Part 5: Beyond 'Peace Through Law': The Use of Law and Its Records as Vehicles of Resistance and Change

Chapter 13 Resistance Through Law: Belgian Judges and the Relations Between Occupied State and Occupying Power

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The legal aspects of war are not limited to questions of respect or violation by the belligerent states of their obligations under international law. War also has many consequences in domestic law, and more specifically in the criminal law, private law, and private international law of the belligerent states (whether in a situation of occupation or not). Depending on the interpretation given to these consequences, war may turn law from an instrument of peace and reconciliation into an instrument of resistance. During the First World War, German-occupied Belgium and its courts had been a legal laboratory of the greatest interest in this respect. Understandably, neither the drafters of the Versailles Peace Treaty nor the League of Nations made much of this experience, since their priorities were to terminate and prevent war rather than to regulate it. However, despite its limited impact on positive law, occupied Belgium definitely set standards that remained relevant afterwards—both with regard to judicial independence in times of occupation and to the power of judges to resist major violations of international law. That is why this contribution is focalized on that state, even if some judgments from other countries will also be mentioned.

1. Overall Approach

The main (but not the only) legal basis of the relations between the occupied state and the occupying power is Article 43 of the Appendix to the 1907 Hague convention. Among Belgian courts, discrepancies with regard to the interpretation of that article arose at the beginning of the First

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World War. The most audacious of these interpretations (which also happened to be the most interesting one) ended up prevailing.

1.1. Article 43 of the Annex to the 1907 Hague Convention

On 18 October 1907, at the end of the second international peace conference held at The Hague, numerous conventions were signed. One of the most important of these conventions was the Convention Respecting the Laws and Customs of War on Land. It was ratified by Austria–Hungary, Belgium, France, Germany, Luxembourg, Netherlands, Russia, United Kingdom, United States, and 21 other powers at that time. It entered into force before the First World War. The very text of the convention is complemented by a most important Annex entitled Regulations Concerning the Laws and Customs of War on Land.[1]

> Article 43 of the Annexed Regulation provides that:
> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[2]

The proceedings of the Hague conference indicate that this provision 'implies no recognition by the legal government, of any right of the occupant on the occupied territory.'[3] As to the meaning of the phrase 'public order and safety [*l'ordre et la vie publics*]', the proceedings indicate that it refers to 'the material order, security or general safety [*l'ordre matériel, la sécurité ou la sûreté générale*]', on the one hand, and 'the social functions and ordinary transactions which constitute the everyday life [*les fonctions sociales, les*

1 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277.

2 ibid. The French version of this provision is written as follows: *'L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays'.*

3 Albert Mechelynck, *La Convention de La Haye concernant les lois et coutumes de la guerre sur terre, d'après les Actes et Documents des Conférences de Bruxelles de 1874 et de La Haye de 1899 et 1907* (Hoste 1915) 334–348 (especially 334 and 344).

transactions ordinaires qui constituent la vie de tous les jours]',[4] on the other hand.

1.2. The Belgian Interpretation

The Belgian courts had to interpret Article 43 from the very beginning of the First World War. Initially, two opposed interpretations emerged: that of two very courageous judges (Raymond de Ryckère and Maurice Benoidt) on one side, and that of the majority on the other.

1.2.1. The Majority's Interpretation

According to the interpretation, which was initially that of the majority, Article 43 of the Regulation annexed to the Convention of 1907 transferred the legitimate legislative power to the occupier. The opportunity to adopt this interpretation was given by a decree of 20 November 1914 of the German Governor-general of occupied Belgium, which conferred upon Belgian justices of the peace (the lowest courts in Belgium) jurisdiction for all disputes between landlords and tenants resulting from the circumstances of the war (destruction of the rented property, etc). It seems that a majority of the Belgian justices of the peace accepted to exercice that jurisdiction, despite the fact that it had been conferred upon them by the German Governor-general, in violation of the Belgian Constitution and Belgian laws. Their argument was that 'Considering Article 43 of the Annex of the 1907 Hague Convention, the decrees of the German Governor-general have the force of law in Belgium.'[5]

1.2.2. The Interpretation of de Ryckère and Benoidt.

At the same moment, another interpretation was adopted by at least two extremely courageous judges, Raymond de Ryckère (Judge at the Brussels

4 Id, eod loc.

5 J P Châtelet, 19 Febr 1915, *Genard v Stainier*, Pasicrisie belge 1915 (III) 3; J P Antwerp, 5 and 11 Febr 1915, *De Buysscher v Jules van Beylen*, and *F Braed v Alphonse Sillis De Mayer*, Pasicrisie belge 1915 (III) 5–7; J P Namur, 16 March 1915, *Gisquière v Rossel*, Pasicrisie belge 1915 (III) 3–5; and numerous other judgments published in the same journal.

Court of First Instance) and Maurice Benoidt (vice-chairman of the same court). The judgments granted by de Ryckère were the most elaborated:

> a) Currently, there are two legal orders in Belgium: that of the occupying power and that of the occupied state. The Belgian courts must only obey the rules of the Belgian legal order. If the occupant wants to be obeyed by courts in Belgium, it has to create its own courts.
> b) During the occupation, the Belgian courts have the duty to continue to judge as a long as the source of their legitimacy remains.
> c) The source of the legitimacy of the Belgian political powers is the election. The source of the legitimacy of the Belgian judicial power is independence.
> d) As a long as the independence of the Belgian judges is respected, they have to continue to judge; would their independance be infringed, they would have to cease carrying out their functions.[6]

1.2.3. 'Whereas the Independence of the Belgian Courts Has Been Infringed...'

Until 1918, Judges de Ryckère and Benoidt remained isolated in their interpretation of wartime judicial independence—which the Belgian *Cour de Cassation* formally rejected in a 1916 landmark decision.[7] It was the German occupiers' divisive policies that eventually made the other Belgian judges side with their colleagues de Ryckère and Benoidt—in particular, their decision to incite a group of Flemish nationalists to constitute itself as a 'Council of Flanders [*Raad van Vlaanderen*]'.[8] Between 11 November 1917 and 21 January 1918, this German-backed *Raad van Vlaanderen* pronounced the deposition of the Belgian government, proclaimed the 'Inde-

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6 Trib civ Brux, 8th ch [de Ryckère], 20 Febr 1915, *De S... c J...*, J T 1918, col 991–994; Trib civ Brux, 8th ch [de Ryckère], 4 March 1915, *Debay. Louage*, J T 1918, col 994–995; Trib civ Brux, 1st ch [Benoidt], 22nd Apr 1915, *Veuve Piron c Deridder*, J T 1919, col 7–10; Trib civ Brux, 8th ch [de Ryckère], 6 May 1915, *Wanda Kulpe c Veuve Malherbe-Rubens*, J T 1918, col 995–998; Trib civ Brux, 8th ch [de Ryckère], 31st July 1915, *B... c L...*, J T 1918, col 998–999; Trib arb Verviers [Désiré Godard], 1st March 1917, *D'Aaoust c Torbach*, J T 1919, col 69–72; Trib civ Brux, 8th ch [de Ryckère], 10 Nov 1917, *Bessels c Meulemans*, J T 1919, col 6–7; Trib civ Brux, 8th ch [de Ryckère], 24 Nov 1917, *Piedferme c Spitaels*, J T 1919, col 7–8; Trib corr, ch temp [de Ryckère], 30 Jan 1917, *Proc Roi c Saeremans*, J T 1918, col 999–1000.

7 C cass, 1st civ ch, 20 May 1916, Pasicrisie belge 1915–1916 (I) 375, 416–418.

8 A detailed account of the events, relying on many reproduced documents, can be found in [Anonymous], 'Une page de gloire de la Magistrature belge', J T 1918, col 946–952, 963–967.

pendence of the Flemish State' and appointed its 'ministers'. The judges of the Court of Appeal of Brussels reacted by using an old procedural provision which allowed them, by a unanimous vote, to order to the Public Prosecutor General to initiate proceedings against 'the members of the de facto group having taken the name of Raad van Vlaanderen'. The resolution was voted unanimously by the judges of the Court of Appeal, the prosecutions were initiated, certain members of *Raad van Vlaanderen* were arrested and presented by the Belgian police before the Belgian investigating criminal judge. The German army came to the Brussels Courthouse to free them by force and to arrest the chairmen of all the Chambers of the Court of Appeal. Three days later, on 11 February 1918, and in the following days, all the courts of the Kingdom decided that 'Whereas the independence of the Belgian courts has been infringed', they had to 'cease carrying out their functions'.[9]

This led to a period of anarchy throughout the country. Crime increased considerably. The occupier had to create its own courts and administration by transferring judges and civil servants from Germany. While the war had entered its most difficult phase for the German Reich, the occupier suddenly needed to devote valuable resources to try to regain control of the situation in Belgium. The 'Belgian judges' strike' (even if it was not perfectly followed, for instance in the courts for the protection of the children) certainly contributed—albeit to an extent difficult to determine precisely—to the final defeat of Germany. This had consequences on the interpretation given to Article 43 of the 1907 Regulation during the Second World War.[10] On the Belgian as much as on the German side, the interpretation given by the judges de Ryckère and Benoidt was considered in 1940 as the basis for the new *modus vivendi*.

2. *Variety of Concrete Aspects*

The 'Belgian judges' strike' is the ultimate consequence of a conception of the relations between the legal order of the occupant and that of the occupied state characterized by the principle of non-permeability. When adopted, this principle prevents the application of the legal norms of the occupant by the courts of the occupied state. However, a more precise analysis results in noting that the effects that the occupied state gives to the legal

9 C cass, gen assembly, 11 Febr 1918, J T 1918, col 949–950.
10 See below, 3.

norms of the occupant, whether simply conceivable or actually observed, are not limited to the assertion of their non-applicability. This is made understandable by a distinction between categories of effects, supplemented by some illustrations.

2.1. Categories of Possible Effects

Those who study the relations between legal orders (especially in private international law and in domestic legal rules concerning the effects given to religious norms) are accustomed to distinguish between two types of operations, known in German as *Anwendung* (application) and *Berücksichtigung* (taking into consideration).[11]

A norm (A) is taken into consideration on the occasion of the application of a rule (B) when (A) plays a role at the stage of the verification of the conditions of (B).

Ex: Rule (B) provides that b1 + b2 + b3 → X

It is conceivable that a norm (A) plays a role when the conditions b1 + b2 + b3 are checked. This role may consist of an addition of condition, a substitution of condition, or a confirmation of condition.

Addition of condition. A French penal provision applies to the infringements of intermediate category committed by a French citizen in a

11 On that mecanism, see, *inter alia* Patrick Kinsch, *Le fait du prince étranger*, (th Univ Strasbourg Robert Schuman 1992/LGDJ 1994) 323–470; Didier Boden, *L'ordre public, limite et condition de la tolérance. Recherches sur le pluralisme juridique* (th Univ Paris 1 Panthéon-Sorbonne 2002, 2 vol) 174–193, 488–490, 651–653 (note 1346), 702–703 (note 1421), 704–709 (note 1428); Estelle Fohrer-Dedeurwaerder, *La prise en considération des normes étrangères* (th Univ Panthéon-Assas Paris 2 2004/LGDJ 2008); Hélène Chanteloup, 'La prise en considération du droit national par le juge communautaire. Contribution à la comparaison des méthodes et solutions du droit communautaire et du droit international privé' [2007] Rev crit DIP 539–572; Didier Boden, 'Les effets en droit international privé français de l'appartenance d'une personne à un prétendu groupe ethnique ou d'une appartenance comparable' in Sylvain Bollée and Étienne Pataut (eds), *L'identité à l'épreuve de la mondialisation* (IRJS 2016) 247–260. *Adde*, CJEU, 18 October 2016, *Republik Griechenland v Grigorios Nikiforidis*, case C-135/15, ECLI:EU:C:2016:774, spec pts 40–55.

foreign country if the facts committed abroad carry criminal liability according to the foreign law.[12]
French applicable rule:

French conditions b1 + b2 + b3 → French penalty

Foreign norm about to be taken into consideration:

Foreign conditions a1 + a2 + a3 → Foreign penalty

Application of the French rule taking into consideration the foreign norm by addition of conditions:

b1 + b2 + b3 + a1 + a2 + a3 → French penalty

Substitution of condition. The fulfilment of the requirements of the norm taken into consideration will act as the fulfilment of the requirements of the applicable rule. The simplest way to illustrate it today consists in taking the example of the ERASMUS exchange programme.

French applicable rule:

French conditions b1 + b2 + b3 → French diploma

Foreign norm about to be taken into consideration:

Foreign conditions a1 + a2 + a3 → Foreign diploma

Application of the French rule taking into consideration the foreign norm by substitution of conditions:

b1 + b2 + a3 → French diploma

Confirmation of condition (**or re-characterization**). The fulfilment of the requirements of the norm taken into consideration and the fulfilment

12 French Penal Code (*Code pénal*), Art 113-6, subpara 2: 'French criminal law ... is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed'.

of the requirements of the applicable rule are checked separately (hence it is not a substitution), but the requirements of the norm taken into consideration are not presented as necessary (hence it is not an addition). It is odd, but quite frequent.

French applicable rule:

French conditions b1 + b2 + b3 → French consequences

Foreign norm about to be taken into consideration:

Foreign conditions a1 + a2 + a3 → Foreign consequences

Application of the French rule taking into consideration the foreign norm by substitution of conditions:

b1 + b2 + b3 (and, by the way, a1 + a2 + a3) → French consequences

Another classification can be made, according to whether the taking into consideration: (1) expresses respect, friendship and esteem towards the norm taken into consideration and the legal order from which it comes; (2) expresses disrespect, enmity and hostility towards the norm taken into consideration and the legal order from which it comes; (3) expresses neither respect nor hostility.

The two classifications may also be combined as follows: [13]

	Friendly	Hostile	Neither friendly nor hostile
Addition	The present decision will apply after obtaining the agreement of the occupying authority	Law against the wearing of the uniform of the enemy	Law on the compensation by the ex-occupied state for the damage caused by the ex-occupant
Substitution	The decrees of the German Governor-general (GGG) have force of law in this country		
Confirmation	Contracts concluded to evade the decrees of the GGG are *contra bono mores*	Contracts between individuals concluded to pursue projects of the occupant are *contra bonos mores*	The '*fait du prince occupant*'[14] is a cause of exoneration

2.2. Three Illustrations

Numerous illustrations could be given of the acceptance or refusal of a given domestic legal order to give effect to the norms of another state's legal order when each one is at war with the other, whether in a situation of occupation or not.

13 Some of the following examples are established facts, others are theoretical possibilities.

14 '*Fait du prince occupant*' : specific case of *force majeure*, where the event that prevents one or both parties from fulfilling their obligations under the contract is an act of the occupying power.

2.2.1. Criminal Law

Article 491 of the Belgian Penal Code (*Code pénal*) punishes the *abus de confiance* (*breach of trust*). In 1917, the recruitment office of the German army in Belgium gave 50 Francs to a petty criminal to let him buy the necessary equipment for travel to Germany, where he was to join the German army. A few days later, the German recruit-to-be presented himself at a Belgian police station to turn himself in for various robberies and swindles. He was presented to the Criminal court of Brussels on 8 May 1917. One of the questions the court had to answer was whether the recruitment office of the German army had been victim of a breach of trust. According to the court,

> Article 491 Code pénal does not protect the undertakings that, established under the auspices of the occupant, have the only goal of supporting its military, economic and political interests, eg, by providing recruits, which constitutes a crime against the external security of the Belgian State, punishable by Article 115 Code pénal. Article 491 is not applicable when the diverted money was given to the defendant with the only aim of making an illicit use of it, contrary to the Belgian law, ... an immoral use, or for criminal ends.[15]

This decision can be analysed as a refusal of a friendly taking into consideration by confirmation of condition.

2.2.2. Contract Law

According to Article 1722 Code civil, if, during the term of a lease, the leased property is entirely destroyed by *force majeure*, the lease contract is automatically terminated without any indemnity. If it is destroyed only partly, the tenant can request a reduction of the rent or the termination of the contract. If the property is located in the 'military rear area' (*Etappengebiet*, near the combat zone) and if the occupant prohibits the tenant to use it as it was meant by the contract, is this a case of *force majeure*? The Civil court of Ghent answered affirmatively.[16] This decision can be analysed as a

15 Trib corr Brux, ch temp [de Ryckère], 8 May 1917, *Proc Roi c Terclavers, J T* 1919, col 133–137.

16 Trib civ Ghent, 28 Jul 1915, *Van den Bulcke c épouse Frohberg*, *Pasicrisie belge* 1915 (III) 116.

taking into consideration by confirmation of condition neither friendly nor hostile.

2.2.3. *International Private Law (Outside Occupied Belgium)*

Let us finish with a last example of relations between state legal orders in wartime which shows once more the variety of the possible effects and how they are sometimes surprising. The British *Trading with the Enemy Act 1914* had legal repercussions in many countries … including in Germany. The most famous judgment on this subject was given in 1918 by the *Reichsgericht* (the civil and criminal supreme court of the German *Reich*). In this case, a German tradesman and an English company had concluded on 1 January 1914 a framework contract concerning future sales of extract of Quebracho (a tree used for its tannin). When the war started, the English company still needed to deliver 6,360 tons of extract to the German party. The company refused to carry out its obligations with the reason that, in the event of performance of the contract, it would have been liable for heavy penalties under the British *Trading with the Enemy Act 1914*. The German party prosecuted the English party before the German courts, and claimed damages for failure to perform the contract. It was dismissed. According to the *Reichsgericht*, admittedly the German courts had to refuse the application of this British law because it was contrary to public policy of German private international law. But in this case the law of the contract was German law, not English law. Under German civil law, *force majeure* exonerates the debtor from his liability. As the British Act fulfilled the criteria of the definition of *force majeure* in German civil law, the judges concluded that it was not applicable, but had to be taken into consideration.[17] This decision can be analysed as a taking into consideration by confirmation of condition neither friendly nor hostile.

17 RG, 2 ZivS, 28 Jun 1918, *RGZ* 93 [1918] 182–185, Nr 59, *S... F... g Forestal Land Timber and Railways Company*.

3. Epilogue

Before the beginning of the Second World War, the *Regierungspräsident*[18] of Cologne, Eggert Reeder, was put in charge of preparing the legal and administrative aspects of the future occupation of Belgium by Germany. He studied what had happened in 1914–1918 and was very impressed by the 'Belgian judges' strike' of 1918. He concluded that, if the *Reich* wanted to occupy Belgium in the least expensive possible way, it would have to respect the independence of the Belgian judges as much as possible and as long as possible. In 1940, the strange relations between occupying power and occupied state resumed, with acceptances and refusals of application, with acceptances and refusals of taking into consideration, and even with a very short judges' strike in 1942.[19]

18 *Regierungspräsident*: German homologue of a French *préfet*, ie a local civil servant appointed by the central government at the head of an administrative district.

19 Didier Boden, 'Le droit belge sous l'Occupation' in Dominique Gros (ed), *Le droit antisémite de Vichy* (30–31 Le Genre humain, Seuil 1996) 543–558; Boden, *L'ordre public…* (n 12) 470–490.