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International Law Situations with Solutions and Notes
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SITUATION II.

War exists between States X and Y. The United States is neutral. A port of State X is placed under martial law. Mr. B, a citizen of the United States, residing and doing business at the port, is seized, imprisoned, and about to be deported without trial. He appeals to the commander of a United States war vessel who chances to be the only representative of the United States in the region.

What action, if any, is the commander justified in taking?

SOLUTION.

The commander of the United States war vessel would be justified in requesting that Mr. B be not arbitrarily deported without trial, that he have a prompt and fair trial by a military court or commission, and if the military exigencies make a trial impracticable, he would be justified in requesting that Mr. B be placed in his custody.

NOTES ON SITUATION II.

Nature of martial law.—*Silent leges inter arma* is a common dictum of municipal law. This has been repeatedly recognized by the Government of the United States. The ordinary courts refuse to interfere with the course of military judgment as enforced by courts-martial. As affirmed by the Supreme Court in the case of *Dynes v. Hoover* (20 How., 65), "With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed which are not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them."

As Halleck says:

It is necessary to distinguish between military and martial law; for the two are very different. In Great Britain the former has only to do with the land forces mentioned in section 2 of the Mutiny Act—now the Army Act, 1881—and the Articles of War. In the United States the Rules and Articles of

War constitute the Military law. This law exists equally in peace and in war, and is as fixed and definite in its provisions as the Admiralty, Ecclesiastical, or any other branch of law, and is equally with them a part of the general law of the land. But Martial law originates either in the prerogative of the Crown, as in Great Britain, or from the exigency of the occasion, as in other States; it is one of the rights of sovereignty, and is as essential to the existence of a State as is the right to declare or carry on war. It is a power inherent in every Government, and must be regarded and recognized by all other Governments. It is one of the incidents of war, invasion, or rebellion; and arises when there is no time for the slow and cumbrous proceedings of the Civil law. Like the power to take human life in battle, it results directly and immediately from the fact that war in name or in substance exists. (Halleck's International Law, Baker's ed., vol. 1, p. 544.)

Application to Mr. B.—Mr. B, in the case under consideration, is a citizen of the United States residing and doing business in the port of State X. This port is under martial law. He is not exempt by virtue of his United States citizenship from any of the legitimate consequences of war. The Instructions for the Government of Armies of the United States in the Field provide (Section 1, 7) that “martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that Government.” These Instructions, which have been generally approved as liberal by other States of the world, also provide (Section 1, 5) that “martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed, even in the commander's own country, when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.”

These rules of war indicate the propriety of the suspension of the ordinary legal processes during the actual hostilities. This position has also been sustained by the Supreme Court of the United States.

“If in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is necessity to furnish a substitute for the civil authority,

thus overthrown, to preserve the safety of the army and of society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this Government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (*Ex Parte Milligan* 4, Wallace 2. Mr. Justice Davis delivered the opinion.)

The fact that Mr. B, the citizen of the United States, was doing business in State X gave to him a more complete connection and interest in the affairs and destiny of State X than would the simple fact of temporary sojourn.

Risley (Law of War, p. 93) says:

Where a person of whatever nationality, or his property, or a tract of territory, becomes connected with the enemy State in such a manner as to be a source, directly or indirectly, of strength and assistance to that State, such person, property, or territory must be regarded as being subject to or belonging to the enemy, and acquires an enemy character.

Enemy character as attaching to persons and their property may arise from permanent allegiance to and residence within the territory of the adverse belligerent, in which case it is complete; or it may be of a partial and temporary nature, limited to certain intents and purposes, arising from such particular circumstances as having possessions in enemy territory, or maintaining a house of commerce there, from personal residence there, or from particular modes of traffic, such as sailing under the enemy's flag or passport.

By this manner a belligerent's own subject or a neutral subject may acquire an enemy character depending upon a kind of implied temporary allegiance to the enemy State; but as soon as he chooses to terminate his hostile allegiance he terminates his hostile character.

As well stated by Davis (*Elements of International Law*, p. 333)—

Martial law, or to speak more correctly *military rule*, or the *law of hostile occupation*, is a term applied to the government of an occupied territory by the commanding general of the invading force. Martial law also prevails in the immediate theater of operations of an army in the field. The reason in both cases is the same. The ordinary agencies of government, including the machinery provided for the prevention and punishment of crime, are suspended by the fact of war. This suspension takes place at a

time when society is violently disturbed, when the usual restraints of law are at a minimum of efficiency, and when the need of such restraint is the greatest possible. This state of affairs is the direct result of the invasion, or occupation, of the disturbed territory by an enemy. The only organized power capable of restoring and maintaining order is that of the invading force, which is vested in its commanding general.

Upon him, therefore, international law places the responsibility of preserving order, punishing crime, and protecting life and property within the limits of his command. His power in the premises is equal to his responsibility. In cases of extreme urgency, such as arise after a great battle, or the capture of a besieged place or a defended town, he may suspend all law and may punish crimes summarily, or by tribunals of his own constitution. . . . He appears in the occupied territory as an agent of his government, charged with the conduct of certain military operations. His first responsibility is to his own government for the successful conduct of the military operations with the direction of which he is charged. In carrying on those operations his government and himself are bound by the laws of war. The usages of war authorize him to employ certain forcible measures toward his enemy. They forbid indiscriminate violence, the use of excessive force, or the use of any force which does not contribute directly to the end for which the war is undertaken. His exercise of authority in the occupied territory must, therefore, be the least possible, consistent with these ends.

Position of Department of State.—During the revolution in Hawaii, in 1895, the following telegram was sent by Mr. Gresham, Secretary of State, to Mr. Willis:

DEPARTMENT OF STATE,

Washington, February 25, 1895.

With reference to your telegram of the 17th instant, touching the imprisonment or condemnation of numerous persons in connection with the recent disturbance in Hawaii, I observe your statement that 13 American citizens are still in prison without charges and without trial. This Government has no disposition to be exacting with that of Hawaii, especially under present circumstances, but it owes a duty to its citizens to see to it that they are not wantonly subjected to arbitrary treatment. Though martial law has been proclaimed, it does not follow that aliens innocent of participation in the acts which gave rise to its proclamation may be arrested and indefinitely imprisoned without charges and without trial. The existence of martial law, while it may imply the suspension of the methods and guaranties by which justice is ordinarily secured, does not imply a suspension of justice itself. You are instructed to insist to the Hawaiian Government that the American citizens still imprisoned without charge and without trial shall be promptly tried or promptly released.

GRESHAM.

The letter of Mr. Gresham to Mr. Willis of the same date with the above telegram, also defines the position of the United States in a special instance. It may be stated in

advance that the Mr. J. Cranstoun mentioned below was subsequently shown not to be an American citizen. The letter is as follows:

No. 66.]

DEPARTMENT OF STATE,

Washington, February 25, 1895.

SIR: I have to acknowledge the receipt of your No. 86 of the 8th instant, in relation to affairs in Hawaii, and particularly in relation to the forcible deportation on the 2d instant of three men, one of whom, Mr. J. Cranstoun, claims to be a citizen of the United States.

I inclose herewith copies of certain depositions made by Mr. Cranstoun on the 11th and 12th instant, before Mr. Peterson, the commercial agent of the United States at Vancouver. These depositions leave the question of Mr. Cranstoun's nationality in doubt, and Mr. Peterson has been instructed to obtain further statements from him on that subject.

Under these circumstances, the Department does not now instruct you to make any representations to the Hawaiian Government in regard to Mr. Cranstoun, but it is proper to express to you, for your own guidance in similar cases, should they arise, the views here entertained in regard to the course of action taken in that case.

It appears that after having been kept in jail for nearly a month, without any charges having been made against him, he was taken under a heavy guard to a steamer and would, in spite of his request to you, have been deported without having had an opportunity then to do so had it not been for the accidental but timely interposition of the British commissioner.

You state that when you asked the attorney-general for an explanation of the proceeding he replied that the cabinet had determined to deport the men "in the exercise of the arbitrary power conferred by martial law." As this was the only explanation he gave, it is presumed it was all he had to offer, and he gave it without suggestion of any question as to Mr. Cranstoun's nationality.

If the position thus assumed be sound, the very proclamation of martial law in Hawaii renders all foreigners there residing, including Americans, liable to arrest and deportation without cause and without any reason other than the fact that the executive power wills it. They may be taken from their homes and their business; they may be deprived of their liberty and banished; they may be denied the ordinary as well as the special treaty rights of residence without offense or misconduct on their part, simply in the exercise of "arbitrary power."

To state such a proposition is, in the opinion of the President, to refute it. "Truly viewed," says an eminent author, "martial law can only change the administration of the laws, give them a rapid force, and make their penalties certain and effectual—not abrogate what was the justice of the community before. The civil courts are in part or fully suspended, but, in reason, the new summary tribunals should govern themselves in their proceedings, as far as circumstances admit, by established principles of justice the same which had been recognized in the courts." (Bishop's Criminal Law, sec. 45.)

In view of what has been stated, your course in protesting against the position assumed by the attorney-general of Hawaii is approved.

I am, etc.,

W. Q. GRESHAM.

(U. S. Foreign Relations, 1895, p. 842.)

Position of the War Department.—A late opinion rendered to the War Department of the United States by Hon. Charles E. Magoon, law officer, Bureau of Insular Affairs (The Law of Civil Government Under Military Occupation, p. 12), says:

It will be seen that a military government takes the place of a suspended or destroyed *sovereignty*, while martial law or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty.

The occasion of military government is the expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion.

The occasion of martial rule is simply public exigency, which may arise in time of war or peace.

A military government, since it takes the place of a deposed sovereignty of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions.

The power of such government, in time of war, is a large and extraordinary one, being subject only to such conditions and restrictions as the laws of war impose upon it.

As was said by the United States Supreme Court, such governing authority "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. . . . 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." (*New Orleans v. Steamship Co.*, 20 Wall., 394.)

Commenting on this view of the law, the Texas supreme court say: "This language, strong as it may seem, asserts a rule of international law recognized as applicable during a state of war." (*Daniel v. Hutcheson*, 86 Texas, 61.)

Martial rule, as exercised in any country by the commander of an invading army, is an element of *jus belli*. It is incidental to a state of war and appertains to the law of nations. The commander of the occupying army rules the territory within his military jurisdiction as necessity demands and prudence dictates, restrained by international law and obligations, the usages and laws of war, and the orders of his superior officers of the government he serves and represents.

Conclusion.—It is evident that the commander in a region under martial law has a right to exercise such a measure of control of all inhabitants of the region, whether natives or foreigners, as military operations may require, and only that degree of force should be used which is necessary to accomplish the end of the war. This end can not be brought about more speedily by inflicting undue hardships on the innocent population; indeed, such action often prolongs hostilities.

In the case of Mr. B, the citizen of the United States, at a port of State X, which port is under martial law, it is proper, according to the position of the United States Government, that the ordinary processes of law should be hastened, because the existence of such a state of jurisdiction implies that ordinary court processes are not sufficiently effective to meet immediate exigencies.

Even though Mr. B is an alien in State X, the fact that he has been residing and doing business at the port renders him liable to the consequences of his sojourn in the time of war, provided the commander declaring martial law does not exceed his authority in the action toward Mr. B.

The seizure of Mr. B is an act which is within the field of proper authority of the commander enforcing martial law. The temporary imprisonment may be and often is necessary in the time of martial law. Imprisonment without trial, however, may be only for the period of absolute military necessity. Martial law does not imply the absence of justice in the treatment of the population which may be under it for the time being, but rather the acceleration of the course of justice. As deportation and imprisonment for a considerable time without trial would imply the absence or denial of proper procedure under generally recognized principles of international law, the commander of the United States war vessel would be justified in hearing the appeal of the citizen of the United States, Mr. B. He would be further justified in asking for Mr. B a fair trial by a military court or commission.

If the military exigencies make such a trial impracticable, the commander of the United States war vessel

would be justified in requesting that Mr. B be placed in his custody, in which case he would be under obligation to see that Mr. B conducts himself in a proper manner with regard to the authorities controlling the port.

Such action would accord with the general principles of justice and would be according to the instructions of the Department of State in the cases in Hawaii in 1895, when the Secretary said—

You are instructed to insist to the Hawaiian Government that the American citizens still imprisoned without charges and without trial shall be promptly tried or promptly released.

The fundamental fact in all cases where martial law is declared is that it does not establish arbitrary authority without regard to law in the commander of the region, but accelerates the course of justice so far as the military necessities at the time demand.