

WAR CLAIMS: WHAT OF THE FUTURE?

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I

PRACTICE OF THE NINETEENTH CENTURY

During the nineteenth century war claims seemed to have been based on one or more of the following considerations: (1) respect for property and other legal rights of individuals, (2) respect for international law, (3) equalization of losses, (4) indemnity to the victor to recover war costs and to delay recovery of the enemy.

(1) *Respect for private rights.* Humanitarian sentiments toward non-combatants and civilians,¹ the economic interests of commercial and propertied classes,² and the prevalence of economic and political theories which emphasized the general interest in the maintenance of international trade, in separating economic activity from government, and in reducing the impact of war upon the community³ greatly influenced the development of international law in the eighteenth and nineteenth centuries. That law came to protect private property from belligerent depredation, unless some specific military advantage was to be gained, and to protect enemy civilians in occupied territory, on the high seas, and in the belligerent's own territory from personal injury. Thus, it was normal for individuals who had had their property seized or their credits confiscated or who had suffered personal injury during war to demand restitution or compensation. Such claims might be made by the defeated as well as by the victor government and also by neutral governments in behalf of their nationals. Through the settlement of such claims international law developed

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¹ Grotius said: "It is the bidding of mercy, if not of justice, that except for reasons which are weighty and will effect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction," especially women and children, the religious, farmers, merchants and prisoners. DE JURE BELLI AC PACIS, Bk. III, c. xi, §§8-15 (1678).

² Franklin urged the exemption of farmers, fishermen, and merchants from the activities of war. 9 SPARKS, WORKS OF FRANKLIN 469 (1840); Hamilton opposed the confiscation of loyalist property during the Revolution (Camillus Letters); and John Marshall on the Supreme Court favored immunities of property in war. Brown v. United States, 8 Cranch 110 (U. S. 1814). See also U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW TOPICS AND DISCUSSIONS 9ff. (1905).

³ Rousseau thought war was a relation among governments and armies, not among populations. This idea influenced French policy, especially in demanding exemption from capture of property at sea. Adam Smith's theory supporting freedom of economic activity from government influenced British policy and that of the world in general during the nineteenth century, especially in extending exemptions from war activity to international debts and property on land. Both theories were endorsed in the early history of the United States. Washington's *Farewell Address* (1796) advised "extending our commercial relations to have with them [European states] as little political connection as possible." See Rudolf Littauer, *Enemy Property in War*, in HANS SPEIER AND ALFRED KOHLER, WAR IN OUR TIME 277ff. (1939); Hans Speier, *Militarism in the Eighteenth Century*, 3 SOCIAL RESEARCH 304ff. (1936); QUINCY WRIGHT, A STUDY OF WAR 308ff. (1942).

definite rules setting the limits to the belligerent's confiscation, sequestration, or requisition of enemy or neutral property in his own or occupied territory or on the high seas.⁴

(2) *Respect for international law.* With the development of international law by treaty, custom, adjudication, and juristic discussion specific rules emerged defining the limits of belligerent action against enemy and neutral persons and property in occupied areas, on the high seas, and in the belligerent's own territory, and against the enemy's armed forces and civilians in the zone of combat. Rules also developed defining neutral duties of impartiality between belligerents, abstention from military assistance by the government, and prevention of hostile use of neutral territory. With this development governments might make post-war claims more to vindicate the law itself than to protect property or personal rights of their nationals, though the measure of such claims was usually the private losses resulting from illegal behavior, and reparation obtained by a government was normally distributed to the individuals who had been damaged.⁵ Though such claims might most frequently be made by the victorious belligerent against his defeated enemy, in principle, as stated in the Hague Convention concerning rules of land warfare,⁶ the defeated belligerent was equally entitled to make such claims.⁷ Furthermore, as indicated by the *Alabama* case, a belligerent might make such claims against a delinquent neutral.⁸

(3) *Equalization of losses.* The injustice of casting an excessive burden of war upon a few individuals who had the misfortune to suffer property or other losses from enemy action tended to the assumption by governments of responsibility to compensate their nationals from such losses. Claim to such compensation was usually confined to combat damages which could not usually be insured against or to claims for separation allowances or pensions because of war services.⁹ Losses resulting from belligerent seizures at sea were normally insured against, unless they took place early in the war before vessels had taken out war risk insurance. To cover such cases international law during the nineteenth century came to recognize "days of grace" upon the outbreak of war, during which belligerent seizure was illegal and would give rise to international claims for restitution or compensation if seizures actually occurred.¹⁰ Claims arising from legitimate acts of war were based on municipal rather than international law and were usually confined to nationals or residents of the state which paid them, although among allies sometimes subsidies

⁴ *Ibid.*

⁵ Losses resulting directly or indirectly from legitimate operations of war gave no claim to compensation under international law though states frequently compensated their own nationals for such "combat damages." E. M. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 247, 256, 259, 279 (1919); 2 MARJORIE M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1420 (1937).

⁶ Art. 3.

⁷ *Id.* at 277ff.

⁸ BORCHARD, *op. cit. supra* note 5, at 246ff.

⁹ *Id.* at 280.

¹⁰ 6 HAGUE CONVENTION (1907); A. PEARSE HIGGINS, *THE HAGUE PEACE CONFERENCES* 300ff. (1909); G. G. WILSON, *INTERNATIONAL LAW* 331 (3d ed. 1939).

and assistance from the more fortunate would be given to equalize sacrifices or to relieve the distresses of the less fortunate.¹¹

(4) *Indemnities*. The cost of compensating its nationals for combat damages as well as the general costs of the war has often induced the victor to demand indemnity from the defeated. Such demands have sometimes been based in principle upon a calculation of reparation for damages from illegal acts, but in practice they have usually gone much further and have included much of the public cost of the war including combat damage to individuals and indeed the cost of maintaining armies in the field. Often the theory that the defeated enemy had instituted the war by aggression and had prolonged it by undue resistance has been set forth as a moral justification. Sometimes indemnity demands have been designed less for compensation for acts in the past than for economic gain for the future through crippling of an economic rival. Sometimes the idea of preventing the defeated power from engaging in a war of revenge by reducing his economic capacity has been involved. But whether for reparation, indemnity, acquisition, or security, only the victor can collect such claims and frequently the economic incapacity of the defeated has imposed a limitation. Such claims have usually gone beyond any theory of justice and have been simply impositions of power with law entering in, if at all, as an unconvincing rationalization.¹²

II

PRACTICE OF THE WORLD WARS

Each of these bases for war claims has been affected by changes in military techniques, in social ideas, in international law, and in international organization during the last half century as manifested especially in the two world wars. Respect for property rights has been adversely affected by socialistic theories and practices and by the totalitarian character of war, which has made it difficult to separate private property and interests from the war effort of the enemy nation.¹³ Claims to vindicate international law have been affected by the important changes in that law, especially the recognition of the distinction between the aggressor and the defender, and the recognition of the interests of the community of nations as a whole in the prevention of war and in the promotion of general prosperity and welfare.¹⁴ The demand for equalization of losses was increased through the technical possibility of destroying enemy life and property on a large scale by aerial bombardment and the

¹¹ The theory of equalizing sacrifices among co-belligerents was one aspect of the lend lease and reciprocal lend lease policies instituted by the United States even before it entered World War II. E. R. STETTINIUS, JR., *LEND LEASE* 5 (1949); *PRESIDENT'S FIFTH REPORT TO CONGRESS ON LEND LEASE* 22 (June 22, 1942); Staley, *The Economic Implications of Lend Lease*, 33 *AM. ECON. REV.* 366ff. (1943). The United Nations Relief and Rehabilitation Administration after World War II and the United States Economic Cooperation Administration have had a similar equalizing purpose.

¹² COLEMAN PHILLIPSON, *TERMINATION OF WAR AND TREATIES OF PEACE* 269-277 (London, 1916); 2 L. OPPENHEIM, *INTERNATIONAL LAW* §269a (6th ed., Lauterpacht, London 1940); BERNARD M. BARUCH, *THE MAKING OF THE REPARATION AND ECONOMIC SECTIONS OF THE TREATY* 18ff. (1920).

¹³ Q. WRIGHT, *op. cit. supra* note 3, at 307ff.

¹⁴ *Id.* at 341ff., 891ff.

increased solidarity of defenders in alliance or international organization. This demand has tended to extend not only to the citizens of a single state, but to the coalition as a whole or the world community as a whole. Those nations bearing the brunt of loss because of geographical position or other cause tend to assert a moral claim to compensation from their more fortunate and wealthier allies.¹⁵ The evolution of a higher ethical sense in the aspirations, if not always in the practice of nations, has made demands for indemnity for recovery of war costs or economic advantage more difficult to sustain. While such demands are still made the terminology of reparation for illegal acts, of measures to prevent future war, or of measures to reestablish world order has tended to be used. The Nazis and the Soviet government felt less need for such rationalization in World War II than did the Western Powers.¹⁶

As to World War I, by the Treaty of Versailles Germany and her Allies accepted responsibility "for causing all the loss and damage to which the Allied and Associated Governments and their nationals" were subjected by the war "imposed upon them by the aggressions of Germany and her Allies" (Art. 231) but, recognizing the inadequacy of Germany to make such vast reparations, actual obligations were to be determined by an inter-allied Reparations Commission which would judge Germany's capacity to pay and would be confined to compensation for damage to the civilian population during war by Germany's aggressions by land, sea, and from the air (Art. 232). In addition, private property rights and interests of Allied nationals in Germany would be restored or compensated and for this purpose the Allies could use the private property of Germans taken over by their alien property custodians during war (Art. 297), and Germany was to compensate her own nationals for their property thus utilized. Mixed arbitral tribunals were established between Germany and each of its allies to adjudicate claims brought by nationals of the Allied countries (Art. 304). The provisions of the other treaties ending World War I were similar.

The settlements of World War II, in so far as they have been made, have followed similar lines. The Yalta declaration "recognized it as just that Germany be obliged to make compensation" for the damage she had caused to the Allied nations "to the greatest extent possible" and the Potsdam declaration referred to this statement and added compensation "for the loss and suffering caused by Germany to the United Nations" and provided for specific removals of capital equipment from Germany for reparations. The Italian peace treaty provided lump sum reparations to the Soviet Union and other Eastern states without statement of reasons (Art. 74), permitted all the Allies to retain Italian property taken over by their custodians during the war, and required Italy to compensate her own nationals for their property thus taken (Art. 79), but prewar debts were not to be impaired (Art. 81). Italy

¹⁵ BARUCH, *op. cit. supra* note 12.

¹⁶ *Ibid.* See *Atlantic Charter* (1941); *Yalta Conference* (1945); *Potsdam Conference* (1945); *Potsdam Declaration Concerning Japan* (1945); *Statement by Edwin W. Pauley on German Reparations* (1945); *Post-Surrender Policy for Japan* (1945), in *THE AXIS IN DEFEAT* (U. S. Dep't State 1945), and *MAKING THE PEACE TREATIES* (U. S. Dep't State 1947).

was to restore identifiable property of Allied nationals taken by force on claim by their governments or, if destroyed, to substitute a similar article (Art. 75). Italy, on the other hand, renounced all war claims of its nationals and agreed to compensate them herself (Art. 76). In addition, the courts of the Allied governments, whose territory was occupied during the war, have in general given effect to the London Declaration signed by most of the United Nations on January 4, 1943 that they

reserve all their rights to declare invalid any transfers of, or dealings with, property rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident of such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

It is clear that the two world wars have resulted in two opposite tendencies in respect to war claims—the first, toward a more idealistic treatment of such claims in the interest of international justice and order and in recognition of the existence of a world community, and the second, toward a more vindictive treatment of the defeated states and peoples because of wide belief in their moral depravity, wide acceptance of their illegal aggression, and wide-spread hatred of them because of the tremendous losses and sufferings they were believed to have caused.¹⁷

A memorandum prepared by a Committee of the Council on Foreign Relations of New York was published in 1945. It stated: "The main objectives of any post-war settlement of property rights should be (1) justice under international law, (2) the establishment of conditions favorable to a durable peace, and (3) the expansion of international trade and investment."¹⁸ Based on these principles nine specific recommendations were made. These permitted the Allies to sequester Axis private property in their territories, but required them eventually to restore it, unless held or used for the benefit of an Axis government or unless the Axis failed to restore the property of Allied nationals, and to compensate for damage and destruction due to use or negligence; to confiscate Axis public property except that protected by the law of war; to exercise all rights of war with respect to private property in occupied territory; and to declare invalid transfers of their own or their nationals' property effected by duress in Axis occupied territories. The Axis governments were to be obliged to restore Allied property, public and private, which they had taken over. Demand for reparation of war costs and combat damages of the Allies was considered a political and economic problem not to be confused with the legal duty to

¹⁷ The wide and growing disparity between theory and practice is a cause of concern. It has in the past marked the decay of a civilization. See Q. WRIGHT, *op. cit. supra* note 3, at 160, 164, 353ff., 385ff.

¹⁸ THE POST-WAR SETTLEMENT OF PROPERTY RIGHTS, A MEMORANDUM ON THE RESTITUTION OR INDEMNIFICATION OF PROPERTY SEIZED, DAMAGED OR DESTROYED DURING WORLD WAR II (COUNCIL ON FOREIGN RELATIONS, NEW YORK, 1945). The Committee consisted of Edwin Borchard, Mitchell B. Carroll, John W. Davis, John Dickinson, Henry J. Friendly, Jerome S. Hess, Philip C. Jessup, Edward F. Johnson, Milton C. Lightner, Creswell M. Micou, Roland S. Morris, Wolcott H. Pitkin, Roland L. Redmond, Quincy Wright.

restore or compensate for private property interests protected by law. This report did not explicitly justify the discrimination between the treatment accorded to private property of nationals of the Allied states and those of the Axis states, but implied that the difference arose because the war had been initiated by Axis aggression, and this was specifically stated in a supplementary statement signed by three members of the Committee.¹⁹ In general, this report manifested the "idealistic" tendency referred to, especially in protecting private rights of both sides in hostilities, and recognizing the legal distinctions between aggressor and defender governments, between genuinely private property and substantially public property, and between losses from government policy or act and from the exigencies of combat. Practice since the war has been based more on the "realistic" principle that "to the victor belongs the spoils." The interest of each victor state in augmenting its immediate wealth and power at the expense of either enemy or ally, and of revenge against not only criminal leaders, but also against enemy peoples has often overridden the human interest in restoration and compensation and the world interest in peace and prosperity.²⁰ After the American Civil War Lincoln's humane policy—"bind up the wounds"—was superceded by the bitter policy pronounced by Thaddeus Stevens—"the South is conquered soil." Such a change is difficult to avoid after hostilities have resulted in costly victory for one side and unconditional surrender for the other. It has not been avoided after World War II.²¹

¹⁹ Messrs. Redmond, Micou, and Wright, *id.* at 62ff.

²⁰ The Western Powers and Russia have quarreled over the quantity and distribution of reparations to be taken from Germany (MAKING THE PEACE TREATIES (U. S. Dep't State 1947)) and the western allies have had difficulty in reaching agreement about the distribution of German reparations and external assets within their control. The agreement among eighteen countries signed at Paris on January 14, 1946 (TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES, No. 1655) was designed to eliminate direct and indirect German enemy interests and to prevent renewed development of German enemy influence as a threat to the national economic security of the participating countries; to protect direct and indirect non-enemy interests; and to promote effective administration seeking the greatest total realization of German enemy external assets. (Mason, *Conflicting Claims to German External Assets*, 38 GEO. L. J. 171, 199 (1950)). This agreement was supplemented by the Brussels agreement of December 5, 1947. 18 DEP'T STATE BULL. 3 (1948).

²¹ This change in attitude is illustrated in comparing reports of the American Bar Association in 1943 and 1945. The first report declared: "Confiscation is contrary to the principles of law. It is contrary to our constitutional law principles, and to the principles of international law. When the reign of law for which we are fighting returns, parties injured by confiscations may be expected to seek just redress; and a just administration of law may be expected to award such redress. It has been so in the past; and if the basic traditional concepts of justice have meaning, it will be so again." *Report of the Special Committee on Custody and Management of Alien Property*, 68 A.B.A. REP. 450, 457 (1943). The report of 1945 repudiated this statement and concluded: "In an unbroken line of decisions the Supreme Court of the United States has held that the laws of war allow a belligerent to seize and confiscate the private property of enemy aliens, as spoil, without any compensation and without any application of the property to its claims or to those of its nationals against the enemy government; that there is no established rule of international law to the contrary; that it is one of the rights of war; that neither the Fifth Amendment nor any other provision of our constitution forbids it; and that it is a matter of grace whether the property shall be restored to the former alien owner. . . . It becomes, then, a mere question of national policy and fair treatment." The report then stated that "Our national policy has been and should be to refrain from confiscating, as *spoils of war*, the private property of enemy aliens, which is found within our borders on the outbreak of war." The report, however, recommended that: "Enemy property within the jurisdiction of the United States should be held and, if necessary, applied to secure the payment of all just claims of this war and any unpaid awards of the last war." Axis assets in enemy and

III

PRINCIPLES OF THE FUTURE

The present writer believes that in the future, law and policy in respect to war claims should have the objectives set forth in the United Nations Charter. These may be stated specifically as: (1) to discourage aggression, (2) to promote respect for human rights, (3) to promote respect for law and, (4) to promote general economic prosperity and welfare. To achieve these objectives the following principles, also expressed or implied by the Charter, should be observed.

(1) *Aggression should be prevented.* War in the sense of hostilities in which the parties are treated as legal equals is not likely to occur. Instead, the United Nations will generally be able to determine the aggressor and the principle of discrimination against the aggressor and its allies and in favor of the victim and the forces organized by the United Nations should be applied. This implies that the aggressor does not acquire new rights or relieve itself of duties by resort to hostilities. Consequently, the aggressor's legal liabilities in respect to "war claims" should be judged by the international law of peace. On the other hand, the victim and the states collaborating against aggression should enjoy all the rights which traditional international law has accorded to belligerents; consequently, the liabilities of these states in respect to "war claims" should be judged according to the rights of belligerents under the laws of war and neutrality.²²

(2) *Human rights should be respected* irrespective of race, sex, language, or religion and should not be affected by the nationality or political convictions of the individual, unless he has been guilty of an offense or unless general public necessities intervene. This implies that an individual's property, contracts, or personal rights should not be subjected to special liability by virtue of the conduct of hostilities whether he is subject to an aggressor government or to a defender government unless he is a "war criminal" or unless required by the necessities of the defenders engaged in United Nations police action as measured by the standards of belligerent rights toward the enemy and neutrals.²³

neutral countries should be similarly applied on the basis of agreements giving consideration to allied and neutral interests. To carry out this policy "a non-political juridical tribunal" should be created by act of congress to adjudicate all claims of American nationals "arising out of acts of enemy governments." This procedure was in large measure unilateral and made no distinction between combat and non-combat claims. It would in effect differ little from a policy of confiscation of enemy property as spoils. The only amelioration in the interest of enemy individuals was the requirement that the Axis governments should compensate their nationals who had thus lost property and the statement: "Ultimately it is desirable to create a permanent adequate system of international courts for the adjudication of all international claims, with the new International Court of Justice as the Court of last resort, in order to build a consistent body of law and procedure relating to them." This committee of which Amos J. Peaslee was chairman, included Mitchell B. Carroll, Ralph M. Carson, Christopher B. Garnett, John Hanna, H. H. Martin, and William D. Mitchell. (AMERICAN BAR ASSOCIATION RECOMMENDATION FOR ADJUDICATION OF WAR CLAIMS ADOPTED DECEMBER 20, 1945, 28, 30, 35 (1945)).

²² See note 14 *supra*. *Harvard Research in International Law, Draft Convention on Rights and Duties of States in Case of Aggression*, Arts. 2, 3, 6, 7, 33 AM. J. INT'L L. 827, 828 (Supp. 1939).

²³ U. N. CHARTER ARTS. 55, 56; UNIVERSAL DECLARATION OF HUMAN RIGHTS ARTS. 2, 17 (1948); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 159 (London, 1950); *Harvard Research, Draft Convention on Aggression*, Art. 7, *supra* note 22, at 899.

(3) *Combat damages* whether resulting from action by the aggressor or by the defender forces should be compensated by national or international plans for recovery and should not be regarded as a basis for individual claims against any government. While the first principle stated above would justify making all combat damages a liability of the aggressor because of his initiation of the hostilities from which all of these damages have occurred, the size of such claims, the usual incapacity of the aggressor (after his presumed defeat) to pay, and the need of cooperation in reconstruction urge the assumption of responsibility by the United Nations to repair combat damages and to equalize losses in so far as individual nations have not dealt with such damages in their own territories.²⁴ The problem should be looked upon as one of reconstruction for the future rather than one of determining liability for past action. Observance of this principle, which tends to maximize the speed of recovery, has the additional advantage that it makes it unnecessary to attempt to determine who is responsible for combat damages, even in hostilities where the belligerents are treated as equal. Such damages refer to losses of life or property through sinking of vessels and bombardments and devastations in enemy or occupied territory under conditions of "military necessity." It is often difficult to tell which belligerent was responsible for a given loss of this kind. During an air raid, damage is caused by the fall-back of anti-aircraft guns as well as by enemy bombs. In the vicinity of battle or in an area of invasion it is often difficult to tell whose guns or mines were responsible for a given damage. It therefore seems desirable, whatever the legal character of the hostilities, that any effort to apportion responsibility be avoided and that the United Nations assume a political and moral responsibility for dealing with all such damages with an eye to reconstruction and equalization of burdens in so far as national governments do not themselves undertake such planning in their territories.

(4) *Non-combat damages* arising from acts of governments in confiscating, sequestering, or requisitioning property; in imprisoning or injuring persons; or in permitting the deterioration or destruction of property in custody should be determined and compensation given in accordance with international law in the sense described in principle one above. Individuals would have claims against defender governments or against the United Nations only if the damage had occurred because of breach of the law of war. Condemnation of prizes taken at sea; confiscations, requisitions, and sequestrations of property in occupied territory; and assumption of custodianship of property of persons on the other side of the line of hostilities would give no claim to restitution or compensation if the action taken was in accord with the law of war. Doubtless, this law under the new principle distinguishing the aggressor and the defender imposes a general responsibility on all states not to protect their nationals who trade to the advantage of an aggressor government²⁵ and

²⁴ This has been the objective of UNRRA and ECA after World War II, extending even to Axis countries, and of the United Nations' General Assembly Resolution of October 7, 1950 in regard to Korea. 9 U. N. BULL. 449 (1950).

²⁵ U. N. CHARTER Art. 2, ¶ 5.

consequently the rights of capture and condemnation of prizes at sea might be greater than those permitted by the traditional law concerning neutral rights at sea.²⁶ In regard to property in occupied territory, the law of war is fairly well defined by the IV Hague Convention, 1907, and by numerous judicial decisions, particularly those of the mixed tribunals established after World War I.²⁷ Doubtless, detailed reconsideration of the applicability of those rules to hostilities against an aggressor is desirable.²⁸

In regard to the custodianship of property in the territory of a belligerent state, the rule is not clear but it is believed that the rule which prevailed in the nineteenth century should be applied. Under this, property genuinely belonging to private persons on the other side of the line of war and not used for hostile purposes might be sequestered for the period of the war, but should be restored after the war with compensation for deterioration or destruction through negligence. The more recent practice by which many belligerent states have taken this property and used it to compensate their own nationals for property seizures or other injuries by the enemy seems contrary to principles of human rights.²⁹ Innocent civilians, even if citizens of, or residents in, an aggressor nation, should not be made to pay for the delinquencies of the aggressor government.

Under this principle individuals would have claims against aggressor governments for any injury to property or persons contrary to the law of peace. No title could be acquired or transferred by action in pursuance of alleged "belligerent rights" because the aggressor does not enjoy such rights. Thus, property which may have been condemned as prize of war; may have been confiscated, requisitioned, or sequestered in occupied territory; or may have been seized in the aggressor's own territory should be restored. International law has accepted the principle that confiscations or transfers by act of a sovereign state within its jurisdiction give a title good against the world, even if the act was in violation of law.³⁰ This does not apply, however, when the property is outside the state's jurisdiction.³¹ All acts of an aggressor based upon alleged "belligerent" rights should be considered outside of the state's jurisdiction. Transfers which had been effected in occupied territory by coercion should be, therefore, regarded as invalid. The theory should be followed that such acts are *ultra vires* and cannot establish a title. Third parties, whether in the aggressor's territory or in other states, could not acquire legal title to property transferred by

²⁶ *Harvard Research, Draft Convention on Aggression*, Art. 7, *op. cit. supra* note 22, at 899.

²⁷ ERNST FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 153 (1942).

²⁸ Downey, *Captured Enemy Property: Booty of War and Seized Enemy Property*, 44 AM. J. INT'L L. 488ff. (1950).

²⁹ See excellent discussion in III CHARLES CHENEY HYDE, *INTERNATIONAL LAW 1726-1743* (2d. ed. 1945).

³⁰ *Oddy v. Bovill*, 2 East 473, 102 Eng. Rep. 450 (K. B. 1802); *Luther v. Sagor*, [1921] 3 K.B. 532 (C.A.).

³¹ *Rose v. Himeley*, 4 Cranch 241 (U. S. 1808); *Dalglish v. Hodgson*, 5 Mo. & P. 407 (C. P. 1831). *The Steamship Appam*, 243 U. S. 124 (1917).

such acts of the aggressor. If innocent, such third parties should have a claim against the aggressor government for compensation, but the original owner of the property should be able to claim restoration of the property.

It is clear that application of the last principle would give rise to considerable difficulty, especially if an aggressor government occupied an area for a long time, and if he condemned much property captured at sea. Many transactions might occur and many purchases for value might prove to have invalid titles. It may be urged that the principle of giving effect to acts of a *defacto* government should be applied in regard to private titles, giving the original owner not restoration but compensation from reparations demanded of the aggressor government. It is believed, however, that the principle of preventing the acquisition of new powers by the fact of aggression and the principle of respecting human rights, in addition to the commonly applied principle that illegal acts of a military occupant may be rescinded by the returning sovereign,³² urge recognition of the *ultra vires* principle. That principle provides better protection for private rights, because the aggressor might not be able to pay reparations without seriously disturbing his economy. Furthermore, a clear rule warning individuals that they cannot acquire good title as a result of "belligerent" acts of an aggressor government or acts under its authority would interfere with the aggressor's activities more than would fear of reparations after the hostilities, in which he would doubtless hope to be victorious.

(5) *Individual claims should be determined judicially.* Claims of individuals against other individuals with respect to titles alleged to have been affected by unlawful "belligerent" action should be determined by tribunals of the state in which the transaction took place, but with appeal to international tribunals established by the United Nations for dealing with such cases. Claims of individuals whether against aggressor or defender governments should be dealt with in first instance by international tribunals constituted by the United Nations to insure impartiality. An opportunity might be provided to appeal on major questions of law to the International Court of Justice.

(6) *General reparations* should not be demanded against the aggressor (who would presumably be defeated). The only individual claims would be those arising from non-combat damages or transfers of property effected through illegal pressures of occupying forces. These would be dealt with in accord with principles four and five. Losses from combat damages should be dealt with by national or United Nations reconstruction plans. There should be no demands against the aggressor state, as such, for reparation, for indemnity, or for punishment. The plan developed by the United Nations should be based upon needs of economic reconstruction and world stability and doubtless, as has been true after World War II, this would frequently result in the economically most capable victims of aggres-

³² This is the doctrine of *ius post liminii* and has been applied by Belgian courts in particular. FEILCHENFELD, *op. cit. supra* note 27, at 145ff.

sion contributing heavily not only to the less fortunate victims, but also to the aggressors themselves.³³ Imposition of disarmament requirements upon the aggressor nation should be judged solely from the point of view of international security and should not be made a reason for reparations in money or in kind.

The only punitive liability should be against individuals found by international tribunals to have been guilty of war crimes. It should be assumed that apart from war criminals the general population of the aggressor state were victims of the criminal action of the leadership of their government no less than were the population of the defender states. After hostilities, efforts should be directed to reconstruction and the promotion of human rights of all and any theory of criminal responsibility of the aggressor state as a whole should be rejected.³⁴

As already indicated these principles were to a considerable extent accepted by the United Nations during World War II but in the circumstances it was inevitable that there should be some departures from them after the war.³⁵ The possibility of realizing these principles in the future will depend upon the development of the United Nations both in its procedures and in its popular support. Will it in time be able to assure that aggressors will never win, that the impartial tribunals called for will be established, and that an enlightened world public opinion will place world security, respect for human rights and international law, and increase of general welfare ahead of ideas of national victory, national power position, guilt claims" may be governed by principles of justice and welfare rather than by power by enemy association, and vindictiveness against the enemy? If it can, future "war to enforce demands for aggrandizement and revenge.

³³ See notes 11 and 24 *supra*.

³⁴ This was the theory of war crimes trials after World War II. See Wright, *International Law and Guilt by Association*, 43 AM. J. INT'L L. 746, 753 (1949).

³⁵ These principles were expressed or implied in certain pronouncements during the war such as the Atlantic Charter (1940), the Lend Lease Arguments (1941), the Declaration of United Nations (1942), the London Declaration on forced transfers (1943), the UNRRA Agreement (1943), and the Nuremberg Charter (1945), but these instruments did not always provide for impartial application of the principles. More vindictive policies toward the aggressor nations and peoples were suggested in the Casa Blanca (1943), Cairo (1944), Teheran (1944), Quebec (1944), Yalta (1945), and Potsdam (1945) declarations, and in practice general reparations demands were imposed on Axis states, economic burdens of practically punitive character were imposed on Axis populations, impartial tribunals were not established to deal with property restitution claims, and war crimes tribunals had jurisdiction only over Axis nationals.

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