

REVIEWS

THE OCCUPATION OF ENEMY TERRITORY. By Gerhard von Glahn. Minneapolis: The University of Minnesota Press, 1957. Pp. 350. \$6.50.

"*Silent enim leges inter arma*," wrote Cicero.¹ He could have added—doubtless in more Ciceronian Latin—*sed non iurisconsulti*. Long before the end of World War II, scholars of all belligerent and many neutral nations had begun to pour forth a mighty torrent of words on the laws of war, a gloss bearing about the same quantitative relationship to the rather skimpy texts of the Hague and Geneva Conventions that the literature of Christian apologetics, exegesis and hermeneutics bears to the New Testament. Professor von Glahn has set himself the task of seining in this turbid flood, apparently with the praiseworthy intent of reducing to manageable size the consensus of more or less civilized nations on what the law of belligerent occupation is or ought to be.

The role of the writer on international law, and particularly on the law of war, is, at least in common-law countries, unique. The law of war has essentially two sources: treaties and custom. The treaties are of unquestioned authority but full of deliberate ambiguities² which can only be elucidated—given solid content and accepted meaning—by the decisions of courts, the practice of nations and the opinions of savants. The first are scanty, and the second is often deplorable, if not actually in violation of those treaty provisions which are explicit. Hence, a gratifying and unusual weight is accorded to the views of scholarly writers—mostly, to be sure, by other scholarly writers, but sometimes by the authorities who shape the policies of belligerents and the statesmen who draft new treaties. If the hardships of war and occupation have been appreciably lessened over the last few centuries, much of the credit must go to the writers.

The experience of the last few decades might well conduce to the dismal conclusion that no such lessening is noticeable and that the labors of Professor von Glahn and his fellows have been so much intellectual *brutum fulmen*. One has to go far back indeed to find anything comparable to the occupation regimes of the Nazis and Japanese. But the saving point is that the mass killings, deportations and systematic looting practiced by those governments in occupied territory represented a sharp deviation from what had by their day become the practice of civilized nations—a deviation which was denounced not only by their

1. M. TULLIUS CICERO, PRO MILONE § IV, ¶ II.

2. See, e.g., articles 43, 52 of the Hague Regulations of 1907, the former obligating an occupant to respect "unless absolutely prevented, the laws in force in the [occupied] country" and the latter providing that "a receipt shall be given [for requisitions in kind], and the payment of the amount due shall be made as soon as possible"—by whom is not stated. See SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 123, 125 (1915).

victims but by most of the rest of the world, and which was punished after the war with remarkably little dissent, and even with the acquiescence of a substantial number of Germans and Japanese. Such enlightened views are not innate in mankind. The Old Testament, of course, is full of appalling massacres, some of them not only tolerated but prescribed by the mores of the time.³ Nor would it have occurred to a statesman of classic antiquity to question the legality of such conduct. In the course of the Peloponnesian War, for example, the Athenians determined, not by the act of any dictator but by the direct vote of the enlightened democracy, to discipline Mitylene, an ally which had defected, by putting to death the entire adult male population—including those who had remained loyal to Athens—and enslaving the women and children. They reversed the decision the next day by a very close vote, largely on grounds of expediency, and contented themselves with the execution of about a thousand Mitylenians who had in fact been active in the rebellion.⁴ The Spartans were no better.⁵ So far as history records, neither of these glories of Hellas was subjected to reproach from any quarter for their treatment of the conquered. The repressive measures taken against partisans and guerillas by Nazi occupants were undoubtedly harsh, but Himmler himself would probably have hesitated at the steps taken by Marcus Licinius Crassus to suppress the servile revolt led by Spartacus.⁶ Crassus was not regarded as a monster of cruelty; he was, in fact, awarded a triumph. Many similar examples could be cited, down to comparatively modern times. The distinction between those ages and this lies in the creation of a climate of world opinion in which the commission of an atrocity is at least embarrassing, and possibly dangerous, to the committer. The conduct of the Soviet government in Hungary, for example, though bad enough, might well have been very much worse if its desired action had not been so obviously inconsistent with the appearance it wished to present to the world. And the existence of international standards, to which that government was reluctant to do more extreme violence than required by its estimate of the political situation, is in some measure due to the accumulated weight of works like Professor von Glahn's.

3. See, *e.g.*, I Samuel, 15:3, 8-11, 32-34.

4. THUCYDIDES, PELOPONNESIAN WAR 193-205 (Crawley transl. 1874). The Athenians, having changed their minds, despatched a second galley to overtake the one which had sailed the day before to carry the original order to the Athenian commander on Lesbos. Stimulated by the promise of a substantial cash bonus (and possibly by considerations of humanity) the rowers of the second galley bent to their oars with such effect that they arrived just in time to stop the massacre.

5. On the urging of their Theban allies, the Lacedaemonians actually meted out such treatment to the little city of Plataea, which had so distinguished itself in the Persian wars. *Id.* at 216-18. It is interesting to note that Thucydides condemns as cruel the first Athenian vote on Mitylene but chronicles without comment the fate of Plataea—which suggests that, in his view, the vice of the Athenian policy lay only in the fact that it contemplated the massacre of friends as well as enemies.

6. He crucified 6,000 captured slaves along the road from Capua to Rome. See 3 MOMMSEN, RÖMISCHE GESCHICHTE bk. 5, c. II (1885).

That weight is considerable. Professor von Glahn has performed the remarkable feat of producing a ponderous tome in a mere 350 pages weighing no more than two pounds. He has done this partly by weighting down his text with 896 footnotes and a bibliography containing some 700 items, and partly by the employment of a singularly heavy-footed style;⁷ but it must be conceded that in large part the feat is attributable to sheer slogging scholarship and the compression of voluminous materials into a comparatively small space. If *The Occupation of Enemy Territory* does not contain a great deal of original thought, it is at least a desk-size encyclopedia of learning on its topic. Here and there one finds a dogmatic statement of a debatable proposition—for example the flat assertion that “indigenous courts have no right whatsoever (during belligerent occupation) to try enemy persons (that is, individuals of the occupant’s nationality or that of any of his allies in the war) for any and all acts committed by them in the course of hostilities in the broadest sense of the term, even if such acts are in the nature of war crimes.”⁸ It is doubtful whether that immunity extends beyond members of the occupant’s armed forces,⁹ regardless of their nationality; and it is probable that the occupant can subject members of his forces, and a fortiori persons of his nationality, to the jurisdiction of the local courts.¹⁰ Equally dubious is the unqualified statement that “decisions handed down by the military tribunals of the occupant lose their validity at the end of the occupation unless otherwise provided for in a treaty of peace.”¹¹ It would seem more reasonable to hold that a decision of a military government court, made in a case within the jurisdiction lawfully conferred on it by the occupant, should be accorded the same treatment as any other decision of a competent court in the occupied territory.¹²

7. See, e.g., p. 23: “[N]o advocate of revision of the laws of war in favor of collective security forces can deny that armed action against an aggressor, whether it is labeled a war or a police action, is not an armed conflict in the meaning of those 1949 instruments.” The meaning of this cumbrous sentence is the exact opposite of what the author probably intended.

8. P. 112.

9. See *Coleman v. Tennessee*, 97 U.S. 509 (1878); cf. *In re Lo Dolce*, 106 F. Supp. 455 (W.D.N.Y. 1952).

10. Cf. *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Neely v. Henkel*, 180 U.S. 109 (1901). In both cases, American citizens were held triable by courts of the American military government of occupied foreign territory; and in the *Madsen* case, the petitioner was deemed to be a member of the occupying forces. Both courts applied the indigenous law of the occupied territory. In neither is there any suggestion that the result would have been different if the military government had provided for trial by the indigenous courts. The Court regarded both situations (Germany after World War II and Cuba after the Spanish-American War) as cases of belligerent occupation of enemy territory, although in both hostilities had ended.

11. P. 258.

12. Cf. *Mechanics’ and Traders’ Bank v. Union Bank*, 89 U.S. (22 Wall.) 276 (1874). A caveat must be entered with respect to criminal sentences imposed by an occupation tribunal for an offense against the occupant’s security regulations, however lawful those regulations might be, especially if the act were not otherwise criminal. It would be too much to expect a returning sovereign to leave in jail one who is, from its standpoint, a

These are comparatively minor matters. More fundamental is the author's espousal of the doctrine that neither the Hague Regulations nor the customary law of belligerent occupation apply after the end of military operations against an enemy still in the field.¹³ Specifically, as applied to Germany, he believes that "only limitations resting on grounds of humanity could be said to have been binding on the victorious Allies during the post-surrender period."¹⁴ He arrives at this conclusion by a somewhat curious route. He appears to believe that most of the American denazification program in Germany—including the eradication of Nazi influence on education, the repeal of characteristic Nazi laws, such as the Nürnberg racial laws, and even the abolition of the totalitarian form of government—would have violated the Hague Regulations and the customary law of belligerent occupation, had those laws been applicable.¹⁵ But he balks, very rightly, at saying that international law forbade the Allies to achieve the very purposes for which they fought the war unless they took the extreme step of an outright annexation of Germany. He resolves the dilemma by concluding that the law of belligerent occupation ceases to be effective the moment that one party surrenders. This is dangerous doctrine. Precisely at that time, the conquered and occupied territory stands in most need of whatever protection is afforded by international law.¹⁶ It would be safer to go a little more slowly and to assume as a first proposition that international law draws no sharp line between occupation *durante bello* and occupation after the end of hostilities but prior to definite settlement of the status of the occupied territory.¹⁷ It can be further argued that nothing in the corpus of the law of

patriot. Yet this caveat has an unfortunate corollary; an occupant may be expected to resort freely to the death penalty for offenses against its security, on the ground that nothing else can be expected to stick. Article 68 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War attempts to counteract this practical consideration by prohibiting the infliction of the death penalty under the ordinances of the occupant except where the accused is guilty of espionage, "serious acts of sabotage against the military installations" of the occupant or "intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began." Aside from the fact that some signatories, including the United States, made reservations to this article, the phrase "serious acts of sabotage against . . . military installations" leaves a good deal of leeway for construction. See U.S. DEP'T OF STATE PUB. NO. 3938, GENERAL FOREIGN POLICY SERIES 34, 185 (1950).

13. See, *e.g.*, pp. 27-28, 117, 281.

14. P. 283.

15. See, *e.g.*, pp. 57-67. Rather inconsistently, he makes an exception of the suspension of the Volksgerichtshöfe and other peculiarly Nazi courts. Pp. 106-07.

16. The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War specifically provides (art. 6) that it shall apply for a year after "the general close of military operations"—whatever that means—and that certain of its more fundamental provisions shall apply for the duration of the occupation. But that convention falls far short of protecting all the rights covered by the pre-existing law of belligerent occupation. See U.S. DEP'T OF STATE PUB. NO. 3938, GENERAL FOREIGN POLICY SERIES 34, 166 (1950).

17. *Madsen v. Kinsella*, 343 U.S. 341, 360 (1952); *Burke v. Miltenberger*, 86 U.S. (19 Wall.) 519, 524 (1873). See *Cobb v. United States*, 191 F.2d 604, 610 (6th Cir. 1951).

belligerent occupation was inconsistent with the Allies' abolition, for example, of the Nürnberg racial laws; in light of their war aims and the very broad construction traditionally given the phrase, they can fairly be said to have been "absolutely prevented" from respecting such a law.¹⁸ The reform of the German educational system and the abolition of totalitarian forms of government can be similarly justified.¹⁹ The laws of war are likely to do more real good if they set themselves the modest goal of protecting the persons and property of noncombatants, and do that at all times, than if they purport to circumscribe a belligerent's achievement of his political aims until actual hostilities have ended and then vanish altogether. For similar reasons, Professor von Glahn's thesis that the law of war ought to distinguish between aggressor nations and their victims—as, for instance, by giving lawful combatant status to guerillas fighting for the latter and leaving the former's partisans in their present unprotected status²⁰—seems of dubious practicality. The trouble is that in the last century, at least, there has been hardly any belligerent which did not claim to be a victim of aggression. It is hard enough to enforce the laws of war without having to determine, as a preliminary, who started the particular war.

Professor von Glahn devotes a chapter to an admittedly summary examination of the subject of punishment of violations of the laws of war. This topic has not escaped the attention of other writers, and his chapter is mainly useful for purposes of reference. But he has largely ignored the potentialities of judicial enforcement of those laws through civil courts which are independent of the occupant, either because they are sitting in another country, or because their proceedings take place after the end of the occupation or because they are the occupant's own domestic courts, exercising under the occupant's own polity some power of control over the actions of its military and political authorities. There is, for example, a small but growing body of case law in the United States which suggests that its courts will apply the law of war to the acts of an occupant very much as they would apply the Constitution to an act of Congress or the President: that is to say, an ordinance or other act of military government will be treated as valid, and binding on parties affected, if it does not exceed the powers allowed by treaties and customary law, and will be treated as void if it contravenes international law.²¹ No American court has yet struck down an act of American military government on such grounds,²² but, if such

18. See note 2 *supra*.

19. It must be admitted that the decartelization laws of the Western Allies present a tougher exercise in casuistry—although, in so far as they contributed to the economic resurgence of West Germany, they might be brought within the occupant's duty to restore and ensure public order and safety.

20. See, *e.g.*, pp. 53, 171.

21. See, *e.g.*, *State of the Netherlands v. Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1953); *Aboitiz & Co. v. Price*, 99 F. Supp. 602 (D. Utah 1951).

22. See, however, *Ochoa v. Hernandez*, 230 U.S. 139 (1913). The Court held an ordinance of American military government invalid because inconsistent with the President's orders to the Military Governor; but the Court laid some stress on the fact that the Presi-

an act could be brought within the jurisdiction of an American court,²³ there is no compelling reason why it should have greater immunity from review than one of a foreign occupation authority. Professor von Glahn has also ignored—reasonably enough, since he had ample ground to cover without getting into the maze of American constitutional law—the related question of the applicability of the Constitution of the United States, and particularly the Bill of Rights, to the actions of American military government in occupied foreign territory. The orthodox view would certainly deny any application;²⁴ but there have been indications that the classic rule might be subjected to some alteration if a proper case were presented.²⁵ The development in civilized nations of a concept that the occupant's domestic courts have a duty and power to check violations of the law of war is greatly to be desired. Otherwise, enforcement of the law of belligerent occupation, so carefully collated in Professor von Glahn's pandect, must continue to rely on the self-restraint of occupants, which is risky, and postwar prosecution of the losers, which is effective but one-sided. Of course, it will be long before any such judicial independence can be expected to develop in some countries, but that is no reason why the seed should not be sown in soil where it has a chance to grow.

Professor von Glahn has produced a well-digested and well-organized compendium of the substantive law of belligerent occupation. Its virtues considerably outweigh its defects. To all those who have the responsibility of applying or enforcing that part of the law of war, *The Occupation of Enemy Territory* will be a convenience.

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dent's order was an expression of accepted principles of international law. The point at issue would have been raised if the President had authorized or tolerated military government ordinances in violation of international law. To the same effect, see also *MacLeod v. United States*, 229 U.S. 416 (1913).

23. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held, through Justice Jackson, that the writ of habeas corpus was not available to a nonresident enemy alien and said, in a dictum which was probably not very carefully considered, that rights of alien prisoners of war under the Geneva Convention of 1929 could be "vindicated . . . only through protests and intervention of protecting powers." *Id.* at 789 n.14. There was a vigorous and cogent dissent. I find it hard to believe that if a prisoner of war were, let us say, sentenced to death for attempting to escape, in violation of the explicit provisions of the Convention, the present Court would thus wash its hands of the matter.

24. See, e.g., *Neely v. Henkel*, 180 U.S. 109 (1901); *Mechanics' and Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276 (1874). See also Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 623-26 (1949).

25. See Black, J., dissenting in *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950); cf. *Best v. United States*, 184 F.2d 131 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951). As Justice Black made clear, not every part of the Bill of Rights would be held applicable in occupied territory. For one thing, it seems probable that the introduction of some of the refinements of the Bill of Rights in favor of criminal defendants might, in countries where criminals have traditionally been given shorter shrift, collide with the occupant's duty to restore and ensure public order and safety.

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