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THE DEVELOPMENT OF BELLIGERENT OCCUPATION

BY

JACOB ELON CONNER

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EDITOR

THE DEVELOPMENT OF BELLIGERENT OCCUPATION

BY

JACOB ELON CONNER

TO
THE MEMORY OF
MY FATHER AND MOTHER
THIS WORK IS DEDICATED

THE DEVELOPMENT OF BELLIGERENT OCCUPATION

By Jacob Elon Conner

INTRODUCTION

The subject which is herein treated under the title of "Belligerent Occupation," might be roughly defined as that stage of military operations which is instituted by an invading force in any part of an enemy's territory when it has overcome all successful resistance and established its own military authority over said territory and the non-combatant population, in lieu of pre-existing civil authority. As a stage of military operations it must come to an end with the treaty of peace, though *military* occupation may continue for some time thereafter.

This fact leads to a discussion of terms. For the stage of military operations just mentioned, the terms "military occupation," "belligerent occupation," "hostile occupation," or following the French usage, simply "occupation," have been indiscriminately employed. During the last few years we have heard much of the military occupation of Cuba, Porto Rico, and the Philippines by the United States, and of China by the united powers. Yet each case represents a different phase of occupation. Speaking more precisely only the last mentioned is a case in point throughout, such as is contemplated in our subject, though the other cases are analogous up to the signing of the treaty of peace with Spain.

The treaty of peace, as the final word upon the issues of the conflict, determines the permanent status of occupied territory. Military occupation thereafter is of an essentially different nature from what it was before, and is to be determined with all prudent expedition. Being of such a different nature it would seem to be opportune in the present treatise to offer a corresponding distinction in the use of terms, trusting that it is not anticipating usage presumptuously. Accordingly, the term "military occupation" when employed herein, will coincide with what is believed

to be popular usage in designating occupation after the treaty of peace, while "belligerent occupation" is reserved for occupation during the conflict. The term "hostile occupation" is rejected for the reason that non-combatant people and territory should not be conceived of as hostile though still technically belligerent. The French term "occupation" is rejected because of liability to confusion with the concept represented by the Roman *occupatio*.

It might be said in further justification of this discrimination that some such distinction is made necessary to fit a situation so fundamental to a consideration of the subject as a part of international law, where it naturally belongs; for with the conclusion of peace, military occupation becomes at once a national rather than an international affair. With the period preceding peace, therefore, since wars may be international, international law is much concerned, whether the occupation be considered as law or as comity. Hence, if military occupation be chosen to designate the later period it can not in International Law be consistently applied to the earlier, and thus for the reasons above given, the term "belligerent occupation" will be employed to designate a set of relations which partake of an international character to a greater degree than does "military occupation."

Belligerent occupation, as the term has just been defined, is to be considered down to 1863 from the point of approach represented in its historical development. It was in this year that Dr. Francis Lieber, at the request of President Lincoln, formulated the first modern manual of instructions to army officers respecting their duties to a conquered territory and people. Since this celebrated manual led to the issuance by other states of similar manuals for their respective armies, it is evident that the comparative or analytic method of approach to the subject is more suitable to the modern phase of its development.

The year 1863, therefore, although but a step in a historical process, is by far the most important step in that process. It may not be called the beginning of belligerent occupation, for this has had many beginnings, as the distinctions between combatants and non-combatants, between public and private property, between movable and immovable property in their legal status as affected by war, etc. Moreover, at least one manual can be pointed out which had been in existence for 444 years when President Lincoln took the initial and significant step which

led to the codification of the rules of war under discussion. This early manual is known as the War Ordinances of Henry V of England. Reserving a fuller discussion of this remarkable work for another place, it need only be stated here that it had no immediate and positive results, so far as observable, upon International Law, whereas, the manual of 1863 was immediately followed by a series of attempts to synthesize their results into an international code. Though this latter has not yet been accomplished, except so far as briefly formulated by the Hague Conference, yet the influence of the modern manuals is permanent and authoritative, and they are fairly uniform.

It is not too much to say, therefore, that with the year 1863 we have the beginning of the recognition of belligerent occupation as a definite stage in military operations; that before this year the elements of belligerent occupation existed merely as the *disjecta membra* of a now well-established and fairly organized code; that it is not until 1863 that we can precisely say that we have such a thing as belligerent occupation in a legal sense.

I

PRIMITIVE USAGE

It will be in order, therefore, though an order neither strictly chronological nor topical, to consider the principal elements in the development of belligerent occupation. These principal elements may be stated succinctly as follows:

1. A distinction between combatants, or those who bear arms, and non-combatants, or those who do not.

2. A distinction in the treatment of public and private property, especially the exemption of the latter from the severities of war.

3. A distinction in the treatment accorded to movable and immovable property.

4. The legal status of territory and people during the period of occupation.

It is evident that these elements, while fundamental to our subject, have a much wider significance in relation to the general progress of civilization. War is a reversion to the argument of barbarians. In so far as it becomes unregulated, ungoverned, it is a recrudescence of the parties to the conflict, a national lapse, whose effects are longer lived than the conflict itself. Mod-

ern international law, reflecting the highest moral sentiments of modern states, declares peace to be the moral condition to which belligerents are bound to return as soon as the issues of the strife have been decided. This is in strong contrast to the earliest usage of each separate tribe or people. But modern nations are unwilling to suffer a complete relapse to barbaric methods, even to accomplish the end of a deadly combat. They therefore confine their hostile operations to the instruments of warfare, the armed forces, and do not visit upon the non-combatant portion of the enemy any of the rigors of war save such as may be demanded by military necessity. The primitive concept of war permitted every person—man, woman, and child—to make war upon every other person belonging to the enemy. The modern concept, on the contrary, limits hostilities to properly authorized agents, who should be distinguished from their non-combatant compatriots by badges or uniforms, by military organization, and by authority to do all possible injury to the like forces of the enemy, only under certain conditions.

It will thus be seen that the constant tendency in warfare is toward intensification; the fiercest possible treatment of the fighting machinery of the enemy, whether it be a weapon or a man, and side by side with this the exemption of the unarmed and inoffensive populace. Thus the advance of civilization may be gauged—and perhaps most accurately gauged, if war represents the minimum of advancement—by the widening of the difference in treatment accorded to combatants and non-combatants, between the execution aimed at the soldier in the ranks and the protection of the farmer in his fields.

As to the second and third characteristics, the distinction between movable and immovable property, and between public and private property, these will be explained more fully in their proper historical connection, the first only being of particular importance in connection with early usage.

It would be difficult, perhaps impossible, to say what is the first recorded instance of an agreement between two belligerents to spare non-combatants on either side, in life or property. One authority[1] says that "the most ancient state whose records have been preserved to us in a condition of fair completeness is that

[1] T. A. Walker, Cambridge University, in "A History of the Law of Nations," p. 31 (1899).

of the Israelites." And we know that the practice of the Israelites was terribly severe. It was no worse, however, than that of neighboring tribes, notwithstanding the occasional voice lifted in protest against the revolting practices which were tolerated. This, indeed, is the most impressive feature of the subject from earliest times to modern; namely the persistence of a brutal custom long after its reiterated condemnation. The earliest departure from the prevailing custom of pitiless slaughter and devastation after a victory was dictated, no doubt, by expediency rather than by mercy. It must have been recognized from the beginning of organized warfare that pillage and excessive cruelty are disorganizing and destructive of military discipline; that wanton devastation exhausts the land from which both belligerents derive their support and that there is more profit in selling a man into slavery than in taking his life. Such considerations as these, and not mercy, are at the bottom of the Mosaic command to spare all the fruit trees in the neighborhood of a besieged city.[1]

Numerous instances may be cited in the warfare of the Israelites where clemency was shown to prisoners, to the wounded, to women and children, and where subject tribes were released from the sternest treatment by promise of ransom or tribute. This, indeed, may be said of other ancient nations; but recorded instances of a stipulated exemption from the hardships of war accorded by combatants to non-combatants in the presence of actual hostilities are almost unknown.

One such instance[2] is recorded by Xenophon in his Cyropaedia. It is the earliest that the writer has been able to find, and is of sufficient importance to deserve extended notice.

> "Cyrus having taken into consideration those who had revolted to him, and who, being in the neighborhood of Babylon, would suffer severely unless he himself were always at hand to protect them, desired all of the enemy whom he dismissed to tell the Assyrian king, and he himself sent a herald to him with a message to the same effect, that he was ready to let the laborers employed in the culture of the lands alone, and to do them no injury,

[1] "It would not be too much to say," says Walker, "that herein we see the beginning of a definite law of War"—which is attributing rather large importance to it, in the opinion of the writer. (See Walker "A History of the Law of Nations", p. 36).

[2] Cyropaedia, V, 4, 24. The colloquial form is a favorite method of narration with Xenophon as with other classic writers.

if he, on the other hand, would allow the laborers of such as had revolted to himself to pursue their work: 'Though indeed,' he added, 'if you are able to hinder them you will hinder but a few, for the land belonging to those who have revolted to me is but little; while I, on the other hand, would allow a large portion of the land to be cultivated for you. And as to the gathering of the crop, if the war continues, he that is strongest, I suppose, must needs gather it; but if there be peace, it is plain that you must gather it. Be that as it may', he said, 'if any of my people take up arms against you, or any of yours against me, we must punish such persons to the best of our ability.'

When the Assyrians heard of this proposal, they did all they could to persuade the king to comply with it and to leave as little war remaining as possible. The Assyrian monarch accordingly, whether from being persuaded by his people, or from his own inclination, consented; and an agreement was made that *there should be peace to those that were employed in labor, and war to those that should bear arms.* Such an agreement did Cyrus make with respect to the laboring people; but the pastures of the cattle he ordered his friends to make use of as they saw fit, each within his own jurisdiction. Moreover they carried off booty from the enemy wherever they could, in order that the allies might be better pleased with the service. For aside from taking the supplies the hardships were the same, and the booty of the enemy seemed to make the service lighter."[1]

Let us look more narrowly at this ancient treaty, for it anticipates the modern manuals by upwards of two thousand four hundred years upon several important points. It is to be noticed:

First, that the war is not to be universal; it was agreed that "there should be peace to those who were employed in labor and war to those that should bear arms." Is not this the greatest step ever taken in the progress from barbarism to civilization? It involves the limitation of war, as far as may be, to the agents and agencies of warfare, exempting the unarmed and helpless, and allowing the continuance of peaceful pursuits. In a word, it makes war a contest between states—a political struggle—and not between peoples—a racial struggle, or homicidal warfare.

[1] Τὰς μέντοι νομὰς τῶν κτηνῶν τοὺς μὲν ἑαυτοῦ φίλους ἐκέλευσε καταθέσθαι, εἰ βούλοιντο, ἐν τῇ ἑαυτῶν ἐπικρατείᾳ· τὴν δὲ τῶν πολεμίων λείαν ἦγον ὁπόθεν δύναιντο, ὅπως εἴη ἡ στρατεία ἡδίων τοῖς συμμάχοις, οἱ μὲν γὰρ κίνδυνοι οἱ αὐτοὶ καὶ ἄνευ τοῦ λαμβάνειν τἀπιτήδεια, ἡ δ' ἐκ τῶν πολεμίων τροφὴ κουφοτέραν τὴν στρατείαν ἐδόκει παρέχειν.

Second, the motives for proposing the agreement were a desire to spare his own allies and a willingness to make reciprocal concessions to that end. It cannot be shown that Cyrus took higher ground than this, though from the general character of his campaigns it would not be too much to expect such clemency to the non-combatant enemy, even without the like favor in return. The same may be inferred likewise from the fact that the concession which he makes is much larger than the one which he anticipates in return. Cyrus never approved of wanton destruction, either of life or of property, and in permitting his soldiers to plunder as he frequently, perhaps usually did, he yielded so far to the universal custom which permitted much greater excesses. And this was done too in the interests of discipline; for although "he knew well", as Xenophon testifies in another place, "that in plundering, cowards are apt to be foremost," yet there would have been danger of mutiny had he attempted a complete suppression of plundering.

Third, it is to be noticed that this agreement is to be enforced by both commanders for their mutual advantage. A non-combatant enemy, because of his supposed inoffensive character, has much more opportunity for mischief than has his compatriot who is under arms. One who violates a privilege granted by an enemy need not expect less than the extreme penalty if he falls into the enemy's hands.

Fourth, nothing is said as to the disposition to be made of the non-combatants at the close of the war, nor of the lands they cultivated, except that it is darkly hinted that he who is the strongest in arms shall gather the crops. Plainly no jural rights had as yet been dreamed of which would secure to these laborers the proprietorship of their land in case of a change of sovereignty and we know from contemporary usage, even till much later times, that they might have reason to expect massacre, slavery, or at the very best, exemption from these by a heavy annual tribute to the conqueror.

Fifth, the agreement did not wholly include private property. How far this was in obedience to "military necessity", which even today will justify a commander in making "requisitions" or levying "contributions" it is impossible to say. An appropriate terminology had not yet been invented, such as would have enabled the narrator to make such distinctions. It is left indefinite, too,

as to whether each is to punish his non-combatant enemies or those of his own side, though presumably it is the former; in which case the punishment would be extreme, even as it is today.

Taking it altogether this is a most remarkable exhibition of clemency, as well as good military judgment, and the humanity of Cyrus, as herein revealed stands out in striking relief against the dark background of contemporary custom. It is not to be supposed that such exemption would have been granted to his non-combatant enemy had it not been for the wish to save his allies. But we find few commanders in ancient times who could see the inexpediency of wanton destruction.

If anything were needed to confirm his reputation for clemency, it is to be found in connection with the storming and capture of Sardes, the capital of Lydia. Such occasions have always been the scenes of the most reckless ferocity, and even down to the middle of the nineteenth century it was a matter of debate among publicists in international law whether the defenders of a garrison or besieged city might be treated with more severity than opponents in the open field. The wellnigh universal practice has been to show little or no mercy, and the more stubborn the resistance the greater the severity. The custom of the Romans was to give no quarter after the head of the battering-ram had once touched the walls of the besieged. But we find in the instance cited[1] that Cyrus not only spared the lives of the besieged but prevented the sack of the city, only desiring of the Lydian king a ransom sufficient to satisfy his soldiers.

These two instances of the magnanimous treatment of a fallen foe even after making sufficient allowance for the personal equation of the narrator, show plainly enough that though the magnanimity was not usually practiced under such circumstances it was not due to lack of knowledge thereof at such an early time, but the disinclination to be influenced by it. Over and over again one is led to believe that in the midst of the sternest, the most revolting

[1] Cyropaedia VII, 2, 11 and 12. "Hear then, Croesus," said he, "knowing that the soldiers after having undergone many fatigues and incurred many dangers, consider themselves now in possession of the richest city in Asia, next to Babylon. I think it fit that they should receive some recompense; for I am sure," continued he, "that unless they receive some fruit of their labors I shall not have them long obedient to my orders. I am not, however, willing to give the city up to their plunder; for I believe that it would thus be destroyed; and in plundering I know very well that the worst men would have the advantage." Needless to say that to this the joyful Croesus assented.

cruelties of ancient warfare, men knew better, but custom governed. It governed to such a degree that the agreement between Cyrus and the Babylonian king is unique. Other laws of war may be discovered in the making, but with these we are not concerned. Other instances of customary or stipulated limitation of hostilities to combatants is the point that directly concerns us, and for this we may search in vain. So far from exempting non-combatants from the evils of war, war itself was defended for the very reason that it afforded a means of procuring slaves; and this, too, by no other than Aristotle. Polybius[1] (about 200 B. C.) condemns treachery and needless cruelty and destruction:

> "The taking and demolishing an enemy's forts, harbors, cities, men, ships and crops and such other things by which our enemy is weakened and our own interests and tactics supported, are necessary acts according to the laws and rights of war." But, "to deface temples, statues and such like erections, in pure wantonness and without any prospect of strengthening one's self or weakening the enemy must be regarded as an act of blind passion or insanity. For the purpose with which good men wage war is not the destruction and annihilation of the wrongdoers, but the reformation and alteration of the wrongful acts. Nor is it their object to involve the innocent in the destruction of the guilty," etc.

Accordingly Polybius points out that Philip of Macedon won his victory over the Athenians not so much by the battle of Chaeronea as by his justice and humanity thereafter;

> "His victory in the field gave him mastery only over those immediately engaged against him; while his equity and moderation secured his hold upon the entire Athenian people and their city. For he did not allow his measures to be dictated by vindictive passion, but laid aside his arms and warlike measures as soon as he found himself in a position to display the mildness of his temper and the uprightness of his motives. With this view he dismissed his Athenian prisoners without ransom, and took measures for the burial of those who had fallen . . . and presented most of those whom he released with suits of clothes . . . . . The pride of the Athenians was not proof against such magnanimity and they became his zealous supporters instead of antagonists, in all his schemes."

[1] Polybius V, 11 and 12, translated by Shuckburgh.

The laws of war, however, in Polybius' time, permit the defeated with their wives and children, to be sold into slavery.

It may be said in summarizing ancient usage upon the subject in question that obviously there could not be international law in regard to belligerent occupation or any part thereof, since international law was in no case beyond the stage of comity, and even then existed as an inter-tribal understanding; that the cases in which a distinction was observed between combatants and non-combatants were sporadic, not of permanent influence, and that consequently there is no continuity of development exhibited therein; but that such as they are they deserve mention in a historical treatment of the development of the subject under consideration.

II.

ROMAN LAW AND USAGE

It is a safe precept in legislation that law should not precede public sentiment. Since international law, however, is not a matter of legislation and is ratified by none but quasi sanctions, it not only *may* precede public sentiment, but, so far as the latter is expressed in military usage, it is under the ethical necessity of doing so,—of marching with the van instead of the main body of opinion. During the development of our modern international code its basis was primarily ethics or morality, and secondarily custom. It is probable that modern authorities would reverse this relationship so far as it contemplates the usage of today,—a natural result of the fact that the formative period is somewhat advanced and the period of codification has scarcely begun.

Keeping this statement in mind, it need not be a matter of surprise if we discover that upon the particular point of our inquiry Roman law outran the usage of the time. Hence, though no adequate conception is to be discovered in their military usage of the phase of warfare we know as belligerent occupation, the legal basis therefor may be discovered in its incipiency in the writings of Roman jurists; and hence, moreover, we are primarily concerned with Roman law in its treatment of the property of the enemy, and with Roman military usage in its treatment of the persons of the enemy.

Primitive warfare involves the slaughter of the armed and unarmed indiscriminately, save as caprice may dictate, and earl-

Roman usage was certainly primitive. The distinction between combatants and non-combatants remained to be made in law many centuries after Rome fell. The Romans went to war with the enemy as a whole nation and made peace with the whole nation, and there was no intermediate stage between the declaration of war and the proclamation of peace. The primitive severity of her warfare gradually relaxed as it was discovered that it was more profitable to sell captives into slavery than to slaughter them. Polybius, the Greek historian of Rome, thought that the war practice of the Romans was mild, and of such matters Polybius was a severe judge; yet in his day and for many centuries later the Roman army was followed by the slave merchant. Not the only prisoners of war but women and children as well,—all were sold *sub jugum*. "When war comes", says Tacitus, "the guilty and the innocent fall alike," and Grotius, commenting upon Roman practice at this time says that "no law spares or protects a captive."

The next great step came very late in Roman history. It was the commutation of slavery to ransom. The influence which was probably most potent in bringing this about was Christianity. By this substitution of a money loss for that of personal freedom, cities and districts might profit as well as captive individuals, and thus the horrors of a war were incalculably mitigated so far as the persons of the unfortunate were concerned. The lateness of this change, however, leaves the fact unaltered as to the severity of Roman usage in general.

There are to be discovered now and then certain gratifying exceptions to this general severity toward the persons of the enemy, as is recorded of Marcellus in the protection of the honor of women at the capture of Syracuse—for which instance Grotius finds parallels in Greek warfare, and more especially in that of the Hebrews. Scipio says that[1] "it concerns both him and the Roman people that nothing which is held sacred anywhere should be violated by them." Many other quotations might be offered of noble sentiments of humanity toward the fallen. The Roman writers as well as the Greek seemed fond of referring to the laws of war (*jus belli*) and to invoke their condemnation of unwonted ferocity. Just what these laws were we have no means of knowing except through their war customs. The Romans were accustomed to refer them for

[1] Grotius III, 4, 19.

general authenticity to the Twelve Tables; but it is improbable that there was anything more definite in the concept of *jus belli* than that it was merely a part of *jus naturae*, implying a sentiment to the effect that cruelty even to an enemy should have bounds. Certain ceremonies[1] connected with the proclamation of war, the sanctity of heralds, etc., may have been included in this indefinite concept. However that may be, neither Ulpian, Gaius, nor Justinian makes any mention by name of such laws.

Enough has been said to show that so far as the persons of the enemy were concerned, Roman custom slowly improved with the passing of the centuries, keeping, perhaps, slightly in advance of contemporary usage; but that nowhere in law or custom was there a recognition of the difference between the rights of combatants and non-combatants. All suffered the same fate, whether extermination, slavery, or ransom.

Turning from the treatment of persons to that of property, it is possible to record a greater elaboration both in legal theory and in military usage. In the first place, public property, then as now, whether movable or immovable, was liable to capture. The more magnanimous commanders generally spared the temples and shrines and all other objects and places of worship. Likewise statues and other works of art enjoyed some such immunity, though there are ancient as well as modern instances of the plundering of Greece. There is but little difference to record between Roman and modern usage as affecting public property. The main point is that in modern times under the development of belligerent occupation the occupant is conceived to have only the right of *usufruct* of all public immovable property. He may not destroy it nor alienate nor acquire title to it until the ratification of peace; but he may use it and derive all revenues arising from it. Romans, however, raised no question as to the ownership of public property either movable or immovable, when captured by their arms; and if they exempted places of worship or objects of art it was as a concession to religious sentiment, or in deference to a general custom, or prompted by a spirit of magnanimity, and not as an admitted legal right.

What has just been said of public property may just as exactly be affirmed concerning private property. [2]"Aucune difference

[1] I. e., portions of the *jus fetiale*.

[2] Nys, Ernest, Les Origines du Droit International, p. 193.

n'est faite entre la propriété privée et la propriété de l'état." But questions as to the possession of captured goods must necessarily arise out of the difference in the original ownership. State property captured by another state undoubtedly belongs to the victor and not to the individuals composing the army. But the victorious state was not conceded so clear a title, or able to enforce it, when private property was the spoil. It can easily be shown as a matter of logic that as soldiers are only employees of the state, which assumes all responsibility for their acts, the state should acquire the ownership of everything they capture. But such reasoning will never satisfy a patriot, who risks his life for a pitiful sum per month, when food and comfort are needed; much less the cupidity of those who fight for gain. In the capture of private property the individual element is more in evidence on both sides, and this accounts for the application of the doctrine of *occupatio* to such cases, if, indeed, it does not account for its origin. Livy, according to Grotius,[1] makes private property begin "when men took possession of what was vacant or won it in war."

"The Roman principle of occupancy and the rules into which the jurisconsults expanded it,"[2] says Maine, "are the sources of all modern International Law on the subject of capture in War." The statement may pass unchallenged here, providing the term *occupatio* is used in a sense broad enough to include the doctrine of *postliminium*. Briefly stated the doctrine of *occupatio*, as applied to war was as follows: Things which have not, or never have had an owner, i. e. *res nullius*, may be taken possession of by the first comer. Now the property of the enemy was in Roman law *res nullius*, inasmuch as it was the property of persons whom that law regarded as nobodies, and who, if captured, themselves became *res nullius*." "Those things which we take from the enemy," says Justinian,[3] "are also ours at once by the law of nations; so much so that even freemen are reduced into slavery to us."

But at this point the effect of the distinction between movable and immovable property must be noticed. Obviously the latter could not be appropriated by the first comer, as Grotius remarks, for if it could the result would be the disintegration of the

[1] Grotius, III, 6, 2, 3.

[2] Maine, Sir Henry, Ancient Law, p. 239.

[3] "Item ea quae ex hostibus capimus jure gentium statim noster fiunt; adeo, quidem, ut et liberi homines in servitutem nostram deducantur." Justinian II, 1, 17 (Emperor of Rome 527 A. D.). See also Gaius II, 69 A. D.

army. Moreover, while the issue of the conflict is in doubt there is no such thing as permanent and stable possession. From these fundamental facts several important results follow: first, the title to immovable property must necessarily rest in the state and not in the soldier; second, while firm possession thereof is contingent upon the successful termination of the war, movable property need only be brought *intra praesidia*. As a corollary to this there is a stronger presumption in favor of ownership by individual capture than by the state. Third, property, whether movable or immovable, which formerly belonged to Roman citizens, was then captured by the enemy and finally recaptured by the Romans, gives rise to a question of proprietorship between the original owner and the recaptor, and hence to the doctrine of *postliminium*. Further, as a logical, though possibly not a historical corollary to the principles of *occupatio* and *postliminium*, there developed in due time the doctrine of *usucapio* or prescription, according to which possession was converted into ownership after the lapse of a definite period of time. And here again a difference was observed as to the lapse of time for movable and immovable property. For the former, according to Gaius and Ulpian,[1] one year was sufficient; for the latter, two years were necessary in order to insure firm possession or ownership. *Usurpatio* remains still to be noticed, but it is best considered in another connection.

Going back to the statement that there is a stronger presumption in favor of individual ownership of private movable property taken in war instead of public ownership, it is by no means clear that this was the recognized military custom among the Romans; if anything, the evidence seems to lead to the opposite conclusion. Grotius quotes Dionysius of Halicarnassus, whom he calls a most diligent observer of Roman manners, to the effect that[2] "whatever is captured from the enemy the law directs to be public property, so that not only private persons are not the owners of it, but even the general is not. The questor takes it, sells it, and carries the money to the public account." It must be added, however, granting that the law was all that Dionysius claimed for it, that it was still within the discretion of the commander as to what extent the

[1] Ulpian XIX, 8. Gaius II, 42. The latter adds that this is so laid down in the Twelve Tables, which would give it great antiquity. Justinian changed it to three years for the former and ten to twenty for the latter. Justinian II, 6.

[2] Grotius III, 6, 14.

private property of the enemy was to be treated as public property when captured. "They who wished to be or to be thought most scrupulous did not touch the prey at all, but if the prize were money they directed it to be received by the questor; or if it were other objects ordered them to be sold at auction by the questor.[1]" Others again "sold it without the aid of the questor and transferred it to the treasury." Again, [2]"booty which is given up to the soldiers is either divided or scrambled for. It may be divided in the proportion of the pay or of the deserts of the individuals. Polybius explains accurately the whole scheme of such a division; namely that one part of the army, the lesser portion, was commonly sent to collect the booty, and what each found he was ordered to bring into the camp that it might be equally divided by the tribunes; those being summoned to take their share who had guarded the camp." "I find this proportion in Livy," continues Grotius, "one share to a foot soldier, twice as much to a centurion, and three times as much to a horseman or knight." On the other hand, basing his opinion in that of Dionysius, "those persons," he says, "are more praised who giving up their right, took no part of the booty to themselves; like Fabricius, who in his love of glory put aside even just gain"; and likewise M. Porcius Cato, who asserted that "nothing should come to him from the spoils of war, except what he had spent in meat and drink", and that "he would rather contend for the prize of virtue with the best than for the preeminence in wealth with the richest."[3]

Summing up what has just been said concerning the treatment of private movable property, it would appear that while plunder was permitted by Roman military law, the commander could and sometimes did prohibit it altogether. When he did not, the law was that the plundering should be done systematically, each one for the whole army and not for himself. Frequently, perhaps even in the majority of cases, the commander permitted indiscriminate pillage, regardless of the military law, for many concessions had to be made, no doubt, to the cupidity of the soldiers. It must be remembered moreover that a large part of Roman warfare was carried on with peoples less civilized than themselves, and a war between races of an unequal degree of civilization is apt to disregard the

[1] Grotius, III, 6, 16.
[2] Grotius, III, 6, 17.
[3] Grotius, III, 6, 17, 4.

laws of civilized warfare. Considering, therefore, the Roman view of the rights of enemy persons, it is evident that whatever restraints they placed upon their soldiers in regard to pillage must have been dictated by expediency and good discipline rather than by compassion for the enemy. Cicero's dictum that "it is not contrary to the laws of nature to spoil the goods of him who it is lawful to kill," betrays the primitive concept of war which obtained in his time, in that so little compassion is found for an enemy in the mind of a naturally compassionate man. Such motives weighed little in the mitigation of war until very late in the life of the empire.

So far, not a hint do we find in law or in usage of that which we are seeking—the origins of belligerent occupation. When, however, we come to consider more nearly the subject of *postliminium*, we see the initial steps in the development thereof with a certainty that almost amounts to positive conviction.

Postliminium, as used by Justinian, has been thus defined: "By the *jus postliminii*, property taken in war and retaken from the enemy was restored to the original owners; and captives, on their return to their own country were re-established in all their former rights. When the captive returned, all the time of his captivity was, in the eyes of the law, blotted out, and he was exactly in the position he would have held if he had not been taken captive." "Thus," says Justinian, [1]"postliminium supposes that the captive, has never been absent." Thence comes the word postliminium, because the prisoner returned to the same limits whence he had been lost. The prisoner, also, who is retaken on the defeat of the enemy is considered to have come back by *postliminium*. Gaius,[2] writing about four hundred years earlier, recognizes the right of postliminium, "whereby on escape from captivity a man recovers all former rights; accordingly if the father returns he will have his children in his power; if he dies in captivity his children will be independent, but whether their independence dates from the death of the parent or from his capture by the enemy may be disputed." The right of *patria potestas* remained in suspense as long as there was doubt as to the father's return, but it never came to an end until it was known that he would never return to claim it. To the same effect, though much more briefly, speaks Ulpian (X, 4). When it is recalled that by means of *patria*

[1] Justinian, I, XII, 5.

[2] In the reign of Antoninus Pius, A. D. 138-161.

potestas the father has the power of life and death over his children, the significance of its interruption becomes apparent; for it is no less than that which a modern state exercises over its citizens, and its interruption is therefore equivalent to an interrupted sovereignty.

But, as is well known, the law of postliminium was only partial in its application, including a limited number of objects. The general rule was that whatever was captured became *praeda*. *Postliminium*, therfore, appears as an exception to this rule. Just what did return to its former state or what was the legal method of rereturn cannot be positively stated; but we know that immovable property was especially so designated, and that slaves, horses, mules, and ships used in war were likewise included. The title to property of this class could not be so easily obtained because ownership was either harder to establish or was likely to be longer in controversy. Land could not be brought *intra praesidia*—not even constructively—until the close of the conflict. Title to it must therefore remain in suspense from the time that the original sovereignty was overthrown until its authority should be re-established or that of the new could supersede it. This condition of suspense of title—bear in mind that we are considering the case from the viewpoint of civil law—was what Roman jurists would probably have called *usurpatio*. It corresponds in an elementary way to the status which we call belligerent occupation. However it represents merely a hiatus in legality rather than a continuance thereof under the authority of a foreign government; for it is a long step from this primitive concept of a mere hiatus in legal lations during war to that of our modern notion of belligerent occupation, where acts done under the sanction of hostile invaders may, and even *must*, be legalized by the invaded state, if ever it should be so fortunate as to reassert its authority over the reconquered territory. Imagine the amazement of a Roman jurist at the idea of legalizing contracts and sales in Roman territory made under Hannibal's sanction during his occupation thereof![1] Many centuries were yet to elapse before the principle of equality of states made it possible and necessary that a condition of legality could continue in the midst of hostilities.

[1] We are told, to be sure, that at this particular time land occupied by Hannibal's army sold for its customary price,—so confident were the Romans of victory; but such a sale must needs be a matter of subsequent legalization, as Roman law could not have recognized Hannibal's sanction thereof as binding.

Hence, at the most, we can consider in this connection only the hypothesis of an invasion of Roman territory, the successful expulsion of the intruder, the return of the said territory to Roman authority as the government both *de facto* and *de jure* and the resumption of legal relations according to *postliminium*.

Narrowing the case to such limits it is evident that it is totally within the jurisdiction of the Civil Law. But the Civil Law very greatly influenced International Law, as we call it now, through its application to international relation by the *praetor peregrinus*. No doubt, therefore, through his functions, the principle of *postliminium* became international in its application though originating as a part of the civil law.

In point of antiquity it is doubtful if any principle in international law takes precedence of *postliminium*. We find no mention of it in what remains to us of the Twelve Tables; but coming down to the time of Gaius, the earliest of the great jurists, we find that the right is fully recognized. True, the illustration he used, that of the returned captive who regains his jural capacity of *patria potestas*, may not at that time have contemplated property, but this, at all events, was included later. Then with the extension of the influence of the Civil Law to international questions through the jurisdiction of the *praetor peregrinus* the suspension of *patria potestas* during the imprisonment furnished a striking analogue for the supension of title in the case of *usurpatio* in an international conflict. There seems to be no good reason to doubt therefore, that we have a historical sequence in these steps, leading up toward the establishment of a legal status for occupied territory. We shall see in subsequent chapters that in approaching the same doctrine of postliminium we come the nearest to the subject of our own inquiry—to that phase of warfare which regards the dispossessed sovereignty as merely in abeyance and by no means defunct, while on the contrary the government *de facto* is entitled to respect and to constrained obedience from its enemy subjects, a dual relationship both of states to citizens and of citizens to states, the most complex of all political situations.

III

FROM JUSTINIAN TO THE PUBLICISTS

The political upheavals following the fall of Rome and continuing with more or less severity down to the time of the publicists of the

seventeenth century it is not our province to rehearse. The character of the military usage of this period shows a relapse toward barbaric methods such as wholesale extermination, enslavement, maltreatment of prisoners, and all sorts of indignities toward the defenseless. Any number of minor causes may be adduced to account for this degeneracy; but the primary causes in all probability, were the destruction of that world power which had done such good service as an international policeman for so many centuries that people could not get rid of the idea that it *must* exist for several more centuries after it had ceased to exist; and second, the fact that it took so long to develop a competent successor. Not until the modern principle of "the balance of power" was established at the Peace of Westphalia in 1648, thus securing a democracy of states instead of a hegemony, and not until the modern states had had time to emerge from the wreck of the Roman empire, to establish their independence and to agree upon the principle of equality was it possible for international order to be restored. One is tempted to say that the long stretch of centuries filling this interim constitutes an interregnum of international law, but this would disregard the more or less effective service rendered by the so-called Holy Roman Empire and the Roman Catholic Church.

The two observations to be made upon this period with reference to our subject, are, first that nothing was added to the legal and theoretical views of the Roman jurists, and second, the usages of war, with an occasional brilliant exception reverted to the barbarity of the earliest Roman times. It will not be irrelevant to point out some of these gratifying exceptions in so far as they contribute to the discussion and one of them, the Ordinances of War of Henry V. will receive extended notice.

An instance of the influence of late Roman usage upon less civilized peoples is seen in the restraint which Belisarius exercised over his army of "Huns, Herulians, Gepidae, Moors, Armenian and Isaurian mountaineers." It is said[1] that "when invading the Vandal kingdom as a province about to pass back to its rightful owner Belisarius deemed it politic to restrain his troops from pillage; . . . . . the inhabitants suffered no violence, even heard no threats;

[1]Walker, T. A., History of the Law of Nations, Vol. 1, p. 71, from Procopius I, 200.

the artificers were not interfered with; the shops remained open; the soldiers were lodged in regularly assigned billets and bought their supplies in the open market."

Another instance to the same effect is that given of Totila, the Ostro-Gothic opponent of Belisarius,[1] "who restrained his troops from the plunder of captured cities, and on the fall of Rome (546 A. D.) sternly forbade murder, rape or other open violence." A century or more before this the Gothic leaders, yielding to the intercession of the Pope, did what they could to spare [2]"the defenceless, exempt the captives from torture, and protect the cities from fire."

The Saracen war practice was probably not on a lower level than that of contemporary Europe. To those who opposed them in arms no mercy was shown, and extermination or slavery was apt to be the fate of those who offered a prolonged resistance or refused to except the faith of Islam. But it is related that their treatment of the unresisting populace was peculiarly mild. The following charge[3] of Abu Bekr to his troops, which charge was repeated by some later caliphs, shows all the spirit of modern usage and somewhat of its explicitness:

"If God should give you the victory, do not abuse your advantages, and beware how you stain your swords in the blood of him who yields, neither touch ye the children, the women, nor the infirm old men whom ye may find among your enemies. In your progress through the enemy's land, cut down no palms or other fruit trees; destroy not the products of the earth; ravage no fields; burn no dwellings; from the stores of your enemy take only what you need for your wants. Let no destruction be made without necessity, but occupy the cities of the enemy; and if there be any that do serve as an asylum to your adversaries, them do you destroy. Treat the prisoner and him who renders himself to your mercy with pity, as God shall do to you in your need, but trample down the proud and rebellious, nor fail to crush all who have broken the conditions imposed on them Let there be no perfidy nor falsehood in your treaties with your enemies; be faithful in all things, proving yourselves ever upright and noble and maintaining your word and promise truly. Do not disturb

[1] Walker, History of the Law of Nations, I, p. 65.
[2] Hosack, The Law of Nations, I, p. 65.
[3] Conde, Arabs in Spain, I, p. 37, from Walker's History of the Law of Nations, p. 76. Time, about the middle of the seventh century.

the quiet of the monk or hermit, and destroy not their abodes, but inflict the rigors of death upon all who shall refuse the conditions you would impose on them."

What is particularly noticeable in these words of the chief Mohammedan ruler is the sharp distinction drawn between conquered and unconquered land and people, as shown in the mildness accorded to the former. Needless to say, the Saracen practice scarcely maintained the high level set by their chief,—an observation which might as truly be made of modern nations, though with less justification for the latter. The usage of the Saracens of a later date has often been contrasted with that of the Crusaders, much to the disadvantage of the latter; and if extreme cases be taken as standards of judgment, such as the taking of Jerusalem in 1099, the justice of this verdict is unquestionable.

The spirit of chivalry, it is disappointing to say, was not influential in the development of belligerent occupation. In the words of a historian, [1]"We are driven to the conclusion that the spirit of chivalry, however strongly it might operate at times upon individuals, had but little real effect upon the policy of princes and the general condition of mankind." The greater the resistance the greater the punishment, seems to have been a favorite canon of military usage, and the defenders of a city or a fortification had no reason to expect clemency in proportion to the stubborness of the defense.

The name of Alfred the Great may well be mentioned among those whose military usage was most humane in a semi-barbarous age; for even to the Danes, the conquered invaders of his own dominions, he willingly gave peace, and permission to remain and become citizens. His successors, the Norman, Angevin and Plantagenet rulers of England were but men of their times, and rarely anticipated the humane usages of the present day, as did Alfred.

But the unique distinction belongs to one of the early kings of England of having made the first attempt at a manual of instruction for his army in the territory of the enemy. This has already been referred to as the Ordinances of War of Henry V.—a most extraordinary document when we consider the date of its issue, the year 1419. If, however, the appearance of this document at so early a date is remarkable, the circumstances of its issue will in some measure account therefor.

[1] Hosack, The Law of Nations, p. 80.

Henry had just fought and won the great battle of Agincourt. He was moving leisurely toward Paris, and had already opened up negotiations with one of the factions of its defenders through the Duke of Burgundy for its surrender. He was likewise negotiating for the hand of the princess Catherine in marriage. He had reached the town of Mantes, and had already begun to look upon the French peasantry as his future subjects. It was here that he caused to be prepared the Ordinances of War, designed both to secure good discipline among his English, Welsh and Irish supporters—a task by no means easy considering the mutual distrust and dislikes among them—and to restrain his rough soldiery from their customary excesses, and thus to attract the population to himself.

The importance of this early manual demands extended notice. It will be observed that most of it relates to "military law", that body of laws which formulates discipline, and which therefore does not concern us. The sections which pertain to our subject will now be considered in some detail.

Sec. 3. "*For Holy Church*". This section secures the exemption of ecclesiastical persons and property from violence. Such exemption was by no means unusual. Even Attila the Hun had shown some respect to the claims of the church, and the Gothic Alaric, Genseric and Totila had shown much more. It is noticeable, too, that this comes first on the list, significant of the only power which wielded any considerable restraining influence since the decline of Rome.

The remainder of this section contains a much more remarkable instance of protection, viz., that given to the honor of women. To the same effect and with an added touch of chivalrous tenderness is Sec. 29. To punish with death a soldier who turns from the slaughter of men to violence toward women—such a penalty is not to be looked for even in the manuals of the present day. Penalties, to be sure, were much more severe at that time for any offense, yet it remains true, judged either by earlier or by later standards, that such wholesome restraints were scarcely to be expected at that time.

Sec. 4 and 5. "*For herbergage*" (lodging). These sections, which are primarily a part of military law, show that the quartering of troops upon the inhabitants, if done at all, must be done in an orderly manner and by the proper officers. It would appear

from the nature of the penalty that only the knights might be so lodged. A later section, (Sec. 32), assigns a penalty for the robbing and pillaging of lodgings.

Sec. 8. "*For robbyng of merchaunts commyng to the market.*" The robbing of merchants in time of peace was a mediaeval pastime very much in vogue. That it should have been prohibited in time of war is probably to be accounted for primarily as affording a means of securing supplies without foraging. This at least seems implied in the especial mention of "vitaillers," i. e. grocers, and further prohibition of robbery of "horsmete" and "mannysmete" (i. e. provender and foodstuff).

Sec. 16. "*For the paying of thriddes.*" This section requires every man, whether soldier or camp-follower, to pay to his "captain, lord, and maister" one-third of "alle manere wynning by werr". This may be understood as applying to earnings only, including the ransom money for prisoners; for it would scarcely agree with Sec. 26, (to be considered later) to suppose that it could mean a permission to pillage upon the payment of a third of the spoil to the general exchequer.

Sec. 39. "*For theim that be wastours of vitaille.*" This is the only section which seems to permit pillage. "If any man fynde wyne or any other vitaill, that he take himself thereof as moche as hym nedes, and that he save the remenaunt to other of the oste withoute any distruccion upon peyn", etc. But the thing which might be taken was regarded as a necessity and wanton destruction thereof was prohibited. This may be reconciled with paragraph 26 upon the supposition that it applies to a country not yet completely occupied. Or, if so occupied, it might be construed as a military necessity supplementary to the regular commisariat, according to the policy that a country should support the invading army, a policy not now sanctioned.

Sec. 37. "*For brennyng.*" "Also withoutyn commandement speciall of the Kyng that noman brenne (burn) upon peyn off death." The purpose of this is apparent without comment; viz, to secure the country from devastation by fire.

Sec. 33. "*A statute for theim that lette labourers and men gayng to plough.*" Industry was to be left undisturbed. Not even the needs of the army for horses might be satisfied by pillage—as good proof as could be given of an invader's intention to disturb the country as little as possible.

Sec. 28. "*A statut for children within the age of XIIII years.*" Children under fourteen years of age were to be unmolested; but "if (unless) he be a lordes son or elles a worshipfull gentilmans son, or a capne, etc.," in which case he might be held for ransom.

Sec. 34. "*For theim that gyve men reproche.*" It is worth noticing that this section, whose chief design was probably to secure good discipline among his own troops mentions also the "Frenshe" as well as the "Englissh, Walsh, or Irissh." Nothing is easier than for trouble to arise out of a taunt or a jest when the passions of men are inflamed, and nothing is more tempting to a soldier of the victorious invading army than to indulge a natural propensity to exchange a jeer or a jest with their late opponents. The weight of the argument of force being on the side of the invaders the restraint of speech that, "no vilony" be said, should be placed especially upon them.

Sec. 26. Comment upon this section has been reserved till the last; for, more than any other, this section recognizes the difference between surrendered territory and that which is still hostile. We know in this that the king had in mind a concept of territory which, while subject to his own arms and authority owed allegiance to a former sovereignty, which allegiance could only be broken by subsequent agreement between sovereignties. The passage should be quoted verbatim:

"For kepyng of the cuntre." "Also if any cuntre or lordship be wonne other by fre wille offerd unto the Kynges obeissaunce, that noman be so hardy to robbe nor pile therin aftyr that the peas is proclaimed, upon peyn of deth. And if eny man of what degre soever he bee, come unto our saide lordes obeissaunce, that noman take hym, robbe hym nor pile hym upon the same peyn, so that he or thay that this wolle obbeye, here a token of our soverayn lorde the king."

Let us dwell for a moment upon the significance of this passage to the development of belligerent occupation.

The Romans, it will be remembered, never conceived in their legal theories of a distinct stage in military operations wherein the land and the people were exempt from the harsh conditions of war, except as an act of grace on the part of the commander. A nation at war with them was at war as a whole, and as long as the war lasted, and no part was entitled to exemption on the ground of its being quasi subject to them. The doctrine of *postliminium* was a

part of their civil code and its application, as a matter of right belonged to Roman citizens or property, returning to Roman sovereignty. As to what would happen the case being reversed, the law was silent; for it had no authority to speak. Contrasting with the case under consideration, we see in the latter an approach to the modern international status of occupation from another standpoint, with a distinct gain in certain particulars.

In the first place, the standpoint is that of the commander in his actual experience. It rests upon no previous legislation and is not meant to conform to an existing jurisprudence. In this it is thoroughly English, and in harmony with the English attitude toward international law as a thing purely occasional in origin. It was not announced as a national policy to which England would be willing to be bound in the future, for it was intended, so far as we know, to apply to this one war only. It therefore lacks continuity both as a legal theory and as a national policy. Does it therefore lack permanence and value? On the contrary, both as an instance of humanitarian usage, and as an approach to the actual status of occupation in the international law of today, it surpasses, not only Roman usage, but the revived Roman legal concepts of the time of Grotius, two centuries later. It is but reasonable to suppose that such a document would have an appropriate degree of influence upon English war practice, though upon this point we can offer nothing stronger than inferential evidence.[1] While we do not find it quoted or reaffirmed specifically by later sovereigns or commanders it is worthy of notice that in the Hundred Years War just prior to this, the triumph of the arms of Edward II. in France was marked by the slaughter of the unarmed and the wasting of the country as an ordinary occurrence. Still further back the war practice of Edward I. presents the acme of cruelty. On the other hand, following the time of Henry V., such instances of indiscriminate and inhuman warfare are sporadic rather than customary.

Now while it would probably be too much to attribute the milder usage following Henry V.'s time to the influence of the "Ordinances", it is not too much to claim that a rapidly improving usage found its highest expression in them, the like of which continental Europe had never known. England's geographical and political isolation gave opportunity for the advancement in military usage which the Ordinances indicate, to the extent, at least, of three hundred years.

[1] The writer follows Twiss in rejecting the ordinances credited to Richard II. and to Henry IV.

Whether, then as cause or effect of the advanced development of English military usage, it is evident that the Ordinances are indicative of such development, and that if we are debtors to the Romans for the origin of the legal status we are debtors to the English for the first specific instances of occupation—antedating by several centuries the completed legal development—and for the milder measures of warfare introduced at so early a date.

Lest it be thought that we are forgetting, it should be added that in carrying on actual hostilities Henry resorted to the savage measures of his time. The memorable siege of Rouen (1417) in the year before the Ordinances were issued, where the most pitiful scenes of war were enacted in the starvation of the non-combatant population outside the walls between besiegers and besieged; likewise the siege of Monteran only the year afterward (1420), bear abundant testimony to the severity of war when it was open war rather than occupation. But this, it is superfluous to say, only emphasizes the distinction he drew between occupied and unoccupied territory—a distinction in fact, for which he had no term. Moreover, he might possibly have justified his extreme measures upon the ground of military "necessity"—that dangerously expansive term—just as much more modern commanders would have done. After all, the chief point of interest is that he was humane enough and had soldierly common sense enough to issue the Ordinances long before usages had grown mild to such a degree as to abandon the harsh measures of actual warfare displayed at the siege of Rouen.

It remains to notice one other instance which approaches in some particulars the status of occupation, and which brings us down to the close of this period. It is that of the conduct of Gustavus Adolphus during the Thirty Years War. Previous to setting out on this memorable campaign he caused to be prepared (1621) a series of military regulations called "Articles of War".[1] The purpose of these articles was to cultivate a good morale among the troops, by the regulation of attendance upon devotional exercises, the prohibition of drinking, swearing, carousing and the "worship of false gods" (images, crucifixes, etc.), the punishment of cowardice, and the establishment of a court corresponding to

[1] "Many of the best principles thus put together are to be found in the Swedish Army Regulations of Gustavus Adolphus". See Taylor, International Law, p. 471. This is incorrect, as an examination of those Regulations will show.

that of the modern judge advocate. It will be observed that this has nothing to do with the personal and property rights of non-combatants, and therefore, strictly speaking, has nothing to do with belligerent occupation. Moreover, the country in which these operations were conducted was not always hostile—not the territory of the enemy. The case is deserving of mention, however, both in justice to the commander because it contrasts so vividly with contemporary usage, and because it is an instance of the mildest usage, at the close of the period under consideration. What Gustavus thought of the rights of non-combatants we get from a speech he is reported to have made at Nuremberg, where he found it necessary to rebuke with great severity his marauding German allies. Thus it runs:[1]

"You princes, lords and gentlemen, and you, my generals, lieutenant generals, and all you my inferior officers, I have ever esteemed you for brave cavaliers, and I bear you witness that upon all occasions of service offered you have in battle given me sufficient demonstration of your valor. But when, having you all here before me, I am put in remembrance of your ravages, robberies and plunderings, and that you yourselves are guilty of these atrocities, my hair stands up on end with horror. Let yourselves be judges. Is it not a doleful and lamentable case, yea, most odious in the sight of Almighty God, that one Christian should pillage another?—one friend, nay one brother—should ransack, spoil and undo another? The very devils in hell are more loving and trusting one to another, than you Christians are among those of your own country."

After thus expressing his horror at their conduct he next exculpates the Swedes and brings the charge directly home to the Germans, then continuing:—

"You will say, perchance, that you want money. But when I have the means to satisfy you, and you by pillaging, robbing and plundering deprive me of those means, whose, I ask you, is the fault that you are not satisfied? What share have I at any time received out of all your plunder? I do protest before God that I have not by all this war enriched myself to the value of a pair of boots, and I declare withal that I would rather ride without boots than make myself the richer by the plunder and the ruin of these poor people. . . . . This is all that

[1]Hosack, Law of Nations, p. 205.

henceforth I shall desire at your hands, that you spoil not others of their goods, but leave to every man his own possessions. The choler and the manhood that you have, score it, in God's name, upon the fronts of your enemies, but stain not the honor of a soldier by outraging unarmed innocence. Live upon your means like soldiers and not by pilfering and spoiling like highway robbers. This if you do not you shall ever be infamous and I with such help shall never be victorious."[1]

Needless to say that as long as Gustavus lived the Swedish army was a model of discipline, but after his fall at the battle of Lutzen it rapidly sank to the level of its marauding allies and enemies. It was in the midst of the terrible carnage and devastation of the Thirty Years War that the work of Grotius appeared, a copy of which Gustavus is said to have carried with him in the later years of his campaigns. It is the work of Grotius, his predecessors and his successors, that we have next to consider.

IV

THE PUBLICISTS

"No more novel or difficult problem was ever presented for solution," says a recent writer,[2] "than that which confronted the publicists of the sixteenth and seventeenth centuries, when they were called upon to furnish rules adequate, by virtue of their intrinsic weight and dignity, to compel the obedience of the freshly emancipated European nationalities, without the coercive force of any recognized central authority." This could be true only in an anticipatory sense, for the "emancipation" cannot be said to have been accomplished until the close of the Thirty Years War (1648) while the work of the publicists—the earlier ones, at least—had already been summed up in the great work of Grotius which appeared in 1625. Yet the statement is to be credited in spite of the apparent "*hysteron proteron*," for thinking men had long perceived that no Roman Empire, real or imaginary, temporal or spiritual, could ever again govern the destinies of Europe. An appeal to reason, to virtue, to Christian sentiment, to supposed "natural laws" of right conduct, and especially to the laws of an-

[1]Gustavus not only protected the people from violence, but he gave orders that the full market price should be paid for all provisions that were brought into his camp."—Hosack, Law of Nations, p. 195.

[1]Hannis Taylor in North American Review, March 1902.

cient Rome, furnished the basis of the new *modus vivendi* for the states of Europe. This was undoubtedly the controlling purpose with Grotius if not with his predecessors, and the success of his effort is seen in the influence he exerted at the Peace of Westphalia, in the recognition of the principle of equality of states.

But there was another purpose, which was more immediate if not so comprehensive. Europe was at this time witnessing a war which for savage ferocity and heedless destruction of life and property is unsurpassed by any within the range of definite knowledge. It is difficult to speak of the cruelty of the Thirty Years War except in superlatives. The military usage was so sickening by the excess of its malignity that it produced a revulsion of feeling, a satiety of suffering, and men cast about for reasons for restraining the cruelties of war. As the publicists appealed to Roman law for other international purposes, so they appealed to Roman military usage, stern as it was compared with modern standards, but gentle and humane compared with that which they saw.

Hence, in taking up the work of the publicists we are resuming the line of development of our subject where the Romans left it some eleven hundred years before. True, the "canonists" had in the meantime appealed to the same source, and the body of the Roman law as it left their hands comprised the courses in law as taught in the mediaeval universities. But whatever may have been the attitude of the earlier publicists toward the canonists, Grotius said of them quite significantly, "While they are good authorities for making new laws they are bad interpreters of laws already made."[1] Hence he goes back to the Codex of Theodosius and the Pandects of Justinian—sources for which he confesses "great deference". It is no injustice to the other publicists[2] to

[1]Grotius—Prolegomena (p. LXXV) to De Jure Belli et Pacis.

[2]The most distinguished of the publicists (for others see Grotius, Prolegomena) were as follows:

Franciscus a Victoria (1480–84) born at Navarre, educated at Paris, Professor at the University of Salamanca, one of the foremost of the predecessors of Grotius.

Balthazer Ayala (1548–84) Judge Advocate of the Spanish army in the Netherlands.

Suarez (1584-1617) Professor at Alcala and Salamanca.

Albericus Gentilis (1552–1608) born in Italy, educated at Perugia, fled to England to escape religious persecution, became Professor of Civil Law at Oxford University in 1582.

Richard Zouch (1590–1660) successor to Gentilis at Oxford.

Hugo Grotius (1553–1645) born at Delft in Holland, educated at Leyden and Orleans, involved in the fall of the Grand Pensionary, condemned to life imprisonment and confiscation of his goods, escaped to Paris where he wrote his great treatise.

allow Grotius to be the spokesman for them and their times, first, because of the comprehensiveness and completeness of his work, De Jure Belli et Pacis, a work which procured for him the title of "Father of International Law," and second, because coming after them in point of time there was opportunity for him to summarize all that was of value in the earlier works. It will be quite sufficient therefore to examine this treatment of our subject in the work mentioned, with incidental notice of the contributions of his predecessors.

Before taking up this examination, however, it seems necessary to pause and consider a matter which might have been treated in the introduction, but has been reserved until the present for reasons which will appear later.

In treating belligerent occupation as a development several aspects thereof are to be distinguished. Two of these have already been mentioned, namely, military usage and legal status. Two more may be distinguished at this point, regarding the matter sociologically; namely, first the social attitude, which changes as a rule so very, very slowly, or else spasmodically in a revolution, whose voice, when it has a voice, is what we call public opinion; and second, the enlightened convictions of the solitary leaders and thinkers among men, such as Cyrus, Cato, Belisarius, Abu Bekr, Alfred, Henry V., Grotius, Gustavus Adolphus, and Lincoln. Of these it can scarcely be said that there is a development. The great man is not so much dependent upon his social environment for his moral concepts as society is indebted to him; wherefore he seems to appear indifferently in any age. Social advancement, on the other hand, is a tardy and a painful progress, but it is seldom either fitful or retrogressive. Military usage, again, does not necessarily conform to social advancement. Indeed it is apt to follow the latter rather tardily, as it did in the Thirty Years War, since they who customarily formulate it are of military profession and naturally have military necessity uppermost in mind. One has but to compare the works of jurists, publicists, and soldiers of the present day to see how persistently the professional point of view thrusts itself forward.

It is evident from the foregoing that these several aspects of development do not proceed *pari passu*; no more do they present a continuity in an upward direction, nor in any direction. Nevertheless, that the direction, though discontinuous, is upward, both

severally and collectively, does not admit the shadow of a doubt. If an order of advancement may be assigned it would be as follows, first the publicist, then the jurist, then the soldier. That this is not always true is seen in the case of the Ordinances of War of Henry V., where undoubtedly the soldier established a military usage which quite put the rest in the rear.

In the work of Grotius we see these several phases of the question at war with each other, as it were, in the attempt of a great mind to reconcile legal status, belated military usage, awakened public opinion, and high moral ideas of his own, and to evolve in the process a standard which would win its way to international acceptance by not being too much estranged from the usage of the day nor too severe for the immediate future. It is now in order to examine it as far as it concerns our subject.

As might be supposed, the nearest approach which Grotius makes to a perception of that which we call belligerent occupation, is in dealing with postliminium. Having discussed the rights of individuals in this connection he turns to the rights of a people. Unfortunately the distinction between people and state had not yet been clearly drawn, or at least as but vaguely perceived by him. This distinction is vital to the subject. A state which is unable to exert its authority over all its territory, due to the presence of the enemy, is not to be confounded with the people, some of whom are still subject to its authority and some to that of its adversary. Again, a war is a contest between states, not peoples, and for the prosecution of the war, the two arms of the service, the army and the navy, are employed by the state. A state guarantees its citizens in their civil and political rights, including the possession of property, in return for the allegiance of the citizen. That part of a people which has been cut off from the authority of the state by means of occupation still owes allegiance to the state to which it belongs, though unable to obey it. Conversely the state continues to guarantee the property rights of such citizens, and this relationship between the state and the conquered part of the nation is recognized and sanctioned by the invading state. In modern usage the civil law of the parent state, or government *de jure* is permitted to remain in full operation, the invader declaring himself the administrator thereof. Needless to say he is an administrator with large powers of discretion, but the import-

ant point is that he does not seek to substitute the laws of his own country for those of the government *de jure*—not until the treaty of peace.

Let us see how near Grotius came to a realization of such a situation. The passage above referred to is as follows:[1] "Quod de singulis personis diximus, idem et in populis locum habere arbitror, ut qui liberi fuerunt suam reciperant libertatem si forti eos, vis sociorum eximat, hostili imperio. At si ipsa multitudo quae civitatem constituerat dissoluta sit, verius puto non eundem populum censeri, nec postliminio res restitui ipso gentium jure, quia populus, ut navis, partium dissolutione plane interit, eo quod tota ejus natura in illa perpetua conjunctione consistit. Non ergo quae fuerat Sagunti civitas eadem exstitit, cum veteribus cultoribus ea sedes octavo post anno restituta est", etc.

In another passage to a similar effect (III, IX, 12) he says:[2]

"Illa quaestio magis ad nos pertinet, an et populi qui subjecti alieno imperio fuerunt in veteram causem recedant quod tractari potest si non is cujus imperium fuerat, sed sociorum aliquis eos hosti eripuisset; puto hic idem dicendum quod in servis, nisi sociali federe aliter convenerit."

In the first of the above passages the illustration of the ship is a correct analogue for the state as opposed to the people, and it exemplifies the confusion arising from a want of terminology. In such a case it is the state which perishes outright, and the will of the invader becomes paramount. Conversely, if they are able of themselves or with the help of their allies to drive out the invader the people regain their former status. In the latter case, however,

[1]What we have said of individuals, I conceive, holds also for people; so that they who have been free recover their liberty if it happen that the force of their friends extricate them from the power of their enemies. But if the multitude which had constituted the state or city be dissolved, I conceive it to be more true that it is not to be reckoned the same people, and that their condition is not restored by postliminium, by the law of nations; for a people, like a ship, by the dissolution of its parts, perishes outright, since its whole nature consists in the continuity of its composition.

Grotius, De Jure Belli et Pacis, Vol. III, ch. IX, p. 9. Whewell's translation.

[2]"Another matter belongs more to us; whether a people which has been subject to another authority returns to its former condition (by postliminium). This may be so construed if they were rescued from the enemy by some of their allies but not if by that power to which they owed allegiance. I think the same is to be said here as in the case of slaves, unless there is something otherwise in the bond of allegiance." (What was said in the case of slaves was that "they are recovered, not captured; the soldier is their defender, not their owner.")

as is implied seemingly in the second passage quoted, the help of the allies may involve the question of salvage. The fact that they do regain their former status involves the continuance of their rights of possession even while the state to which they owed allegiance was unable to guarantee those rights. But is this anything more than a restatement of the Roman *jus civile*? It is, in just this way: that whereas the *jus civile* was laid down for Roman citizens, and, as was said before, drawn upon by the *praetor peregrinus*, this principle may have been employed in other cases than those concerning Roman citizens in late Roman times. But here we find it avowedly set forth as a principle to be followed in law and usage by all states internationally. The amount of it is the recognition of the obligation of the state to the citizen, and the continuance thereof under hostile occupation. It is significant to notice also that this has been done notwithstanding a lack of terminology, which would have greatly simplified the reasoning.

Turning next to property rights, and first of all to land, Grotius puts the recovery of title to the original possessor at the time of expulsion of the enemy, which might mean at the treaty of peace closing the war, as he seems to imply in his illustrations. That this is not a necessary conclusion is supported by another passage, which because of its importance to the subject must be quoted verbatim. It runs as follows: "At agri non statim capti intelliguntur simul atque insessi sunt; nam quam-quam verum est eam agri partem quam cum magna vi ingressus est exercitus ab eo interim possideri, ut a Celsu notatum est; tamen ad eum quem tractamus effectum non sufficit qualiscunque possessio, sed firma requiritur. Itaque Romani agrum extra portam, quam Annibal castris insidebat, adeo non amissum judicabant, ut eo ipso tempore nihilo minoris venierit quam ante venisset. Is ergo demum ager captus censebitur, qui mansuris munitionibus ita includitur, ut nisi iis expugnatis parti alteri palam aditus non sit."[1]

[1]De Jure Belli et Pacis III, IV, 4. "But the lands are not understood to be captured as soon as they are occupied. For though it is true that the part of the land which an army has entered upon with a great force is for the time in its possession, as Celcus notes; yet for the effect of which we speak, possession of every kind is not sufficient, but firm possession is required. Thus the Romans were so far from judging the land on which Hannibal had planted his camp to be lost that at that very time it sold for no less than it had sold before. That land, then, is to be conceived as captured, and no other which is included in permanent defenses, so that it is very evident there is no access to it till these are carried." Whewell's translation, Vol. III, p. 112.

This shows very clearly that an intermediate condition was recognized between firm possession and mere occupation; between the sovereignty of the government *de jure* and the tentative possession by the government *de facto*. The development of the idea of occupation had proceeded, so far as the territory was concerned, almost to its present condition. The outlines of the whole subject, it might be said, were dimly perceived and presented, the details were yet to be filled in. But it is a case where the details outweigh the importance of the outline, for they involve, first, the distinction between combatants and non-combatants—a distinction that had not yet been made in international law—and second, the exemption of private movable property from capture. The first of these follows very shortly after Grotius, and the second is yet to be secured in military usage, though sanctioned already by international law and public sentiment. The further exemption of non-combatants from the severities of war and the reasons therefor will be considered later; but it is necessary to consider next the treatment of private movable property.

[1]"Concerning movables, on the other hand," says Grotius, "the contrary rule in general holds; that they do not return by postliminium, but become prize. Hence objects of traffic whereever bought, become the property of him who buys them; and if found among neutrals or brought home, cannot be claimed by the old owner. But from this rule were excepted formerly munitions of war, the reason being, apparently, that men might be more active in recovering these."

Here we go back to ancient usage indeed. It has been stated before that public property, movable or immovable, comes at once into possession of the captor and remains as long as he can make good his claim by force. This has always been true and doubtless always will be, the only modification being that such property is not to be abused or wantonly destroyed; that places of public worship are to be respected, and that works of art should be unmolested. Again, private immovable property, i. e. lands, real estate, "returns," according to Grotius, "to the original possessor when the enemy is expelled." That is to say the annullment of the rights of ownership of the inhabitants does not take place immediatly. This is not because such property rights are regarded as more sacred than those of mov-

[1]De Jure Belli et Pacis III, IX, 14.

able or personal property, but rather because the capture of immovable property is the act of the whole force and not individual soldiers. Contrasting this with the modern view we have only to add that real estate never leaves the possession of the original owner because of a change of sovereignty. It is the sovereignty of the state and not the ownership of the individual which returns when the enemy is driven out, or perishes when he succeeds. Farmers continue to own their fields, therefore, and business contracts are binding, though the power which guarantees these civil relations succumbs and another takes its place.

But when we come to private movable property—that which is most easily appropriated and least easily defended—we have to do with the severest sufferer from the hardships of war aside from the agencies of the combat. Today the word of the Hague Conference is explicit and mandatory—[1] "Pillage is expressly prohibited," a prohibition which does not necessarily extend to firearms and ammunition; but when Grotius wrote, pillage was one of the recognized processes of war. The right to plunder was unquestioned, no matter how humane a Gustavus Adolphus might be. Grotius admits that it is justified by Natural Law and by the Laws of Nations, and he backs it up further with numerous Scriptural and classical illustrations. "Not only he who for just cause carries on a war, but anyone, in a regular war, may without limit or measure, take and appropriate what belongs to the enemy."[2]

This was Grotius, the scholar, dealing with the facts of history and of contemporary usage. These he could not state otherwise than as he found them. But when we turn to his "temperamentum circa vastationem et similia" we hear Grotius, the man, pleading for a clemency which he dared not put forth as law or usage. "Although," he says,[3] "it is not a part of our purpose to speak of the advantages of any course of conduct, but rather to restrain the loose license of war to that which is lawful by nature, or among the lawful ways, the better; yet even Virtue in this age little esteemed of her own account, ought to pardon me, if I try to make

[1] It should be added, however, that this is another instance where public sentiment and legal precept are ahead of military usage. A case in point is that of the pillaging by the soldiers of the united powers in China in 1900.

[2] De Jure Belli et Pacis, III, VI, 2.

[3] Ibid, III, XII, 8.

her value apparent by her utility." Then he points out that "this moderation in preserving things which do not effect the course of war, takes away from the enemy that great weapon, despair," since the enemy will fight with the greater determination when they see that their all depends upon it. Again, "that course (moderation) presents the appearance of a great confidence in victory; and that clemency is apt to bend and conciliate men's minds." This again he supports by numerous historical instances and by the moral teaching of the theologians. He commands in particular a number of cited cases where the country was spared because the conqueror expected it to become a part of his own domain. In a word, if we may follow the opinion of many in ascribing the greatly ameliorated conditions of warfare a century later to the influence of Grotius, that influence is to be looked for in his "temperamenta."

Taking usage as he found it, he was glad enough to revert to later Roman times, assume that plunder was a necessary concomitant of war, and discuss the methods of capture and distribution. [1]"By land", he says, "the common use everywhere now is, that in pillage of towns, and in battles, everyone makes his own what he takes; but in expeditions for booty the captures are common to those who are in the company, and are divided according to their rank." A somewhat similar distinction he points out as having been observed by the Greeks, λάφυρα, or public spoil, and σκῦλα, or private spoil, the latter implying[2] "what was taken from the enemy during the contest; the former, what was taken afterwards." Continuing he says that[3] "what soldiers capture when not on duty or on service to which they are ordered, but in the course of what they do by promiscuous right or by permission, is forthwith their own; for they do this not as public servants. Such are spoils which they win from an enemy in single combat, and such as they take in free excursions not made by order, at a distance from the enemy (the Roman rule was ten miles). This kind of capture the Italians at present call correria, plunder, and distinguish it from butina, booty." And it might be added, it is this kind of marauding which is most subversive of discipline, exasperating to noncombatants, and foreign to the idea of belligerent occupation.

[1]De Jure Belli et Pacis III, VI, 24.
[1]De Jure Belli et Pacis III, VI, 24.
[2]σκυλεῖα—despoiling a slain enemy.
[3]De Jure Belli et Pacis, III, VI, 12.

It has been said that neither in form nor in matter did Grotius contribute anything new to the discussion of what is now called international law. It is something, however, to be a judicious compiler and editor. But Grotius was much more than this. A common theme with that of his immediate predecessors shows a commonality of ideas, the inception of which is not to be credited to him in every case or perhaps in the majority of cases. A few of these it may be well to notice.

Victoria had maintained that it never was lawful to slay the innocent intentionally, or to spoil them of their property if it could be avoided. "A prince . . . . ought not to wage war for the destruction of the people against whom the war is made, but for the obtaining of his rights."[1] More's Utopians "do not waste nor destroy theire enemies lande in forraginges, nor they burne not up theire corne." "They hurt no man that is unarmed, onless he be an espiale." "None of themselfes taketh anye portion of the praye." Gentilis, to whom Grotius confesses himself to be particularly indebted, in dealing with the treatment of the persons of noncombatant enemies, evidently follows the legal, that is to say, the Roman view in regarding them all as enemies, to be made prisoners of war and otherwise dealt with much as those under arms. He advises clemency, especially to young boys and women. "A long line of famous commanders unite in condemnation of attacks upon female honor." As to the treatment of property he gives only a qualified approval to the exemption of temples, porticoes, statues, etc., for this, he thinks, is modified too much by changing circumstances. Concerning private property, "the victor may take to himself lands and other property of the enemy. But let him remember that he exercises all these rights *pro arbitrio boni viri*." "When a state passes in its entirety from prince to prince, it passes *cum omnibus suis qualitatibus*." One cannot but think that if a sharper distinction had been drawn between sovereignty and ownership, Gentilis would have assigned only the former to states, though this conviction is not so positive as in the case of Grotius. Further, private movable property is subject to capture, though the exercise of the full legal right in this respect should be restrained. Indeed [2]"policy may well induce a victor to leave to the conquered complete liberty. . . . . In all cases of the exercise of the

[1] T. A. Walker, p. 234, History of the Law of Nations

[2] Ibid, p. 289.

victor's rights, equity is to be preferred to strict law, honor to bare utility." It is the spirit of the teaching of Gentilis, undoubtedly, as much as the content of his work, which had its appropriate influence upon Grotius.

It is a matter of regret that none of the publicists seem to have known of the War Ordinances of Henry V. A concrete case, such as this would not only have been eminently worthy of quotation along with the multitude to be found in De Jure Belli et Pacis; more than this, it would have thrown a great deal of light upon the practical problems of a commander who has the will to put into operation the reforms they so much desired. Consider for a moment his situation. A general at the head of a victorious army marching into the enemy's territory, that enemy fleeing before him and powerless to oppose his approach, the country with its defenseless population and tempting wealth all about him, with skulking foes waylaying his pickets, with the necessity of providing for thousands of armed men who may have the will, as they have the power to supply their own wants if permitted to do so—such a general needs all the support of public opinion, the established military usage of the most humane, the guidance of enlightened authorities, the restraints imposed by judicial decisions and legal enactments, in a word, needs the authority of international law to prescribe the limits for the use of force. This, moreover, is further emphasized by the large measure of discretionary power that must unavoidably be conceded to him, the opinion of the mass of uninformed which would make him a dictator rather than an administrator, the weight of historical precedents which he might choose according to his liking and especially the inexpediency of taking him to task for acting unwisely in an emergency, in a word, his irresponsibility. It is an easy matter for a publicist to say what ought to be as a matter of justice; it is comparatively easy for the public which is interested to prescribe its own exemption; it should not be difficult for the jurist and legislator to derive a legal status in conforming with the national jurisprudence; but it needs a commander of the type of Gustavus Adolphus or Henry V. to meet such an emergency as is implied in a situation of absolute power united with utter irresponsibility. On the other hand, to frame a definite program of action needs just such a contingency as a commander must face; for it must necessarily be the outgrowth of circumstances and not of theorizing. That such a rudimentary manual was already in

existence, and had been for two hundred years, might have been pointed out by Grotius, much to the support of his own contentions, even though he could not have maintained that it was established usage. And much more than this, it would have exemplified for him a status far beyond that which he derived from Roman Law. Gentilis at Oxford (1585) "lays it down", says Ward,[1] "that all Sovereign Princes are bound to be governed by it (Roman Civil Law) in the disputes which arise between them." But, it is submitted, in this instance they followed their Roman teachers too closely, when a better was at hand. For this, Gentilis could scarcely be excused. As to Grotius, possibly the conflicting interests of his own country and England, at this time, may have prejudiced his judgment slightly, or prevented his looking to English sources with the same assiduity that he bestowed elsewhere; for it will be remembered that in defending the maritime rights of Holland against the claims of England just before his great work appeared, his services were characterized by zealous patriotism as well as by his unusual ability.

It does not follow, however, granting that this specific case was unknown to the publicists, that the mildness of the later English military usage was without its influence upon them. Gentilis, it will be remembered, was at Oxford during Elizabeth's reign—than whom no sovereign, perhaps, ever had a greater abhorrence for war—and he was frequently consulted upon matters of international policy. From the mildness of his counsel and the readiness with which it was accepted we are warranted in inferring a harmony of views upon such subjects in general, whether or not those of Gentilis may be understood as cause or effect. This comes a long way short of proof; but it is sufficiently probable to be mentioned along with that of a previous chapter as indicative of our special indebtedness to English usage along with Roman, and in contrast with continental European.

V

FROM GROTIUS TO VATTEL

The century following Grotius witnessed the greatest degree of amelioration of military usage the world has ever known. When we compare the Thirty Years War with what Vattel says of the

[1] Robert Ward, An Enquiry into the Foundation and History of the Laws of Nations in Europe, p. 609.

wars of his times—about the middle of the eighteenth century—the change is scarcely believable.[1] The changes were such in general, as affected the rights of persons rather than those of property, the former naturally winning recognition sometime in advance of the latter.

It needs no debate to show that in all the steps in the development of belligerent occupation, the greatest, as affecting persons, is the distinction between combatants and noncombatants, a distinction which came about during this period. [2]"Till the distinction between combatants and noncombatants was clearly and definitely embodied in the laws of war in the latter half of the seventeenth century," says Lawrence, "the unarmed inhabitants of an invaded country were liable to be slaughtered at the will of the invader, and were almost always exposed to shameful indignities." This exposure of the unarmed to the same fate as that of the armed is a corollary to that ancient theory which regards a war as waged between peoples rather than between states. But how did such a change come about?

The answer is not far to seek. Nationalism, the chief political outcome of the middle Ages, was necessarily accompanied by the growth of standing armies to add the sanction of force to the authority of the state. Says Taylor, [3]"During the Middle Ages war became a trade, carried on by highly trained mercenaries, who sold their services wherever required. Upon the formation of large states, however, that plan became unreliable and unsatisfactory. The growth of Spanish power in the fifteenth century was accompanied by that of a disciplined national army under Ferdinand, Charles, and Philip. Thus was necessitated similar organizations in France under Francis I and Louis XIV, and in Prussia under Frederick II." Now a regular army acts under military law and is subject to vigorous discipline, its aim being to become the most efficient fighting machine possible. In this specialization of function we have the growing differentiation between combatants and non-combatants which has resulted so beneficially upon the usages of war. Obviously, the differentiation had to be made within the

[1]Vattel . . . tells us that what struck him most in the wars of his day was their extreme gentleness; and of the standard of gentleness proper to be followed in war Vattel was a severe judge. Maine, Sir H., in International Law.

[2]T. J. Lawrence, The Principles of International Law, p. 342.

[3]Hannis Taylor, p. 472, International Public Law.

state before it could be observed internationally. Along with this distinction there naturally grew up also a differentiation between people and state, the latter being the organism which governs, while one further concept, the nation, is equivalent to the people plus the state. A still further result of nationalism was the idea of territoriality; that is to say, that a state's jurisdiction extended over a certain definite territory as well as over a particular people.

Summing up the results of the upgrowth of nationalism they are chiefly as follows:

1. The distinction between people, state and nation;
2. The idea of territoriality,—the coterminous limits of the jurisdiction of the state with a certain geographical area;
3. The distinction between the agencies which the state uses to enforce its will, i. e., combatants, and those for whom these agencies are used, i. e., non-combatants.

Of these three the first and second are fundamental and therefore important; but it is the third which goes farthest in correcting a notoriously antiquated and infamous usage. In the whole range of race development it seems hardly possible that any other step could equal the importance of this.[1] "Chaos would come again on land and sea if the old theory dominated the modern practice; if all the citizens of one country engaged in actual hostilities with all those of the other."[2]

But it may be said, the distinction between combatants and non-combatants did not wait upon the development of nationalism. Even in ancient times the same distinction was sometimes drawn, and the Roman citizen had a right to exemption from the hardships that the legionaries endured, for the latter were paid for just that service to the public. True, but while the Roman had procured this exemption for himself he had no idea of attributing the same degree of advancement to other peoples It was not until there were many nations professing adherence to the same principles that the changes above outlined could occur. It was not until then that the distinction took on a legal aspect, whereas it had formerly been mainly optional with the commander.

How far these changes were due to the teachings of the publi-

[1]Those who with Tolstoi see nothing but evil in the nationalism of today with all its burdensome militarism, must both take account of the importance of this step, and show that there is no danger of a necessity of its recurrence in case their views were to prevail and disarmament follow.

[2]Hannis Taylor, International Public Law, p. 473.

cists, it is not a part of our purpose to inquire. Of Grotius we need but add the words of Hallam—"It is acknowledged by everyone that the publication of this treatise (De Jure Belli et Pacis), made an epoch in the philosophical and we might almost say in the political history of Europe." Suffice it to say that the change came in the due course of historical development after a long period of quiescent preparation, and that they came promptly after the Peace of Westphalia where the influence of Grotius was unprecedented. Some notice remains to be taken of the views of his successors down to the time of Vattel, since when the course of international regulations has been more a matter for world's congresses and for admiralty and prizecourt decisions.

Richard Zouch, the successor of Gentilis at Oxford, shows nothing of the imminent departure from the older usages. He recognizes the right of complete mastery of the victor over conquered territory.[1] Samuel von Pufendorf (1631–1694) follows so closely in the steps of Grotius that his work might almost be called an edition thereof.[2] "How far the liberties of war may be extended upon the goods of an enemy and things we call sacred we are informed by Grotius, I, III, C. 5." Thus he refers us to the same authority in respect to the treatment of the persons of the enemy. He thinks that mercenary soldiers have no right to plunder, but "it is no more than a good prince that hath a love for his subjects would yield to, that the subjects should be allowed in return to make some advantage to themselves by the war; which may be done either by assigning to them a certain pay from the public when they go out upon any expedition or by sharing the booty among them, or by giving everyone leave to keep the plunder he gets himself,[3]" etc. This is following Grotius by forgetting his "temperamenta". In one particular, however, he takes advanced ground beyond that of his master, and therein speaks the conviction born of the new movement. Grotius had tolerated private war; Pufendorf shows that "this is also part of the right of war, to appoint what persons are to act in a hostile manner against the enemy, and how far." In other words, it is the distinction between combatants and non-combatants and the exclusion of the latter from hostile acts. "No

[1]Deinde universum Dominum in res et personas, regiones scilicet & populas, acquiritur Deditione & victoria." See Juris et Judicii Fecialis, p. 80, Richard Zouch, (1590–1660).

[2]Samuel von Pufendorf, De Jure Naturae et Gentium Sec. 19.

[3]De Jure Naturae et Gentium Sec. 21.

private person," he says, "hath power to make devastations in an enemy's country, or to carry off spoil or plunder, without permission from his sovereign."[1] This same idea is brought out and emphasized again in connection with the subject of postliminium, in that all property recaptured by soldiers returns to the former owners, since the soldiers are public servants and it is no more than their duty to defend the property rights of their countrymen.

It is disappointing to find that this advanced ground was not taken by the able jurist [2]van Bynkershoek. As already pointed out by Wheaton, both he and Wolf[3] "assert the broad principle that everything done against an enemy is lawful; that he may be destroyed though unarmed and defenseless; . . . . that an unlimited right is acquired by the victor to his person and property." As to postliminium he simply quotes Grotius, gives a few contemporary applications and illustrations, especially its application to ships; but his influence upon the amelioration of war, notwithstanding his services in behalf of neutrality, was decided reactionary.

The work of Vattel[4], though appearing but a few days later furnishes an agreeable contrast to what has just been said. At last we have reached an authority who has distinctly the modern point of view. Grotius had chosen his illustrations from the remote past, and looked to the same sources for the principles which he wished to prevail. Thus also it had been with his followers. Vattel, on the other hand, searched for his principles just as he tells us he did for his illustrations, in the usages of his own times. Thus he did well not only to forget a great deal of the old but to profit by much that was new. We detect no echo of scholasticism, for all is concrete and recent.

It is important to notice first his distinction between the different classes of enemies. Thus he says, [5]"Whilst a man continues a citizen of his own country, he is the enemy of all those with whom his nation is at war. But we must not hence conclude that these

[1]Ibid, Sec. 21.

[2]Cornelius Jan van Bynkershoek (1673–1743) Quaestiones Juris Publici, 1737.

[3]Dixi per vim, non per vim justam, omnis enim vis in bello justa est, si me audias, & ideo justa, cum liceat hostem opprimere, etiam inermem, cum liceat veneno, cum liceat percussore immisso . . ut uno verbo dicam quomodo cumque libuerit. Quaestiones Juris Pub. I, I, 3.

[4]Emmerich de Vattel (1714) The Law of Nations, 1758.

[5]Vattel, The Law of Nations, III, M71–2.

enemies may treat each other as such, wherever they happen to meet. . . . . Since women and children are subjects of the state, and members of the nation, they are to be ranked in the class of enemies. But it does not thence follow that we are justifiable in treating them like men who bear arms, or are capable of bearing them. It will appear in the sequel that we have not the same rights against all classes of enemies." The phrase "or are capable of bearing arms", shows that he had not quite reached the modern distinction between combatants and non-combatants. Though the term "enemy" admits of gradations of meaning it is evident that men unarmed but capable of bearing arms would not be granted exemption upon the same terms as women and children, as would now be the case. The further significance of this is seen in the treatment of private property, since it necessarily shares the fortunes of its owners. [1]"It is not the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs." This is true of movable property. Immovable property, however, belongs in some measure to the state, is a part of its domain. Hence property of this kind does not cease to be enemy's property though possessed by a neutral foreigner." But while this gives us some idea of the distinctions following upon the recognition of classes of enemies, we are not yet in a position to say what was the nature of the legal status of occupation in Vattel's system. This we find again in connection with his treatment of postliminium.

[2]"Prisoners of war, who have given their parole—territories and towns which have submitted to the enemy, and have sworn or promised allegiance to him—can not of themselves return to their former condition by the right of postliminium; for faith is to be kept even with enemies." This passage is full of significance to our subject. It is significant that "territories and towns which have submitted to the enemy and have[3] sworn or promised allegiance to him" are placed along with "prisoners of war who have given their parole." This implies an obligation on the part of the territories and towns similar to that of the prisoner who gives his word of honor, as required, in return for the sparing of his life or the release of his person. And just as the released prisoner should observe the terms

[1]Ibid Sec. 75, 76.

[2]Ibid, III, XIV, Sec. 210.

[3]Inhabitants of an area of occupation are not now required to promise or swear allegiance to the invader. They merely promise obedience to his authority so long as he is able to maintain himself as the occupant.

of his parole, so the inhabitants of the occupied area, in return for the protection which the commander gives them from the violence of marauders, should render obedience to the government de facto. But why can they not return to their former condition by postliminium? It will be remembered that according to the Roman law, as Gaius expressly states, a captive upon escaping to his own country returns to his former condition, and his absence is in the eyes of the law as if it had not been. The word of Regulus in promise of return to his Carthaginian captors, however, was not to be broken even with the permission of the law. This high sense of personal honor when Vattel wrote had come to the point of recognition as international law, in that a paroled prisoner did not enjoy the right of postliminium while a recaptured prisoner did; and along with the paroled prisoners he classes what we would call occupied territory. On the contrary as to recovered prisoners or territory, if the sovereign retakes them [1] "he recovers all his former rights over them, and is bound to restore them in their pristine condition. In this case they enjoy the right of postliminium without any breach of their word, any violation of their plighted faith. The enemy loses by the chance of war a right which the chance of war had before given him."

After considering the fundamental questions of sovereignty and allegiance Vattel speculates briefly upon a few specific sub-topics. He asks, for instance, whether a town having been reduced by the enemy's arms and then retaken, recovers such part of her property as had been alienated by the enemy. Replying to this he says that movable property "belongs to the enemy who gets it into his hands, and he may irrecoverably alienate it." Immovable property, on the other hand, enjoys the right of postliminium, whether public or private. If public, the invader enjoys only the right of usufruct, and that, too, only for the purposes already employed thereon. "The acquisition of a town taken in war is not fully consummated till confirmed by the treaty of peace, or by the entire submission or destruction of the state to which it belonged." Likewise a person who should be so "prematurely forward" as to purchase immovable property from the occupant would deserve to lose his title thereto.

Under the general term of "booty" he includes all movable prop-

[1] Ibid M211.
[1] Ibid, III, xiv, Sec. 212.

erty taken from the enemy. "This," he says," naturally belongs to the sovereign making war." His soldiers and auxiliaries are only his instruments and all that they do is in his name. He [1]"may grant the troops what share of the booty he pleases. At present most nations allow them whatever they can make on certain occasions when the general allows plundering, such as the spoil of the enemy's fallen in the field of battle, a camp which has been forced, and sometimes that of a town taken by assault."

Here we find for the first time the use of the word "contributtions" together with an account of the origin of the custom for which it stands.

[2]"Instead of the custom of pillaging the open country," he says, "another mode has been substituted, which is at once more humane and more advantageous to the belligerent sovereign—I mean that of contributions. Whoever carries on a just war has a right to make the enemy's country contribute to the support of his army, and towards defraying all the charges of the war. Thus he obtains a part of what is due to him; and the enemy's subjects, by consenting to pay the sum demanded, have their property secured from pillage and the country is preserved." . . . . "Instances of humanity and moderation can not be too often quoted. A very commendable one occurred during those long wars which France carried on in the reign of Louis XIV. The sovereigns seeing it was their mutual interest as well as duty to prevent ravage, made it a practice on the commencement of hostilities to enter into treaties for regulating the contributions on a supportable footing; they determined the extent of hostile territory in which each might demand contributions, the amount of them and the manner in which the parties sent to levy them were to behave. . . . . By such steps they prevented a multitude of disorders and enormities which entail ruin on the people and generally without the least advantage to the belligerent sovereigns. Whence comes it that so noble an example is not universally imitated?" It is scarcely necessary to add that it is now almost universally imitated. However students of history will recall that the above instance is by no means typical of all the warfare of Louis XIV. An instance to the contrary is seen in the devastation of the palatinate in 1688; which was such, according to one writer[3] that

[1]Ibid, III, IX, Sec. 164.
[2]Ibid, Sec. 165.
[3]Hosack, The Law of Nations, p. 240,

"even the dismal records of the Thirty Years War afford no parallel." This language may be a little extreme. Certain it is, however, that the usage in the latter half of the seventeenth century was much milder in general than in the first half, and it was no less certain that it furnished several examples of savagery which would by no means justify the rather roseate view of war which Vattel entertained. No doubt he had most in mind the orderly campaigns of Marlborough and Eugene with which the eighteenth century opened.

One point further in connection with private movable property, which had been much in controversy with Bynkershoek and others, was the right to confiscate debts due to the enemy. Upon this point Vattel agrees with modern practice in that public debts are confiscable, and he cites the classic instance of Alexander's permission to the Thessalians of a debt due to the Thebans whom he had just conquered. As to private debts, he grants the right of a sovereign to confiscate them if the term of payment happen during the war; or he has the right to prohibit his own subjects from paying a debt to the enemy during the war, though as to the latter he thinks that the sovereigns of Europe in the interests of commerce act with less rigor than they formerly did.

We may summarize the development of our subject as treated by Vattel thus:

1. The distinction between combatants and non-combatants, though not quite as it is drawn today.

2. The distinction between sovereignty and ownership, following upon the distinction between state and people.

3. Denial of the right of an invader to alienate or abuse public immovable property, and concession of his right to the usufruct thereof.

4. Concession of his right to confiscate all public movable property, including debts and securities.

5. Denial of invader's right to dispossess the owners of private immovable property.

6. The recognition of the right to seize all private movable property.

7. The origin of the system of contributions as a substitute for confiscation and pillage.

"As far as consistent with prudence it is glorious to obey the voice of clemency"[1]—such is Vattel throughout.

[1]Ibid, III, IX, Sec. 142.

VI

FROM VATTEL TO THE PRESENT

The last of the publicists of commanding influence speaks in the pages of Vattel; for though there have been treatises in abundance since his time, no other has arisen, or seems likely to arise, who can be in a position to command the attention of statesmen and rulers to the same degree. International law as now understood springs out of comity, and comity is not accustomed to listen to authority. In its earlier days while it was in the making international law needed to be moulded and shaped into a system, and given the stamp of individual minds. Those were the days, and that was the opportunity of the publicists, the schoolmasters as it were; for comity does not systematize, does not humanize the law of nations.

"Vattel," says Lawrence, writing in 1758, "was the first jurist to scout the theory that a military possessor might perform acts of sovereignty."[1] The consequence of such a theory, as we have seen, is to make the military possessor utterly irresponsible—a military despot. This theory "seems to have been acted upon," to quote again from Lawrence, "down to the middle of the eighteenth century", (and then a few instances are added by way of illustration, such as the settling of occupied territory by the King of Denmark in 1712, and the impressment of the Saxons against their own country by Frederick the Great). As a matter of fact the theory has been acted upon, though with a different purpose, at a much later time, and is still upheld by some military writers of the present day. In the Napoleonic wars, if we are to believe the testimony of the Duke of Wellington concerning himself, the ancient theory prevailed, though it was benignly interpreted.[2] "Martial law," said the Duke, "is neither more nor less than the will of the General who commands the army; in fact martial law is no law at all (!) Therefore, the General who declares martial law and commands that it shall be carried into execution is bound to lay down distinctly the regulations and rules according to which his will is to be carried out. Now I have in no country carried out martial law; that is to say, I have not governed a large proportion of a country by my own will. But then what did I do?

[1] T. J. Lawrence, Principles of International Law, p. 364.

[2] Sir Henry Maine, International Law, p. 182.

I declared that the country should be governed by its own national law, and I carried into execution my so declared will."[1] It need only be said that at the present day the Duke would have no choice in the matter, notwithstanding what military writers may say, for the authority of international law is supported by that of national law as embodied in the military manuals of the various nations and as confirmed by the Hague Conference. No commander in a civilized land today would make the mistake of supposing that "martial law means no law at all."

Comparing the military usage of the two wars between Great Britian and America, the second shows no advancement over the first toward present day usage, but rather the reverse. The reason for this is not far to seek. In the Revolution the Colonies were still regarded as British posesssions, and the least possible injury was done by the British forces to the country which they expected to regain. Again it is well known that the British, and even the French allies, paid in coin for the needed supplies; so that while the national government was bankrupted by the war and its worthless fiscal and currency system, there was at the end of the war a super-abundance of coin in the country. Moreover the persons of the colonists were protected for there were many British sympathizers among them. On the other hand in the War of 1812 the contrary conditions prevailed. The treatment accorded to the invaded country was not merely such as would be shown to any foreign nation, but was tinctured, no doubt, with some asperity because of its having successfully revolted; besides there were no tories then. Consequently the ravages along the Atlantic coast, the burning of the national Capitol and the employment of Indians places the usages of this war on a plane considerably below that of the first.

It will be remembered that Vattel speaks of the custom of demanding contributions as a substitute for pillaging the open country, the advantage being that it is less wasteful and less abusive than the ancient practice. We are now to see that the further development of belligerent occupation since his day has been almost exclusively in this direction; and thus that private movable property is at last winning its right to protection.

[1] This language can hardly be explained, as Sir Henry Maine attempts to do, as a confusion of military law with martial law. The intention plainly enough is that the Duke of Wellington meant to state his utter irresponsibility in governing the occupied territory.

Contributions soon came to be differentiated into two classes; contributions in money and contributions "in kind", i. e. articles for consumption. Both, of course, were "forced" contributions. The first is still called by the original term, but contributions in kind, though probably the earlier form, is now more precisely called "requisitions". What is called a "fine" is really a kind of contribution demanded for some offense. It is uncertain how early the distinction arose between contributions and requisitions, though Lawrence says, speaking perhaps untechnically, that requisitions took the place of indiscriminate plunder "during the campaigns of Marlborough and Eugene".[1] As to the earliest use of the word in this connection, Taylor[2] says, "By the irony of history the origin of the word 'requisition' has been attributed to that most considerate of generals, Washington, although the practice is as old as war itself." As we have just seen, however, the practice could have originated but a short time before Washington, and coming as an amelioration of existing practice the irony at once disappears. From what was said above concerning the Revolutionary War it is evident that the distinction had been made in practice at that time, and moreover that requisitions were not always "forced" since commodities were paid for at the market price.

The courses open to an invading officer in provisioning his troops may be summarized as follows:

1. [3]He may compel the inhabitants to furnish them without payment and if they refuse, send out detachments to collect them. This is superior to indiscriminate pillage in that it is orderly, and limited to specific objects. In such case he should always give a receipt for the articles.

2. He may take them at prices fixed by himself. While this is a forced contribution, like the first, it may be necessitated by the rise in prices due to the increased demand.

3. He may purchase them in the open market.

4. He may obtain the money for the purchase in the form of ransom or extortion enforced by threats.

5. He may obtain it by levying taxes upon the district according to laws already in force but at increased rates.

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[1]Lawrence, Principles of International Law, p. 360

[2]Taylor, Hannis—International Public Law, p. 550.

[3]The first three are quoted from Lawrence, Principles of International Law, p. 361.

6. He may employ the ordinary revenues of the district for the ordinary expenditures, appropriating the residue thereof to the needs of his force.

7. He may obtain all funds from the home government, awaiting the issue of the war to settle all expense accounts in indemnity claims.

No two commanders have to face exactly the same set of conditions; hence it is impracticable to prescribe either of the above courses as always the best for all occasions. The commander may find an insolent and insulting population to deal with; he may distrust the competency of his force for the area occupied; he may have guerilla bands, "war rebels" and "war traitors" to contend with; he may be assigned the unpleasant duty, under "military necessity" of burning a city, or devastating a fair region; he may be confronted with such a contingency as meeting a *levee en masse*, for certainly the population cannot be blamed for throwing off the burden of constrained obedience whenever they feel themselves competent to do so, nor can the commander, on the other hand, if they fail in their undertaking, be blamed for treating them with much more rigor than he treats his prisoners of war. All such conditions and many more, so diversify the problem in each particular case that we can only say what is the ideal course in a hypothetically ideal war—that is, a war between states, not individuals.

It may be stated in general terms that down to the time of Vattel the progress of amelioration of military usage tended to eliminate the individual element on the side of the invader. Contributions and requisitions mark the diminishing freedom of the soldier to pillage. Since his time the tendency has been and still is to set limits to the rights, even of the invading state, to the confiscation of private property. One exception that must always be made to this statement is that of contraband of war. If we grant the right of a state to make its adversary pay the bills, as international law of today maintains, it is evident that payment must be exacted from the enemy state rather than its subjects. Whatever loss the subjects suffer should be as part of that state, in order, as a matter of justice, that the loss may be distributed equally, and that the person primarily responsible, i. e. the state, may be primarily accountable

The conclusion necessarily follows that in an ideally conducted war, first, all supplies should be purchased in the open market;

and second, the expense, in so far as it falls upon the enemy state, should fall upon the whole state, and should therefore be an item for adjustment at the close of the war. Such a conclusion eliminates all confiscation, granting that the war itself is justifiable, not only by the individual soldier, but by the state. In such a case, non-combatants suffer only in the increase of taxes, and this is the fullest realization of the aim and the development of belligerent occupation.

It may be said that this is Utopian; it is not to be expected that warfare will ever be so mild for non-combatants while every possible means is used to annihilate those who are under arms. In reply it can be positively asserted that this is certainly the logical outcome of the historical tendencies in the matter. Moreover, if instances are wanted, Lawrence points out that "Wellington purchased the supplies he did not carry with him when he overran southern France in 1813 and 1814, and General Scott followed his example during the invasion of Mexico by the forces of the United States in 1846 and 1847."[1] Again, "In the Crimean War the British bargained with the country people for what they bought, but the French fixed their own prices." Such cases come very near realizing the hypothetical war we have supposed.

But it is not so far short of this when contributions are levied in an orderly way, as is required by modern international law. The commander collects the taxes, retains the civil officers so far as practicable, administers the laws already in force, and maintains his own troops, if he can, by means of the local revenues as a part of the local government. From such an undisturbed condition to that of great turbulence and possible desolation of the land there are many gradations, each of which must be met as circumstances may determine.

The military usage of the American Civil War concerns us chiefly as affording the occasion which produced the first military manual ever compiled, if we except the comparatively rudimentary attempt of Henry V. Being a civil war, it had no international character, except such as was voluntarily accorded to it by the contestants. The position taken by the Federal administration was that the seceding states were never out of the union. In occupying a part of the seceded territory the Federal army was occupying a part of the national domain subject to the Federal Constitution.

[1] Ibid, p. 362.

It was simply restored by occupation to its true allegiance as soon as it was wrested from the hostile forces. So much for the legal status of the invaded territory.

But while the international character was thus denied to the invaded district, the magnitude and importance of the struggle stamped it with the international character, and the usages of international warfare were observed as to the contestants. Hence we have a duality of relationship, such as must necessarily be the case in civil wars generally, where the condition of warfare affecting the territory are more favorable than those affecting the forces in rebellion.

It may be wondered at that the usages in the Civil War were less mild than those of any other civilized contest in which the United States has been engaged. Certainly the ideals of General Scott in the Mexican War were not always realized in the occupation of a hostile territory in the Civil War; on the contrary even the defenceless conduct of Admiral Cockburn in the War of 1812 could be paralleled in Sherman's march to the sea, *unless* the latter can be defended as a "military necessity." What the Confederate soldiers would have done, the case being reversed, it is fair to infer from what they did do in their brief invasion of the North, the burning of Chambersburg[1] and the wasting of the country on the

[1]The attitude of General Lee in regard to military usage is to be seen from the following:

Headquarters A. N. V.
Chambersburg, Pa., June 27, 1863.

General orders No. 73.

The commanding general has marked with satisfaction the conduct of the troops on the march and confidently anticipates results commensurate with the high spirit they have manifested. No troops could have displayed greater fortitude or better performed the arduous marches of the first ten days. Their conduct in other respects has, with few exceptions, been in keeping with their character as soldiers and entitles them to approbation and praise.

There have, however, been instances of forgetfulness on the part of some that they have in keeping the yet unsullied reputation of the army, and the duties exacted of us by civilization and Christianity are no less obligatory in the country of the enemy than in our own. The commanding general considers that no greater disgrace could befall an army, and through it to our whole people, than the perpetration of the barbarous outrages upon the innocent and defenseless and the wanton destruction of private property that has marked the course of the enemy in our own country. Such proceedings not only disgrace the perpetrators and all connected with them but are subversive of discipline and efficiency of the army and destructive of the ends of our present movements. It must be remembered that we make war only on armed men, and that we cannot take vengeance for the wrongs our people have suffered without lowering ourselves in the eyes of all whose abhorrence has been excited by the atrocities of our enemy, and offending against Him

line of march. The treatment of the population of the occupied areas was certainly not harsher, however, than military usage in other respects on both sides. The reasons for recrudescence are sufficiently numerous and cogent, even when briefly examined, to account for the departures from the best usuage preceding, and they incriminate both sides equally.

Not to go too far into so vast a subject, let it suffice to point out the following:

1. The war was at first conducted mildly enough to satisfy modern usage.

2. The bitterness of a political and economic antagonism of many years duration broke forth as the struggle narrowed and intensified, and the time approached when it must come to a decisive issue.

3. A large part of the harshness shown to the inhabitants of the occupied area was due to the provocations which they gave to the occupant. The tolerance of guerilla bands, the ambush of sentries, the contumely openly shown to troops and officers the conduct of "war-traitors" and "war rebels", the treatment of prisoners—all these causes called down upon guilty and innocent alike the penalty which only the former would suffer.

4. Americans North and South are not so much accustomed to associate authority with the state as with themselves. A state is only an instrumentality for political ends. Consequently when the will of a hostile state is imposed upon them it is not easy to bow to the consequences and yield obedience, as, in the case of superior force, they manifestly should. A citizen in an occupied area enjoys peace and security only upon terms of non-resistance. To resist is worse than to join his comrades in arms, and the usual penalty is not imprisonment upon capture, as with the latter, but death. It would be hard to point in any war to as many instances of defiance on the part of subject non-combatants, or of tolerance upon the part of the invader where harsh measures would have been justifiable.

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to whom vengeance belongeth, without whose favor and support our efforts must all prove in vain. The commanding general therefore earnestly exorts the troops to abstain, with most scrupulous care, from unnecessary or wanton injury to private property; and he enjoins upon all officers to arrest and bring to summary punishment all who shall in any way offend against the orders on this subject. R. E. LEE, General."

(Quoted from the Official Report of the History Committee of the Grand Camp, C. V. Department of Virginia, October 25th, 1901).

5. It is extremely difficult to make an army of citizen-soldiers such as those in the armies of the North and South, realize fully the vast difference between a man as a citizen and the same man when he becomes a soldier. His private nature ceases, and he becomes an instrument of the state to be hurled against similar instruments of the opposing state, not against the private citizens thereof. In invading the enemy's territory it is very easy to forget these abstractions when he sees what he wants and has the power to get it without being found out. It takes a great deal of discipline to get him accustomed to the self-restraint which should come as a part of professional training. The initiative of the American soldier showed its regrettable side on many a foraging expedition when the rights of private property as now accorded by international law were totally ignored.

6. All such rights of international law, to borrow an expression from positive law, were in an uncodified state. There was no knowing, at least by the officer in the field, to say nothing of the private soldier, where the *disjecta membra* of this law were to be found, and when found and fitted together into codified form, it needed the sanction of national authority to make it valid.

7. Even when promulgated upon national authority, coming as a new law it was difficult, if not impossible, to enforce it strictly.

8. As to the Confederate troops, after having seen their own country endure the ravages of war, it was but human that as soon as they invaded the North, retaliation should be uppermost in their minds and the "general orders" of their commander which followed those of President Lincoln by a few months, were not sufficient to prevent it.

To meet the need for such instruction, President Lincoln assigned to Dr. Francis Lieber[1] the difficult and responsible task of preparing a manual for the Federal armies, covering chiefly the subject of military occupation, and also such other usages of war as were necessary. The manual[2] was duly prepared, passed upon by a board of army officers, authorized by the President,

[1]Dr. Francis Lieber, born in Berlin, March 18, 1800, fought in the Napoleonic wars, came to America in 1827, lived successively in Boston, New York, and Philadelphia, Professor of Political Economy in South Carolina University, 1835–56, Professor of Political Science, Columbia College, New York City, until his death in 1872.

[2]For the full text of this manual see Rebellion Records, Series III, Vol. III, p. 148.

and published by the War Department, April 24th, 1863.[1] This date therefore, ushers in a new period of development, the period of codification; for following its advent many others have appeared in the various civilized states, and these in turn, have been partially harmonized into a world's manual by the various congresses, especially the Hague Conference.[2]

The difficulty of the undertaking may readily be conceived. In a letter to General Halleck concerning this work Lieber wrote: "I have earnestly endeavored to treat these grave topics conscientiously and comprehensively; and you, well read in the literature on this branch of international law, know that nothing of the kind exists in any language. I had no guide, no ground-work, no text-book. I can assure you, as a friend, that no counsellor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labor than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason and conscientiousness, a sincere love of truth, justice, and civilization, have been my guides but of course the whole must be still imperfect." It was, in fact, an attempt similar to that of Henry V. though carried out with much greater detail, formulated by a civilian who had already won a reputation as a writer upon such topics, ratified by soldiers put to the test of practical experience in current usage, and imitated in a measure by all civilized nations.

It is evident from the above that the War Ordinances of Henry V. were unknown to Dr. Lieber. In the four hundred and forty-four years intervening, usage had advanced to such a degree that we might expect that the earlier one would be of little assistance in framing the later one. Such, indeed, would be the case, save in the personal element, the mildness and humanitarian sentiment running through it. Abundant justification for restricting the rigor of usage in any particular may well be found in the fact that the same purpose had successfully taken shape so many years ago. On the other hand, the great political changes intervening made it possible for the American manual to provide for such a politi-

[1] Maine says (International Law p. 129) that this manual was prepared "Just at the close of the American War of Secession"—not the only mistake he has made concerning it.

[2] See appendix B for that of the Hague Conference. That of Dr. Lieber was reissued by the United States without modification for the government of its armies during the war with Spain in 1898.

cal stage as the military occupation of today, whereby an extemporized state is secured to the occupied area, and thus the chasm is bridged over between the preceding and succeeding stages of peace, and a quasi legality given to all legal acts that occurred during the interregnum.

A knowledge of this manual, moreover, would have made it easier to dogmatize upon disputed points—for dogmatize he must who culls from the usage of the times and the opinions of accepted authorities, gives it the stamp of his personality and formulates it in the shape of authoritative rules of conduct. The wonder grows that a scholar, such as Dr. Lieber was, could have the hardihood to do so; and that he did, is all the more eloquent in its testimony to the great need which called it forth.

However, we are not to suppose that Dr. Lieber relied alone upon "usage, history, reason, conscientiousness, a sincere love of truth, justice and civilization." The task was not simply that of a humanitarian, nor primarily so, but of one having the necessary erudition and technical training. Moreover, the points upon which it was necessary to dogmatize were almost exclusively those relating to the treatment of private property. The treatment of public property, movable and immovable, had been settled long ago. The treatment of persons, public and private, had likewise become a matter of established usage. But the status of occupied territory had not yet been clearly set forth, and the rights and usages relating to private property—these were chief points still presenting ambiguity.

In regard to private property in occupied territory it will be of interest to notice the opinions of various writers just prior to the appearance of the Manual in question.

"All movable property which belongs to Enemy-Subjects," says Twiss[1], writing in the same year that the manual appeared, "is booty of war, and passes with the territory into the hands of the belligerent." Nevertheless he regards this as merely a matter of "strict right", which is only enforced "where the Right of Resistance has been maintained to the uttermost." Woolsey[2], writing but three years earlier, lays it down as a rule of war, that the "movable as well as immovable property of private persons in an invaded country is to remain uninjured." Contributions and re-

[1]Sir Travers Twiss, "The Law of Nations," p. 122.

[2]Theodore Dwight Woolsey, Introduction to International Law, p. 219.

quisitions, however, "are still permissible." Wheaton,[1] in 1836, admits the right of the belligerent "on general principles . . . . to seize on all the enemy's property of whatsoever kind and wheresoever found." But by the modern usage of nations private property on land "is exempt from confiscation."

Perhaps the most important writer to quote in this connection is General H. W. Halleck.[2] This happens because of his well known ability and competence as an authority on international law as relating to war, because of his position and influence in the Federal Army at the opening of the Civil War, and because the author of the Manual was especially considerate of his counsel. "Private property on land is now", said Halleck (1861) "as a general rule of war, exempt from seizure or confiscation; and this general rule extends even to cases of absolute and unqualified conquest." "Private rights and private property, both movable and immovable, are in general unaffected by the operations of a war." "Some modern textwriters—Hautefeuille, for example—contend for the ancient rule that private property on land is subject to seizure and confiscation. They are undoubtedly correct with respect to the general abstract right as deduced from the laws of nature and practice; but while the general right continues, modern usage and the opinions of modern text-writers of the highest authority, have limited this right by establishing the rule of general exemption."

Most of the writers above quoted agree upon these points: first, that the abstract right still remains to the conqueror of confiscating private property; second, that as a matter of fact, he does not exercise this right—that usage is to the contrary; third, that this usage is subject to such modifications as may be imposed by military necessity; and fourth, that this military necessity must not be exercised except by command, the object being to maintain the troops by means of contributions and requisitions, or to weaken the enemy, in extreme cases, by the devastation of his source of supply. This is likewise the usage at the end of the nineteenth century with the possible exemption of the first; for the "natural rights" are very little in evidence in political philosophy, and an "abstract right" which is admittedly contrary to usage enjoys but a shadowy existence.

[2]Henry Wheaton, International Law (1861) p. 456–7.

[1]Henry W. Halleck, International Law (1861) p. 456–7.

The influence of this manual upon the codification of the rules of war has been most remarkable. Practically all of the European states have followed the example, and issued manuals of similar purpose and design. How far they are indebted to that of the United States it would be impossible to say without a close analysis and comparison of them all, and this is out of the question as long as they are not all obtainable. The German manual, for instance, exists only in the form of confidential instructions to the army officers. It has been said that[1] "perhaps the most singular feature of these (later) manuals is the number of rules adopted in them which have been literally borrowed from the De Jure Belli et Pacis." This seems quite improbable from what we know of the crudity of the subject at the time that Grotius wrote. It is much more probable, indeed, that Lieber's manual was still more influential upon the later ones, both as a national source and as an authoritative utterance in regard to usage. As an incentive to action there is no occasion for argument.[2]

Since the appearance of all these manuals, however, an event has occurred which promised much and fulfilled little in the matter of affording a concrete illustration of modern usage, namely the Pekin Expedition of 1900. Here we have a joint invasion of hostile territory by several great military powers, or rather a series of parallel invasions executed conjointly, and the occasion would seem to be instructive. But unfortunately for purposes of study the country invaded was one of the few which does not as yet come within the pale of international law upon terms of equality. It is unaware of the gravity of the violation of the right of legation, and could only be treated as an inferior nation. From time immemorial a contest between states of an unequal degree of civilization, has always been on the plane of the lower civilization, and necessarily so. It mattered nothing in the present instance that the people of the invaded territory are naturally of a peace-loving disposition. There was but one category in which to put them under the circumstances and that was with barbarians. Moreover the expedition was punitive in purpose, calling for retaliation upon the country and people. Taking these facts into con-

[1] Sir Henry Maine, International Law, p. 24.

[2] Those interested in studying the subsequent efforts to synthesize the various manuals, except the work of the Hague Conference, will find the subject treated in Holland's "Studies in International Law."

sideration it is easy to see that the only possible contribution it affords to our subject must be by way of comparison of the usages of the different armies. Here again the data are not all available, and the testimony of eyewitnesses is too conflicting to be reliable. There is no doubt that innocent Chinese suffered many indignities, both in person and property, and there is no doubt too that every nation involved would be glad to believe its own troops the least culpable. The report of the Lieutenant General commanding the American army of invasion shows several cases of violence which were properly tried and the offenders severely punished, and serious attempts at restraint were very generally adopted. The whole matter, however, awaits the historian.

It is fitting to close this study with an examination of the legal status of belligerent occupation in connection with the right of postliminium.

Occupation, as we have seen, is but a temporary condition which ceases with the close of the war. It can have one or the other of two possible outcomes—neglecting for the present the discussion of the results of aid by allies—namely restoration or conquest; either result is expressed or implied in the treaty of peace at the close of hostilities. If it is the latter, the conquering state makes such political adjustment as may be necessary to fit the acquired territory to its new allegiance. Owners of immovable property on their part are not dispossessed but may alienate their possessions and return to their former allegiance. In case of conquest the right of postliminium perishes with the treaty of peace so far as it affects property.[1] Undoubtedly the same right as affecting the jural capacity of persons returning to the land of their former allegiance, could not be denied; and in such a case we would have practically an exact analogy to the ancient Roman origin of the right; namely, by the return of a Roman prisoner from captivity. All this is well illustrated in the treaty of peace concluding the Franco-Prussian War wherein the liberties of the inhabitants of Alsace-Lorraine in the choice of their allegiance were properly safeguarded.

[1]Upon this point the writer respectfully begs leave to differ with the opinion expressed in the Manual of the United States Naval War College, p. 115. True, "the right of postliminium, so far as international law is concerned . . . . refers now to the restoration of *things* and less to movable things than to real property and territory." But it is also true that there are personal and political rights which have nothing to do with property, and these must be resumed, in the case supposed, by postliminium.

The other outcome of occupation previously referred to, namely restoration, is clearly contingent upon the right of postliminium. Without it, the occupied territory must either be in a state of unorganized and desultory resistance, much to the detriment of both contestants, or of submission and allegiance to the conqueror, whereby it would innocently incur the displeasure of its own government, to say nothing of the duplicity it must resort to in order to win a dishonorable peace. Its importance, therefore, not as affecting private movable property, but of territory, immovable property, and personal rights other than those referring to property, can not be overestimated. Whatever one might say of the treatment of private movable property, no one now would be willing to say with Halleck: "We think, therefore, that by the just rules of war, the conqueror has the same right to use or alienate the public domain of the conquered or displaced government as he has to use or alienate its movable property."

[1]The importance of postliminium has been much underrated by recent textbook writers because of its decadence as applied to private movable property—ships being the only article of this category now covered by it. But it must be apparent from the foregoing that while in an unimportant particular it has decayed, in these fundamental particulars it has gained a new and enlarged significance.

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