

January 13, 1945.

MEMORANDUM

Re: Termination of the War with Germany and
the Scope of Military Government Powers
in Occupied Germany.

I. Termination of the War with Germany

In a separate memorandum, it has been pointed out that the war aims of the United Nations can be achieved through a military government of Germany after hostilities cease. The right to occupy an enemy country to carry out basic war objectives does not depend for its validity upon the continuance of a technical state of war. In principle, such an occupation serves the same purpose as annexation or a treaty of peace -- both of which may be resorted to legally for the purpose of accomplishing war goals and both of which continue after war has terminated. Military government that is substituted for annexation or a treaty must be coextensive with these procedures and can be so only if it too may continue into the post-war period.

It is not necessary, however, to establish by detailed analysis of the rules of international law that military occupation can appropriately continue when the war ends. Hostilities with Germany will cease as a result of a formal and unconditional surrender or a complete collapse of the German army and the German government. Neither situation constitutes a termination of the technical state of war.

Wars terminate only if there is:

- (1) a formal treaty of peace;
- (2) a prolonged cessation of hostilities accompanied by the re-establishment of peaceful relations; or
- (3) complete subjugation of one belligerent by the other.

Since termination by treaty of peace is not a matter of immediate concern, this memorandum will be limited to the other two procedures whereby wars end.

Text-writers on international law agree that what is meant by a prolonged "cessation of hostilities" is the withdrawal of armed forces and the resumption of peaceful relations without any formal agreement. This situation rarely occurs and there is little law on the subject. Oppenheim, however, describes it as follows:

"Belligerents may abstain from further acts of war, and glide into peaceful relations without expressly making peace through a special treaty."^{1/}

To the same effect is Hyde's statement that "a cessation of hostilities together with the withdrawal of military forces from hostile territory may, when followed by a sufficient lapse of time, be regarded as marking the termination of the war."^{2/}

Since this type of termination will generally result from the exhaustion of both belligerents and the ensuing withdrawal of armed forces before victory is won by either side, it is obviously inapplicable to a situation such as that which will exist when Germany surrenders unconditionally or collapses.

Termination of war by subjugation stems from the time when the typical war was one of conquest. Upon the subjugation of one nation by another, the conquered nation was annexed or absorbed by the conqueror. The result was the extinction of the former enemy and termination of the war necessarily followed. Accordingly, a reference to ending a war by subjugation invariably means subjugation plus annexation.

Phillipson explains what is meant by ending a war by subjugation in the following words:

"But in the case of subjugation not only have the occupied forces acquired effective possession of the territory concerned but the adversary has been reduced to impotence and submission, or has been practically annihilated -- or at all events, all his organized resistance has disappeared -- and the victorious government has clearly manifested its intention to hold the said territory permanently under its dominion."^{3/} (Underscoring supplied)

^{1/} 2 Oppenheim, Note 21 at section 261.

^{2/} 2 Hyde, Note 24 at section 904. For a discussion of several examples of the termination of war by a cessation of hostilities, see Phillimore, Note 20, at pages 4 and 5.

^{3/} Phillipson, Termination of War and Treaties of Peace (1916) 9.

Oppenheim clearly indicates that this is his understanding of the ending of a war by subjugation when he states:

"Subjugation may, therefore, correctly be defined as extermination in war of one belligerent by another, through annexation of the former's territory after conquest, the enemy forces having been annihilated."^{4/} (Underscoring supplied)

Hall is in accord with the view that an intention to annex the subjugated country is necessary to terminate a war by conquest, stating:

"As in the case of other modes of acquisition by unilateral acts, it is necessary to the accomplishment of conquest that intention to appropriate and ability to keep shall be combined. Intention to appropriate is invariably, and perhaps necessarily, shown by a formal declaration or proclamation of annexation."^{5/}

Hyde recognizes the absurdity of asserting that mere subjugation of an enemy results in conquest when he writes: "Although the victor may be able to bring about a transfer of rights of sovereignty by some appropriate action, the bare possession of such power does not suffice to effect a change. The State whose armies have gained control of enemy territory and occupied it may have no design of doing more. In such case it would be unreasonable to shift the title, and transform the conqueror into the territorial sovereign, even against its will."^{6/}

Thus, it is clear that even after complete subjugation following an unconditional surrender, the state of war continues unless there is an overt manifestation of an intention to annex the defeated nation. As a state of war will still exist, the occupying forces will continue, after unconditional surrender and subjugation, to have all the rights of a military occupant under the laws of war. This conclusion is explicitly reached by Hyde:

"Thus absence of evidence of an intention on the part of the occupant to acquire that right (sovereignty) by some unequivocal process such, for example, as annexation, would justify the inference that the conflict was not deemed to be terminated."^{7/}

^{4/} Oppenheim, International Law (6th Lauterpacht ed. 1940) Sec. 264.
^{5/} Hall, International Law (8th Higgins ed. 1924) 681.
^{6/} 2 Hyde, International Law (1922) Sec. 106.
^{7/} 2 Hyde, Sec. 907.

The American Civil War is an excellent example of the fact that complete collapse of an army and government will not in itself terminate a war. In 1865 hostilities between the Union and Confederate armies ceased, the Confederate Army disbanded, and the Confederate Government collapsed. Nevertheless, on several occasions the Supreme Court held that the Civil War had not terminated in any particular area until the issuance of a proclamation by the President.^{8/}

Thus, under international law, the war with Germany will not terminate when Germany surrenders unconditionally or disintegrates completely, but only when: (1) a treaty of peace is concluded; or (2) there has been a "prolonged cessation of hostilities", including the withdrawal of troops and the gradual resumption of peaceful relations; or (3) subjugation is so extended that Germany is extinguished through the absorption of all German territory by other countries.

Briefly, then, the intention of the United Nations to occupy Germany after hostilities cease raises no practical problem under any conceivable circumstances. Even assuming that there must be a state of war to justify occupation -- and this was expressly negated above -- the end of the war will not create any difficulties because:

(1) if it is terminated by a treaty of peace, the terms of that document will govern post-war occupation;

(2) If it ceases to exist because hostilities are over and peaceful relations have been re-established, there will be no desire for occupation and the question will be academic; and

(3) if it concludes with all of Germany being annexed by other countries, Germany will have ceased to exist and there will be no problem of "occupation".

II. Scope of Military Government Powers in Occupied Germany.

The nature and extent of a military occupant's rights in territory it controls were discussed at some length in a memorandum opinion of the General Counsel prepared in October 1943 in connection with the issuance of Allied Military Government currency in Sicily, and again in an opinion of the General Counsel, dated December 23, 1943, that dealt with the authority to establish military government in "Allied" territory recaptured from the enemy. In addition, a separate memorandum has discussed the authority of the United Nations to use a military government as a means of accomplishing their war aims. For the purpose of this memorandum, it should suffice to recall one or two of the outstanding authorities which set forth the basic principles involved.

^{8/} The Protector (1871) 12 Wall. 700, 702; McElrath v. U.S. (1880) 102 U.S. 426, 438; see particularly New Orleans v. Steamship Co. (1874) 20 Wall. 387, 393-394 in which the lease whose validity was sustained by the court under the laws of war was executed more than three years after military government had been instituted in the area in which the property was

The proposition that the military authority in an occupied area constitutes a de facto government and as such may exercise all governmental powers is virtually undisputed. In the case of New Orleans v. Steamship Company, the United States Supreme Court stated:

"In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject." 20 Wall. (87 U.S.) 387, 394 (1874) (Underscoring supplied)

Lauterpacht in the sixth edition of Oppenheim's International Law states the proposition as follows:

"As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the territory and its inhabitants; and all legitimate steps he takes in the exercise of this right must be recognized by the legitimate Government after occupation has ceased. * * *"^{9/}

With reference to the laws which govern the area during the military occupation, the United States Supreme Court in the case of Dooley v. United States 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." (182 U.S. 222, 231 (1901)).

^{9/} Lauterpacht, Oppenheim's International Law, Vol. II, Sixth Edition, section 169. To the same effect, see Edmunds, The Lawless Law of Nations, p. 394; J.M. Spaight, War Rights on Land, pp. 322-23; W.E. Hall, A Treatise on International Law, Eighth Edition, pp. 559-60.

This statement not only recognizes the complete authority of the military commander, but also the fact that he may select those powers he wishes to exercise.

The text-writers are in agreement on this point. Hyde states that the military commander "may assume at will, to such extent as he may deem proper, all of the functions of government," and again that " * * as a matter of practical expediency, the occupant may be disposed to utilize certain existing agencies of that government and to suspend the operation of others."^{10/}

Colby, in a recent article,^{11/} takes the same position:

"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. * * *."^{11/}

It is clear, therefore, that the military government can, if it so desires, exercise all governmental powers but that it may select those it wishes to exercise, leaving the balance to local administration.

^{10/} 2 Hyde, International Law, 363, 366.

^{11/} Colby, Occupation under the Laws of War, 26 Col. L. Rev.; to the same effect see New Orleans v. Steamship Co., supra; Lietensdorfer v. Webb, 20 How. 177; 67 Corpus Juris 422.