possession for an indefinite period, provided there has not been a continued and material effort upon the part of the former holder to regain possession. If, after a reasonable time, this effort to regain possession seems futile, the conquest may be regarded as complete. Each state must judge for itself as to the reasonableness of the time and futility of the effort. (2) Conquest may be said to be complete when by decree, to which the inhabitants acquiesce, a subjugated territory is incorporated under a new state. (3) A treaty of peace or act of cession may confirm the title by conquest.”²

From what has been said there is an agreement sufficient to be called general that the city, bay, and harbor of Manila was in a state of hostile occupancy by the United States on August 20, 1898; that such occupancy does not work a change of nationality in the territory so occupied, and that the change in nationality occurs only when the conclusion of the treaty of peace or long uninterrupted holding after conquest shows no intent on the part of the original holders to maintain their title to the occupied territory.

It is certain that the uninterrupted holding by the United States had not been sufficiently long, sufficiently complete and uncontested (as the city had only been taken a week before) to warrant any claim of title in the United States. It was certain that no agreement conferring this territory upon the United States had been made. It is certain that the United States had made no claim to this territory other than that of hostile occupancy.

¹ Int. Law, 4th ed., p. 481. See p. 488, sec. 155.

² Wilson & Tucker, p. 99.

Thus as Manila had not been incorporated into the United States on August 20, 1898, it could not be considered "a port of her own country." Again it might be an offense to Spain to give expression to such an opinion pending negotiations the issue of which could not be foretold. There was no way by which it could be presumed by the British authorities that this might ultimately be incorporated by the United States rather than be restored to Spain, be made an independent state or be disposed of otherwise.

The United States has also led the way in giving an interpretation to the rule as is shown in the proclamation of President Grant, October 8, 1870, when it allowed "only sufficient coal to take the vessel to the nearest European port of her own country," regardless of the fact that there were island ports of one of the belligerents nearer. This by implication eliminates ports which are in doubt or are liable to involve hardship if made the points to which vessels must of necessity set out. Of course a neutral may make further regulations for safeguarding herself against abuses of coaling privileges if the vessel, unless the ordinarily accepted contingencies of accident, weather, or other stress prevent, does not sail to the port for which it sets out.

Grounds of the commander's protest.—The commander of the war ship should protest against the decision of the authorities at Hongkong that Manila was on August 20, 1898, "the nearest port of her own country" in the intent of the neutrality proclamation.

He should protest on the ground that:

- (1) Manila is simply in a state of hostile occupancy.
- (2) That hostile occupancy does not transfer nationality in people or place.
- (3) That it is only by the terms of peace or long occupancy that Manila could become "a port of the home country."

(4) That the condition of Manila was itself uncertain while so small an area was occupied.

(5) That to affirm that Manila was a United States port prejudged the Spanish rights which might revert by postliminy.

(6) That the request for coal for Honolulu at least was a reasonable one, and that a statement that the vessel would not journey to Manila would be made if there were any question still remaining.

What constitutes a "port of a home country?"—The question as to what constitutes, as it is called in the British and other neutralization proclamations, "port of her own country" is in part already answered. It is a port in which the political authority of the state would have full vigor. The element "own country," in this international sense, implies within the sovereign authority, which manifestly Manila can not be, for it is merely military authority by power of arms, without political competence, that the United States is exercising on August 20, 1898. Further, a "port" implies, when applied to a home country, a place in which full rights and privileges are secured without effort upon the part of the domestic vessel but as a right requiring no defense.

Manila is not such a harbor.

Further, it may be said that "port of her own country" can not be construed to mean merely a point within its jurisdiction, unless such point be a reasonably suitable port considering the nature of the vessel. A harbor which would be of such a character as to forbid entrance or make it exceedingly dangerous in time of peace would not be a reasonable harbor, nor would one for the time being in the possession of the enemy. While the neutral is bound to exercise "due diligence," the neutral is not bound to carry on war or sacrifice itself or its merchants unduly for either of the belligerents. As Wharton has said:¹

"To require a neutral to shut up its ports so as to exclude from coaling all belligerents would expose a nation with ports as numerous as those of the United States to an expense as great as would be imposed by actual belligerency. It is on the belligerent who goes to war, not on the neutral, who desires to keep out of it, that should be thrown expenses so enormous and constitutional strains so severe as those thus required."

¹Criminal Law, 9th ed., sec. 1908.

A "port of the home country" would, then, be a reasonably suitable harbor at a point which is within the political sovereignty of the state to which the vessel belongs.

Conclusion.—In conclusion, then, the commander has a right to protest against the action of the authorities at Hongkong, and to claim that Manila was not, on August 20, 1898, a port of the United States, but was nothing more than a temporary military base.

The term "port of a home country" must be given an interpretation which will permit a reasonably suitable harbor within the full political sovereignty of the flag of the vessel.