1-16-45

MEMORANDUM

Subject: The Use of German Labor Battalions in Territories of the United Nations for Purposes of Rehabilitation

1. Introduction

During the course of the war the damage wrought by the German armies in the countries which they have occupied has been tremendous. In addition to the inevitable damage caused by fighting, they have deliberately and wantonly wrecked and destroyed thousands of towns and villages when there was no military necessity therefor. There appears now to be a determination on the part of some of the members of the United Nations that Germany must, to the greatest extent possible, be made to pay for the damage which she has caused. It seems clear that payments in money cannot compensate the occupied nations for the damages suffered. Reparations or indemnities in kind, besides being inadequate, are also considered by many to be objectionable. The proposition has therefore been made that indemnity be made, in part at least, by the requisition of German labor to assist in the restoration of Russia, Yugoslavia, Czechoslovakia, France, Poland and the like.

Modern precedent for this type of reparation is not at all clear. At least one text writer has stated that there is no right on the part of an occupying power to deport inhabitants to the country of the occupier or compelling them to work there.[1/] This writer however

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1/ Oppenheim, International Law (6th Edition Lauterpacht), Vol. II, p. 345.

was referring to the deportations engaged in by Germany during World War I. The deportations which took place at that time are more fully discussed by Garner in "International Law and the World War."[2/] The objection to such deportations which aroused the condemnation of the entire anti-German world were twofold: (1) the manner in which these persons were treated, and (2) that they took place while hostilities were still going on and were used as a direct aid to the German war effort. Investigations which were conducted after the war indicated that large numbers of the deportees were subjected to brutal treatment, insufficient feeding, long hours, excessive tasks, work under degrading conditions and the like. Women were lodged with men. The deportees were transported in filthy cattle trucks without food or drink, were tortured, and were subjected to many other types of indignity. ~~Similar and probably worse conditions~~ outrages have taken place during the current war. The Germans have not only removed millions of people to Germany and forced them to work at any task they decreed under cruel and degrading conditions, but have also in some instances impressed some of the inhabitants of occupied territories into the German army and forced them to fight against their homelands. There can be no question that the activities of the Germans in this respect merit universal condemnation.

2/ Vol. II, pp. 163-185.

What is proposed here, however, is an entirely different matter. In the first place, this will not be the action of an aggressor nation enslaving the populations of its victims for the purpose of further aggression. The United Nations employing German labor will be taking this action in order to redress themselves for the unwarranted damage which has been caused. In the second place, it is assumed that the United Nations in making use of such labor will do so under humanitarian conditions and will not subject the workers to starvation or enslavement. It is further assumed that the employment of this labor will take place after the cessation of hostilities between the United Nations and Germany so that there can be no question raised that German workmen will be forced to aid in the defeat of their own country. It is this proposition which will be examined herein - a proposition for which there is no modern precedent - which arises under circumstances which are new and distinct from anything that has taken place in the past.

2. Provisions of the Hague Convention

Article 52 of the Hague Convention recognizes that a belligerent may requisition the services and labor of the inhabitants of occupied territory under certain limitations. The article states:

"Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country." 3/

Commentators on international law also confirm this view of the right of the occupant to demand limited services. 4/ Both the article of the Convention and the writings thereon place great emphasis upon the fact that inhabitants must not be made to aid in operations to the detriment of their own nation's war effort and a great deal of time is spent in discussing what types of services fit into this category and what type do not. The same basic principle is seen in Articles 44 and 45 of the Convention which prohibit a belligerent from forcing an inhabitant to furnish information about the army of the inhabitant or to force an inhabitant to swear allegiance to the occupying power.

The limitations mentioned above, therefore, clearly point to the fact that the Hague Convention provisions were intended to cover a period during the continuance of hostilities. It was no doubt felt by the drafters of the Convention and by writers on international law that it would be repugnant to human feelings to force a person in occupied territory to act traitorously or to contribute

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3/ The Hague Convention of 1907 (IV) Respecting the Laws and Customs of War on Land, Article 52.

4/ Garner, supra cit., p. 137; Oppenheim, supra cit., p. 278; Taylor, International Public Law (1901) p. 548; Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. II, pp. 326-327.

directly to the defeat of his own country. As further indication that the Convention was intended as a rule of fair play during actual fighting, reference can be made to a statement in the preamble to the Convention, reading as follows:

> "According to the views of the high contracting Powers, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants."

But as was previously noted, the proposal discussed herein is meant to go into effect after hostilities have ceased and are not intended to aid in the military defeat of Germany but to assist in the rehabilitation of the countries ravaged by Germany.

The provisions of the Hague Convention and the discussions of the text writers thereon are therefore not authoritative since they refer to a situation which is not under consideration. In the absence of specific provisions on the subject, it is therefore necessary to have recourse to generally recognized principles of law and to analogous situations. 5/

5/ Oppenheim, International Law (5th Edition, Vol. I), p. 100; Cayuga Indians Case, Nielsen's Report (1926) 203, 307, 313-315, 317, 321; Eastern Extension, Australasia and China Telegraph Co., Ltd., Ibid., pp. 73, 76.

3. The General Propositions Involved

The general principles which can be applied in this matter are the following:

(a) The United Nations are entitled to indemnity for the damages caused by Germany.

(b) After unconditional surrender or the complete collapse of German resistance, the occupying powers, to the extent they deem desirable, will completely control Germany.

(c) Under this complete control they will have the power to requisition or draft labor in order to be indemnified for their losses.

(a) The Right to Indemnity

The right to claim indemnity from a conquered state is well established. Thus Taylor in his treatise on international public law states:

> "It has become usual to claim indemnity from the conquered state, nominally for expenses and pensions, but often really for gain or in order to cripple the enemy. The habit of exacting money contributions from districts during invasion and from the whole country at the conclusion of peace, infrequent before the wars of the French Revolution, has, to use Calvo's expression, been erected since that time into a system. Napoleon often enforced such demands, and the allies, after his fall in 1815, imposed an indemnity on France of seven million francs, payable in installments running over five years. All precedents sink into insignificance, however, beside Germany's exaction of five billion francs (one billion dollars) of France in 1871, also payable in five years. * * *" 6/

6/ Supra cit., p. 612.

Wheaton's "International Law"[7/] comes to the same conclusion. The section covering indemnities in this work reads as follows:

> "The rule is often to require the defeated side to pay indemnities, which may or not cover a considerable portion of the victor's war costs. The most famous case is that of the crushing burden of five milliards imposed on France in 1871, which had a vital effect on the course of German commercial development. But indemnities have been on occasion waived, or territorial cessions accepted in lieu, as in the case of the Russo-Turkish war of 1877-78. No indemnity was conceded by Russia in the peace negotiated in 1905. The war of 1914-19 saw a disclaimer by the victors of any demand for indemnities, but by Article 231 of the Treaty of Versailles, Germany accepted responsibility for herself and her allies 'for causing all the loss and damage to which the allied and associated governments and their nationals have been subjected as a consequence of the war, imposed upon them by the aggression of Germany and her allies.' By Article 232 she undertook to make compensation for all damage done to the civilian population of the allied and associated Powers and to their property during the period of the belligerency of each as an allied or an associated Power against Germany by such aggression by land, by sea, and from the air, and in general, all damages as defined in Annex I. An Inter-allied Reparation Commission was established to assess reparations, and provision was made for payment of reparations by Austria, Hungary, and Bulgaria."

The usualness and the clearly established precedent for the imposition of indemnities or reparations on the defeated nation is further clearly illustrated by the statement of Oppenheim:

> "Treaties of Peace often provide for the payment by the vanquished Power to the victor of a sum of money. The causes of such stipulations are various, and from the legal point of view immaterial. It may be a desire to enrich the victor, or to punish the vanquished, or to achieve both these ends; or it may be merely the recoupment of the victor for the expenses of the war. Such payments have usually in the past been described as 'indemnities,' and history affords many instances of them. No indemnity in this sense was stipulated for at the end of the World

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7/ Supra cit., p. 627.

War. Part VIII. (Reparation) of the Treaty of Peace with Germany in 1919 provided for compensation for part of the loss and damage inflicted by her and her allies during the World War. By Article 231 she accepted the responsibility for herself and her allies 'for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.'" 8/

It may be urged that indemnities or reparations are not payable by a defeated nation except by its agreement evidenced by a signature to a treaty of peace or an armistice and that it is contemplated that in this war no armistice will be entered into at all, and there will be no treaty between the United Nations and Germany for an indefinite period of time. It is considered that such objection is unreal. Although in the past the reparations or indemnities provided for in treaties or armistices have been "agreed to" by defeated nations, it cannot be said that these "agreements" were free acts. It will be noted in the quotations above given that the word "imposed" is used by Wheaton and the word "exaction" by Taylor. There can be no question that while an armistice or treaty of peace are in some respects in the form of a contract, in one important respect, that of duress, such agreements do not fit into the normal concept of a contract. Thus Lauterpacht in discussing treaties states:

"There are few questions in international law in which there is such a measure of common agreement as this, that duress, so far as states are concerned, does not invalidate a contract." 9/

8/ Supra cit., pp. 471-472.

9/ Lauterpacht, Private Law Sources and Analogies of International Law (1927) p. 161.

Lawrence takes the same view:

> "Most treaties of peace are made by the vanquished state under duress." 10/

Accordingly, there seems to be no reason why an indemnity cannot be imposed upon or exacted from a conquered nation without going through the gesture of entering into a form of agreement. It may be argued that the conquered nations in earlier cases of indemnities or reparations agreed to such impositions or exactions because of the other benefits which they obtained from the treaty or armistice, such as the cessation of hostilities or the regaining of sovereignty. In answer to this, it may be said that the United Nations, whatever other terms they may impose, can insist in exchange for the granting of a final peace that such indemnities be paid. In their position as conquerors, they will be in a position to demand such indemnities as a condition precedent to any concessions on their part. Having once decided to take such a stand, there seems to be no reason why they cannot impose this condition in advance at a time when the services of the laborers are of prime necessity rather than to wait until such time - possibly years in the future - when all final arrangements have been concluded. Of course, if articles of surrender are signed, a provision for indemnities can be included therein.

10/ Principles of International Law (1923), p. 303. See also Hyde, supra cit., p. 8; Phillipson, Termination of War and Treaties of Peace, p. 162.

There is also another legal basis upon which a claim to compensation can be made. Article 3 of the Hague Convention provides:

> "A belligerent party which violates the provisions of said regulations shall, if the case demands, be liable to pay compensation."

There can be no question that Germany has violated the Convention in many respects, particularly those provisions which relate to the subject for which compensation in labor is now sought. Thus, Article 23(g) provides that a belligerent is especially forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Article 25 states: "The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited." Article 28 states: "The pillage of a town or place, even when taken by assault, is prohibited." No citations are necessary to illustrate the numerous occasions on which Germany has violated these provisions. The devastated areas of Poland, Russia, Yugoslavia and Greece bear eloquent witness thereto.

(b) <u>After Unconditional Surrender or the Complete Collapse of German Resistance, the Occupying Powers to the Extent They Deem Desirable Will Completely Control Germany</u>.

According to public statements of the leaders of the United Nations, hostilities against Germany will continue until there has been an unconditional surrender, or, if no such formal step is taken, until there has been a complete collapse of armed German resistance.

Traditionally, such collapse or surrender would be followed by either a treaty of peace or by the complete subjugation of the conquered territory and its annexation.[11] Little consideration has been given in modern writings (except in unpublished memoranda[12]) to an intermediate stage whereby the victorious nation occupies the defeated country for as long a period of time necessary to accomplish its war aims.[13] Older writings, however, recognize this situation. Thus Grotius in describing what he called "pure surrender" quoted Publius Cornelius Lentulus in regard to the Carthaginian State at the end of the Second Punic War:

> "Let the Carthaginians entrust themselves to our decision, as conquered peoples are accustomed to do, and as many have done heretofore. We shall then look into the matter, and if we shall have granted anything to them they will be grateful to us; for they will not be able to call it a treaty.
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> "That, furthermore, makes a very great difference. So long as we make treaties with them they will always be finding pretexts, as if wronged in respect to some point of the treaty, in order that they may break it. For openings for controversy always remained, since many points are of doubtful interpretation. But when we have taken away their arms

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11/ Oppenheim, International Law (6th Lauterpacht Ed. 1940) Sec. 264; Phillipson, Termination of Wars and Treaties of Peace (1916) p. 9; Hall, International Law (8th Higgins Ed. 1924) p. 681.

12/ See Jessup, informal memorandum prepared in May 1944; memorandum of Lt. Col. W. C. Chanler, February 12, 1944.

13/ Excluding, of course, discussion of action taken by the Germans during their occupations in World Wars I and II which, since they were temporary and prior to the cessation of hostilities, are not relevant here.

> from them, as having surrendered, and have brought their very persons under our power, then at length they will understand that they have nothing that is their own; then they will lose heart, and whatever they may have received from us they will gladly accept as if bestowed from another's bounty." 14/

The dearth of modern material on the subject no doubt results from the fact that unconditional surrender or occupation following complete collapse have not been the usual method of terminating hostilities. Even in an armistice, however, which, being in the form of a contract, contemplates something less than unconditional surrender, the victorious belligerent is usually enabled to accomplish its war aims. Thus Phillipson states:

> " * * * whether the armistice convention is to contain provisions purely and simply for regulating the cessation of hostilities, or it is to include articles of surrender, or the vital conditions upon which peace proposals will be entertained, are matters also for the determination of combatants - or depend, rather, on the will and dictation of the victorious belligerent." 15/

As a matter of logic, there appears to be no reason why a victorious nation once in a position to go to the extreme of complete subjugation and annexation cannot take a lesser step to accomplish its war aims, if it desires to do so. The fact that the procedure may be untraditional is no bar. If it is clear that these war aims can be accomplished by other methods, no argument can be made that the goal cannot be reached by an untraditional means based, if anything, on stronger ground.

14/ De Jure Belli Ac Pacis Libri Tres (1625) Vol. II, pp. 825-826 of Translation in Carnegie Classics of International Law.
15/ Phillipso n, Termination of War and Treaties of Peace, p. 74.

International law, after all, is a living and expanding code. 16/

The power of an occupant, even in cases where there has not yet been an unconditional surrender or complete collapse, has been construed broadly in international law. The military authority in occupied territory has been stated to be that of a de facto government. 17/

Colby, in a recent article, states:

> "The right of a military occupant to govern implies the right to determine in what manner and through what agency such government is to be conducted. The municipal laws of the place may be left in operation, or suspended, or others enforced. The administration of justice may be left in the hands of the ordinary officers of the law, or these may be suspended and others appointed in their places. Civil rights and civil remedies may be suspended, and military laws and courts and proceedings substituted for them, or new legal remedies and civil proceedings introduced * * *." 18/

In Dooley v. United States, 19/ the Supreme Court approved the following sentences from Halleck's International Law:

> "The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. * * * He, nevertheless, has all the powers of a de facto government, and can at his pleasure either change the existing laws or make new ones."

16/ Nielsen's Report (1926) pp. 73, 76. See also Brenner memorandum, January 12, 1945, on General Approach to Problems of International Law, and Authority of the United Nations to Carry Out Their Legitimate War Aims which contains a full citation of authority on the points above mentioned.

17/ For a more complete citation of authority on this subject see Brenner memorandum of January 13, 1944, Termination of the War with Germany and the Scope of Military Government Powers in Occupied Germany; memorandum, O'Connell to Morgenthau on Issuance of Allied Military Currency in Sicily, October 1943.

18/ Colby, Occupation under the Laws of War, 26 Col. L. Rev.

19/ Dooley v. United States, 182 U.S. 222, 231 (1901).

(c) The United Nations, Having as Occupiers as Complete Control of Germany as They Deem Necessary, Have the Power to Requisition or Draft Labor to Indemnify Themselves for the Damage Caused by Germany.

The legitimate aims which the United Nations intend to achieve by unconditional surrender can be stated to be (1) the complete submission of the enemy, (2) the establishment of certain basic reforms in the enemy's social, economic, political and legal systems, and (3) the rehabilitation of their damaged areas. In this memorandum we are principally concerned with the accomplishment of the third aim. It has already been pointed out in the two previous sub-divisions of this section (a) that the United Nations are entitled to reparations or indemnity for the damages caused, and (b) that their power as occupiers after unconditional surrender or complete collapse are as complete as they wish to make it. It should logically follow that there could be no question but that the United Nations could requisition labor for use in rehabilitation provided that such requisitioning were done in an humanitarian fashion.

However the power which the United Nations may exercise as occupiers of Germany is not absolute. There is no question but that the United Nations could not massacre the population or commit acts of perfidy. Their acts must be such as to fall within the principles humaneness and must not be shocking or abhorent to the world conscience. As was pointed out in the opening paragraphs of this memorandum, the

protests against German deportations from occupied territories to Germany were well founded. But here we have a different situation, since the time, manner and purpose of the use of such labor are all different.

There are good analogies in international law, in the laws of the United Nations and in those of the enemy powers to support the compulsory use of such labor. As was previously noted, the Hague Convention recognizes that a belligerent occupant may requisition the services of the inhabitants of occupied territory for the needs of an army of occupation. There is some dispute amongst writers as to the extent to which the occupant can go since the services must not be "of such a nature as to involve the inhabitants in the obligation of taking part in military operations against their own country."[20] There is no doubt, however, that certain services can be demanded. There is also no question that those services which a majority of writers agree can be demanded are useful to the occupying army in its war effort.[21]

In the United States there was no great protest concerning compulsory military service at a time when we were not yet engaged in war. No one alleged that such service constituted slavery. In

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20/ Article 52.

21/ See Garner, Contributions, Requisitions and Compulsory Services in Occupied Territory, 11 A.J.I.L., pp. 100-112, which discusses the German practices in World War I and cites a number of authorities on the right of an occupant to demand services.

Great Britain there has been even greater mobilization of the population. All men between the ages of 18 and 51 and all women between the ages of 18 and 47 were compelled to register, and if they were not already engaged in essential wartime occupations, they could be assigned to such work. A defense regulation of Britain provides:

> "Control of employment. (1) The Minister of Labour and National Service (hereafter in this Regulation referred to as 'the Minister') or any national service officer may direct any person in Great Britain to perform such services in the United Kingdom or in any British ship not being a Dominion ship as may be specified by or described in the direction, being services which that person is, in the opinion of the Minister or officer, capable of performing." 22/

In Germany, the German population was similarly treated. As early as February 13, 1939, a decree was issued which compelled any inhabitant of the Reich, including aliens, to take any position assigned to him by the Labor Employment Office. 23/ Various other decrees implementing and supplementing this measure were passed from time to time, the latest available being the decree of January 27, 1943, which directed all men from 16 to 65 and all women from 17 to 45, who had not as yet registered, to register at the local employment offices. The decree provided that all those not otherwise engaged in essential industry could be assigned to any position which the administration selected. 24/

22/ Regulation 58A of the Defense (General) Regulations, 1939, as amended up to and including 18th December, 1941. (Defense Regulations, Vol. I, 10th Edition, 18th December, 1941, p. 175.
23/ RGBI, I, 308.
24/ RGBI, I, 10.

The world conscience has not been shocked or amazed by any of these actions and they have been accepted as legitimate wartime practices. If in time of war it is considered proper to send millions of men to their death, if men and women can be requisitioned to do any wartime job that a government directs, if an occupant under international law can demand the services of inhabitants of an enemy country to aid in the occupant's war efforts, it cannot be said to be improper during a post-hostility period to demand services for the purpose of rebuilding ravaged lands. In view of Germany's unprovoked aggression, in view of her deliberate violation of treaties and in view of the terrific and wanton devastation which she has wrought in the countries which she has occupied, it would appear to be much less shocking to the world conscience to requisition German labor for the purpose not of making war but to repair and rehabilitate the countries of her victims.

4. The Use of Prisoners of War

One of the best sources of labor supply to be used in accordance with the proposal herein discussed will be the members of the German army who capitulate at the time of unconditional surrender, or of those persons who are already in Allied hands as prisoners of war. It might be difficult to utilize properly the services of such persons if the Geneva Convention[25/] is applicable, since certain sections

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25/ July 27, 1929.

thereof, such as Article 27, exempt officers from labor and prohibit the use of non-commissioned officers except in supervisory work. If the Geneva Convention is applicable, it will be necessary, therefore, by proclamation or decree, after the cessation of hostilities, to amend the status of these persons and declare them not to be prisoners of war. On the other hand, it may well be that the German army is not entitled to the benefits of the Geneva Convention because of Germany's violation of the Convention and of the Pact of Paris. For further discussion of this latter point, reference is made to the memorandum on the "General Approach to Problems of International Law, and Authority of the United Nations to Carry Out Their Legitimate War Aims" January 12, 1945.

LEAackermann/jns 1-16-45