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TRANSFER OF CIVILIAN MANPOWER FROM OCCUPIED TERRITORY

By JOHN H. E. FRIED

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One of the methods by which National Socialist Germany hoped to win the war consisted of the deportation of non-Germans, mainly citizens of occupied territories, as a labor force in support of the German war effort. The hope was not fulfilled but this policy, carried out on an enormous scale, enabled the Third Reich to wage war much more ruthlessly and for a much longer period than would have been possible otherwise.[2] With hostilities ended and their lands devastated, several of the United Nations now intend to obtain at least partial reparation of the damage caused to them by transferring Germans as a labor force for reconstruction work.

The political, economic, and ethnological effects of both policies are bound to influence European and world affairs greatly for a long time to come.

In the following pages an attempt is made to analyze the two policies from the standpoint of international law. The fundamental differences between them must be clearly recognized, not only by jurists whose profession it is to discern, but by people at large—including, first of all, the Germans. Otherwise there is reason to fear that the subject may become a perturbing and equivocal one, apt to confuse public opinion, disturb the understanding among the United Nations, be exploited by National Socialist apologists and propagandists, and to lead to retrogression in the conduct of international affairs.

Voluntary migration, whether for employment or for settlement, whether organized or unorganized, is, of course, a regular and important aspect of international relations.[3] International conferences on emigration and immigration were held in Rome in 1924 and in Havana in 1928. The International Labor Organization has, from its beginning, endeavored to improve the situation of migrants and to foster international coöperation on their behalf.[4]

[1] The opinions expressed in this article are those of the author and do not necessarily reflect the opinions or policies of the International Labor Office or of the International Labor Organization.

[2] International Labor Office, *The Exploitation of Foreign Labor by Germany* (Studies and Reports, Series C, No. 25), Montreal, 1945 (in the following pages cited as *Report*).

[3] See lists of bilateral Government agreements containing provisions on recruitment of bodies of workers, on supervision over contracts of employment of migratory workers, and on individual migration for employment, International Labor Office, *The International Labor Code 1939*, Montreal, 1941, cited hereafter as *Code*, p. 526, n. 1, p. 523, n. 2, and p. 527, n. 1.

[4] The International Emigration Commission, appointed by the Governing Body of the I.L.O. and consisting of government, employers', and workers' delegates from 18 countries,

Under special circumstances—or, to be more exact, for particularly important purposes—international law recognizes the right of governments to organize compulsory migration, that is, the transplantation of groups irrespective of the consent of the individuals of which such groups are composed. An example is found in the Convention of Lausanne of January 30, 1923, regarding the exchange of Greek and Turkish populations. Under it Turkish nationals of Greek Orthodox religion who were established in Turkey (except persons established in Constantinople before October 30, 1918) were to be moved into Greece, and Greek nationals of Moslem religion who were established in Greece were to be moved into Turkey. A Mixed Commission, composed of representatives of the two governments, and of three neutral members appointed by the Council of the League of Nations, was given full power to take the measures necessary for the execution of the Convention.[5]

Compulsory transfer of population entails, of course, a most serious interference with the persons concerned. So grave a step can only be justified if the public conscience considers the purposes to be achieved by it as compelling. In the Greek-Turkish case the measure was designed to solve very thorny minority problems and, thereby, to promote international peace. The achievement of this purpose was considered so important that the community of nations approved the uprooting and transplantation of several hundred of thousands of persons. In the wake of the Second World War plans for voluntary or compulsory exchange as well as unilateral transfer of groups of population are about to be carried out on a very much larger scale. Compulsory mass migration in various European and Asiatic areas will, it appears, be one of the characteristic features of the immediate post-war

formulated in 1921 a number of detailed resolutions concerning standards of emigration and immigration policy. Several International Labor Conferences adopted Conventions and Recommendations dealing with this subject. The session of 1939 adopted a Convention and Recommendations containing rules for the protection of migrants and defining the role which the governments of the sending and the receiving countries ought to assume in regulating migration: *Code*, pp. 519 ff. For general studies on migration laws and movements see: International Labor Office, *Studies and Reports*, Series O, Nos. 1–4, Geneva, 1925–1929. On migration for employment see same series, No. 5, "The Migration of Workers: Recruitment, Placing, and Conditions of Labor" (1926); on migration for settlement, No. 7, "Technical and Financial International Coöperation with regard to Migration for Settlement" (1938). For lists of articles on migration published in the *International Labor Review* see *Code* p. 519, n. 1, p. 520, n. 2, and p. 522, n. 1.

[5] The completion of the scheme took more than a decade. The most important agreements signed by Greece and Turkey during that period included the Agreement of Athens (Dec. 1, 1926) concerning the simplification of the administration of the population transfer, the Agreement of Ankara (June 10, 1930) delegating to the neutral members of the Mixed Commission the right to decide upon matters upon which the two governments were unable to agree, and the Agreement of Dec. 9, 1933, providing for the liquidation of the Mixed Commission. The latter submitted a final report on its work on Oct. 19, 1934.

period.[6] In these cases, the measures will be carried out for the same purposes—to solve minority problems deemed otherwise insoluble, or to limit their number or gravity and, thereby, to remove causes of dangerous friction.

On the other hand, important as the purpose is, it is not the only prerequisite to be fulfilled in order to make the organized displacement of persons and groups legal under international law. Since these measures involve governmental actions carried out on foreign territory and concerning foreign nationals the right to do so must be acquired either by treaty or in another way legally bestowing such right on the state or states in question. Finally it is an evident obligation to obey, in the execution of such measures, the standards of decency and humanity in civilized intercourse. Thus, international law accepts the displacement of persons and groups from country to country under three conditions: that the authorities carrying out such measures do so under a rightful title; that they act for a legitimate purpose; and that in the execution of the measures involved they obey the standards of decency and humanity generally valid in the relations between nations.

I. TRANSFER OF CIVILIAN MANPOWER FROM TERRITORY UNDER BELLIGERENT OCCUPATION[7]

The Hague Convention

Realizing that military occupation of enemy territory is a frequent aspect of warfare, the Hague Peace Conference of 1899 adopted provisions concerning "the rights of the military authority over the territory of the hostile state" (Sec. III of the "Regulations respecting the laws and customs of war on land," annexed to the "Convention with Respect to the Laws and Customs of War on Land"). The relevant articles provide:

> Art. 42. Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territories where such authority is established, and can be exercised.

[6] Such population transfers differ in two points from those here considered: they involve permanent migration for settlement, and not temporary migration for employment.

The fact that it is, above all, the *purpose* which determines the legality or illegality, under the law of nations, of the transportation of persons from one country to another, can be seen, e.g., from the international arrangements endeavoring to prevent that women (and children) even *with their free consent*, be transported from one country to another for immoral purposes. (Cf. International Agreement for the suppression of the white slave traffic, signed at Paris, March 18, 1904 (League of Nations, *Treaty Series*, vol. 1, pp. 85 ff.); International Convention of May 4, 1910 (Martens-Triepel, *Nouveau Recueil Général de Traités*, 3c série, Tome VII, pp. 252 ff.); and International Convention of Sept. 30, 1921 (*ibid.*, Tome XVIII, pp. 758 ff.), especially Art. 7.)

[7] As Sir Arnold D. McNair ("Municipal Effects of Belligerent Occupation," in *The Law Quart. Rev.*, Jan. 1941, p. 33) said, following Dana in his edition of Wheaton's *International Law* (1866), the term belligerent occupation is much more precise than the term military occupation.

Art. 43. The authority of the legitimate power having actually passed into the hand of the occupant, the latter shall take all steps in his power to reëstablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44. Any compulsion on the population of occupied territory to take part in military operations against its own country is forbidden.

Art. 46 (1). Family honor and rights, the lives of individuals and private property, as well as religious convictions and liberty of worship, must be respected.

Art. 52 (1). Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to imply for the population any obligation to take part in military operations against their country.

One of the tasks of the Hague Peace Conference of 1907 was to reconsider that Convention and the annexed Regulations. Among the many amendments submitted, only one dealt with the treatment of civilian populations in occupied territory. It was proposed by the German delegate, Maj. Gen. von Gündell, and read: "It is forbidden to compel *ressortissants* [8] of the hostile party to take part in the operations of war directed against their own country even if they were enrolled in its services before the commencement of the war." The Conference realized the importance of this German proposal. There was considerable discussion, and several counter proposals were made,[9] but at the 4th plenary meeting of August 17, 1907, it was carried with only slight alterations: "A belligerent is likewise forbidden to compel the nationals of the adverse party to take part in the operations of war directed against their country, even when they have been in his service before the commencement of the war." The provision goes further than Art. 44 of the 1899 version which it replaced.[10]

On the proposal of Maj. Gen von Gündell, the Conference also added the following clause to the Convention which became its Art. 3: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands (*s'il y a lieu* in the authentic French version) be liable to make

[8] The term was used in order to include non-citizens over whom a state claims jurisdiction by virtue of domicile: A. Pearce Higgins, *The Hague Peace Conferences*, Cambridge, 1909, p. 266, n. 1.

[9] The Austro-Hungarian delegation, backed by the Russian delegation, wanted to insert after the word "to take part" the words "as combattants." This would have completely changed the meaning of the new provision by suggesting that a belligerent should be permitted to compel enemy citizens to give assistance in the operations of war against their country, except actual military service: *Proceedings of the Hague Conferences*, Carnegie Endowment for International Peace, New York, 1921, pp. 106–127, 240. See also A. S. de Bustamente y Sirren, *La Seconde Conférence de la Paix* (transl. by G. Scelle), Paris 1909, p. 256.

[10] The amendment was added to Art. 23 of the Regulations. Art. 44 of the 1907 version contains provisions not connected with the topic of the present study.

compensation (*sera tenue à l'indemnité*). It shall be responsible for all acts committed by persons forming part of its armed forces." This was a significant step forward; for, by expressly stipulating that a state whose armed forces violate the Hague Regulations must give indemnification, it converted a general principle—that a law-breaker—into a contractual liability.[11]

Reparations exacted for violations of the Hague Regulations rest, therefore, to the extent just mentioned, on a positive provision which was proposed by Germany. Despite the "teeth" which were thus put into the Convention the Second Peace Conference either kept unchanged or even tightened the protection of the civilian population in territories under belligerent occupation.

Deportation of civilians from such territories had been so alien to modern warfare that it was not even discussed at the Hague Conferences. In fact, representatives of smaller nations showed reluctance to have the prerogatives of an invader defined in the Regulations since this might be interpreted as legalizing his position. For example, a member of the U. S. delegation to the first conference reported that Belgium urged the omission of some provisions concerning occupation, "because they had the character of sanctioning in advance rights of an invader and of thus organizing the regime of defeat; that rather than to do this it would be better for the population of such territory to rest (only) under the general principles of the law of nations." He added that "the provisions were retained upon the theory that, while not acknowledging the right, the possible fact (of invasion) had to be admitted and that wise provision required that proper measures of protection for the population and of restrictions upon the occupying force should be taken in advance." [12]

Bluntschli, the leading German-Swiss authority on international law of his time, wrote in 1866: "The modern international law of civilized nations acknowledges no absolute right of the war-making power over either the peaceful inhabitants of enemy territory or even the members of the armed forces of the enemy state." [13]

The German manual for war on land, *Kriegsbrauch im Landrecht*, issued

[11] Prior to the amendment some writers considered the Convention and the Regulations as a *lex imperfecta* and erroneously even doubted their obligatory character. Such doubts were dissipated by the amendment: "The change in Art. 3 (1907) is important; a sanction is now provided for the Regulations. . . . This would appear to determine the obligatory character of the Regulations": A. Pearce Higgins, work cited, p. 260.

[12] Report of Capt. Crozier, quoted in *Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports*, New York, 1916, p. 49.

[13] He continued: "The alleged right of the victor to be master (*verfügen*) over the life and death and the personal liberty of the vanquished, is contrary to the rights of man and the natural limitations of all state prerogatives and, therefore, also contrary to all war prerogatives": *Das Moderne Kriegsrecht der civilisierten Staaten als Rechtsbuch dargestellt*, Nördlingen, 1866, p. 13. This latter sentence was left out of the 1872 edition, and following it, in the French edition (*Le droit international codifié*, trans. by M. L. Lardy, Paris, 1899, p. 330).

by the German general staff, declared in the edition of 1902 that, contrary to concepts of former times, the inhabitants of an invaded territory "are considered as persons endowed with rights (*Rechtssubjekte*) whom the exceptional character of the state of war makes subject to certain restrictions, burdens, and coercive measures, and who are obliged to provisional obedience toward the power actually in control, but who otherwise may live free from vexations and, as in time of peace, under the protection of the laws."

When, at the 1907 Conference, the Japanese delegate proposed to outlaw the internment of citizens of occupied territories, the Belgian, Bernaert, president of the commission reconsidering the 1899 Convention, declared such provision superfluous because internment of citizens of occupied territories was understood to have been outlawed by that Convention. After the Italian delegate had supported this view, the Japanese delegate withdrew his proposal on the ground that Bernaert's statement had made it clear that the hostile state can intern only prisoners of war but not civilians and the commission went on record in this sense.[14]

While the articles of the Hague Regulations dealing with the law of belligerent occupation do not mention deportation, they manifestly forbid them *argumento a minori ad majus* since they outlaw much smaller encroachments upon the liberty and dignity of the populations. In addition, both versions of the preamble to the Convention in respect to the laws and customs of war on land stipulate: "Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the laws of nations as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." This clause makes the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience, a part of the laws of war established by the Hague Conventions.

The Precedent of 1916–17

Had there been any doubt about the illegality of the deportation of peaceful civilians from territories under belligerent occupation, they were dissipated when, during World War I, Germany entered upon such a policy in occupied Belgium. General von Bissing, who was then in charge of the German administration in Belgium (except in the so-called *zone d'étape*) at first vigorously objected to the demand of the Reich War Ministry and the German Supreme Command for compulsory mass transfer of Belgian work-

[14] *Actes et documents de la 2ième Conférence Internationale de Paix*, Vol. III, pp. 108–110. French edition (*Le droit internationale codifié*, trans. by M. L. Lardy, Paris, 1899, p. 330).

ers into Germany because this would be contrary to the law of nations.[15] But by order of May 15, 1916, he introduced forced labor for "recalcitrant unemployed" Belgian workers and stipulated that they were liable to be transferred to the places where work was to be assigned to them.[16]

The Order, entitled "concerning the unemployed who, out of laziness, are shunning work," ostensibly aimed at reducing expenses for unemployment relief; and, in order to prevent Belgians from declaring that they were not in need of such relief, the Order made it a punishable crime not to declare one's indigence. However, this Order was not used by the Germans to deport Belgians to places outside their own country.[17]

These deportations began after the German Supreme Command had issued its famous order of October 3, 1916, "concerning restrictions of public relief." Shortly before, an expert opinion (*Rechtsgutachten*) of the Reich Chancellery had declared that "under the law of nations, the intended deportation (*Avschiebung*) of idle (*arbeitzschene*) Belgians to Germany for compulsory labor can be justified if (a) idle (*arbeitzschene*) persons become a charge of public relief; (b) work cannot be found in Belgium; (c) forced labor is not carried on in connection with operations of war. . . . Hence, their employment in the actual production of munitions should be avoided."[18] The wording of the Order endeavored to make the deportations appear partly as a police measure directed against vagrants and idlers and partly as an economic measure to combat unemployment in Belgium.[19] These pretences deceived nobody and were at once abandoned by the German authorities[20] but indicated awareness of the illegality of the procedure.

Probably no other German war measure, with the possible exception of the unrestricted submarine campaign, caused such world-wide indignation. "The whole civilized world stigmatized this cruel practice as an outrage."[21] The declarations of protest referred either to general principles of international law and humanity or specifically to the Hague Regulations. For example, a note signed by 49 members of the Universities of Liège, Louvain, and Brussels called the measure "not only contrary to the principles of the

[15] *Report*, pp. 283–4.

[16] *Bulletin officiel des lois et arrêtés pour le territoire Belge occupé*, No. 213, May 20, 1916, quoted in J. Pirenne et M. Vauthier, *La Legislation et l'Administration Allemandes en Belgique*, Paris-New Haven 1925, p. 193.

[17] Fernand Passelecq, *Les Déportations Belges à la Lumière des Documents Allemands*, Paris 1917, p. 4.

[18] L. von Köhler, *Die Staatsverwaltung der besetzten Gebiete, Band I: Belgien*, Stuttgart-New Haven, 1927, p. 152.

[19] Art. 1 read: "Persons who are able to work may be subjected to forced labor even outside their domicile if, on account of gambling, drunkenness, idleness, lack of work, or laziness, they are compelled to have recourse to the assistance of others for their own subsistence or for the subsistence of their dependents." J. Pirenne-M. Vauthier, work cited, p. 188.

[20] *Cri d'alarme des évêques Belges á l'opinion publique, daté Malines, Nov. 7, 1916*, quoted in Passelecq, p. 93.

[21] Oppenheim-Lauterpacht, *International Law*, 5th ed., London 1935, p. 353.

Belgian public law but to rules which have become sacred international law by agreement between nations." The city councillors of Brussels, referring to Art. 43 of the Hague Regulations, protested that "among Belgian laws none is more precious and more sacred than that which guarantees to every Belgian citizen his personal liberty, extending, particularly, to the realm of labor." Mr. Vandervelde, president of the International Socialist Bureau, pointing to the revised Art. 23, called the deportations "the most odious, most unjustifiable assault against human freedom and dignity." [22] On December 2, 1916, a storm broke in the Reichstag, the opposition faction of the Social Democratic Party accusing the Reich government of breach of international law.[23] The U. S. Department of State protested in a *note verbal*

> against this action which is in contravention of all precedent and of those humane principles of international practice which have long been accepted and followed by civilized nations in their treatment of non-combatants in conquered territory.[24]

The Netherlands Government based its official recriminations on the incompatibility of the deportations with the "precise stipulations" of Art. 52 of the Hague Regulations.[25] Professor James W. Garner pointed out that if a belligerent were allowed to deport civilians from occupied territory, in order to force them to work in his war industries and thereby to free his own workers for military service, this would make illusory the prohibition to compel enemy citizens to participate in operations of war against their own country. "The measure must be pronounced as an act of tyranny, contrary to all notions of humanity, and one entirely without precedent in the history of civilized warfare." [26] Another authority on international law declared that [27]

> If the IVth Hague Convention of 1907 does not include a precise text concerning the displacement of the civilian non-combatant population, it still results from the spirit of that Convention that such a measure is in complete contradiction to the concept of wartime occupation; the concept which has taken the place of the outmoded theory of conquest which made the conqueror the sovereign of the conquered

[22] Quoted in same, pp. 362, 382.

[23] Umbreit-Lorenz, *Der Krieg und die Arbeitsverhältnisse*, Berlin-New Haven 1928, p. 123; *Report*, p. 285.

[24] G. H. Hackworth, *Digest of International Law*, Vol. VI, Washington, D. C., 1943, p. 399.

[25] Passelecq, *Déportation et Travail Forcé des Ouvriers et de la Population Civile de la Belgique Occupée, 1916–1918*, Paris, 1928, p. 389. For a fuller discussion of the actions of the neutrals, see same, pp. 286–308; for texts of other declarations of protest: pp. 93–103, 309–367, 380–383.

[26] This JOURNAL, Vol. XI, No. 1 Jan., 1917, p. 106, and J. W. Garner, *International Law and the World War*, New York, 1920, Vol. II, p. 183.

[27] Prof. Ernest Nys, of the University of Bruxelles, statement of Nov. 6, 1916, quoted in Passelecq, p. 234.

> country. In the wars of our time the peaceful populations possess rights; the victor is the provisional administrator, he is bound to respect the rights of the peaceful inhabitants.

Whereas in World War II the National Socialist regime continued to deport and exploit foreign workers until the very end, Imperial Germany retracted in view of this avalanche of protest. After secret negotiations through diplomatic and church channels, an appeal to repatriate the deportees and to stop further recruitments was submitted to the Emperor by Cardinal Mercier and other Belgian dignitaries in February 1917. William II acceded, with certain restrictions. From the middle of February 1917, Belgians were no longer deported from the Belgian "Government General," and it was promised that, by 1 June 1917, deportees who would not volunteer to remain in Germany were to be repatriated. However, recruitment of workers for employment in Belgium and in occupied Northern France continued, especially in the *zone d'étape*. These "Civilian Labor Batallions" were the forerunners of the foreign forced labor groups employed all over Europe later during the second world war.[28]

Although the illegality, under existing international law, of deportation of civilians from territories under belligerent occupation was not doubted, the Tenth International Red Cross Conference adopted the following resolution in 1921:

> Deportation of civilians is only permitted in individual cases, for individually committed delicts which have been duly defined and which necessitate such measure. The measure may be carried out only on the basis of a judicial sentence (*sentence judiciaire*). Mass deportation applying to entire categories of inhabitants, shall not be decreed.[29]

At the international conference which met in Geneva in 1929 to deliberate on a new convention on prisoners of war various delegates wished to deal also with the position of civilian deportees in time of war. It was finally decided to leave the subject to another conference which, indeed, was supposed to be convoked in Geneva in 1940. But the outbreak of war interfered.

It must be noted, however, that long after the end of the first world war, republican Germany officially upheld the "unemployment theory" which the Kaiser's Government had unsuccessfully tried to apply. The German Constituent Assembly created a parliamentary commission to investigate into the charges made against Germany of having violated international law during the war. On July 2, 1926, the third subcommission of this body issued a majority report stating that the deportations had been in con-

[28] *Report*, pp. 71–81.

[29] *Compte rendu de la Xème Confér. Internat. de la Croix Rouge*, Geneva 1921, quoted in G. Werner, *Les Prisonniers de Guerre*, Académie de Droit International, Recueil des Cours, 1928, Tome 21, p. 34.

formity with the law of nations, and more particularly with the Hague Regulations provided "that the workers in question did not find sufficient opportunity to work in Belgium and that the measure was indispensable for reëstablishing or maintaining order and public life in the occupied territory." The report admitted that in the execution of the measure many mistakes were made and that the deportees had to undergo hardship—facts which it called regrettable and contrary to international law, but for which the German Government could not be held responsible because it had not ordered them. With consternation, Mr. Vandervelde, then Belgian Minister of Foreign Affairs, declared that his country had erred in its belief "that at least on this point, the war policy of the Kaiser's Government would no longer find defenders." [30]

To be sure, the minority report of the third subcommission squarely condemned the deportations. The acrimonious debate that followed in the Reichstag and in the German press revealed the militancy and strength of the forces backing the majority report and the politically precarious situation of those supporting the standards of democratic world opinion in Weimar Germany even in the post-Locarno period.

The German Deportation Policy During the Second World War

In World War I deportation of enemy civilian manpower was a subordinate aspect of Germany's system of warfare. In World War II it was one of the cornerstones. It is no exaggeration to say that the Reich waged in 1939–1945 war to a very large extent through the exploitation of enemy manpower conscripted from the civilian population of territories held under belligerent occupation.

Some contingents of foreign workers came from non-belligerent states and from states which were Germany's allies or satellites.[31] It is not possible to enter here into an examination of (a) the constitutional situation in these sending countries in order to determine whether the foreign authorities actively supporting, or, at least, benevolently assisting, the German deportation measures had the power to do so, and (b) whether and to what extent the German authorities, after having received concessions in the form of bilateral treaties, kept within the concessions or overstepped them. One decisive point can, however, be cleared up without answering these questions. Even assuming that Germany had acquired a rightful title for deporting workers, for example from Italy (before July, 1943), and even leaving aside the fact that the purpose of these procedures was to help the Third Reich to carry on a *bellum injustum*, namely, an aggressive war outlawed by conventional international law, it would still remain true that Germany was

[30] Belgian Chamber of Representatives, session of July 14, 1927. *Documents Legislatifs, Chambre des Représentants*, No. 336. Passelecq, pp. 416–433.

[31] For numerical estimates, *Report*, pp. 264–267.

not entitled to disregard the basic rules of decency and humanity with respect to these labor deportees. As it was, both with respect to the methods of recruitment in their home countries and the treatment meted out to them at their German-assigned places of employment, the citizens of the allied and satellite States fared hardly better than many categories of deported enemy nationals.[32]

The deportations carried out by Imperial Germany are dwarfed in magnitude by those undertaken by Hitler's Germany. In 1914–1918 the number of labor conscripts ran into tens of thousands, in 1939–1945 into millions. An official Belgian investigating commission stated that 58,500 Belgians were deported from the Belgian "Government General" (Belgium minus the *zone d'étape*) into Germany. (This figure must be considered as a minimum.)[33] In a memorandum to the Reparations Commission the Belgian Government reached a total of 160,000 deportees because it added those deported within German-occupied Belgium or to German-occupied France.[34] But Fritz Sauckel, Hitler's Commissioner-General for Manpower, declared on June 30, 1943, that the number of foreign workers (including employed prisoners of war) in the German economy amounted at the end of May 1943, to 12,100,000.[35] This, it must be remembered, was not an over-all total as were the Belgian figures for the first war. It was a total for one particular moment when the importation of foreigners certainly had reached a peak; but hundreds of thousands of labor conscripts had already died or returned to their home countries on account of invalidity, etc., and other hundreds of thousands were still to be brought into the Reich during the 23 months of war yet to come.

As to the duration of the individual deportation during the first war, the Belgian Government memorandum just mentioned calculated that it averaged seven months, of which, again on the average, five months were spent on forced labor. For 1939–1945 no comparable statistics are, as yet, available. But it is known that for the majority of deportees the duration of their forced employment is to be counted in years; as long as a foreigner was, in the eyes of the German manpower administration (*Arbeitseinatzverwaltung*), able to work he had little chance to be released.

Bad as the treatment of the deportees had been in the first war, it was incomparably worse in the second. The ever-repeated recruitment drives brought cruel persecutions and countless indignities to the workers and their families. As the war proceeded and the German need for manpower became ever more insatiable, the terroristic methods used from the outset (Fall of 1939) in Poland and (Summer of 1941) in Soviet Russia were applied with

[32] *Report*, in general.

[33] Passelecq, p. 397.

[34] *Mémoire sur les dommages de guerre, subis par la Belgique*, Ch. VI, part 1, entitled *Rémunération aux deportés*, quoted in the case of *Jules-Hector Loriaux* c. *Etat allemand*, in *Recueil des décisions des tribunaux mixtes*, Paris, 1924–25, Vol. V, p. 684.

[35] *Report*, pp. 61, 54–64, 264–267.

increasing frequency in other German-occupied territories. Incontestable reports speak of the many deaths caused by the policy of transporting deportees in open freight cars or in locked unheated cattle cars, without provisions for their most elementary needs. At their destinations, the foreign workers were at the mercy of the German manpower administration service, the Labor Front, the various police and SS authorities and the (often armed) factory guards.[36] There was no "protective Power" to look after their interests as in the case of prisoners of war covered by the Geneva Convention of 1929. Nor was the International Red Cross Committee able to extend to labor deportees the humanitarian work it was doing for prisoners of war. A typical example can be found in the report of September 1944 of a delegate of the International Red Cross Committee from the emergency camp in Pruszkow (Poland) for evacuees from Warsaw. The International Red Cross tried somewhat to improve their plight but on the worst aspect of this evacuation, the report could merely state that of 238,218 persons arriving at Pruszkow between August 6 and September 18, 1944 (when the exodus had not yet ended) 128,371 had been found fit for work and immediately transported to Germany.[37]

Most of the foreigners were overworked and underfed. They were systematically used for the most exhausting[38] and most dangerous work, often being given no safety appliances. The majority of them lacked even the most essential clothing. Their mass quarters were, as a rule, utterly inadequate, as were the medical and health services and the hygienic conditions.[39]

Inhumane "corrective" and punitive measures were applied to the foreigners who possessed no rights of defense. Labor deportees and persons who had tried to escape recruitment constituted a huge portion of the population of the Gestapo prisons[40] and concentration camps, both inside and outside the Reich. It must be added that the inmates of concentration

[36] As late as April 21, 1945, Reich Minister Goebbels exhorted the factory guards "immediately to arrest rebellious foreign workers or, better still, to render them harmless" (*Deutsches Nachrichten Bureau*, Apr. 22, 1945).

[37] *Revue Internationale de la Croix Rouge*, Oct. 1944, p. 780.

[38] After the first war the "Allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" urged the creation of an Allied tribunal for the trial, amongst others, of "the crime of forced labor in mines where persons of more than one (non-German) nationality were forced to work": *Bulletin of International News*, London, Feb. 3, 1945, p. 98.

[39] *Report*, in general.

[40] The Congressional report on German concentration camps of May 16, 1945, stated that the surviving population of the Buchenwald camp, as of April 16, 1945, was about 20,000 of whom 1,800 were Germans, the others foreigners, namely 4,380 Russians, 3,800 Poles, 2,900 Frenchmen, 2,105 Czechs, etc. (*Atrocities and other Conditions in Concentration Camps in Germany*, Report of the Committee requested by Gen. D. D. Eisenhower, in the Congress of the U. S., 79th Congr., 1st Sess., Doc. No. 47, Washington, D. C., 1945, p. 6). The present paper was completed before the Nuremberg trial; much additional information on the treatment of deported labor has been brought to light there.

camps and even of the special "extermination camps" were forced to work, under indescribable conditions, on road building or in war factories situated in or near the camps. At the entrance of Oswiecim Camp, there was a huge poster with the inscription *Arbeit Macht Frei* (Work Makes Men Free).[41]

Taxation of Deportees

Some remarks are in order on the taxation of the labor recruits—an aspect of Germany's deportation policy which has gone almost unnoticed but which is noteworthy from the standpoint of international law both of war and of finance. The majority of the workers, namely the Russians and Poles, had to pay special discriminatory income (wage) taxes, called "Eastern Tax" (*Ostarbeiterabgabe*) for the Russians and "Social Equalization Tax" (*Sozialausgleichsabgabe*) for the Poles. The Eastern Tax especially was so high that large categories of workers received no wage at all after the employer had deducted the tax and the standard rate for their mass shelter and mass canteen. The other foreigners paid, as a matter of principle, the same income (wage) tax as comparable German workers. In addition, many of them had to pay fees to the German Labor Front; also these taxes and contributions were automatically deducted by the employer. The total amount thus collected by Germany from the deportees amounted to several billion Reichsmark.[42]

Any examination of this taxation must start from the fact that the Hague Regulations strictly limit the right of the occupant to levy taxes, dues, and tolls from inhabitants under belligerent occupation in two respects; if the occupant collects taxes from the enemy population, he "shall do it, as far as possible, in accordance with the rules in existence and the assessments in force"; and—an even more stringent limitation of his discretion—he must use the money thus collected "to defray the expenses of the administration

[41] *Report*, p. 255. See: Executive Office of the President, War Refugee Board, *Report on German Extermination Camps*, Washington, D. C., Nov., 1944, pp. 1–40.

A directive of the Main Economic Board of the SS, dated Dec. 28, 1942, pointed out that of 136,000 prisoners sent to 16 concentration camps between June and November 1942, no fewer than 70,610 died and 9,267 were executed during this six-months period (*News from Europe*, London, July 24, 1945, p. 1). The proportion of foreigners is not given in that document, but a clue can be found in Gestapo reports, discovered by Allied troops during the last stages of the war, showing that during the first six months of 1944 the Gestapo arrested about 205,000 persons in the (pre-1938) "Old Reich" and 105,000 in the rest of "Greater Germany"; of the 205,000 arrests in the "Old Reich," 146,000 (71.2%) were for "labor evasion and slowdown" (*Tribune*, London, Apr. 27, 1945, p. 3). It is safe to assume that the majority of these 146,000 were foreign workers and that in the outlying territories their percentage was even higher than in Germany proper.

Statistics on the death rate among the deportees are not yet available. But it is indicative that in 1914–1918, according to official Belgian investigations, 2.5% of the Belgians deported to Germany had died "during the course of deportation," lasting on the average seven months: Passelecq, p. 398. This corresponds to a yearly death rate of 4.25% which is higher than that of the armed forces of the belligerents.

[42] *Report*, pp. 118–136.

of the occupied territory on the same scale as that to which the legitimate Government was bound." Thus, as a result of the basic doctrine of the Hague Regulations, that the occupant may act only as place-holder for the absent legitimate Government, he is only entitled to levy taxes to procure the money needed for the administration of the occupied territory. The exception to this rule, contained in Art. 49, merely serves to emphasize this principle: "If, besides the taxes referred to in the preceding article, the occupant levies other money contributions in the occupied territory, this can only be for military necessities or the administration of such territory."

Patently, under these rules Germany was not entitled to compel the foreign workers while they were still in their homelands to pay taxes to the Reich Treasury or fees to the Labor Front (which was a huge financial organization of the National Socialist Party). Nor could Germany do so after having them deported. If the levying of those contributions was illegal it could not be legalized through preceding it by another illegality, namely deportation. If Germany was forbidden to levy these taxes and fees in the occupied homelands of the workers it was all the more forbidden to do so after it had abducted the workers. To prove the illegality of the taxation of the illegally deported workers one need not invoke the doctrine *ex injuria jus non oritur;*[43] it results from codified international law, whether the contributions were exacted in the occupied countries or elsewhere, and whether they were exorbitant or "normal."

Can the objection be made that if this is so the foreign workers would have been, as far as taxation was concerned, in a more favorable situation than their German fellow workers? It cannot. The point is that the capacity of the foreigners to pay taxes was one of the assets of which, according to the Hague Regulations, Germany was allowed to avail itself

[43] On the applicability of this doctrine see Lauterpacht, *Legal Problems in the Far Eastern Conflict*, New York, 1941, pp. 139–147, where Prof. Lauterpacht concedes that the doctrine *ex injuria jus non oritur* cannot be said to apply in international relations without qualification. However, there is no doubt that the trend is toward its wider application in international law, particularly in so far as the legal position of an aggressor state is concerned. See, for example, Art. 2 of the Draft Convention on Rights and Duties of States in Case of Aggression of the Research in International Law (Harvard Law School); "A State does not acquire rights or relieve itself of duties by becoming an aggressor. In particular, . . . (d) An aggressor does not have the rights which under international law would accrue to a military occupant in time of war in respect of property titles, *taxes*, requests, contributions, or forced loans, in territory held in military occupation. (e) An agressor does not have the rights which under international law would accrue to belligerent forces in invaded territory." In the same spirit, Art. 5 (b) of the Neutrality Draft Convention No. 2 of the Research in International Law declares: "A law-breaking State cannot pass title to any property or levy taxes, requisitions or contributions within any territory which it holds in military occupation." Principles of this character were repeatedly declared to govern the attitude of the United States with respect to *faits accomplis* created by or resulting from aggressions and other acts of law-breaking States; they follow from the Stimson doctrine. (See this JOURNAL, Vol. 26 (1932), p. 342.)

only for the specific purposes mentioned above. As it was, the German taxation policy added to Germany's illegal advantage of exploiting the productive capacity of millions of enemy citizens, the illegal advantage of exploiting their tax-paying capacity as well; and it caused their respective home countries not only to be illegally deprived of their citizens' productive capacity but also to be illegally deprived of their tax-paying capacity. Any contributions levied from these foreigners should have gone to their respective occupied home countries.[44]

Except to the extent provided in the Hague Regulations, the occupant does not possess taxing jurisdiction over the inhabitants of territory under belligerent occupation. The illegal transportation of these persons into German territory did not give Germany taxing jurisdiction over them.[45] The special problem of the taxation of enemy citizens deported from territory under belligerent occupation has, it appears, not been treated by Courts or by authorities on international law. But the general question as to whether an alien who was brought against his will into another State's territory is to be considered under the jurisdiction of that State, was answered in the negative, by the Supreme Court of the United States in 1870.

> If the legislature of a state should enact that citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislation as to valid judicial action.[46]

In terms of American precedent, *Cook* v. *U. S.* (1933), 288 U. S. 102, 121–122 is also pertinent. The Supreme Court stated that a state has no power to subject a vessel to its own laws if the vessel is seized in violation of an international treaty. Not only the courts of the state, but the state itself, has no jurisdiction in such case. "Our Government, lacking power to seize, lacked power, because of the treaty, to subject the vessel to our law. To hold that adjudication may follow a wrongful seizure, would go far to

[44] In fact it is interesting to note that, as a propagandist gesture, the Germans sent the Labor Front contributions of some foreign groups to the German-dominated "Labor Fronts" that had been established in their respective countries (*Report*, p. 123).

[45] While it is a rule of almost universal application that the power of the state, acting through its governmental agencies to tax its citizens, is absolute and unlimited as to persons and property and that every person within the jurisdiction of the state, whether a citizen or not, is subject to this power, yet, as said in *Endicott, Johnson & Co.* v. *Multnomah County*, 96 Or. 679, at 1109, 1110: "A tax imposed without jurisdiction over other persons or property is void." *Winston Bros. Co. et al.* v. *State Tax Commission et al.*, 62 P. (2d) 7, 10 (Sup. Ct. Oreg., 1936).

[46] *St. Louis* v. *The Ferry Co.*, Wallace 423, 430. Cf. J. H. Beale, "The Jurisdiction of a Sovereign State," in 36 *Harvard Law Review* (1923), 243:" The sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law."

nullify the purpose and effect of the treaty. . . . The ordinary incidents of possession of the vessel and the cargo yield to the international agreement." Professor Edwin D. Dickinson, calling the principle of *Cook* v. *U. S.* unimpeachable, comments: "Since this seizure or arrest was made in excess of a state's proper competence and in violation of the rights of a foreign state, there is in consequence no national competence to invoke local process or to subject the thing or person to local law."[47]

Another reason for the illegality of the taxation of the deportees must be mentioned. A tax is a price paid for the fair protection of the person of the taxpayer or his property, as well as his material and immaterial rights. "It must be clear that in so far as international law is concerned the right of a state to impose a personal tax upon an individual depends upon the intimacy and closeness of the relationship that has been established between itself and him."[48] German writers used to speak of the need for "equivalence" between the tax demanded from a foreigner and the services rendered to him by the state levying the tax. For example, in 1934 a member of the Superior Administrative Tribunal of Prussia stated:

> Taxation of aliens always requires a special justification. Therefore, we [experts on the law of international finance] have established the doctrine of equivalence: as a matter of principle, a foreigner may be taxed only to the extent to which such taxes form a counter-value for the advantages that he derives from his contact with the regime (*inländische Staatsordnung*). Taxes which go beyond this extent are illegal. To demand (*zumuten*) from a foreigner that he should, without benefiting from the state, enhance the purposes of such state by contributing a part of his own assets, would mean to ask membership fees from a non-member who is prevented from receiving even a limited number of advantages resulting from membership. To subject a foreigner to taxation which is not the counter-value of benefits granted to him, is a usurpation.[49]

[47] "Jurisdiction following Seizure or Arrest in Violation of International Law," this JOURNAL, Vol. XXVIII (1934), p. 231.

In 1929, in its "restatement of the conflict of laws" the American Law Institute proposed the following new provision: "Sec. 83A. *Individual Involuntarily within the State.* A state cannot exercise jurisdiction through the courts over an individual brought into the state by force against his will wrongfully or by act of God until he has had a reasonable opportunity to leave the state": quoted in "Jurisdiction Over Persons Brought into a State by Force or Fraud," in Yale Law Journal, Vol. 39 (1930), p. 895). See also cases cited by Dickinson, p. 235, n. 12, and p. 239, n. 23.

[48] C. C. Hyde, *International Law*, 2nd rev. ed., Boston, 1945, Vol. 1, p. 665 (almost identical in first ed., Boston 1922, Vol. 1, p. 362).

[49] Ernst Isay, *Internationales Finanzrecht: Eine Untersuchung über die äusseren Grenzen der staatlichen Finanzgewalt*, Stuttgart 1934, p. 48. Isay remarks that the equivalence theory can already be found in Grotius. He quotes Helfferich (in Schönberg, *Allgemeine Steuerlehre*, Vol. III) to the effect that the taxation of foreigners can only be justified if conceived as a remuneration (*Entgelt*) for the protection afforded to their persons and their assets (p. 48).

Considering the methods by which the foreigners were brought into Germany, the illegal purpose for which they were used (namely, to help their enemy in his war against their own countries), and the treatment they received, it would indeed be difficult to find any "intimacy and closeness" between them and Germany, or any "equivalence" between their tax payments and the benefits rendered them by Germany.

Attempts to Legalize the Deportations

In many occupied territories Germany did not attempt to justify its deportation policy from the viewpoint of international law but based it on military, geopolitical, or racial arguments, or on the obligation of all Europeans, irrespective of nationality, to support Germany's "war for the defence of European culture."[50] However, with respect to some categories of foreign workers, Germany claimed to have legalized its deportation policy on several grounds.

1) Annexation. Germany unilaterally incorporated or annexed foreign territories which it had invaded and occupied during the war, e.g., Alsace-Lorraine, Luxembourg, and large parts of pre-war Poland. The workers conscripted in these areas—particularly if they were considered, according to National Socialist standards, as Germans,—were not counted amongst the foreign workers. Sir Arnold D. McNair expressed an uncontested principle when he wrote: "A purported incorporation of occupied territory by a military occupant into his own kingdom during the war is illegal and ought not to receive any recognition, *e.g.*, Germany's claim to have annexed Alsace-Lorraine to the Reich during the present war." [51]

2) State treaties. Germany concluded treaties with German-supported authorities in territories occupied during the war. For example, the Vichy Government agreed to the transportation of large contingents of French workers to the Reich (or other destinations as determined by the Reich) and to give other forms of assistance to the National-Socialist war labor policy.[52] France was the only country which, before entering such agreements, signed an armistice; and the Vichy Government was the only one of the German-supported Governments which, for a time, was recognised by some of the United Nations. If these German-French agreements were nevertheless invalid under the law of nations, the other agreements of this class must be considered invalid also.

From the time when Marshall Pétain signed the armistice on June 22, 1940, General de Gaulle and the "Free French" authorities denied its validity, not on grounds of unconstitutionality but as an act of high treason. Similarly, they have contested the validity of the Enabling Act of July 10, 1940, which formed the basis of all acts of the Vichy regime, not so much on

[50] W. Stothfang, in *Hamburger Fremdenblatt*, March 4, 1944, quoted in *Report*, p. 37.

[51] *Legal Effects of War*, 2nd ed., Cambridge 1944, p. 320, note.

[52] For provisions concerning social insurance see *Report*, pp. 218–230.

grounds of unconstitutionality but again as an act of high treason. The question of whether the proceedings leading to the passing of the Enabling Act of July 10, 1940, followed the letter of the Constitutional Laws of 1875 is controversial.[53] But the official French attitude after the disappearance of the Pétain Government seems to be that even if it were true that in abrogating the Third Republic the formalities of its own Constitution were scrupulously adhered to, this would only be an additional proof of the shrewdness of the conspirators who, under the protection of the invader, wanted to gain power and to help the enemy. The De Gaulle authorities, claiming full jurisdiction over acts committed during the Vichy interlude, found the persons chiefly responsible for the signing of the 1940 armistice and for the passing of the Enabling Act guilty of treason and sentenced them to death. By an Order issued in April, 1945, they also declared French parliamentarians who had voted for the Enabling Act ineligible for the Constituent Assembly unless individually rehabilitated by a special *jury d'honneur*.[54]

However this may be, it is certain that at the time when the German-French deportation treaties were signed, there existed two authorities both contesting to represent France. In such situation the eventual course of history is the final arbiter on the question of who is the rebel and who is the legitimate government. History decided for de Gaulle. But even while it lasted, the Pétain Government did not acquire that measure of stability and independence as to be capable of concluding international treaties. There is no doubt that, from its inception, the Vichy Regime owed whatever authority it possessed to the physical power of Germany; it lacked the required minimum of independence and stability to make it a sovereign government. This fact was not altered by the temporary recognition accorded to Vichy by some nations. Recognition is merely the "assurance given to a new state that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations." [55] The sovereignty of a new state neither depends on, nor can be created by, recognition. Yet, the deportation treaties would have been

[53] K. Loewenstein, "Demise of the French Constitution of 1875," in *American Political Science Review*, Vol. 34, No. 5 (Oct. 1940), p. 894, held that the proceedings "were carried out with a full, and even excessive, sense of legality, and in complete accordance with the requirements of the Constitution which they destroyed." M. Koessler, "Vichy's Sham Constitutionality," in *American Political Science Review*, Vol. 39, No. 1 (Feb. 1945), p. 86, took the opposite view because "the ratification by the (French) nation which the Enabling Act itself required before it was to become operative, was never made." Other writers also deny the legality for various reasons: see literature quoted in Koessler's article.

[54] The *jury d'honneur* was composed of M. Cassin, Vice Pres. of the *Conseil d'Etat*, Vice Admir. Thierry d'Argenlieu, and M. Saillant, Pres. of the *Conseil National de la Résistance* (*Combat.*, March 18/19, 1945; *Aurore*, March 20, 1945; *Ordre*, Apr. 6, 1945).

[55] Moore's definition, quoted by Hyde, p. 148. On November 8, 1942, Canada severed relations with Vichy because there no longer existed in France any Government with "effective independent existence." Three days later, German troops occupied the hitherto "unoc-

illegal under international (and also under domestic French) law even if it is assumed that the Vichy Government was a legal government capable of entering into treaties with other states and that the post-Vichy Government did not have the power to invalidate *ab initio* the acts of the Vichy Government. What taints the deportation treaties is their content. These treaties were manifestly *contra bonos mores*. The German-French armistice (assuming that it was valid) was an armistice in the technical sense; it did not end the state of war between the signatories, but merely aimed at suspending hostilities between them. In fact, this aim was never fully realized: French armed forces continued to wage war against Germany in the name of France. The outcome of the war continued to be uncertain both legally and factually. By the time the war came to an end the circumstances prevailing in June, 1940, were reversed. Until this final outcome, France's allies and, to an increasing extent, French troops stationed in France's overseas possessions or on allied soil and fighting under the authority and command of Free French authorities waged full-fledged war against Germany. In occupied France, the overwhelming part of the population sympathized with the Allied cause. More and more Frenchmen actively fought against the invader. Under such circumstances, it was flagrantly illegal for any French Government to conclude agreements providing for the compulsory mass deportation of French workers for the purpose of aiding Germany's war effort. The principle that neither civilians nor prisoners of war must be compelled to work for the direct war effort of the enemy is basic. It is embodied in the Hague Regulations and in the Geneva Convention relative to the treatment of prisoners of war of 1929. The deportation treaties aimed at exactly this forbidden object and were, therefore, invalid.[56]

cupied" part of metropolitan France whereupon recognition was withdrawn also by the other United Nations which had previously accorded it. Most French-German deportation agreements were signed after these events.

[56] "The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications" (Hall, *International Law*, 8th ed., 1924, p. 382); "It is a unanimously recognized customary rule of international law that obligations which are at variance with universally recognized principles of International Law cannot be the object of a treaty" (Oppenheim-Lauterpacht, Vol. 1, p. 706). International law denounces "as internationally illegal agreements which are concluded for the purpose of, and with a view to causing the performance of acts which it proscribes. . . . The obligation of a State to respect the terms of an agreement with another . . . may not come into being if the international society regards the arrangement as gravely injurious to its interests and contemptuous of what its law of nations is deemed to require. . . . In theory, any agreement which purports to do violence to the underlying principles of international law, must, to that extent, be regarded by the family of nations as internationally invalid" (Hyde, pp. 1374–5). See also Shotwell, *The Great Decision*, New York, 1944, p. 202. For a lucid discussion of the legal position of Czechoslovakia under German domination, see E. Taborsky, *The Czechoslovak Cause*, London, 1944.

3) Individual labor contracts. During the first world war, the German occupation authorities and the recruitment agents of the *Deutsches Industriebüro* used strong pressure—ranging from promises of better treatment and higher pay in Germany, to deprivation of food rations and physical violence[57]—in order to induce the Belgian labor recruits to sign individual contracts. The contracts were to prove that the men had voluntarily agreed to going to Germany and being employed there.[58] The practice was repeated during this war on a proportionately larger scale. If the signing of the contract was a genuinely voluntary act on the part of the worker, i.e., if the worker accepted German employment on his own free will, international law was not violated. This, however, refers only to a small minority to which the present analysis does not apply. In the great majority of cases, the foreigners signed under duress. According to a general rule of private international law, a contract entered upon under coërcion, is not binding on the coërced party even if expressed in writing.

However, a (written or oral) contract entered into under coërcion by one party is not *ipso facto* null and void. The coërced party cannot be compelled to fulfill the contract. But the other party (whether or not it exercised the coërcion) cannot free itself from its own obligations under the contract, merely by pleading that the coërced party had not actually willed the contract. This holds true, in particular, when the coërced party has fulfilled its obligations under it and the other party has not. It must be noted that many of the contracts which foreigners signed under duress contained more favorable conditions—e.g., about wages, vacations with pay, reimbursement of travelling expenses, etc.—than were actually granted them once they had arrived at their places of employment.[59] The point

[57] Passelecq, pp. 106, 169, 195/6, 279, 359; J. Pirenne-Vauthier, p. 56.

[58] On April 5, 1922, the Belgian worker Jules-Hector Loriaux brought test action against Germany before the Belgian-German Mixed Arbitration Tribunal set up under Art. 304 of the Treaty of Versailles. He claimed to have been subjected together with other Belgians "à des véritables tortures" in order to sign a labor contract and, owing to the maltreatment, to be permanently incapacitated for work. The Tribunal (decision of June 3, 1924) declared itself incompetent to decide upon the claim insofar as it was based on a forced labor contract because the contract was "based primarily on violence systematically exercised on a whole portion of the civilian population"; such acts of violence constitute "the gravest violation of the law of nations"; but indemnification for the wrong suffered by the claimant was covered by the German reparation payments pursuant to No. 8 of Annex I to Part VIII of the Treaty of Versailles (*Recueil des décisions des Tribunaux Mixtes*, Vol. IV, p. 686). In other cases (which did not refer to deportees) the Mixed Arbitral Tribunals had defined their jurisdiction more broadly, notably the French-German tribunal in *Société Vinicole de Champagne c. Consorts de Mumm*, decision of March 4, 1921, *Recueil*, Vol. 1, p. 23, and the Belgian-German tribunal in *Milaire v. Etat Allemand*, decision of Jan. 13, 1923, *Recueil*, Vol. II, p. 715. In July 1925 the German Government agreed with a federation representing former Belgian deportees to pay them a lump sum indemnification of 24 million francs, subject to the approval of the Mixed Arbitral Tribunal: *The Times*, London, July 14, 1925, quoted in A. J. Toynbee, *Survey of International Affairs, 1924*, London, 1926, p. 401. Also Oppenheim-Lauterpacht, p. 352.

[59] *Report*, p. 115.

here raised is, therefore, important in connection with claims foreign workers may make on the basis of the contracts.

4) "Transformed" prisoners of war. International law forbids the deportation of civilians from territory under belligerent occupation and their employment on war work for the hostile power. Hence there exist no codified regulations concerning the conditions of employment if such measure is taken nevertheless. Making use of this fact, Germany treated a large portion of its prisoners of war as if they had been civilian "foreign workers." This practice aimed not so much at legalizing German policy as at avoiding obligations under international treaties. It was applied to several hundreds of thousands of prisoners, mainly French, Polish and Russian. To change a person's status from prisoner to civilian "foreign worker" was, in some respects, advantageous from the German point of view. It lent itself to be represented as a conciliatory gesture and at the same time it was construed as releasing the Reich, as far as prisoners covered by the Geneva Convention of 1929 were concerned, from obligations and responsibilities laid down in that convention—for example, to grant them food rations equivalent in quantity and quality to that of the depot troops (Art. II, 1); not to compel officers to work (Art. 27, 1); to abide by the limitations on disciplinary punishments which may be inflicted on a prisoner of war, and by the provisions concerning judicial proceedings against them (Art. 54 ff., 60 ff.); to permit protecting neutral powers to exercise control over the treatment of the prisoners of war, and the International Red Cross Committee to perform its humanitarian work for their protection (Art. 86 ff.); etc. The measure was construed as abrogating the prohibition to employ a prisoner of war on work for which he is physically unsuited (Art. 29) or which is unhealthy or dangerous (Art. 32; 1), the provisions concerning working time, weekly rest periods, and pay (Art. 30, 34), and, most important of all, the restrictions concerning the type of work which may be requested from a prisoner of war.[60]

To deprive prisoners who fall under the Geneva Convention of 1929 of these rights and guarantees without actually liberating them, constitutes a gross violation of international law for the convention regulates the rights and duties of the detaining power and the prisoners until the latter are actually liberated and repatriated.[61] If the detaining power could, during hostilities, change the status of the prisoners without releasing them, and thereby free itself from its obligations, the Convention would be meaningless.

[60] His work must have "no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units" (Art. 31, 1).

[61] The Convention knows only the following ways of "ending the captivity": a) direct repatriation during hostilities; b) accommodation (*l'hospitalisation*) during hostilities; c) liberation and repatriation after conclusion of an armistice or of peace; d) "liberation on parole" as provided for in Art. 10–12 of the Hague Regulations of 1899 and 1907.

The situation is in the main the same with respect to prisoners of war of a country which, while not a party to the Geneva Convention of 1929, is a party to the Hague Regulations of 1899 and 1907. By concluding the Geneva Convention, "it was not intended to abrogate or replace the (Hague) Regulations . . . but rather to amplify and extend them." [62] The provisions of the Hague Regulations are far less extensive and on important points less benevolent to the prisoners. But they contain (as, indeed, the Brussels Declaration of 1874 contained) many of the essential principles of the Convention of 1929, in particular the prohibition to employ prisoners of war on work connected with the operations of war.[63] The provisions of the Hague Regulations protecting, on the one hand, prisoners of war and, on the other hand, enemy civilians, may not be circumvented by changing the status of prisoners into an in-between situation in which they would lose both the rights of prisoners of war and of enemy civilians.

* * *

Unfortunately the machinery of the immediate past for the enforcement of international law was not able to prevent Germany's war labor policy, just as it was not able to prevent the war. But the fact that the Third Reich saw itself compelled to engage on this labor policy contains an encouraging lesson for the future, and a warning to would-be aggressors.

After most systematic preparation,[64] Germany entered the war much more strongly armed than its opponents, and with its formidable industrial apparatus fully geared for war. In spite of this exceptionally favorable situation the manpower requirements of modern warfare proved so great that Germany had to rely, throughout World War II, on the labor of many subjugated territories.

But it must be realized that it was only Germany's extraordinary military successes, gained in the early phases of the war, which put these foreign resources at its disposal. In the future, with the effective functioning of the United Nations Organisation for immediate concerted action against threatened aggression, a potential aggressor could hardly hope to gain the military successes which would enable him to put a similar policy into practice.

[62] J. W. Garner, in this JOURNAL, Vol. XXVI (1932), pp. 808/9. See also F. W. Heinemann, *Das Kriegsgefangenenrecht im Landkriege nach moderner völkerrechtlicher Auffassung*, Krefeld 1931, pp. 50, 53.

[63] Art. 6 (1) Hague Regulations. Regarding required standards of food, quarters, and clothing of prisoners of war, see Art. 7. It must also be pointed out that "the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience" (general clause in the preamble to the Hague Convention) apply fully to captives whose legal position is governed not by the Geneva Convention but only by the Hague Convention.

[64] "Without the achievements of the years 1933–1938 we should hardly have been in a position to wage this war in so powerful and manly a fashion as we have done" (declaration of the head of the German Labor Front, Dr. Robert Ley, Nov. 30, 1944, *Deutsches Nachrichten Bureau*, Nov. 30, 1944).

II. TRANSFER OF CIVILIAN MANPOWER FROM SUBJUGATED TERRITORY

The German wartime deportations of enemy civilians were illegal because Germany lacked a valid right to remove these persons from their lands and because the purpose of the deportations was illegal. Insofar as their treatment fell below the accepted minimum standards of decency and humanity the deportations were also for this reason illegal under international law. We have now to examine whether the legal situation is different with regard to the contemplated employment of German civilians for the reconstruction of war-torn areas of the United Nations.

The employment of Germans can be organized under the following four forms: a) employment of prisoners of war; b) employment of war criminals; c) voluntary employment; d) employment through compulsory conscription of civilians.

The three first-mentioned forms need little comment. Voluntary employment abroad would be a special case of organized temporary migration. That war crimes in the technical sense, i.e., violations of the laws and customs of war, may be punished by forced labor abroad follows from the fact that this is a milder penalty than death, which is an established penalty for the more serious of such offenses. "All war crimes may be punished with death, but belligerents may, of course, inflict a more lenient punishment, or commute a sentence of death into a more lenient penalty. . . . If a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may select a more lenient penalty and carry it out even beyond the duration of the war." [65] The charter of the Military International Tribunal of August 8, 1945, agreed upon between Great Britain, the United States, Soviet Russia and France, provides that in addition to "war crimes, namely, violations of the laws and customs of war," also "crimes against peace" and "crimes against humanity" are punishable by "death or such other punishment as shall be determined by [the Tribunal] to be just." [66] One form of punishment can be forced labor. Finally, as far as prisoners of war are concerned, the Geneva Convention of 1929 stipulates (Art. 75, 1) that "the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace." Until the prisoners are repatriated

[65] Oppenheim-Lauterpacht, Vol. II, p. 460/1.

[66] The preamble to the Charter of the Military International Tribunal appropriately points out that "the United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice." These declarations were not limited to war crimes in the technical sense, but referred generally to "barbaric crimes," "atrocities which have violated every tenet of Christian faith," "unheard-of crimes," "barren horror," etc. See Churchill-Roosevelt declaration of Oct. 25, 1941, Declaration on behalf of the Governments of eight Occupied Countries and on behalf of the Free French National Committee, London, Jan. 13, 1942, note of Mr. Molotov of Apr. 27, 1942, Declarations by Mr. Roosevelt of Oct. 7, 1942, and of the United States Government of Aug. 29, 1943, Moscow Declaration of Oct. 30, 1943, (Royal Institute of International Affairs, *Bulletin of International News*, 1942, pp. 50, 961, *Information Bulletin of Embassy of USSR*, Washington, D. C., Apr. 27, 1942, *Department of State Bulletin*, Vol. IX, p. 150), etc.

their rights and duties continue to be ruled by the Convention. They can, therefore, be compelled to work, even after the cessation of hostilities, under the conditions laid forth in the Convention. The Hague Regulations of 1899 and 1907 do not deal with this point; but since the Geneva Convention of 1929 is the more recent and more lenient law it is fair to interpret the Hague Regulations in the sense that prisoners covered by them but not by the Geneva Convention, can also be compelled to work, under the conditions contained in the Hague Regulations, until they are repatriated after the conclusions of peace.[66a]

There remains the question whether Germans who do not fall under either of the categories just mentioned can be recruited for reconstruction work on United Nations territory.

Difference between Belligerent Occupation and Post-Surrender Occupation

Germany's military defeat, its unconditional surrender, and the collapse and disintegration of its governmental structure resulted in the transfer of sovereignty over Germany to the Allies. Together, these events constituted subjugation,[67] meaning the temporary suspension of Germany as a governmental entity. According to the declared intentions of the Allies, the subjugation was to be of limited, though indefinite, duration; only a portion of the subjugated territory shall be annexed; and at an as yet undetermined date, Germany shall reëmerge as a State and sign a peace treaty. The following remarks refer only to the period between May 8, 1945, and Germany's reëmergence as a State. This period may be called "the post-surrender period."

Through the subjugation of Germany the outcome of the war has been

[66a] British policy in regard to German prisoners of war held in Great Britain was described as follows by the Secretary of State for War, Mr. Lawson: "Only prisoners of war who are on medical grounds permanently unfit for employment are now being returned to Germany; members of the SS. and suspected war criminals are excluded from such repatriation": Hansard, Oct. 16, 1945, col. 974.

It is not generally known that Germany kept Russian prisoners of war and internees for several years after the end of World War I. In 1921 the International Labor Office received protests concerning their treatment in the German internment camps from a Committee of Members of the Russian Constituent Assembly, the International Federation of Trade Unions, and a group of prisoners in the Lichtenhorst camp. With the approval of the German Government a representative of the International Labor Office visited the German camps of Wünsdorf, Cottbus, Lichtenhorst and Zelle, in February, 1922, inquired into the living and working conditions of the inmates, and made suggestions concerning measures for their relief. G. A. Johnston, *International Social Progress*, London, 1924, pp. 220–1.

[67] "Subjugation" is not always used in an identical sense but the disagreement is merely terminological. In accordance with Oppenheim-Lauterpacht, Vol. II, p. 470, subjugation is here meant to describe the situation which follows conquest. McNair uses the term somewhat differently when he states: "International law recognizes three stages which normally occur in the process of conquest: (a) invasion; (b) occupation; and (c) transfer of sovereignty by means of a treaty of cession, or as a result of subjugation without cession." ("Municipal Effects of Belligerent Occupation" in Law Quarterly Review, Jan. 1941, p. 34.)

decided in the most definite manner possible.[68] One of the prerogatives of the Allies resulting from the subjugation is the right to occupy German territory at their discretion. This occupation is, both legally and factually, fundamentally different from the belligerent occupation contemplated in the Hague Regulations, as can be seen from the following observations.

The provisions of the Hague Regulations restricting the rights of an occupant refer to a belligerent who, favored by the changing fortunes of war, actually exercises military authority over enemy territory and thereby prevents the legitimate sovereign—who remains the legitimate sovereign—from exercising his full authority. The Regulations draw important legal conclusions from the fact that the legitimate sovereign may at any moment himself be favored by the changing fortunes of war, reconquer the territory, and put an end to the occupation.[69] "The occupation applies only to territory where such authority [i.e., the military authority of the hostile state] is established and can be exercised" (Art. 42, 2)[70] In other words, the Hague Regulations think of an occupation which is a phase of an as yet undecided war.[71] Until May 7, 1945, the Allies were belligerent occupants in the then occupied parts of Germany, and their rights and duties were circumscribed by the respective provisions of the Hague Regulations. As a result of the subjugation of Germany the legal character of the occupation of German territory was drastically changed. The occupants do no longer act *in lieu* of "the legitimate sovereign." They themselves exercise sovereignty. There is no legitimate German sovereign who is merely waiting,

[68] The situation created by Germany's subjugation differs fundamentally from the situation created by an armistice. An armistice merely suspends hostilities. If either party seriously violates the armistice the other party has "the right to denounce it and even in case of urgency, to recommence hostilities at once," i.e. without formal denunciation. Under the armistice of Nov. 11, 1918, the German Government in June 1919 actually considered denouncing the armistice and resuming the war. Now, Germany cannot "denounce" the surrender. If it were to resume hostilities its armed forces would not enjoy the protection of the laws and customs of war but could be treated as criminals.

[69] Oppenheim-Lauterpacht, Vol. II, pp. 345, 348. "The legal justification (*Rechtsgrund*) of the *occupatio bellica* lies in the mere fact that the territory is occupied: the occupant takes the territory into possession, not on the basis of a legal title but on the basis of his power." O. Bamberger, *Occupatio Bellica im Landkrieg*, Freiburg i.B., 1909, p. 13.

[70] "The power of the occupant is of a precarious nature and may, therefore, come to an end at any time. A minor battle, nay an unfavorable skirmish can suffice to force him to leave the occupied territory" (S. Cybichowski, *Das Völkerrechtliche Okkupationsrecht* in *Zeitschrift für Völkerrecht*, 1936, p. 297). At the first Hague Conference the German delegate, Col. von Schwarzkopf, attempted to have this provision eliminated from the Regulations, arguing that an interruption of the occupation due, e.g., to a temporary success of a "rebellion," should not be permitted to curtail the territorial jurisdiction of the occupant (Protocols, Vol. III, p. 117).

[71] Oppenheim-Lauterpacht, Vol. II, p. 278, defines "occupation and administration of the enemy territory" as one of the methods—the other being the defeat of the enemy armed forces—for the achievement of "the purpose of war, namely, the overpowering of the enemy."

merely prevented from exercising his power. Whatever powers German authorities have during the post-surrender period, they must be construed as deriving from and delegated by the Allies. As a consequence of the doctrine that during belligerent occupation the sovereignty of the absent legitimate Government is merely suspended, the occupant must "respect, unless absolutely prevented, the laws in force in the country." But under the post-surrender occupation the abrogation instead of the preservation of National Socialist law is one of the principal aims of the Allies.

The difference between the two types of occupation would be most apparent in case of withdrawal of the occupation forces. Had, for example, the German occupation forces voluntarily withdrawn from the Netherlands during the war, the German occupation regime would automatically have come to an end. But if the present occupation of Germany were not "effective" or if the Allies would withdraw their occupation forces, their prerogatives over Germany would not be affected. During the post-surrender period, neither the extent nor the duration of the rights of the Allies is conditional upon establishing or maintaining an occupation,—whereas this is the first and foremost prerequisite for the exercise of the limited prerogatives of the belligerent occupant. The occupation of Germany is, in legal contemplation, only an incidental aspect of the post-surrender situation. Under belligerent occupation, the occupant's limited powers derive from the physical fact of military occupation; under the post-surrender occupation, the right to occupy derives from the occupant's unlimited powers. It is the essence of the provisions of the Hague Regulations concerning enemy civilians that the belligerent occupant does not possess sovereignty over them; whereas it is the essence of the legal situation prevailing during the post-surrender period that the Allies possess sovereignty over Germany.

The Different Purpose

The formal power of the Allies to issue binding orders for the German population is, however, only one aspect of the problem. In judging the legality, under international law, of the recruitment of German civilians for the reparation of war damages, the purpose of such measure is of equal importance. In fact, whoever would leave the purpose out of consideration and would merely stress the power of the Allies—though this power is not only physical but also legal—to issue binding law for the Germans would paint a distorted picture. The case for the recruitment of German manpower would, indeed, be a weak one if it were based only on the "right of the victor." The public conscience of our age is very alert on this point. It not only, in the words of Mr. Justice Jackson, utterly renounces and condemns aggressive war as an instrument of policy; [72] it even watches very carefully over the use which the law-abiding States make of a victory gained

[72] Statement on the signing of the War Crimes Agreement of Aug. 8, 1945: *The New York Times*, Aug. 9, 1945.

over a law-breaking State. This aversion to aggressive war and the abuse of force—a strong influence in shaping international law—makes it necessary to distinguish carefully between lawful and unlawful purposes in the use of force.

Here, then, lies the most essential difference between the recruitment of foreign workers for German war work on the one hand, and the contemplated recruitment of Germans for Allied reconstruction work on the other hand: it is the difference between the purposes of these measures. In the first case, the purpose was unjustifiable under the law of nations; in the other, the purpose is just. The Third Reich conscripted citizens of countries which it had overrun and against which it continued to wage a war of aggression: it forced the conscripts to help it in this very endeavour. The Allied measure aims at serving a purpose fully acknowledged by international law, namely to obtain at least partial reparation for damages caused by unlawful behaviour.

Why do the Hague Regulations narrowly limit the occupant's right to demand services from the enemy population? Why do the Brussels Draft Declaration of 1874, the Hague Regulations, and the Geneva Convention of 1929 forbid the detaining power to employ prisoners of war on work directly connected with military operations? Why was the German deportation policy in both world wars so unanimously condemned? Because civilised nations consider it illegal for a belligerent to procure for itself an unfair advantage over his opponents by forcing enemy citizens to help in the war against their own countries. International law rejects as immoral any compulsion to perform a protracted series of acts, which, objectively, constitute treason. It is utterly obnoxious to international morality to confront an enemy citizen with the loathsome dilemma of violating his loyalty to his own country, or risking punishment and death. By forcing foreign workers to produce the implements for Germany's war against their own countries Germany conspicuously increased its own war-making capacity; thereby it proportionately increased the loss of lives and wealth of its opponents, and proportionately prolonged its rule over the home territories of the labor conscripts. The work performed by the deportees delayed their own release.

If German manpower is recruited for reconstruction work on behalf of the Allies, the purpose of such measure would not be to secure for Germany's enemies any unfair advantage. The Germans are not asked to perform work detrimental to Germany. There is no collision between their duties toward their own fatherland, and their duties toward their foreign employers or the comity of nations.[73] By contributing, to some extent, to the repair of the

[73] It may be noted that during the Ruhr occupation leading German jurists, backed by the Reich Government and the German Supreme Court, asserted that a collision existed between the moral duty of German citizens to obey instructions of the Reich Government to sabotage the French efforts to exact reparations, and the demands made by the French occupation authorities under the Treaty of Versailles. This dilemma, it was asserted, could

devastations in non-German countries caused by Germany's war of aggression the workers would not only fulfil a moral and legal obligation fully recognized by international law but would by the same token hasten Germany's eventual political recovery. In every respect, the situation is the opposite from the situation which prevailed under Germany's wartime deportation policy.

The Conditions of Employment

Public opinion in the United Nations has agreed on the need for German labor reparations. In the countries which have felt the full impact of the National Socialist methods of warfare the demand is particularly general and elementary. There are indications that the demand finds understanding in Germany itself. Perhaps, there will be much less need for compulsion than is sometimes assumed. Immediately after the end of the last war, the German trade unions spontaneously acknowledged Germany's obligation to help in the rebuilding of the devastated regions of France and Belgium, and declared that German workers were ready to perform on the spot.[74]

The objections which, outside of Germany, are raised against German labor reparations are in the main directed not against the scheme itself but are based on apprehension lest the Germans should receive treatment comparable to that which the Allied workers had received from the Third Reich. On this point President Roosevelt declared in an address to the Foreign Policy Association in New York, in October, 1944: "The German people are not going to be enslaved. Why? Because the United Nations do no traffic in slavery. But it will be necessary for them to earn their way back, earn their way back into the fellowship of peace-loving and law-abiding nations." [75] Pursuant to the generally accepted principles of inter-

rightfully be solved by obeying the Reich Government, rather than the occupying power. The doctrine was upheld before French military courts, e.g., in the trial against Fritz Thyssen and other leaders of the Rhenish Westphalian coal industry accused of having sabotaged the supply of "reparation coal," and in a similar trial against directors and workers of the Krupp Works in Essen. A. Finger, *Der Krupp Prozess*, Stuttgart, 1923, p. 6.

[74] Hedwig Wachenheim, "The Use of German Labor for Reconstruction," in *American Labor Conference News Letter* of May 22, 1945, published by the American Labor Conference on International Affairs, New York, N. Y.

[75] See also testimony of Mr. Bernard M. Baruch before the Senate Committee on Military Affairs on June 22, 1945:

"Mr. Baruch: . . . [Germany's] principal payment will have to be in labor. All the countries seem to want it so, and I would let them have it.

"The Chairman (Sen. Elbert D. Thomas): Mr. Baruch, can we avoid, in using labor reparations, labor slavery?

"Mr. Baruch: . . . I do not think that anyone has in mind the establishment of slave labor; I do not suppose the United Nations will undertake anything of that kind." (Hearings before a Subcommittee of the Committee on Military Affairs, United States Senate, 79th Congress, First Session, pursuant to Senate Resolutions 107 (78th Congress) and Senate Resolutions 146 (79th Congress) authorizing a study of war mobilization problems. Part 1, June 22, 1945, Washington, D. C., 1945, p. 14).

national law, inhuman treatment of the recruited German workers would constitute a violation of the law of nations. But if they are treated according to the generally accepted standards of decency and humanity, Allied measures ordering the recruitment of German manpower for the reconstruction of devastated Allied territories are to be considered in accordance with the demands of international law.