

Bk 4

LAW ON THE DEPORTATION AND EMPLOYMENT OF FOREIGN
CIVILIAN WORKERS AND CONCENTRATION CAMP INMATES

It is contended that the forcible deportation of civilians from occupied territory was perfectly lawful. The argument made in this connection by the ostensible leader of defense counsel needs an answer, if for no reason other than to indicate the nature of the principal defenses upon this phase of the case.

The substance of the argument is as follows. There exists in The Hague Rules of Land Warfare no provision explicitly prohibiting the use of manpower from occupied territories for the purpose of war economy. Article 48 is certainly not conclusive...Reference to international common law is not more conclusive. For the only case in modern history, the conscription of Belgian labor during the first world war has remained a completely open question as regards its admissibility under international law."

It is, therefore, insisted that the prosecution's position with respect to wholesale deportation on a compulsory basis of members of a civilian population of occupied territories "is based on a fundamental misconception of the first rule of war, viz., that measures necessary for achieving the purpose of war are permissible unless they are expressly prohibited, and that methods required for achieving the purpose of war are determined by the development of war into total war, especially in the field of economic warfare."

In principle this is the same argument made in connection with the asserted proposition that the concept of total war operated to abrogate The Hague Rules of Land Warfare. But the reference to the deportation of Belgian labor to Germany during the first world war requires an additional answer, if for no other reason than to keep

the record straight. That crime on the part of imperial Germany caused world wide indignation. (1)

The deportations began after the German Supreme Command had issued its notorious order of October 3, 1916, "concerning restrictions of public relief." Shortly prior thereto the Reich Chancellery had declared in an expert opinion that "'under the law of nations, the intended deportation (Auschiebung) of idle (arbeitschene) Belgians to Germany for compulsory labor can be justified if (a) idle (arbeitschene) persons become a charge of public relief; (b) work cannot be found in Belgium; (c) forced labor is not carried on in connection with operations of war.....Hence, their employment in the actual production of munitions should be avoided.'" (2)

The obvious subterfuge lies in the fact that the measure was ostensibly directed against vagrants to combat unemployment in Belgium as an economic measure. But no one was deceived by this pretense and it was soon abandoned in a manner which indicated an awareness of the illegality of the procedure.

The protests were so wide spread and vigorous that the Kaiser was forced to retreat. These protests were based upon either the general principles of international law and humanity or specifically upon The Hague Regulations. For instance, the United States Department of State protested "against this action which is in contravention of all precedent and of those humane principles of international practice which have long been accepted and followed by civilized nations in their treatment of noncombatants in conquered territory." (3)

- (1. Oppenheim Lauterpacht, International Law 5th Edition London, 1935, p. 353
- (2. American Journal International Law, Volume 40, April, 1946, p. 309.
- (3. G. H. Hackworth, Digest of International Law, Vol. VI, Wash., D. C., 1943, p. 399.

The protest of the Netherlands Government pointed out the incompatibility of the deportations with the precise stipulations of Article 52 of the Hague Regulations. It was pointed out by Professor James W. Garner, scholar and author of high repute, that if "a belligerent were allowed to deport civilians from occupied territory, in order to force them to work in his war industries and thereby to free his own workers for military service, this would make illusory the prohibition to compel enemy citizens to participate in operations of war against their own country. 'The measure must be pronounced as an act of tyranny, contrary to all notions of humanity, and one entirely without precedent in the history of civilized warfare.'" (4)

Negotiations through diplomatic and church channels to repatriate the deportees and stop the practice were partially successful. From February, 1917, Belgians were no longer deported from the Belgian "Government General" and the Kaiser promised that by June 1, 1917, deportees who would not volunteer to remain in Germany would be repatriated.

Nevertheless, long after the end of the first world war, the unsuccessful effort of the Kaiser's Government was to an extent upheld in Germany. A parliamentary Commission created by the German Constituent Assembly to investigate charges made against that nation of having violated international law during the war by a majority report submitted July 2, 1926, stating that the deportations had been in conformity with the law of nations and, more particularly, with the Hague Regulations. The report proceeded upon the theory that "the workers in

(4. American Journal of International Law, Vol XI, Jan., 1917, p. 106, & J. W. Garner, International Law and the World War, New York, 1920, Vol. II, p. 183.

question did not find sufficient opportunity to work in Belgium and that the measure was indispensable for re-establishing or maintaining order and public life in the occupied territory.'" (5) The Belgian Minister of Foreign Affairs expressed the sentiment of the civilized world when he declared that his country had erred in its belief "'that at least on this point; the war policy of the Kaiser's Government would no longer find defenders.'" (6) And it should be noted in this connection that even a minority of the German parliamentary commission above mentioned found no justification for the practice and upon the other hand, squarely condemned it.

It is apparent, therefore, that learned counsel's contention that "the conscription of Belgian labor during the first world war has remained a completely open question as regards its admissibility under international law," is based upon the fact that a majority of a committee appointed by the parliamentary body of Republican Germany found it to be in accord with the law of nations. We think it must be conceded that this is at least rather thin ground upon which to establish a negation of international customary law. However this may be, it is certain that this action by the majority of the committee of the German body did not operate to repeal the applicable Hague Rules of Land Warfare, particularly Article 52, which in the present case was shown beyond doubt to have been violated. Deportees were not only used in armament production in the Krupp enterprise, but

- (5. American Journal International Law, Vol. 40, April, 1946, p.312.
- (6. Belgian Chamber of Representatives, session July 14, 1927. Documents Legislatifs, Chambre des Representants, No. 336. Passelecq, pp. 416-433.

in the latter years of the war the production of armament on a substantial scale reached could not have been carried on without their labor.

This was not only a violation of the Hague Rule of Land Warfare but was directly contrary to the expert opinion of the Reich Chancellery hereinabove referred to which preceded the order of the German Supreme Command of October 3, 1916, for the deportation of Belgians. As above indicated, that opinion, though providing a subterfuge for the illegal conduct, did annex as one of the conditions "that forced labor is not carried on in connection with operations of war... Hence their employment in the actual production of munitions should be avoided."

The law with respect to the deportation from occupied territory is dealt with by Judge Phillips in his concurring opinion in the United States of America vs. Milch decided by Tribunal No. II. We regard Judge Phillips' statement of the applicable law as sound and accordingly adopt it. It is as follows:

"Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime. If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power

over its citizens. Article 43, 46, 49, 52, 55 and 56, Hague regulations which limit the rights of the belligerent occupant, do not expressly specify as crime the deportation of civilians from an occupied territory. Article 52 states the following provisions and conditions under which services may be demanded from the inhabitants of occupied countries.

- (1) They must be for the needs of the army of occupation.
- (2) They must be in proportion to the resources of the country.
- (3) They must be of such a nature as not to involve the inhabitants in the obligation to take part in military operations against their own country.

"Insofar as this section limits the conscription of labor to that required for the needs of the army of occupation, it is manifestly clear that the use of labor from occupied territories outside of the area of occupation is forbidden by The Hague Regulation.

"The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country.

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"The third and final condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose

of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods.

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"Article II (1) (c) of Control Council Law No. 10 specifies certain crimes against humanity. Among these is listed the deportation of any civilian population. The general language of this subsection as applied to deportation indicates that Control Council Law No. 10 has unconditionally contended as a crime against humanity every instance of the deportation of civilians. Article II (1) (b) names deportation to slave labor as a war crime. Article II (1) (c) states that the enslavement of any civilian population is a crime against humanity. This Law No. 10 treats as separate crimes and different types of crime 'deportation to slave labor' and 'enslavement.' The Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying power are crimes against humanity."

In connection with the subject of deportation of civilians from occupied territory, it is interesting to note that as shown by a document introduced by the defense, General Thoenissen was dismissed from the service by the High Command during World War II because of his "refusal to violate" the laws of war and to deport French workers to Germany.

The deportation of Belgians to Germany also was over the vigorous protests of the military commander in Belgium, General von Falkenhausen. With reference to Sauckel's order introducing a compulsory labor service for the Belgians, he deposed that "this was done against my explicit and constant protest for I had various objections against a compulsory labor allocation and considered it more important to keep the indigenous economy in motion."

That the employment of concentration camp inmates under the circumstances disclosed by the record was a crime there can be no doubt. The conclusion is inescapable that they were mostly Jews uprooted from their homes in occupied territories and no less deportees than many of the other foreign workers who were forcibly brought to Germany. The only difference was that they had to go through all of the horrors of a concentration camp under the supervision of the SS before they finally landed at the firm of Krupp. That these persecutees had been arrested and confined without trial for no reason other than that they were Jews is common knowledge and in fact not controverted. The subject is dealt with exhaustively by the judgment of the IMT and there is no need to add anything to what is there said to show the unspeakable horrors to which these unfortunate people were subjected. However, in the present connection, one or two excerpts from the judgment are pertinent. It is there recited that "the Nazi persecution of Jews in Germany before the war, severe and repressive as it was, can not compare, however, with the policy pursued during the war in the occupied territories."

After referring to the fact that in the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all Europe, the judgment continues: "Part of the 'final solution' was the gathering of Jews from all German-occupied Europe in concentration camps. Their physical condition was the test of life and death. All who were fit to work were used as slave laborers in the concentration camps." The "final solution" meant extermination.

Under the facts of this case it is obvious from what has been said as to the law that the employment of these concentration camp inmates was also a violation of international law in several different particulars.

In this connection it is argued that the defendants had scant knowledge of the persecution of the Jews by Nazi leaders. This can be justly characterized as no more than a gesture.

The fact was common knowledge not only in Germany but throughout the civilized world. Whether this was true in all the horrifying and gruesome details is immaterial to the legal question.

Moreover, apart from the fact that the Krupp activities at Auschwitz hereinabove detailed gave ample opportunity to know the true situation, there is evidence introduced by the defendants which directly refutes the contention that the officials of the firm lacked knowledge of the persecution of the Jews on racial grounds. Among other items is the affidavit of Mickenschrieber. It was offered along with other documents to show that the officials of the firm were not in accord with the attitude of the Nazi regime toward Jews. But it shows also that without doubt they knew of that abominable policy as early as 1936. The affidavit shows this so conclusively that it is worthwhile to quote from at some length.

After deposing that one Robert Waller had been in the service of the firm as an electrical engineer for twenty years, the affiant continues:

"From 1936 on his working associates brought pressure to bear on the Firm, because of his non-Aryan descent (Herr Waller is a Jewish), with the aim of having Waller dismissed. Herr Ihn did not yield to the demands of the employees, however. At his behest Herr Waller was given protection by designated persons, who always intervened on his behalf, shielded him in the campaign of persecution against him, and later provided him with a special place of work, apart from the other workers. Furthermore, thorough-going efforts were made to find a position abroad for him. On 9 November 1938, the day of the general persecution of the Jews in Germany, the employees as well as the Vertrauensrat (Confidential Council) at the time categorically demanded the immediate dismissal without notice of Herr Waller. According to this there was no longer any possibility of retaining Herr Waller. However, without the persons in power knowing of it, by order of Herr Ihn, Herr Waller was paid a lump sum, corresponding to his salary, which he would have received had he been given regular notice (about 8 month's salary), in order to enable him to emigrate, as he was contemplating doing. Moreover, after the war the personnel manager made amends to Herr Waller, in a manner which met his satisfaction, for the wrong done to him at the instigation of working associates."