THE RELATIONS OF INVADERS TO INSURGENTS

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I. WAS AN INVADER EVER SOVEREIGN

Orthodox doctrine has instructed us that in bygone times an invading prince was understood to displace the ruler of the land invaded in his sovereignty. Invasion operated as a temporary annexation. Allegiance was due the invader, and not the former sovereign. The invader could properly place the population in his armies, or subject them to any severities he pleased.

It is perhaps doubtful whether such a view does not mistake for an accepted theory the *mala praxis* of a moment. If the invader were really a substituted sovereign, then the rudimentary but quite definite and real restrictions which were placed on his powers by the Law of Nations could have had no existence. "Private property in land . . .," says W. E. Hall,¹ "was very early regarded as exempt from appropriation" by an invader; the reason being that "an invader could not be reasonably sure of continued possession for himself, nor could he give a firm title to a purchaser." A sovereign who cannot give a firm title to things within his sovereignty is almost a contradiction in terms! As to personal property, Frederick II enumerates the things which an occupied country is bound to supply to an invader: if the invader were sovereign in the land, there could be no possibility of such restrictions and no need of such enumeration. The slaughter of non-combatants would be perfectly permissible, if the invader were simply killing his own subjects. Yet we know it was strongly reprobated by all authorities, and seldom or never infringed on any large scale in practice, except in cases of sack and storm, when it was excused rather than justified by the supposed impossibility of controlling the soldiers.

Hall's declaration that up to the middle of the 18th century practice conformed to the theory of substituted sovereignty therefore appears to rest rather on the occurrence of violent abuses than on any settled theory maintained in bygone times. He gives no references to authorities, beyond saying that "in the 17th century express renunciation of fealty to the legitimate sovereign was sometimes exacted." But we know that an oath of submission to Queen Victoria was "sometimes" exacted from Transvaalers in the nineteenth century; and we also know that it was entirely unjustified. He quotes Frederick II's impressment of Saxons in 1756 and 1758; and he subjoins Frederick's cynical remark that a commander in enemy winter quarters will recruit

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¹ HALL, INTERNATIONAL LAW (6th ed. 1909) 419.

from the country. But he omits to remark that when Frederick made these recruitments it was not as a military occupant; it was by virtue of a treaty—the Capitulation of Stouppen. The incorporation of the Saxon Army in 1756 with the Prussian was not accomplished by Frederick at his own hand, but was one of the terms of this Convention. It is not very clearly expressed;² but, read literally, it hands over Saxony and the Saxon army *en bloc* to Frederick; and having got them, was he not at liberty, he argued, to use them? The *deditio* of the army was unconditional (though it may be noted that the officers were not included); and the whole kingdom was, at any rate temporarily, to belong to Frederick, so that he might be excused for regarding himself as temporary sovereign, and the population as owing him a perfect, if temporary, allegiance. It must be remarked, also, that this was a case of a complete conquest of a kingdom; it was not the occupation of a part. The King of Saxony was only able to continue the relations of a belligerent because he happened at the same time to be King of Poland. And the universal reprobation with which Frederick's step was met surely shows that no such doctrine as that of "substituted sovereignty" existed, which would have entitled him to take recruits without any treaty at all.

The same sort of thing happened in the Baltic Wars of the seventeenth century. When Charles X, Gustavus of Sweden, causelessly invaded Poland in July, 1655, the King of Poland (John Casimir) fled the country and took refuge in Silesia. Many Polish regular troops thereupon submitted to the Swedish king in October and November, and he put 7000 of them in the army with which he attacked Polish Prussia, which still held out for John Casimir, in the following January.³ A similar "submission" was earlier made by the Posnanian, Kalischian and Lithuanian portion of the Polish forces; and the leader of the latter recognized the invading king as Grand Duke of Lithuania. Apparently the capitulations of submission involved the necessity of taking service with the Swedish king; and we find⁴ that the soldiery subsequently maintained that in submitting to the protection of Sweden, in the hope of preserving their lives and property, they had tacitly reserved the right of remaining faithful to the Swedish king only until the times should alter, and they should be able safely to return to the obedience of the legitimate sovereign! Frederick II, therefore, was hardly an innovator. Mercenaries, of course, were handed about much in the same way as cavalry, horses and cannon. When Charles-Gustavus was forced to quit Poland and to turn his armies

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² CARLYLE, HISTORY OF FRIEDRICH II (1859).

³ 12 KOCH & SCHOELL, *Traité de Paix* (1817) 172, 177, 171.

⁴ *Ibid.* 181.

in 1657 against Denmark, he took Itzehoë and placed 3000 German mercenaries whom he found there in his own army.⁵ But we find no case mentioned of recruiting in an occupied territory, to which no dynastic claim was laid.

A stronger instance in support of Hall's position seems to be afforded by the sale, cited by him, of the Swedish duchies of Bremen and Verden by Denmark to George I of England, *flagrante bello*. But was this in reality more than a sale of the possession and the ultimate reversion? It is said that the treaty has never been printed, but Koch & Schoell⁶ tell us that on June 26, 1715, Denmark ceded to Hanover for cash down, these two duchies (formerly bishoprics) but so executory did the whole matter remain, that on September 6, 1715, by the Treaty of Greifswald between Russia and Great Britain, it was distinctly agreed that when peace should be made with Sweden, they "should be" ceded to Hanover, and they were duly ceded in 1719. This shows that the "cession" by Denmark was a purely reversionary thing. And as a matter of fact, the King of Great Britain paid to Sweden at the definite cession in 1719 the interim income which he had received in the meantime from the duchies.⁷ Not only that, but he indemnified the landed proprietors for their sequestered rents, and restored to Sweden the military *material* seized in the duchies. Just in the same way, sixty years earlier, when Sweden invaded Poland, she ceded to Brandenburg, "*dans toute souveraineté et propriété*," four Polish provinces which she had over-run.⁸ But by the treaty of Labian⁹ (five months later) the Elector promised to renounce these promises, in case it should not be possible to *obtain* the cession of some part of them at least from Poland. This shows that they were not regarded as completely transferred to the sovereignty of Sweden by the mere fact of occupation.

The fact is that prior to the Peace of Westphalia, and even for some time afterwards, the non-centralized states of the period were composed of somewhat loosely-compacted feudalized elements; on invasion, the feudal head very often transferred his allegiances to the new-comer in return for protection, and of course this carried the adherence and support of the local population. Technically, this was treason and rebellion, but it

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⁵ The transfer of all Germans serving in the Danish army to the service of Sweden was one of the demands made prior to the treaty of Roskilde in 1658. *Ibid.* 238.

⁶ 13 *ibid.* 257.

⁷ *Ibid.* 291. Great Britain now made the first of her alliances with Sweden to secure the Baltic against the growing power of Russia.

⁸ Treaty of Marienburg, June 15, 1656. 12 Koch & Schoell, *op. cit. supra* note 3, at 183.

⁹ *Ibid.* 188 (secret article).

does not always seem to have been very seriously regarded as such.¹⁰

By the Treaty of Roskilde (1658),¹¹ a convention very unfavorable to Denmark, Sweden ceded to Denmark "all the rights and claims which she might have (*peut avoir*) to (*aux*) the islands, provinces, towns, or fortresses which she has occupied in the course of the war, in Denmark, Norway or the Duchy of Holstein." If she had acquired them in full sovereignty by the very fact of occupation, the language of this article would have been entirely different. It is very restrained and conditional, and suggests rather such things as claims in respect of *impense utiles* during the occupation, though it may not be limited to that. It is true that at the Peace of Oliva (1660), Poland ceded to Sweden "all the rights which might (*pouvoient*) up to the present belong to" her in Esthonia¹²—which had for exactly 100 years been in Swedish occupation,¹³ much the same dubious expression ("*peut avoir*," "*pouvoient appartenir*"), being thus used in regard to both sovereign and occupier. But the explanation of the use of the potential mood by the Polish sovereign is that Poland had never effectively ruled in Esthonia. The Teutonic Order bought it in 1347 from Denmark,¹⁴ but in 1561, under pressure of a Russian invasion, the Master of the Order purported to cede it, along with the other territory of the Order in the vicinity, to Poland (or rather to Lithuania). But he could not deliver the goods; they were in the hands of the enemy, and in fact the people of Esthonia threw themselves into the hands of Sweden, so that the King of Poland and Lithuania was never able to make his rule effective, and during the long wars and truces of the ensuing hundred years, they re-

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¹⁰ The Peace of Oliva (1660) (Art. 16) contains a very interesting provision concerning one Court Koeningsmark, which may here be mentioned, although irrelevant. He was a distinguished commander, who was taken, on Sept. 11, 1656, out of a Swedish vessel by the Dantzigers, when on a voyage to Prussia (doubtless ducal or Brandenburg Prussia). The Swedes complained, like the British in the Trent case, that he was a mere passenger. The Lord Protector of England wrote to the City of Dantzic in his favor, but the King of Poland as its feudal superior, directed its magistrates to refuse his release on any terms. He and the Duke of Courland, who had been kidnapped by Sweden, were both to be honorably set at liberty, signing "reversals" by which they undertook to seek no revenge. As the Count asserted that his capture was contrary to the Law of Nations, the Dantzic magistrates were very anxious to be saved harmless in the matter. The case is an early anticipation of the modern doctrine, which it is interesting to find so well established in 1660. ¹² KOCH & SCHOELL, *op. cit. supra* note 3, at 354.

¹¹ *Ibid.* 243 (Art. 12).

¹² *Ibid.* 346.

¹³ *Ibid.* 24.

¹⁴ *Ibid.* appx. 393 (correcting the date, 1352, given in the text, page 15).

mained in Swedish hands,¹⁵ thus amply justifying the use of the potential mood by the Poles at the Peace of Oliva.

One of the few passages in which there seems direct evidence of military service being enforced on the subjects of an occupied territory occurs in Art. 14 of this Peace: "Persons who have been obliged to take up arms on one side or the other shall be regarded as prisoners," and set at liberty.¹⁶ Whether this implies recruitment in occupied territory, or only extends to troops taken over by capitulation, remains uncertain. As we have seen, on the Swedish invasion of Poland, the local magnates affected to place their territories under the protection of Sweden, and it would not be surprising if they permitted the Swedes to recruit from the local population.

The same Peace of Oliva (1660) provided¹⁷ that the judgments pronounced and the contracts made in places occupied during the previous war by the Swedes, should be confirmed, except those pronounced in Riga against Lithuania and Courland subjects, or by Lithuanian or Courland judges against subjects of Swedish Livonia, which were annulled. If the occupant was sovereign, there would be no need of such confirmation.

As an instance of the way in which dynastic claims to *de jure* sovereignty complicated the question, we may take the Swedish occupation of Livonia. The Swedes had long been in military occupation of Livonia at the time of the Peace of Oliva, but they did not claim to hold it by right of conquest, but as the grantees of imperial rights over Livonia from Charles V, Ferdinand I, and Maximilian as Emperors. The grants were not forthcoming, but the Poles did not deny their existence—only they said they confirmed a protectorate against Russian encroachments, and nothing in the nature of sovereignty. In the course of the negotiations, the Poles demanded that inhabitants of Livonia who had fled the country on the Swedish invasion, and had left their estates, should be reinstated in them; this they completely failed to secure, and the case is thus an authority against the proposition that an invader from early times never confiscated landed property.¹⁸ The Swedish occupation had, however, lasted eighty or ninety years, since the invasions of the sixteenth century, which the Truces of 1629 and 1635 had not interrupted in any respect.¹⁹

Hall cites also the case of the Austrians who are said to have

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¹⁵ The Swedes vindicated their position by force of arms against Russia, which in 1595 definitely recognized their right to Esthonia, by the Peace of Teusin. *Ibid.* 65.

¹⁶ *Ibid.* 352.

¹⁷ Art. IV, par. 4.

¹⁸ HALL, *loc. cit. supra* note 1.

¹⁹ See KOCH & SCHOELL, *op. cit. supra* note 3, at 322.

placed Bavarian militia in their Italian armies in 1743. But here again the Austrians had made a complete conquest of Bavaria and expelled the Elector. True, he was still seeking to oppose them with foreign support—but Bavaria as an independent unit was entirely in the power of Austria, as Saxony in 1756 was in the power of Prussia. The fact that the Chief of each state was still making armed efforts from without to recover his power might well be regarded as immaterial. After James II had been expelled from England, it may not have affected King William's title to that kingdom, nor his ability to impress Englishmen, that King James was still making efforts to maintain himself in Ireland.

When the Danes entered and occupied Stralsund, Rügen and Pomerania beyond the Peene after driving out the Swedes in 1715, Schoell²⁰ tells us that the Danish king "s'y fit prêter hommage." Exactly what this meant and involved is not clear. The capitulation of Stralsund may have authorized it. And it is not said that the King of Prussia "s'y fit prêter hommage" in Stettin, and Swedish Pomerania between the Peene and Oder, which he occupied on the same occasion. The important things to know would be, whether the Danish king interfered with the local laws, and whether he drafted the population into his armies. There is no evidence that he did. And when the Swedes occupied Hamburg in 1657 we are told that they got provisions and clothing there (probably *gratis*), but not that they got recruits.²¹ In 1700, Count Fleming, with 2000 Saxon cavalry invaded Swedish Livonia from Poland with the professed object of raising the country against the Swedish king; but they would not join him, which does not look much like supporting the proposition that he could have pressed them.

Perhaps the strongest cases in favor of the asserted principle are those in which King Louis XIV is asserted to have exacted oaths of allegiance from the then Dutch cities of Namur and Hainault in 1692. But we know that Louis was accustomed to consider himself *supra leges*: we know that he affected to invade Holland and the Palatinate "sans que la paix soit rompue de notre part"—and it will take more than this typical Ludivican high-handedness to prove a rule. Not being a historian, I do not wish to deny that there was a received doctrine of substituted sovereignty; but I say that there seems singularly little evidence of it.²²

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²⁰ 13 *ibid.* 256.

²¹ *Ibid.* 225.

²² Wolf, indeed, is quoted in 3 NYS, LE DROIT INTERNATIONAL (1912) 259 (transl.) as saying: "In making conquest of towns and districts, he makes conquest of, or occupies, also the sovereignty over them; as a consequence the inhabitants become subjects of the conqueror; they cease to be enemies,

No doubt, much that was barbarous was done in the Thirty Years War—but will anybody say that it was all done in the name of legality? The proofs of a legal doctrine of substituted sovereignty seem to be somewhat markedly wanting. The English medieval wars with France and Scotland were complicated by claims of right to the allegiance of the invaded realms or to the homage of their rulers.²³ But do we ever find a hint that William or David of Scotland regarded the Yorkshiresmen as his subjects when he invaded England? Or did Henry of England consider Frenchmen his subjects after Ardres and the spurs? Or Francis of France consider Castilians Frenchmen? Or did Charles V treat Picardy as his own? There seems to be no trace in the wars of medieval times of any doctrine of substituted sovereignty.

Hall admits that after the Seven Years' War "these violent usages fell into desuetude." It appears to me that they had fallen into desuetude long before, and that they never rested on any doctrinal basis of "substituted sovereignty," but were mere abuses of force, reprobated by all authorities. As early as 1694 DeVillene told Marshal de Noailles that "les peuples conquis par la force des armes, . . . ne doivent être considérés comme sujets du prince qui a la domination de leur pays, qu'au cas de véritable cession ensuite de la conclusion d'un paix."²⁴

II. RECENT APPARENT REVIVAL OF THE DOCTRINE

However all this may be, it is common ground that there is

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and nothing can be permitted to be done to their prejudice which is permitted against the enemy; that only can be done which may be done against one's own subjects in virtue of sovereignty." But Wolf seems to refer to a complete conquest, not a mere military occupation; he wrote in 1740-8, and if he meant to equate occupation to consolidated conquest, his statement is inconsistent with the facts. It may be explained by the notorious circumstance that Wolf, like Puffendorf, attempted to derive the prescriptions of International Law from abstract principles of justice, styled "The Law of Nature," and frequently deduced from Roman law. In Roman law an enemy had no rights; his property lay open to acquisition in full ownership by occupation. This simple scheme of things doubtless commended itself to Wolf's theoretic mind. As Woolsey says, his school were prone to present the spinnings of their own brains as the Law of Nations.

The writer has not had the opportunity of consulting the works of LAMEIRE: *THÉORIE ET PRATIQUE DE LA CONQUÊTE DANS L'ANCIEN DROIT* (1902); *L'OCCUPATE MILITAIRE EN ITALIE* (1903); *LES OCCUPATIONS MILITAIRES EN ESPAGNE* (1905).

²³ Thus, when Lewis of France invaded England in 1216, he claimed the kingdom in right of his wife, Blanche of Castile. Naturally, the barons and Londoners, who favored him, swore fealty to him as king *de jure*. So, also, when Charles VIII of France invaded Naples in 1494.

²⁴ 3 NYS, *op. cit. supra* note 22, at 230.

no substituted sovereignty nowadays, nor has there been since the mid-eighteenth century; though a "quasi-sovereignty," investing the invader with large powers, but not altering the national character of the territory and inhabitants, has been very commonly maintained.²⁵

But some startling developments have marked the recent European war. The national character of Egypt and Cyprus was purported to be changed, *flagrante bello*, by a power which would have been the first to exclaim against any change in the national character of Flanders. The national status of Egypt was legally that of a vassal province of Turkey; the special intervention of Great Britain had modified this since 1882 in a more or less ill-defined manner, but certainly Egypt was not part of the British Empire. On the outbreak of war between Britain and Turkey, the former power purported to dissolve the bond which united Turkey to Egypt, and to set up a new bond between Egypt and herself. As the Egyptians were in theory Turkish subjects, and liable to be called on to assist the Sultan against his enemies, the enormous importance of this proceeding can hardly be exaggerated. The national character of Egypt, which was Turkish, was affected to be changed, converted into that of a vassal of Turkey's enemies!

So entirely was it recognized that Egypt was in theory part of the Ottoman dominions, that Egypt never sent or received foreign envoys, the Turk capitulations applied in all their force to Egypt, and the Egyptian flag was that of the Ottoman Empire. It may be a question whether, after the firmans conceding the government of Egypt to the line of Mohamet Ali, the relation of Egypt to Turkey was that of an autonomous province, or that of a *mi-souverain* vassal. It does not matter which it was: neither Egypt nor England had any power to destroy it.

The only explanations of the powers are either that Egypt, whether a province or a vassal, rebelled against its ruler or its suzerain, and gave itself as a vassal or as a subject province, to his enemy; or that Britain made an illegitimate use of the rights of an occupant. The fact that the enemy was already in military occupation of the country made rebellion easy, but did not make it lawful.

We may be reminded of the Treaty of Copenhagen, made between Sweden and Brandenburg in 1661, by which the Dukedom of Prussia threw off the suzerainty of Poland and accepted that of Sweden. By the Treaty of Königsberg (1656), the Elector

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²⁵ W. E. Hall's objections to the recognition of such a "quasi-sovereignty" are rather thin. On all lands, the powers of the invader have limits. On all lands, these limits are very wide. Whether we call their sum "quasi-sovereignty" or "the military exigencies of an occupying force" does not seem really to make very much difference.

of Brandenburg disclaimed the suzerainty of Poland in respect of his Prussian Dukedom (formerly the possession of the Teutonic Knights) and accepted that of Sweden. The decent excuse, however, was offered, that the Elector's suzerain, the Polish king, had failed to protect him from the Swedish invasion, and had therefore forfeited his feudal rights.²⁶ Charles IX of Sweden had seized Elbing and Thorn, and penetrated up to Welau,²⁷ within twenty-five miles of Königsberg, where lay the Elector-Duke. Moreover, Ducal Prussia was in no sense an integral if autonomous part of Poland, as Egypt was of Turkey.²⁸ The people were not subjects of the King of Poland, as the Egyptians were of the Sultan of Turkey. It may be added that Sweden and Ducal Prussia promised each other liberty to recruit in Royal (Polish) and Ducal Prussia respectively. But doubtless such recruitment was voluntary; neither ruler would have cared to concede compulsory rights to his neighbors.²⁹

If it is true that the Khedive of Egypt was the Sultan's officer, and the Egyptians the Sultan's distant subjects, then the Prussian precedent is of no applicability. But if it is held that the Sultan's authority in Egypt was a shadow merely, and his flag in Egypt a symbol of nothing in particular, the Khedive being his vassal and not his officer, then the Prussian precedent is much in point. But what a precedent! One drawn from the obsolete practice of the seventeenth century!

It is believed that the United States never acknowledged the severance, *flagrante bello*, of the tie which bound Egypt to Turkey, until Turkey herself acknowledged it—not even when they became an ally of the intrusive power. Had Egypt enjoyed a really international position—had she had a separate flag and a separate nationality and separate diplomatic representation in the capitals of the world—it would have been a very difficult and delicate question to determine whether after the outbreak of war she could have joined with the enemies of her suzerain, to levy war upon the latter. It would have been a triple question—(1) whether she could become a lawful combatant against Turkey at all; (2) whether, granted that she could, she could become so on any and every occasion, or whether she could only in case of breach of her privileges on the part of the suzerain; (3) whether, granted that she enjoyed the liberty possessed by entirely inde-

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²⁶ This was a common excuse. Esthonia in 1561 justified the repudiation of the suzerainty of the Teutonic Order on the ground that for four years they had failed to protect her against the Russians. 12 KOCH & SCHOBELL, *op. cit. supra* note 3, at 24.

²⁷ Near the field of Friedland.

²⁸ Though appeals went from the Prussian ducal courts to the court of the King of Poland. See Treaty of Königsberg, Art. 17.

²⁹ *Ibid.* art. 20.

pendent states of going to war when and with whom she pleased, she was guilty of any breach of faith or promise to her suzerain in turning upon her. And I imagine that the questions would be answered in the sense that a vassal state is not only wrong in making war on her suzerain, but is incapable of doing so, except in the simple case of a breach by the suzerain of the pact of submission, (such as is afforded by an armed attack on the vassal), or in self-defense. It would seem impossible to allow that a vassal can at pleasure repudiate her vassalage, and join with her suzerain's enemies. And to say that vassals did it in the seventeenth century is not an answer. Vassals only did it in the seventeenth century when the suzerain had broken the fundamental pact. Is it argued that Turkey had failed to protect Egypt against England? In the first place, that formed no part of the Turco-Egyptian pact; in the second place, England was in Egypt ostensibly not as an enemy, but as a friend, supporting the Khedive for the Khedive's own good.

But Egypt was not in fact a vassal state. It was merely an autonomous part of the Sultan's dominions. Not only had Egypt no separate flag, no separate diplomatic missions, no separate treaties, but it was expressly provided in the Convention of London of 1840, between Austria, Britain, Prussia, Russia and Turkey, that—“(6) The military and naval forces which may be maintained by the Pasha of Egypt and Acre, forming part of the forces of the Ottoman Empire, shall always be considered as maintained for the service of the State.” Judge Phillimore decided in *The Charkieh* ³⁰ that the ruler to whom the administration of Egypt had irrevocably been committed by the Sultan of Turkey was not even a semi-sovereign, but a mere privileged subject or officer of the Porte. Mr. John Bassett Moore's invaluable *Digest* similarly indexes the treatment of the Mixed Courts of Egypt under the head of “Turkey.” ³¹

When Austria converted the occupation of Bosnia in 1908 into annexation, much severe comment was passed on the pretension. It was improper, but not an iota worse than the conversion of Egypt and Cyprus in 1914. It had no immediate practical consequences, and it remained open for Turkey to protest and finally to secure concessions in return. But the annexation of Cyprus and the virtual annexation of Egypt, *flagrante bello*, had infinitely important practical results, turning the population of the localities from the subjects into the enemies of the Porte.

The only possible excuse for the English action in Egypt would be that Egypt had by some tacit process been annexed (or converted into a colonial protectorate—it is the same thing)

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³⁰ L. R. 4 Adm. and Eccl. 59, 120 (1873).

³¹ 2 MOORE, DIGEST OF INTERNATIONAL LAW (1906) § 286.

already. But Britain had so often and so emphatically proclaimed that she was occupying Egypt for temporary purposes only, that this shameless defense is not available. It must, I think, be considered, before long, whether and to what extent one country may be in peaceful occupation of territory belonging to another without being (at any rate temporarily) regarded as the sovereign of its inhabitants to all intents and purposes. Should it go to war with a third state, the situation of these inhabitants must otherwise be too precarious and anomalous. But this is a large and difficult question, with which it is impossible here to deal.

How could Great Britain, in 1914, seize and incorporate into her own service against the Sultan the army in Egypt which was by the convention of 1840 distinctly declared to be the Sultan's army? Was the Treaty of 1840, like that of 1830, a "scrap of paper"? Egypt could only be torn away from Turkey by Turkish cession; *flagrante bello* to assume to appropriate it as a "protectorate," and to turn its troops from their allegiance was no more proper than it would have been for the Germans to tear away Flanders from Belgium and to force the Flemings to take up arms against King Albert. Everybody knows what a modern "protectorate" is; it is a mere synonym for a colony to which one refuses the rights of citizenship. Egypt, after 1914, began to figure in "Whitaker's Almanac" as a component part of the British Empire. Essentially, the transaction was a return to the vicious old practice—if it ever really was a practice—of conquest by mere occupation.

The case of Cyprus is even less defensible. Cyprus was handed over by Turkey in 1878 to be administered by Great Britain as long as Batavia and Kars were held by Russia. But the Cypriotes did not become British subjects. It was for some time even a question whether the rights of foreign countries to the benefit of the Capitulations conferring extra-territorial status on their people did not continue to subsist. To affect to annex the island, and to turn the people *uno ictu* from subjects of the Sultan to enemies of the Sultan, was totally at variance with the modern principle of International Law which refuses to allow a military occupant to play fast and loose in this way with the allegiance of the population.

Had the Germans affected to set up a dummy kingdom in Flanders and Brabant, independent of King Albert, or had they fomented a republican government which should have declared His Majesty to have forfeited the throne of Belgium, we should rightly have objurgated it as German arrogance. It would have been patently incompatible with the principle that national allegiance cannot be diverted by a military occupant. Yet we allow the thinnest of veils to obscure the fact that the British did alter

the allegiance of the Egyptians in Egypt and of the Cypriotes in Cyprus.

III. INVADERS AND BONA FIDE REVOLTS

This brings us to the consideration of the main question which we purpose for discussion. It was easy for Sweden in Poland, or Poland in Prussia, or Britain in Egypt or in Cyprus, to claim the allegiance of the populace, because such Powers could readily secure the allegiance of the local magnate—he joined them with his territory and army. But in these days of impersonal rule, it will not always be so easy.

In these Egyptian and Cypriote cases, the process of annexation or change of suzerainty was a very simple thing. The British had in each case a light grip on the country; and all that was requisite was to declare their will. It was very easy to proclaim the deposition of an absent Pasha and to seat an obedient puppet on the tinsel throne. But the facility of the process must not blind us to the fact that it would have been no less legal, had it not been easy. The rebellion of a toy king against his Sultan constituted a thin veil. The forced rebellion of an island against the Sultan was hardly even a form. But there will be cases in the future in which the rebellion will not be a form.

What is to prevent an invader, in the future, from fomenting rebellion in occupied territory, and even from covertly enforcing it? Very little, that the writer can see; and in this way the invader very readily disembarrasses himself of the difficulties erected by the modern Law of Nations, forbidding him to alter the local laws and to force the local population into his army against their rightful sovereign.

Let us first consider the case in which a rebellion is what we may call a bona fide rebellion, unconcerned with, though perhaps not unconnected with, the fact of invasion and war. A disaffected faction makes a *pronunciamento*, and declares that "the ruling family has ceased to reign," or that "the province of Baretania is and ought to be independent." The usual test of the result of such proceedings is to inquire whether the old government is still continuing its efforts to maintain itself with any reasonable prospect of success. But if the territory is in the hands of an invader the test becomes entirely inapplicable. The prize for which the old government and the new one are contending—the control of the population—is removed out of their reach by the third party, the invading occupant. Various complications will also invariably arise in practice. It is seldom that the occupied area, itself constantly varying, and not to be measured in broad territorial divisions, but counted in comparatively small units,³² will coincide precisely with the area of revolt. The

³² *E. g.*, the French canton, some eight or nine miles square, was protested against as too large a unit, in the war of 1870.

latter may be within the occupied area, may adjoin the occupied area, may be mainly without it though partly within it or *vice versa*—or it may be pretty equally within and without. It may be concentrated, and clearly evidenced by the definite acts of local rulers, such as the palatines of Poland or the secession legislatures of North America. Or it may be sporadic and proclaimed merely by juntas and self-styled patriots. In all these cases somewhat different considerations appear to apply. But, reserving the treatment of the others, let us take first what, perhaps illusively, seems to be the simplest, and consider the case of an area forming a local unit under a distinct authority, and well enclosed in the area of occupation. Let us suppose also that the occupation is of a fairly durable character. The obvious example would be that of a town aggrieved by national tolls or imposts, which declares itself, through its mayor and council, a Free City. But since such a city could hardly make head against the forces of the State, in modern times, (though such towns as Buenos Aires and Sydney might be reasonably sustained as exceptions) we shall suppose a somewhat larger area. Say that a maritime province, rich and energetic, and occupied by a foreign enemy, as Catalonia was by France in 1808, revolts against its sovereign. A deliberate act by the local authorities proclaims its independence; it organizes an executive and a legislature and is accepted by the courts. What must be the attitude of the invader, of the territorial sovereign and of third parties?

Is it quite adequate to say that the decision must be postponed until the force of the invading power is withdrawn? Is "the sacred right of revolution" suspended indefinitely by invasion? The state system may be honeycombed with many absurd privileges, many obvious anachronisms. Are the people obliged to suffer them until they are left face to face with their old rulers? The administration may be staffed by nominees of the central government, hateful to and hated by, the local population. Can they not be got rid of? Must everything, save for the exigencies of the invading forces, be left *in statu quo*? In short, must we say that because the test of force is inapplicable, we are left with no test?

It is easier to raise such questions than to solve them. For the eighteenth century thinker, for whom the population was normally the patrimony of a monarch, the problem would doubtless tend to be resolved in the sense of refusing the right of revolt, except where the facts proved too patent for contradiction. For the rapidly dying race of parliamentary democrats, the whole question would turn to the desires of the population, as expressed by some form of vote or supposedly representative action. If a local assembly voted for independence with virtual unanimity, or if a plebiscite, however rigged, pronounced in the same sense,

such thinkers might probably accept the vote as a test in cases such as we are considering, where the recognized test of force is impossible. But realistic thinkers who see, on the one hand, that the patrimonial conception even in monarchical states (such as Persia) is dead—and, on the other, that political machinery is extraordinarily fallacious as an expression of genuine popular desire,³³ and who see, moreover, that the genuine desire of a local part is not necessarily entitled to overcome the wishes of the collective whole of a given political organism, will find the problem a perplexing one.

Upon the whole, it would seem safest that the decision should be against the possibility of any change; chiefly on the practical ground that if such a possibility were recognized it would infallibly be turned by the invader to his advantage.

An invader will, in ordinary circumstances, be extremely foolish if he neglects to avail himself of offers of assistance volunteered by individual members of the invaded population. Treasonable, technically or substantially, these offers may be; the invader is under no obligation to decline to avail himself of treason. But he cannot coerce the dissentients; he cannot force his enemies to be his soldiers, or his guides, or his law-givers. Can they force each other? One cannot but think that the principle of the Roman civil law and of English equity jurisprudence here applies, which renders trustees, tutors and mandatories incapable of doing certain things, not because they might not conceivably be honestly done, but because of the extreme difficulty of proving them to have been dishonest. A *cestui que trust* is to have absolute security from his trustee in such transactions; he is not to be presented with a lawsuit. So, in International Law, a belligerent is not to sink a neutral at all, and is not to capture on suspicion *dehors* the ship's papers. The minor and the neutral are not to be saddled with lawsuits for the convenience of the trustee and the belligerent. And similarly, I imagine, hard as it may be on the population, hostile occupation suspends their right of revolution altogether. The sovereign ought not to be put to the impossible task of proving that the revolt was collusive and not spontaneous. Votes there may have been—but were they free? Resolutions there may have been—but were they representative? The imperious question of allegiance cannot be left to depend on such occasions for quibble and contradic-

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³³ Heimweh, an enthusiastic partisan of plebiscites, admits that the French plebiscites taken on the successive invasions by the revolutionary armies, of the Netherlands and the Rhineland, were thoroughly fallacious. And it may be recalled that Nice and Savoy voted in 1860 almost by unanimity to be French rather than Italian! *DROIT DE CONQUÊTE ET PLÉBISCITES* (1896) 25.

tion. The tests by which International Law works must be clear and indisputable.

But, reverting to our other suppositious cases, there are those in which the test may be clear, although the situation is complicated by invasion. Assume that a definite province, with at any rate some amount of local government as a unit, is invaded at some small and limited strategic point, and thereafter rises in revolt against its own rulers in the unoccupied and extensive area. As the war drags on, its revolt is firmly established—it is not attacked by the mother country, and no attempt is made to reduce it to obedience. It is difficult to see why its independence should not have fulfilled the test of fact. True, the mother country hopes some day to reduce it when her hands are free—but so Spain hoped some day to reduce Chile and Peru. Does the mere fact that she is carrying on war against other enemies in other quarters preserve her rights over her recalcitrant child? There seems no reason why it should, even in the difficult case where the campaign against that enemy is in the immediate neighborhood, though there may well be two opinions as to that. It is difficult to agree with Hall³⁴ that “there can be no question that conquest [of an entire state] cannot be held to be consolidated while a war continues which by any reasonable chance may extend to the conquered territory.” A foreign enemy may well prefer to treat the conquered country as incorporated and often to attack rather than as an occupied country open only to release. And if this disagreement is justified, it must be equally true that a revolt may be held to be consolidated, and independence established, although the mother country may still be carrying on a war which might involve at some stage a re-assertion in practice of her sway. It surely would not prevent Iceland from becoming independent of Denmark, that Denmark was carrying on a war against Holland, the theatre of which might by a “reasonable chance” be transferred to Iceland. But would such a successful assertion of independence carry the occupied portion of the province, so that the invading enemy in alliance with the revolted state, could treat the population as a recruiting-ground. It may seem pedantic to doubt this, but I believe the doubt would be justified. The inhabitants of the occupied territory here had no chance of disputing by force the new state of affairs; they should not be affected by it. It may be said that if they had been cut off by some natural means from participating in the revolt, they could none the less be affected by it. I question whether this is true. It does not appear to me that a revolt, successful on the mainland, necessarily and *ipso*

³⁴ HALL, *op. cit. supra* note 1, at 486. He is speaking of the question of Genoa, a republic entirely subjugated by the French forces, whilst France was still at war with Great Britain.

facto carries the allegiance of adjacent islands, comprised in the same territorial division. Revolt, like occupation, is measured by actual control; and until that control is exercised in fact in any part of the insurgent area, such part cannot properly be said to be comprised in the insurrection. It is a temptation to use the facile means afforded by the existence of local areas of subordinate government, and to say that if a local capital has pronounced in favor of revolt, the whole province, country, island, must be considered as revolted. But it is fallacious. No local power can avail to make a rebel of anyone within its borders except by a successful assertion of control.³⁵

Let us now take the more difficult case in which the main part of the insurgent territory lies within the occupied territory. If the brain of the revolt is outside, shall we say that the same principles apply? That the small, but self-conscious, outside territory becomes capable of independence, whilst the main bulk, though sympathetic, remains unchanged in allegiance? That would seem to be exceedingly dangerous; the small area is within the orbit of the invading influence, though out of the invader's control; to allow it to secede would be to expose it to certain absorption. Yet, since it is *ex hypothesi* small, it would be better to admit the possibility of its secession, for the sake of simplicity and certainty. Even suppose the brain, the active ganglion of revolt, to be within the occupied area, and exposed to the invasive influences. Still one considers that for the avoidance of subtlety, the small outside area may be allowed to revolt? The crucial difficulty comes when the parts, outside and inside the invaded area, are approximately equally divided, *and the brain inside*. It is hard, in such a case, to adhere to our principle, and allow the outside important half to be virtually carried over to the enemy. But the maintenance of the principle, even in such a hard case, presents the fewest difficulties.³⁶

IV. INVADERS FOMENTING REVOLT

At last we can approach the final and crucial group of cases; those, that is, in which the invading enemy not only desires to

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³⁵ The writer is not here referring to subordinate states which enjoy some measure of international sovereignty, or whose alleged right of secession or revolt implies it.

³⁶ The case in which the invader enters the country solely to vindicate the independence of the revolting territory can only be regarded as war, however disguised and benevolent. Thus the invasions of Crete by Greece in 1896, of Flanders by Louis Philippe, of the Morea by Charles X, were really acts of war against Holland and the Porte. One does not besiege fortresses and occupy whole premises as a means of coercion without in essence waging war, however little one may like the prospect. And those who say one can, only afford encouragement and comfort to lawless violence.

avail himself of revolution, but actually inspires and foments it. Here, it would seem, there can exist no doubt. It is not open to an occupying enemy to do indirectly what he cannot do directly, and force the local population into active hostility to their sovereign under color of insurrection. If, during the war of 1812, the United States had occupied Lower Canada, and had availed themselves of local disaffection to secure a proclamation of secession and alliance with themselves, the allegiance of the people of Quebec would not have been in the least degree affected. If, conversely, the British had occupied Maine, and had taken similar proceedings there, the validity of the step could only have been rested on the right of a state to secede, and on the continued international existence of Maine as a member of the family of nations.³⁷

Sometimes a state goes further, and instead of going to war at all, secures the chestnuts to be picked out of the fire for it by suborned revolutionaries. Of such was the nature of the operations against Colombia in Panama which were succinctly and eloquently described by Roosevelt in four words—"I took the Isthmus"—and he might equally well have added four more, and explained,—“because I wanted it”—naturally, on the most exalted and altruistic grounds.³⁸ Of a somewhat different complexion is the attitude of a state which decides to adopt an insurrection independently initiated, and actively to support the

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³⁷ 2 NYS, *op. cit. supra* note 22, at 50, says that the British imposed an oath of allegiance on invaded districts of the United States. This must have been due to the misguided zeal of some naval or military officer. Nys's only authority, given in Vol. 3, at 241, is JOHNSON, HISTORY OF THE WAR OF 1812-1815 (1882) 268, where it is stated that on July 11, 1814, Sir Thomas Hardy, commanding the squadron before New London, occupied Eastport and Moose Island, and proceeded to issue a proclamation declaring that all the islands in the Bay of Passamaquoddy had surrendered and were thenceforward British territory, and that he gave the inhabitants a week to choose between emigration and taking the oath of allegiance. But this incident is of no value, standing by itself, and Nys is surely much mistaken when he says that: "when a British force invades enemy territory, it forthwith becomes a 'domain of the King in right of his crown,' and the inhabitants become British subjects. This is a principle of the Constitutional Law of England." If it is, it is one of which the present writer has never heard. The "oath of allegiance" tendered by Hardy was probably of the same nature as that referred to in the *Boedes Lust*, not operating any real change of allegiance, and not enabling the persons who took it to be placed in the British army or navy.

³⁸ Compare also the action of Sardinia in 1861, in actively encouraging the Garibaldian insurrection in Naples, and in supporting the blockade by the insurgents of Gaeta, with the result of driving the king from the two Sicilies altogether, and enabling the country to be annexed by Sardinia. Reference may also be made to the countenance given by France and England between 1835 and 1845 to the opponents of the Argentine dictator, Rosas—quite without success.

insurgents in their contest. This, as we have seen, may be legitimate enough, but it is war.

When the French in 1792 invaded Italy, they had no scruple in summoning the invaded populations to repudiate all allegiance to their sovereigns, and doubtless they forced them with their armies. Nys may tell us³⁹ that the French generals "limited themselves" to breaking the tie between the invaded peoples and their princes and to convoking assemblies to determine the form of government.⁴⁰ There is no doubt that the assemblies would never have been permitted to reinstate the princes, or to establish any form of rule distasteful to the Republic; it was practically a reversion to the old type of conquest by occupation; the later decree which Nys cites, directing the military authority to suppress all existing authorities, taxes, feudal government and privileges, in reality goes very little further. The whole drastic proceeding was a consequence of the breaking away of France from the sphere of International Law, and of her desire to replace it by a new Law of Nations of which the first article should be—"no state may be organized on any but a soi-disant republican system." It was not that a monarchical state was necessarily, as she expressed it, her enemy; it was not even a lawful enemy. Some attention will have to be devoted in the future to the question of whether it is possible that states may exist whose principles and conduct put them outside the pale of International Law, so that their subjects may forcibly be placed in the ranks of their enemies. The recognition of such a possibility is obviously very dangerous, and perhaps it may be preferable to keep it in the background as a possibility not to be mentioned lest its discussion should give encouragement to its misuse. It is fatally easy for one State to say that another has put itself outside the pale of International Law, when all that it means is that it much dislikes its methods.

But on any view of the matter, that attempt by the French to subvert the institutions of States and to replace their governments by governments in hearty alliance with themselves, was a revolutionary outburst. It is defended by no one as a legal measure. It was one of the phenomena that present themselves in a time of world upheaval. It took thirty years of war to establish the principle that monarchies and republics could live side by side, as it had taken thirty years of war, in the seventeenth century, to prove that Protestant States and Catholic States could live side by side. International Law was not in-

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³⁹ NYS, *op. cit. supra* note 22, at 230.

⁴⁰ See LORRIOT, *L'OCCUPATION DE GUERRE* (Paris, 1903) 161. Lorriot says that by these measures "La Convention le mettait hors la loi et hors le droit . . . il faut voir dans ce derret une des causes premieres der Vingt-trois années de guerre qui suivirent."

voked to justify it; it challenged the existing Law of Nations—which, nevertheless, it failed to subdue.⁴¹

We cannot prevent such aberrations in such times. But the recent cases of Cyprus and Egypt show what a clamant danger exists in ordinary times. No special disregard for International Law was avowed and proclaimed by the Allies. There was no fury of parliamentarism among them, like the religious fury of the seventeenth, or the revolutionary fury of the eighteenth century. Russia was indeed, herself, a complacent despotism. Yet the national status of subjects of the Porte was affected to be converted, and the Ottoman troops turned against the Ottoman Empire.⁴² It can easily be seen how facile and inevitable is the next step—to secure a *pronunciamento* from some kind of local tools, and on the strength of that to pose as allies and no longer as invaders. Unhampered by the generous rule which compels a belligerent to respect the loyalty of an invaded people, the invader can treat the loyalty as transferred to his creatures, and in effect to himself; and will enforce with all the rigor of sovereignty the obligation of the people to assist him on pain of the penalties of treason.

Will any invader fail to seize the opportunity? Except in cases where strong national feeling absolutely bars the attempt as not worth the cost,⁴³ will anyone hesitate to turn his enemies from an invaded population into a sovereign ally? What is to prevent its becoming common form for an invader to seat on a new and chilly throne, a figure arrayed in purple and stiff with the gold brocade of sovereignty, but as dead and stiff itself as its apparel—the simulacrum of a ruler, behind which flickers the veiled form of an intruder and a usurper?

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⁴¹ Its challenge, in a subtler and more insidious form, has been repeated in our own days, when great leaders like Mr. W. Wilson have declined to regard states as possessing a government (and therefore, implicitly, as being states at all) unless that government is based on votes and plebiscites.

⁴² It is possible that no Egyptians or Cypriotes actually fought against the Turkish troops. But Egyptian troops at any rate must have garrisoned Egyptian forts, and released British troops for service against the Turkish forces.

⁴³ The British government actually attempted to enforce conscription in Ireland in the course of the War of 1914.