HOHFELD IN OCCUPIED TERRITORY*

From ancient times[1] enemy territory occupied by a belligerent was considered immediately to become part of the occupying state. Occupation was not distinguished from conquest. The occupant had sovereign powers so that he could devastate the country, appropriate public or private property, compel the people to take an oath of allegiance, and force them to fight in his army against their previous sovereign. The Greeks and Romans in their later wars mitigated the harsh practices which had formerly been employed, but only through a realisation that it was less profitable to kill a man than to sell him or allow him to buy his freedom. After the fall of the Roman Empire, military usage reverted to the barbarity of the earliest times, although during the Middle Ages there were exceptional examples of a more enlightened attitude.[2] The greatest barbarity was attained during the Thirty Years War. The cruel practices of belligerents in occupied territory led Grotius to cite (*inter alia*) the military usage of the Roman Empire as a plea for clemency. His plea for more humane practices was based on moral grounds, and the nearest approach he makes to a discussion of belligerent occupation is in his treatment of *Postliminium*. In the century following Grotius, military usage approximated much more closely to the dictates of humanity. This improvement as affecting persons in occupied territory was largely achieved by the distinction reached during this period between combatants and non-combatants. But the distinction between occupation and conquest was still not made.[3]

The modern conception of the law of belligerent occupation first appears halfway through the eighteenth century in the writings of Vattel. In his treatment of the acquisition of property by conquest he writes:

> Real property—lands, towns, provinces—become the property of the enemy who takes possession of them: but it is only after the treaty of peace or by the entire subjection and extinction of the state to which those towns and provinces belong that the acquisition is completed and rendered permanent and absolute.[4]

And treating of *Postliminium* he writes:

> As to real property it must be remembered that the acquisition of a conquered town is only consummated by the treaty of peace, or by the entire subjugation or destruction of the state to which it belongs.[5]

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* (The title, of course, derives from the application in the following comment of the analysis developed by Wesley Hohfeld in *Fundamental Legal Conceptions* (1923) to the legal problems arising in occupied territory—Eds.).

[1] J. E. Conner, *The Development of Belligerent Occupation* (1912) Vol. 4, University of Iowa Studies.

[2] The Ordinances of War of Henry V of England (1419) were designed to secure discipline in the army and to restrain soldiers from their customary excesses. Art. 26 makes a clear distinction between surrendered territories where the people are exempt from the harsh conditions of war and territory which is still hostile.

[3] Thus Denmark in the Northern War (1700-18) sold certain Swedish territories to Hanover before the war was decided, and Frederick II of Prussia during the Seven Years War made forcible levies of recruits in occupied territory to fight in his army against their former sovereign.

[4] *The Law of Nations* (1758) Book (iii), para. 197.

[5] *Ibid.* para. 212.

In these passages it is pointed out for the first time that mere occupation does not confer sovereignty on the belligerent occupant. Ultimate sovereignty over the occupied territory will depend on the terms of the peace treaty.

However, it was not till after the Napoleonic Wars that the consequences of this distinction were reflected in state practice and in theory by such writers as Klueber and Heffter. It took the whole of the nineteenth century to develop the rules now enacted in the Hague Regulations, for the old theory was slow to die. Thus in 1814 a British court stated: "No point is more clearly settled in the courts of common law than that a conquered country forms immediately part of the King's dominions".[6] This case concerned British conquest and occupation of an island. But this view had been modified by 1857, at least so far as the enemy character of occupied territory was concerned, for it was then stated by another British court:

> The mere possession of a territory by an enemy's force does not of itself necessarily convert the territories so occupied into hostile territories or their inhabitants into enemies.[7]

Even in 1875 Twiss still insisted that occupation vested sovereign rights in the occupant. But these were isolated instances and a demand for unqualified allegiance by an occupant gradually ceased to be made in practice.

In 1863 the first attempt made to gather the various new ideas into a code.[8] In that year, Dr. Francis Lieber was largely responsible for preparing a set of Instructions for use by the Union Forces in the American Civil War. From this point in the history of belligerent occupation it is necessary to trace two threads; one is concerned with the duty of allegiance, the other with the duty of obedience. In Lieber's Code they are seen still inextricably interwoven. Art. 26 provides:

> Commanding generals may cause the magistrates and civil officers of the hostile country to take an oath of temporary allegiance or an oath of fidelity to their victorious government or ruler, and they may expel everyone who refuses to do so. But whether they do or not the people and their civil officers owe strict obedience to them as long as they hold sway over the district and country, at the peril of their lives.

The notion of temporary allegiance was peculiar to Anglo-American law of this period and was applied by United States Courts in the early nineteenth century.[9] Yet by 1863 we see that even an oath of temporary allegiance was not required to be administered generally to the people. However, whether an oath was administered or not, all the people still owed a strict duty of obedience to the occupant. The writers of this period like Bluntschli and Halleck agreed with Lieber in this conclusion.

The next step was taken by the Brussels Conference in 1874, when the necessity for an oath of allegiance was finally denied. Art. 37 of the Declaration provided: "It is forbidden to compel the population of occupied territory to swear allegiance to the hostile power". No mention of a duty of obedience was made.

In 1880 the Institute of International Law prepared the Oxford Manual which in Art. 47 provided:

> The population of occupied territory cannot be compelled to swear allegiance to the hostile power, but people who commit hostile acts against the occupant may be punished.

Insofar as provision is made for punishment, it would appear that the framers

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[6] *The Foltina* (1814) 1 Dods. 450.
[7] *The Gerasimo* (1857) 11 Moo. 88.
[8] For an historical account of the Law of Belligerent Occupation from 1863 to 1914, see D. Graber, *The Development of Belligerent Occupation* (1949).
[9] E.g. *U.S.* v. *Hayward* (Mass.) (1815) 2 Gall. 485.

believed the people owed a duty of obedience to the occupant.

In this period before the Hague Peace Conferences, a division of opinion appears concerning the duty of obedience. Writers such as Wheaton in his 1889 edition and Birkhimer in 1892 assert that allegiance to the displaced sovereign is temporarily diverted; and Birkhimer states that the people owe the occupant a transient duty of obedience which he seems to equate with temporary allegiance. For the first time, however, writers such as Hall[10] and and Martens[11] deny that any duty of obedience is owed at all, although they admit it is to the people's advantage to obey those demands of the occupant which do no violence to their allegiance to their own sovereign.

By 1899, the prohibition on an occupant requiring an oath of allegiance was well settled, and Art. 37 of the Brussels Declaration was re-enacted without discussion in the 1899 Hague Convention and again in the 1907 Hague Convention concerning the Laws and Customs of War on Land. The latest expression of this principle is in the 1949 Geneva Civilians' Convention which provided in Art. 68 that no death penalty may be pronounced against a protected person unless the court's attention has been particularly directed to the fact that the accused is not bound by any duty of allegiance to the Occupying Power.

The thread concerning the duty of obedience is not so easily resolved but it is interesting to note here a significant change in the history of belligerent occupation. Up to the middle of the eighteenth century the duty of obedience was considered coterminous with the duty of allegiance. Both were unqualified. By 1899 it was established that no duty of allegiance is owed to an occupant; but the exact limits on the duty of obedience, or indeed whether such a duty exists at all, still remain to be ascertained. Only one thing was certain; it had become clear that the occupant's power had become strictly limited and to that extent the duty of obedience (if any) had become qualified. The limits on the occupant's power had a separate history and do not concern us here. They are now enacted in Arts. 23 and 42-56 of the Hague Regulations, and in the Geneva Civilians' Convention. What concerns us now is the source and extent of the duty of obedience.

There appear to be three possible sources of the duty.[12] First, the duty might arise from municipal law, either of the occupant state by the delegation of legislative power to the appropriate occupation organs, or of the occupied state. This latter case arose when the Belgian Court of Cassation held that the German occupation legislation in World War I pursuant to Art. 43 of the Hague Regulations derived its legal effect from the Belgian Law of 1910, by which the Hague Regulations were made part of Belgian municipal law. In other words, the Belgian Court took the view that future belligerents were authorised by Belgian law to impose a duty of obedience on the Belgian people.

Secondly, the duty might arise from International Law. This view was often taken by writers in the late nineteenth and early twentieth centuries and is still widely held by continental writers. The duty was justified either on the basis of some form of social contract between the occupant and the people, or on the basis of reciprocity: that is, a duty of obedience was said to be owed in exchange for protection and humane treatment. Rarely was the extent of the duty considered. Bordwell, however, writing in 1908, was an exception, and his analysis has the great virtue of accommodating the motivation of patriotic

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[10] *A Treatise on International Law* (4 Ed. 1895) 498-9.

[11] 2 *Volkerrecht* (1886) 572.

[12] See, generally, R. R. Baxter, "The Duty of Obedience to the Belligerent Occupant" (1950), 27 *B.Y.B.I.L.* 235. Also, L. Oppenheim, "The Legal Relations Between an Occupying Power and the Inhabitants" (1917) 33 *L.Q.R.* 363 and J. Stone, *Legal Controls of International Conflict* (1959) 723.

sentiment which so often invites disobedience to the occupant. Any analysis is unsatisfactory which does not accommodate both the claim by the people (and their government) of allegiance to their lawful sovereign, and the necessity of obedience to the legitimate commands of an occupant. Bordwell wrote:

> So long then as the occupant is acting as the territorial authority in carrying out the ordinary purposes of government and not for his own belligerent purposes it would seem that the inhabitants owe him obedience; but when he goes further and takes measures which are for his own belligerent purposes it would seem that the inhabitants far from owing him obedience may still look upon him as the enemy of the government to which they owe allegiance and so far as his orders are hostile to that government, may disregard them as far as they may reasonably do so.[13]

Bordwell's theory has been criticised by Professor Oppenheim and by von Glahn. Oppenheim has said:

> Insofar as the occupant conducts the administration of the country according to existing laws the inhabitants do not really render obedience to him but to their own laws and their own governments.[14]

This may be so but this criticism does not affect the situation where an occupant alters or modifies existing law pursuant to his obligation under Art. 43 of the Hague Regulations, when the occupant may still be acting as "territorial authority". Von Glahn has said:

> It is not the right of a citizen in occupied territory to judge the legality of an occupant's order and in the event of an adverse personal decision to claim a right of disobedience.[15]

To say that a citizen has no *right* to judge the legality or illegality of an occupant's order may be disputable but this criticism seems otherwise valid. Yet criticism of this type can apply with equal force to a soldier and his plea of superior orders when the order has been held to be illegal.

The third possible source of the duty may simply be the military authority or power of the occupant. Baxter cites numerous modern authorities for this view which he himself supports. He writes:

> There is a strong tendency in modern law, and it is submitted a correct one, to deny that there is any legal duty of obedience founded on any legal or moral obligation with which international law concerns itself.[16]

In his view, obedience arises simply from the fact of the superior military power of the occupant and he therefore concludes: "International law suffers the occupant to legislate but it will not lend its authority or its assistance to the enforcement of such legislation".

At least one municipal court has said: "International law does not impose upon inhabitants of occupied territory any obligation to obey the occupying power or to recognise its authority as lawful".[17] Subsequent writers, too, substantially agree with Baxter. Von Glahn has said:

> Returning once more to the question whether the duty of obedience of the native population is based on the military power of the occupant or

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[13] Bordwell, *Law of War* (1908) 300.
[14] Oppenheim, article cited *supra* n. 12, at 366.
[15] Gerhard von Glahn, *The Occupation of Enemy Territory* (1957).
[16] Baxter, article cited *supra* n. 12, at 243.
[17] *Transatlantica Transport Maatschappij* v. *Laufer* (Netherlands) (1953) *Int. L.R.* 655. But contrast the difficult case of *British and Polish Trade Bank* v. *Bary and Co.* (Netherlands) (1954) *Int. L.R.* 485. In this last case payment, by order of the German occupant, to a Berlin bank of a credit balance held by the defendant bank, was held to be a valid discharge. Yet the German order was declared contrary to international law by the Dutch Government. The validity of the discharge seemed to depend on a Dutch Royal Decree which provided that a debtor who during the occupation by virtue of a then existing obligation, had paid a debt to a person other than the person recognised as creditor before the occupation, was to be considered discharged from the debt.

> on international law, it appears that usually the former is true but that the latter case may occur. The duty of inhabitants to observe the regulations issued by the occupant must be clearly distinguished from their duty to abide by the rules of international law. Most of the duties of inhabitants in occupied territory fall under the former category.[18]

Unfortunately, he does not give examples of rules of international law binding on people in occupied territory, but if they are limited to the prohibition against committing war crimes, then there seems little point in the distinction as war crimes are violations of a duty of obedience, not to a belligerent occupant but to international law. His conclusion is in agreement with Baxter's: "In other words the population is under no moral duty to observe such regulations, although the occupant is entitled to punish such offenders as are apprehended by him during the occupation". Professor Stone, too, has said:

> . . . International law . . . stops short of itself prohibiting resistance to the occupant or commanding obedience to him. It merely leaves the occupant a certain freedom by its municipal regulation to command and to suppress and punish disobedience.[19]

Stone is one of the few writers who explicitly states that there is "some kind of legal duty to obey" although it is not clear what he regards as the exact source of that duty. Even when writers insist that the duty of obedience depends solely on the "military authority" or "military power" or "martial law" of the occupant, it is not clear whether the duty can be juristically described as a legal duty.

The writer agrees that there is "some kind of legal duty to obey" a belligerent occupant but considers this whole problem has been confused by attempting analysis with right-duty relationships in mind. It is submitted that a more profitable analysis might be in terms of another Hohfeldian relationship; the privilege—no right relationship. The privilege resides in the occupant who has a licence under international law to make legitimate regulations. The people have a correlative burden also imposed by international law which deprives them of the right to object to such regulations. In other words, they do not have a duty to obey but a no-right in respect of the occupant's efforts to enforce these regulations. The breach of such regulations, therefore, is not a violation of international law as no duty is owed under international law to the occupant.

To be more particular: the occupant has a privilege or licence under international law to make regulations in pursuance of his own military needs, but this privilege or licence is circumscribed by the requirement that his regulations be legitimate, that is, that they conform to any specific duties imposed by international law on a belligerent occupant. Such duties are, *inter alia*, to ensure public order and safety[20] and to fulfil the requirements of the Geneva Civilians' Convention. These are duties properly defined and imposed by international law and in respect of which correlative international law rights reside in the occupied inhabitants. They may be considered the "terms" of the licence granted by international law to the occupant and they all flow from the fact that the occupant exercises only military authority and not sovereignty. It should also be noted that only in respect of these rights and duties is there unlikely to be a conflict of what Professor Stone has called "ethical allegiances", on the part of the occupied inhabitants.

The practical position would seem to require a distinction not dissimilar to that drawn by Bordwell and previously noted. On the one hand there will be legitimate regulations promulgated in furtherance of the occupant's licence

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[18] *Supra* n. 15 at 47.
[19] *Supra* n. 12 at 726.
[20] Hague Regulations, Art. 43.

as above described. These may constitute a body of rules which can be appropriately called "Occupation Law". This law is made under an international law power and obedience to it is secured by the military power of the occupant and not by any sanction of international law itself. Its breach is not a violation of international law but may still be properly considered a violation of a legal duty as the duty has been imposed by this new legal hybrid "Occupation Law". On the other hand there will be legitimate regulations promulgated in furtherance of duties specifically imposed by international law on the occupant. Only if these latter type of regulations are broken is there a violation of international law. In either case, if the occupant exceeds the limits of his authority, which as we have seen has now become strictly limited, then his acts have no legal force whatever.

The writer is in full agreement with Miss Morgenstern when she writes:

> . . . belligerent occupation is a legal régime circumscribed by the limits which international law places on the authority of the occupant. Within these limits and these limits only, the acts of the occupant derive from international law a legal force which is binding both on the inhabitants and on the returning sovereign. Where the limits are exceeded the acts of the occupant are *ultra vires* and absolutely void, even though the occupant may have the physical power to give them practical effect . . . (This position) represents both an affirmation of the authority of international law and a compromise between the conflicting interests involved, namely, the legitimate interest of the occupant in the furtherance of his war effort and the safety of his army, and the equally legitimate interest of the occupied state in the defeat and expulsion of the occupant and in the protection of the civil population.[21]

It is submitted that the foregoing analysis accords with the factual situation of belligerent occupations and accommodates the ethical allegiances underlying the problem; but that these allegiances render futile any attempt at complete analysis in terms of rights and duties.

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[21] F. Morgenstern, "Validity of the Acts of the Belligerent Occupant" (1951) 28 *B.Y.B.I.L.* 291 at 320.

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