THE LAW OF BELLIGERENT OCCUPATION:
BASIC ISSUES

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The formative period of the law of belligerent occupation is that between the Napoleonic Wars and the First World War. This body of law owes its existence to a dual impulse and fulfils two closely related functions. The first consists in drawing a firm line between wartime occupation and any pretention to the acquisition of a definitive territorial title by way of unilateral annexation. It, therefore, emphasises the purely provisional character of belligerent occupation.

The second of the functions of the law of belligerent occupation is to give effect, primarily if not exclusively, to the standard of civilisation. For the very reason that the occupant — or Occupying Power as he is termed in Geneva Red Cross Convention IV of 1949 — must not treat enemy territory under his control as his own, his discretionary powers require to be firmly curbed. This is made easier by the fact that occupied territory is limited to invaded enemy territory outside the actual fighting zones of land warfare.

As it was put in the Award in the Arbitration between Germany and Portugal (1950), the obligations imposed on the Occupying Power by the law of belligerent occupation may be infringed by any act contrary to international law which was ordered or tolerated by the military or civil occupation authorities. In order to determine which acts of an Occupying Power or its occupation authorities are in conformity with international law with, perhaps, greater precision, it is advisable to establish clearly the governing, as distinct from the more specialised, rules in this compact body of law. The functional difference in emphasis between the law of belligerent occupation and the rules of warfare stricto sensu will then become more easily apparent. Moreover, this division will provide a commensurate perspective in which to analyse — albeit not in this paper — the more specialised rules of the law of belligerent occupation.
I — LEGAL FOUNDATIONS

Since the Hague Peace Conferences of 1899 and 1907, the law of belligerent occupation is conveniently codified in the fifteen Articles of Section III of the Hague Regulations on Land Warfare. In Geneva Red Cross Convention IV of 1949, a number of the relevant rules have received further clarification and amplification.

As in relation to other codifications of the laws and customs of land warfare,4) so in relation to the law of belligerent occupation, the question arises whether these treaty provisions are merely declaratory of international customary law or are of a constitutive character and, therefore, binding only on parties to these conventions.

On the international judicial level, the issue was considered first in the case of Questions concerning Danube Shipping (1921) between some of the former Allied and Central Powers. The Sole Arbitrator proceeded with considerable caution. In the view of Austria and Hungary, Section III of the Hague Regulations on Land Warfare of 1907 was declaratory of international customary law. The other parties to the proceedings did not seriously challenge this proposition.

In these circumstances, the Arbitrator accepted the Austro-Hungarian submission, but only »for the purpose of this decision«.5) Having rendered this decision, the Tribunal, as an ad hoc international judicial institution, became functus officio. Thus, this qualification would be pointless if it were understood as a reservation of the Arbitrator’s freedom of appreciation in any subsequent phase of the same case or any other case between the same parties. The reservation rather puts the emphasis on acquiescence by the parties who were entitled to object to the equation of the laws and customs of land warfare with Hague Convention IV of 1907. It expressed the Arbitrator’s willingness to treat this acquiescence as an informal consensual understanding between the parties on the law which it was for the Tribunal to apply.

The International Military Tribunals of Nuremberg and Tokyo went considerably further. In the Nuremberg Judgment (1946), it was held that, by 1939, the rules on belligerent occupation had been »recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war«.6) Moreover, the Tribunal specifically pointed out the declaratory character of the Articles of the Hague Regulations of 1907 for the protection of the personal and proprietary rights of the inhabitants of occupied territories and the prohibition of general penalties for the acts of individuals.7) The Tokyo Tribunal adopted the same general line of reasoning.8)