Singapore, Bataafsche Petroleum v. The War Damage Commission

[**Source**: *AJIL*, vol. 51 (4), 1957 pp. 802-815; footnotes omitted.]

N.V. DE BATAAFSCHE PETROLEUM MAATSCHAPPIJ & ORS.

v.

THE WAR DAMAGE COMMISSION

22 Malayan Law Journal 155 (1956)

Court of Appeal, Singapore,

April 13, 1956

Whyatt, C.J., Mathew, C.J., and Whitton, J.

Oil stocks in the Netherlands East Indies, which were owned by Dutch corporations, were seized by Japanese armed forces and used for Japanese civilian and military purposes. They were not, however, requisitioned by the Japanese under the Hague Regulations. Large quantities of these stocks were found in Singapore at the end of the war, and were seized by the British Army as war booty. The Dutch corporations claimed compensation. Their claim was dismissed below, but on appeal was allowed. Whyatt, C.J., in an opinion stating the facts more fully, said in part:

[...] The appellants contend that the petroleum was their property and not, as the respondents allege, the property of the Japanese State and in support of their contention, they rely upon two broad submissions, first, that they had a valid title to the petroleum under municipal law, and secondly, that they were never lawfully deprived of their title by the Japanese belligerent occupant.

Before examining these submissions in detail, it will be convenient to set out the relevant facts which have been proved or admitted in the course of these lengthy proceedings. The appellants are three oil companies, incorporated in Holland, who prior to the outbreak of the war with Japan in 1941, carried on the business of producers and refiners of oil in Sumatra. [...] By the end of 1941, the appellants had established production in 32 oil reservoirs, as they are technically known, situated in various places in the concession areas [...].

For the evidence of the events which occurred during the Japanese occupation, [...] the testimony of Japanese naval and military officers [...] may be summarised as follows: When the Japanese armed forces occupied Sumatra, they immediately seized the appellants' installations in the field and also their refineries at Palembang because, as a Japanese naval officer, Admiral Watanabe, called by the respondents, put it, "oil was the most vital war material at that time, and personally, I thought we started the war for the

sake of the oil." The installations had been badly damaged as part of the Netherlands Indies Government's denial policy, and the Japanese military authorities organized a special technical unit under military discipline to repair them. By the end of the first year of the Japanese occupation, they were all in working order again and crude oil was once more being extracted from the reservoirs and being processed in the appellants' refineries. The Japanese military authorities did not bring any new oilfields into production but continued to extract oil from the existing reservoirs throughout the period of the occupation. The oil so extracted, or at least a substantial part of it, was shipped as refined products, and sometimes as crude, to Singapore where it was kept in storage tanks, belonging in some cases to the appellants' associated companies, until eventually it was forwarded to various destinations [...] to meet not only military demands but also civilian requirements in those areas. The Japanese colonel in charge of the Shipping Department of the Petroleum Office in Singapore [...] gave no estimate of the respective quantities allocated to military and civilian consumers. When the British landed in Singapore on the 5th September 1945, they found in the storage tanks [...] refined petroleum and [...] crude oil, all of which, as is admitted by the respondents, had been extracted from the oil reservoirs in Sumatra by the armed forces of the belligerent occupant [...]. The British military forces seized the petroleum stocks as war booty. [...]

I now proceed to consider whether the Japanese belligerent occupant had a right, under international law, to seize the crude oil in the ground and so deprive the appellants of their title to it. It was common ground that if such a right did exist in the belligerent occupant, it was derived from Article 53 of the Hague Regulations. Before, however, I examine this Article, it is necessary to consider a formidable submission advanced by the appellants which, if sound, renders a detailed examination of the Hague Regulations academic. The appellants contended that Japan commenced the war, or at least launched an invasion against the Netherlands Indies, in order to secure the oil supplies of that country, because oil is an indispensable raw material in conditions of modern warfare.

Therefore the Japanese invading armies, as soon as they had established the necessary military superiority, seized the appellants' installations, "lock, stock and barrel," and then proceeded, as speedily as possible, to repair and put them into operation, using for that purpose civilian technicians, [...] who were attached to the army and placed under service discipline. The whole operation, according to the appellants' argument, was prepared and executed by the Japanese military forces in accordance with Japan's Master Plan to exploit the oil resources of the Netherlands Indies in furtherance of their war of aggression. The plan was successful and enabled the Japanese forces in South East Asia in the course of the war to distribute vast quantities of oil, both crude and refined, to meet the needs of military and civilian consumers in the territories under their control and in Japan proper. This exploitation of the oil resources of the Netherlands Indies was, so the appellants contend, premeditated plunder of private property by the Japanese State on a totalitarian scale and, as such, it was contrary to the laws and customs of war.

The appellants rely upon the evidence of Japanese naval and military officers to prove the facts upon which this submission is based. The Chief of the Fuel Section of the Supply Depot of the Ministry of the Navy in Tokyo stated that he was concerned in the spring of 1942 with plans for restoring the oil fields of the Netherlands Indies and later he toured the captured oil fields and arranged for personnel and material to be sent to repair them and put them into working order again. [...] Further details concerning the processing, refining and distribution of the oil were given by the Japanese military officers who were stationed at Palembang and at the Headquarters of the Petroleum Office in Singapore which clearly show that in addition to supplying military requirements, the oil was also used to meet civilian demands. In my view this evidence establishes that the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the

requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

These facts being proved, the next question to be determined is whether seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war. On this point there is, fortunately, considerable authority available from decisions arising out of the war in Europe. First, there is the decision of the Nuremberg Tribunal, delivered in 1946, in which the principle is laid down that to exploit the resources of 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 and customs of war. This principle has been approved and further expounded in the cases of In re Flick, (1947) U.S. Military Tribunal, Nuremberg, and In re Krupp, (1948) U.S. Military Tribunal, Nuremberg [**See** United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al. [2]], and *In re Krauch*, (1948) U.S. Military Tribunal, Nuremberg, where it was applied to the acts of German industrialists who systematically plundered the economy of occupied territories by acquiring substantial or controlling interests in private property contrary to the wishes of the owners. The present case is much stronger as the plunder of the appellants' property was committed not by Japanese industrialists but by the Japanese armed forces themselves, systematically and ruthlessly, throughout the whole period of occupation. In my opinion, these authorities fully support the appellants' submission. Accordingly I reach the conclusion that the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants in Sumatra was in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

I now turn to the alternative argument urged by the appellants under this head, namely,

that in any event the seizure was illegal as the crude oil in the ground was not "*munitions-de-guerre*" within the meaning of Article 53 of the Hague Regulations because it was then a raw material and, moreover, an immoveable raw material. According to the British Manual of Military Law issued by the Army Council pursuant to the provisions of Article I of the Hague Regulations, "*munitions-de-guerre*" are such "things as are susceptible of direct military use." The respondents accept this interpretation of "*munitions-de-guerre*," as indeed they are bound to do since they are, in fact, the Crown although not appearing as the Crown *eo nomine* in these proceedings. Consequently they are compelled to argue that crude oil in the ground, although a raw material, is susceptible of direct military use or at least had a sufficiently close connection with direct military use to bring it within Article 53. No direct authority was cited for the proposition that raw materials could be "*munitions-de-guerre*" but the respondents referred to a passage in *Oppenheim*'s International Law (7th Edition) at page 404 where it is said that "all kinds of private moveable property which can serve as war material, such as ... cloth for uniforms, leather for boots ... may be seized ... for military purposes ..." which they contend supports the view that raw materials can be "*munitions-de-guerre*". On the other hand, *Professor Castren*, a Finnish Professor, in "Law of War and Neutrality," at page 236, says that "Raw materials and semi-manufactured products necessary for war can hardly be regarded as munition of war". It may be that certain types of raw material or semi-manufactured products, such as cloth for uniforms and leather for boots, which could possibly be made up into finished articles by army personnel without the assistance of civilian technicians and outside plant can, without stretching the meaning of "*munitions-de-guerre*" unduly, be regarded as having a sufficiently close connection with direct military use to bring them within Article 53. It is not, however, necessary to decide this point as the facts of this case show that there is no such close connection in the present instance. According to the evidence, elaborate installations and civilian technicians were needed by the army to enable them to appropriate this oil and prepare it for use in their war machines. It had to be extracted

from underground reservoirs, and then transported to a refinery, and then subjected to a complicated refining process before it was of any use to any one. In these circumstances, it cannot be said, in my opinion, that at the moment of its seizure in the ground, the oil had a sufficiently close connection with direct military use to bring it within the meaning of "*munitions-de-guerre*" in Article 53.

A further argument advanced by the appellants was that "*munitions-de-guerre*" does not include an immoveable and as the crude oil when seized, was part of the realty, it was not a "*munitions-de-guerre*." The appellants conceded that certain things included in the categories specified in Article 53 which partake of the character of the realty, as for example, a railway transportation system, are seizable but they contended that oil in the ground could not be regarded as an exceptional case and in support of this view, reliance was placed on a dictum of Lord Simon in *Schiffahrt-Treuhand v. Procurator General*, (1953) A.C. 232, (at page 262) to the effect that "it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting)... ." Lord Simon was not, of course, intending to give an exhaustive interpretation of "*munitions-de-guerre*" but, it would, I think, be a startling extension of his phrase "arms or ammunition which could be used against the enemy in fighting" to say that it could include minerals in situ. In my judgment, Article 53 was intended to apply, generally speaking, to moveables and only in those categories where the description is wide enough to include things which may belong, in part, to the realty, as, for example, "appliances for the transport of persons or things" mentioned at the beginning of the second paragraph of the Article, is it permissible to interpret it so as to include immoveables. "*Munitions-de-guerre*" is not, in my view, such a category. Accordingly I hold that crude oil in the ground, being an immoveable and not susceptible of direct military use, is not a "*munitions-de-guerre*" within the meaning of Article 53.

The appellants, who were nothing if not prolific in preferring alternative arguments, contended that even if crude oil in the ground could be seized as "*munitions-de-guerre*" under Article 53, the seizure in this case was invalid because no receipt was given to the owners or any one representing them. Article 53 does not in terms require a receipt whereas Article 52 (which deals with requisitioning) expressly provides for one; consequently it might be said, as a matter of pure construction, that the omission in Article 53 was deliberate on the part of those who framed the Regulations and such a requirement ought not to be implied. This, however, is not the view taken by municipal courts which have construed this Article. In the case of *Billotte*, (1948) Netherlands District Court, Arnhem ... it was held that the failure of German military personnel to give a receipt when seizing a car rendered the seizure invalid. The Court of Cassation at the Hague took a similar view in *Hinrichsen*'s case in 1950. In that case a German Customs Frontier Guard seized two motor cycles without giving a receipt to the owner and the Court held that "this may not be done without in some way being officially acknowledged, in order to ensure compliance with the rule that such goods must be returned and compensation fixed when peace is made." In reaching their decision the Court of Cassation referred to the report of the proceedings at the First Hague Peace Conference (1899) in which it was stated that although it had not seemed opportune to make a special stipulation with regard to a receipt, the Committee nevertheless were of the opinion that the fact of seizure should be clearly stated one way or another if only to furnish the owner with an opportunity to claim an indemnity. [...] The respondents sought to distinguish these authorities from the present case on the ground that a receipt or acknowledgement was not required when the seizure was otherwise notorious. No authority was cited in support of this view, but in any case it does not meet the case where, as here, the fact of seizure is notorious but the quantity seized is unknown. The appellants do not know and have no means of discovering how much crude oil was seized from their oil reservoirs during the Japanese occupation and even if everything else had been done according to law, it would not now be possible for them to claim the

compensation expressly provided for in Article 53. It would have been quite a simple matter for the Japanese belligerent occupant to have given an official acknowledgment to the Custodian of Enemy Property who [...] was appointed by the Japanese in Sumatra to represent absent owners, and to have furnished him with proper records of the crude oil they extracted; but nothing of the kind was done and the failure to do so, was, in my opinion, an infringement of Article 53 and renders the seizure invalid.

The last alternative argument advanced by the appellants on the construction of Article 53 was that even where the seizure is valid in all respects, the belligerent occupant obtains only a provisional title to seized property and must restore it to the original private owner if it still *in esse* at the cessation of hostilities. They contended that in the present instance the seized property was still in esse when hostilities ended and therefore the rights of the appellants revived and the property should have been restored to them. In support of this proposition, the appellants relied, first, upon the express words of the Article which states that "seized articles must be restored ... when peace is made," secondly, upon the views of *Westlake* (War, Vol. II, page 115) and *Rolin* (Le Droit Moderne de la guerre, paragraph 492), and lastly on two cases decided in municipal courts in 1943 and 1947 [...]. The respondents conceded that the provisions about restoration apply to some seizures and that if, for example, the seized article had been a motor lorry, the belligerent occupant would have been bound to restore it to the owner; but they contended that it would be contrary to common sense to apply these provisions to consumable war materials, such as petroleum, which are not readily identifiable as belonging to any particular owner. Such a distinction does not appear to be based on any principle but rather on the supposed difficulty of carrying out the provisions of the Article in practice. But if, in fact, there is no practical difficulty in identifying the owner of the property, as was the position in this case, I can see no justification for departing from the plain words of Article 53. The respondents further objected that if there was a duty to restore these petroleums stocks, it did not arise until peace was actually made. It

is obvious, however, that the right of the belligerent occupant to use "*munitions-de-guerre*" must cease with the cessation of hostilities, and it appears to me that when this occurs, the only right then remaining in the belligerent occupant is a right to retain possession of the property on behalf of the owner, all other rights in the property revesting in the original owner. Accordingly I am of the opinion that, on any view of the matter, the appellants were entitled to require the belligerent occupant to hold these surplus petroleum stocks on their behalf until such time as they could be restored in accordance with the provisions of Article 53.

I have now dealt with the many contentions put forward by the appellants in respect of the Hague Regulations. At the outset of his argument, counsel for the appellants claimed that in seizing this crude oil, the Japanese military forces had contravened the rules of international law in every single particular. It was a sweeping claim but I am bound to say that I think he has made it good [that] the seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a "*munitions-de-guerre*", the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled. In all these matters, the belligerent occupant, in my judgment, contravened the laws and customs of war and consequently failed either to acquire a valid title for himself or to deprive the appellants of the title which I have found existed in them prior to the seizure. [...]

For these reasons I am of the opinion that the appeal should be allowed. The appellants should have the costs of the appeal and of the proceedings before the Board. [Other opinion omitted.] [...]

Discussion

1. If proven that Japan invaded in order to take over private property (the oil) solely for the war effort, why does this make, as the Court states, examination of Art. 53 of the Hague Regulations merely academic? Does such action by Japan violate the laws and

customs of war? Does it mean that Japan cannot exercise the rights of an occupying power under IHL? That all its actions become unlawful? To which laws and customs of war does the Court refer? Is the Court's reasoning confusing *jus ad bellum* and *jus in bello*?

2. a. When may an army take property in the territory it occupies? May the occupying army seize property for its own use? For the use of its civilian population? (HR, Arts 23(g) [3], 46(2) [4], 52 [5], 53 [6]and 55 [7]; CIHL, Rules 49 [8]-51 [9])
   b. What property may an occupying army seize, utilize, or destroy? Does it matter whether the property is state-owned or privately owned? What other characteristics of the property are determinative in assessing appropriate seizure or requisition by an occupier? (HR, Arts 23(g) [3], 46(2) [4], 52 [5], 53 [6]and 55 [7]; CIHL, Rule 51 [9])
3. a. Does crude oil not constitute a munition of war? What constitutes munitions of war (*munitions-de-guerre*) under Art. 53 of the Hague Regulations? To constitute munitions of war, must an item fulfil two requirements: be susceptible of direct military use and be moveable? Is the British Manual of Military Law's definition of munitions of war binding on all?
   b. If one accepts the definition of munitions of war provided by the British Manual of Military Law, was the Court's analysis of the facts of this case, determining oil to be a raw material not susceptible of direct military use, convincing? Are raw materials never munitions of war?
   c. Need munitions of war be moveable property? Does the Court convincingly interpret the wording of Art. 53 of the Hague Regulations on this point? Is oil really immovable?
4. What is the distinction between the seizure and the requisition of items? What is permissible for an occupying power to seize? To requisition? Under IHL, are there different rules governing seizure and requisition? Does the Court correctly interpret requirements necessary for compliance with Art. 53 of the Hague Regulations concerning seizure? Are these stated explicitly in that article, or implicitly? (HR, Arts 52 [10] and 53 [11]) Was Japan's failure to give a receipt "a fatal omission", as the Court writes?

5. Must seized property be returned? If so, when? “When peace is made”? (HR, Art. 53 [11]) When is that exactly? On the cessation of hostilities?
6. Does the appropriation in the present case not violate Art. 147 of Convention IV? Is Art. 147 alone sufficient to make the Japanese appropriation a grave breach of IHL, or is a substantive rule protecting such property necessary for that article’s application?
