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THE DUTY OF OBEDIENCE TO THE BELLIGERENT OCCUPANT

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WHEN enemy territory has been subjected to belligerent occupation, the inhabitants of that area are commonly said to be under a duty not to commit acts which would jeopardize the security of the occupant. Violations of this duty of obedience are often described in terms of 'war treason' and 'war rebellion'. However, there has been no agreement on the questions whether the juridical basis for this obligation is to be sought in international law, in the municipal law of the occupied state, or merely in the superior force of the occupant and whether its violations may accurately be described in terms borrowed from municipal law. The ruthlessness and disregard for international law which have characterized the conduct of belligerent occupations during two world wars have raised these questions in a particularly acute form. Although the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 profited from experience gained since the adoption of Hague Convention No. IV of 1907, it did not purport to be a complete recodification of the law of belligerent occupation.[2] The fundamental question of the relationship existing between the inhabitant and the occupying Power remains for the most part a problem of the common law of war and is illuminated only fitfully by explicit provisions of the new Geneva Convention.

III. *War rebellion*

The history of 'war rebellion' has roughly paralleled that of war treason, but the concept itself has proved to be considerably less controversial. The writings of Francis Lieber similarly constitute a point of departure for the development of this doctrine. The draftsman of General Orders No. 100 claimed,[4] and his statement appears to be an accurate one, that he originated the term in his pamphlet on guerrilla parties.[5] He defined the war rebel as a 'renewer of war within an occupied territory', and it is in this sense that the term continues to be understood. It presumably refers to uprisings in arms by groups of persons as distinguished from individual acts of hostility and from such conduct as sabotage committed either by individuals or groups. The latter two categories would probably be referred to as war treason, although the reason for the distinction is obscure.

From Lieber's pamphlet, the concept of war rebellion found its way into his *Instructions*[6] and the writings of Bluntschli[7] and so into European

[1] *In re Schonfeld et al.* (1946), *War Crimes Reports*, vol. xi, p. 64.

[2] *In re Von Falkenhorst* (1946), ibid., p. 27.

[3] Two further cases, one in the First World War and the other in the Second, touch on the subject of war treason, but neither took place in occupied territory. The first of these concerned a German agent, Lody, who was tried and convicted by a British court martial on a charge of having committed war treason in Great Britain. It has been stated that he was so charged because espionage was not at the time a capital offence (Phillipson, *International Law and the Great War* (1915), pp. 213–17; Morgan, 'War Treason', in *Transactions of the Grotius Society*, 2 (1916), p. 169). One of the charges against the German saboteurs, whose case was reviewed by the United States Supreme Court in *Ex parte Quirin* (1942), 317 U.S. 1, was violation of the 81st Article of War, which defines the offence of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy. Paras. 205 and 206 of the *Rules of Land Warfare* express the belief that this article of war defines the offence of 'war treason'. Whether the military commission which tried Quirin and his fellow agents considered the charge in this light and whether the accused were found guilty thereof cannot be stated at the present date, as the proceedings of the military commission are not to be released until the World War of 1939–45 is officially declared terminated (*New York Times* newspaper, 9 August 1942, p. 1, col. 4).

[4] MS. Notebook, *supra*.

[5] *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862), p. 13.

[6] Art. 85 provided that 'War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same.'

[7] *Das moderne Völkerrecht der civilisirten Staaten* (1868), § 643.

jurisprudence. The necessity of taking harsh measures against armed resistance in occupied areas has seldom been questioned, and the principal source of controversy has been, as was noted in connexion with the general duty owed to the occupant, whether there is any *right* to rebel and whether war rebellion constitutes a violation of any moral or legal obligation. The question arose at the Brussels Conference of 1874 and proved to be insoluble. The preliminary draft which had been drawn up by Russia contained an article providing that individuals in an area where the power of the enemy was already established who rose in arms against him might be referred to justice and would not be considered as prisoners of war.[1] The proposed article was subjected to criticism by the delegates of several of the smaller countries represented at the Conference, notably the Netherlands, Belgium, and Switzerland, who contended that it would be improper to require a state, the territory of which might thereafter be occupied, to concede to the enemy in advance jurisdiction over citizens who were responding to the highest sentiments of patriotism and to a positive duty to defend their country.[2] They conceded that the occupant might be forced to take severe measures against those opposing his authority, but were unwilling to make a *levée en masse* in occupied territory the subject of a blanket prohibition in positive international law. Agreement between the major Powers and these small states having proved impossible, it was decided to omit the draft article[3] and to leave the matter to existing international law, which was at the time itself uncertain.[4] Opposition from several large states defeated a renewed attempt at the Hague Conference of 1899 to reach a modicum of agreement through an ambiguous statement that nothing in the convention was to be construed as precluding 'the population of an invaded country' from fulfilling its 'duty of offering by all lawful means the most energetic patriotic resistance to the invader.'[5]

In the writings of the publicists, varying effects are attributed to revolution by occupied populations. To many it is a violation of international law, which is variously said to produce as its sanction the removal of the occupant's protection, the termination of the protection of the law of war, the offender's prosecution as a 'war criminal' for 'illegitimate hostilities in arms', or his punishment at the unfettered discretion of the occupant.[6] In

[1] *Projet*, Art. 46.

[2] *Actes de la Conférence de Bruxelles* (1874), pp. 158–65.

[3] *Actes*, p. 165.

[4] Graber, *The Development of the Law of Belligerent Occupation 1863–1914* (1949), p. 85.

[5] The provision was proposed by the British technical delegate and was withdrawn in the face of strenuous objection from Russia and Germany (*The Proceedings of the Hague Peace Conferences. The Conference of 1899* (ed. by Scott, 1920), pp. 550–5).

[6] Halleck suggests that the right of an occupied population to revolt rests on the same principle as the right of revolution against any government (op. cit., pp. 792–5). See also Bordwell, op. cit., p. 302; Nys, op. cit., vol. iii, p. 108; Fauchille, op. cit., vol. ii, pp. 210–11; Rolin-Jaequemyns, op. cit., pp. 667–8; *Kriegsbrauch im Landkriege* (1902), p. 50.

the opposing camp are to be found authorities such as de Visscher, Calvo, Hannis Taylor, and Hall, who state that there is a 'right' to revolt and perhaps even a duty, of which international law must take account, imposed by the continuing allegiance of the citizen to his own state.[1] The conflicting views which are taken are, for the most part, the logical concomitants of the diverse theories which have been adopted concerning the general relationship of the occupied population to the occupant. The doctrine of war rebellion appears, however, to have gained a fairly firm footing in Anglo-American law, for it is referred to in the standard texts of both Great Britain and the United States[2] and is described in the military manuals of both countries.[3] It should be noted, however, that whereas war rebellion is recognized as a 'war crime' by Oppenheim, his treatise denies that the inhabitant owes any duty of obedience to the occupant under international law.[4]

In modern warfare, the *levée en masse*, or a general uprising of the populace, has been supplanted by the more subtle tactics of the resistance movement and the underground, which, while generally enlisting the sympathies of a large proportion of the population, are actively conducted by a minority of that group. The occupant is less likely to be faced by open rebellion than he is by guerilla warfare, sabotage, individual armed attacks, and other more refined acts of defiance. Having lost its utility, the conventional concept of war rebellion has, like war treason, passed into desuetude both in the practice of belligerents and in the substantive law applied by war crimes tribunals.[5]

Axis occupation practices exhibited such a callous contempt for the limitations imposed by international law on the conduct of the belligerent occupant that during the last five years courts have been called upon in relatively few instances to consider the conformity of resistance activities with the law of nations. More often cases dealing with the punishment of acts hostile to the occupant were decided on the issue whether the occupation authorities ought to have afforded, and did afford, a fair trial to the accused before his execution.[6] It was sufficient in several other instances to

[1] De Visscher, loc. cit., pp. 76–77; Calvo, op. cit., vol. iv, p. 218; Taylor, op. cit., p. 592; Hall, op. cit., p. 498.

[2] Oppenheim, *International Law* (6th ed. by Lauterpacht, 1944), vol. ii, p. 456; Hyde, op. cit., vol. iii, p. 1794 (citing Lieber but not employing the term 'war rebellion').

[3] *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 83, which characterizes war rebellion as 'illegitimate hostilities in arms'; United States *Rules of Land Warfare*, para. 349.

[4] Op. cit. (6th ed. by Lauterpacht, 1944), vol. ii, p. 343.

[5] For an isolated example of the use of the term see *In re Ohashi et al.* (1946), *War Crimes Reports*, vol. v, p. 25.

[6] *In re Von Leeb et al.* (*High Command Trial*) (1948), *War Crimes Reports*, vol. xii, p. 1; *In re Buck et al.* (1946), ibid., vol. v, p. 39; *In re Kato* (1946), ibid., vol. v, p. 37; *In re Yamashita* (1945–6), ibid., vol. iv, p. 1; and *In re Wagner et al.* (1946), ibid., vol. iii, p. 23, are typical examples.

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decide that reprisals against resistance activities were excessive or had been taken prematurely.[1] As the result of the prohibition of reprisals and collective punishments and the detailed provisions concerning judicial proceedings in the courts of the occupant which have been incorporated in the recent Geneva Civilians Convention,[2] the pronouncements of war crimes tribunals on these matters have become of diminished practical importance. Nevertheless, those cases in which the propriety of resistance activities has been considered have almost universally reached the conclusion that such acts are not in violation of international law. In the *Trial of Hans Albin Rauter*, who had been a German police official in the Netherlands, the Dutch Special Court of Cassation went so far as to state that resistance is a 'permissible weapon' to use against the occupant.[3] A Norwegian court of appeals rejected the defence raised by German police officials for their conduct in Norway that the activities of the underground movement were acts of illegitimate warfare and therefore might be made the subject of reprisals, which in this case took the form of torture. In the opinion of the Court the underground movement did not constitute a violation of international law, although the activities of members of the movement were presumably violations of a body of local law enforced by the German authorities.[4] This issue was not discussed by the Supreme Court in affirming the decision of the court of first instance, but in the *Trial of Flesch* on similar charges, the Supreme Court affirmed the holding of the court of appeals that underground activities, even in the form of guerilla warfare, were not, in the circumstances, in violation of international law.[5] The military tribunal which tried Wilhelm List did not specifically discuss whether resistance is lawful under international law.[6] It did, however, state that persons guilty of acts of resistance to the occupation forces become 'war criminals *in the eyes of the enemy*'[7] and 'must accept the increased risks involved in this mode of fighting' because it is only in this fashion that the occupant may protect himself against what the Court called 'the gadfly tactics of armed resistance'. The Tribunal concluded that 'We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war.'[8] The language is more suggestive on the whole of a punishment *permitted* by international law than it is of a punishment *imposed* by international law.

The larger question of the obligation of inhabitants to obey the measures

[1] *In re Von Mackensen and Maelzer* (1945), *War Crimes Reports*, vol. viii, p. 1; *In re Flesch* (1946–8), ibid., vol. vi, p. 111.

[2] Arts. 33, 64–78.

[3] *In re Rauter* (1948), *War Crimes Reports*, vol. xiv, pp. 127–9.

[4] *In re Bruns et al.* (1946), *War Crimes Reports*, vol. iii, p. 17.

[5] *In re Flesch* (1946–8), *War Crimes Reports*, vol. vi, pp. 115, 119.

[6] *In re List et al.* (*Hostages Trial*) (1948), *War Crimes Reports*, vol. viii, p. 34.

[7] Emphasis supplied.

[8] *War Crimes Reports*, vol. viii, p. 58.

taken by the occupant for his security was considered by Dutch courts in connexion with the prosecution of collaborationists. Several contractors and police officials raised the defence that they had been legally obligated to obey what they contended to be the lawful commands of the German occupation authorities. The Dutch criminal courts and the Special Court of Cassation held, on the contrary, that the only effective defence to a charge of collaboration was one of *force majeure* and that the mere fact that the Hague Regulations sanctioned the requisitioning of services and the enactment of legislation designed to assure order and protect the occupant created no compulsion for individuals to render services in conformity therewith. The Hague Regulations were not intended to create rights against the population of an occupied territory; they merely limit the *de facto* authority of the occupant. Accordingly, they do not create legal obligations in conscience binding upon the inhabitants.[1]

The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 has removed any lingering doubts about the status of certain organized resistance forces by providing that members of 'volunteer corps', including 'organized resistance movements' operating even in occupied territory, are entitled to be treated as prisoners of war upon capture, if they are commanded by a responsible person, have a fixed distinctive sign, carry arms openly, and conduct their operations in conformity with the laws of war.[2] This provision has been rendered necessary by war-time difficulties in securing recognition as prisoners of war for partisans who had conducted their activities in conformity with international law.[3] Underground movements carrying on clandestine activities and persons who individually make armed attacks on occupying military forces are presumably left to the common law of war, subject to the protection afforded by the Geneva Civilians Convention. For the activities of such persons, the appellation of 'war rebellion' hardly seems appropriate.

IV. *The validity of the traditional concepts*

The presence in international law of a theory which envisages a duty of obedience imposed by that law and characterizes certain acts hostile to the occupant as war treason or as war rebellion can only be explained in terms

[1] *In re Contractor Worp* (1946), *Na-oorlogse Rechtspraak, Tribunalen in Nederland*, 2nd Year, 1946, No. 519; *In re Van Huis* (1946), ibid., 2nd Year, 1946, No. 605; *In re Heinemann* (1946), ibid., 3rd Year, 1947, No. 763. In *In re Van Huis*, the Special Criminal Court of The Hague, in a distinction reminiscent of Bordwell, conceded that measures designed exclusively for the benefit of the occupied country might create legal obligations for individuals.

[2] Art. 4 A (2). This principle had already been anticipated in previous writings, which had specified that members of a *levée en masse* in occupied territory who were taken prisoner by the enemy were not thereby deprived of all legal protection (Westlake, op. cit., Part ii, p. 100; Grob, *The Relativity of War and Peace* (1949), p. 268).

[3] *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, International Committee of the Red Cross (1947), pp. 107–10.

of history. It is particularly significant that these kindred concepts date from a period which was still one of transition from the rigorous law of conquest to the modern and more enlightened view of belligerent occupation. That they have persisted is the consequence of inertia in the law, which has failed to take account of later developments in warfare and in the law of occupation itself. One need only point out as illustrative of the antiquated state of the law the fact that certain paragraphs about war treason in the United States *Rules of Land Warfare* have remained unchanged over a period of nearly ninety years.[1] It must be observed, moreover, that these concepts have never during their history met wholehearted acceptance as positive international law; their present position is more than precarious.

The essential issue which must be faced in a re-examination of this area of the law is whether a duty of obedience is imposed by international law or is merely a consequence of the armed might of the occupant, who alone creates the duty. There is no doubt that theories of allegiance and temporary allegiance are no longer tenable and belong to the past. As for a duty of obedience imposed by municipal law, it would appear that it lies within the competence of a state to impose such a duty if it believes this course to be desirable. Although it may be determined as a matter of policy that non-resistance or outright collaboration will best serve the national interests of the occupied state, it is improbable that such considerations will carry much persuasion.

In modern war resistance to the occupant is virtually inevitable if hostilities are still in progress. The civilian has not only been drawn into the maelstrom of war; he has voluntarily interjected himself into it. It seems to be a natural phenomenon in modern political societies that the citizen should feel a greater measure of responsibility for the support of his country and its political institutions than was true in an age when wars were fought by professional armies in the interests of absolute monarchs. We must also recognize that in the eyes of a citizen's fellows and in those of the world—indeed, probably in those of the enemy as well—there is no moral taint attached to an act of resistance by a civilian patriot.[2] If international law is to have a moral content, it is difficult to see how an ethical basis can be found for the principle that international law intervenes to quell acts of resistance which, in the moral sense of the world, are regarded as heroic rather than criminal.

The aggressor of today appears to have an initial advantage over defend-

[1] See p. 250, n. 3, *supra*.

[2] Although Oppenheim asserts that the inhabitant's duty of obedience is grounded in the martial law of the occupant rather than in international law, he indicates that making use of treason and espionage, while not illegal, is 'detestable and immoral' ('On War Treason', in *Law Quarterly Review*, 33 (1917), p. 268). This attitude does not appear to be in conformity with modern views of morality in warfare.

ing forces, and an immediate, extensive occupation by the state first to move will in all probability befall the invaded country until defending military forces can be mobilized to drive out the enemy. At the same time that the occupant must continue to have the means of penalizing acts hostile to him or dangerous to his security, the emphasis of modern international law must nevertheless be on the protection of *all* the inhabitants of occupied territory, including those whose conduct is prejudicial to the occupant, against unwarranted severity in the occupant's rule. Yet the theory that international law imposes a duty of obedience serves the interests of the occupant, rather than those of the inhabitant, and may either inflame his passions or offer a rationalization for excessively harsh treatment of those under his protection. The emotional overtones of a belief that some higher legal order forbids and penalizes acts of resistance must inevitably lead to unmerited rigorousness in dealing with such conduct. Although collective punishments and reprisals and the taking and killing of hostages have been forbidden by the new Geneva Civilians Convention and certain maximum limitations have been placed on punishments,[1] there is still room for making penalties more onerous than they should be.