Humanizing the Laws of War

Selected Writings of Richard Baxter

Richard Baxter

Edited by Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel, and Charles Keever

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The Selected Writings of Richard Baxter

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HUMANIZING THE LAWS OF WAR

Contents

Introduction

Richard Baxter was the preeminent figure in the field of the law of war during the period 1950 to 1980. He was an outstanding scholar as is evident from the articles republished here. But he was also active in a variety of other ways. He participated in the redrafting of FM 27–10, the U.S. Army's field manual on the Law of Land Warfare in 1956. He took part in diplomatic conferences and negotiations. He urged Congress to act to curb poisonous weapons. As Counselor on International Law in the Department of State he was active in the formulation of the Foreign Sovereign Immunities Act of 1976. He left no doubt about his convictions. He consistently favored moves that would enhance the protections afforded to those injured or threatened by armed conflict. An outstanding example was his reaction to the position advanced by a group of scholars that the law of war was not applicable to the United Nations.

> How can the view that the law of war is not applicable to a United Nations action be reconciled with the humanitarian inspiration of the law of war? The Committee's conclusion would seem to suggest that the laws relating to prisoners of war, the sick and wounded, belligerent occupation, are not of their own force applicable to the United Nations forces. If these bodies of law are set aside, one can only conclude that the United Nations forces are not to be influenced by humanitarian considerations in the conduct of hostilities. It must be that the United Nations will be guided by some new standard of humanity, yet unknown to us when it starts the selective process of deciding what principles will guide its conduct.

Fortunately the Baxter view prevailed and UN forces are subject to humanitarian law.[1]

A Biography of Richard Baxter

Stephen M. Schwebel

Richard R. Baxter was born in New York City in 1921 and died in Cambridge, Massachusetts in 1980, at the age of 59. His death was tragically premature, not only because of his age but because it cut short, at its outset, his service as a Judge of the International Court of Justice. He sat from February 1979 to September 1980,

[1] Frederic Kirgis, *The American Society of International Law* 248 (2006).

and fell gravely ill during the spring of 1980. He took part only in the momentous case of *United States Diplomatic and Consular Staff in Tehran.*

Judge Baxter was graduated from Brown University summa cum laude in 1942 and received an LL.B from Harvard Law School in 1948. Following wartime service as an enlisted man and officer, Baxter was in the Regular Army from 1947 to 1954. At the time of his resignation from the Army, he was Chief of the International Law Branch in the Office of the Judge Advocate General.

The Army sent Captain (shortly, Major) Baxter to Cambridge University in 1950 to work for a year with Professor H. Lauterpacht, Whewell Professor of International Law, who was widely acknowledged to be the world's leading international legal scholar. Lauterpacht had recently revised the British *Manual of Military Law* while Baxter was engaged in the revision of the United States *Rules of Land Warfare* made necessary by the adoption of the Geneva Conventions of 1949 and developments in the law of war that flowed from World War II and the Korean conflict. Baxter's year in Cambridge was a turning point in his career. Lauterpacht became a patron of Baxter's career as Arnold McNair had been a patron of his. He was instrumental in Baxter being appointed in 1954 to a research and teaching position at Harvard Law School which ripened into an appointment as a professor of law and the first holder of the Manley Hudson Chair of International Law. Baxter's early articles on the law of war were published in *The British Year Book of International Law*, then edited by Lauterpacht.

A product of Baxter's research period at Harvard Law School was the preparation of his monograph on *The Law of International Waterways.* In the latter part of his twenty years of teaching at Harvard Law School, he devoted a great deal of time and effort to the writing, together with Professor Louis B. Sohn, of a study on State responsibility for the U.N. International Law Commission. Baxter's widely published articles, comments and book reviews, not only on the law of war but also on other topics of international law such as the relationship between treaties and customary international law, were of exceptional quality.

Baxter devoted as much care to the preparation and conduct of his classes, and to the mentoring of his students, as he did to his scholarship. He taught torts and criminal law as well as international law in order to burnish his credentials both with professors and students, some of whom tended to treat international law as a subject removed from the mainstream of Harvard Law School's concerns.

Baxter was a member of the board of editors of the *American Journal of International Law* for many years, and the *Journal*'s editor-in-chief from 1970 to 1978. He was a superb editor. He worked at it relentlessly like a jovial demon. His comments on prospective manuscripts were detailed and constructive, or dispositive, as the manuscript merited. Many an author could have listed him as a co-author, so extensive and excellent were his annotations. The meetings of the board of editors, under his cheery chairmanship, were a delight. He would distribute a list of articles he had not thought worthy of submission to other editors for analysis but had rejected on his own authority; he disposed of a hundred or more each year, in addition to his other editing work. Each entry was accompanied

by a pithy dispositive comment worthy of *The New Yorker* magazine. The list was destroyed at the end of the meeting to avoid embarrassing those whose submissions had been rejected—an act characteristic of Baxter's concern for the feelings of others.

For two years, while editor-in-chief of the *Journal*, Baxter concurrently served as President of the American Society of International Law. Among his many contributions to the Society was the lead he took in organizing a student branch of the Society. That led to the creation of the Association of Student International Law Societies, which in turn has contributed to the proliferation of the publication of student international law journals.

Baxter was the first to propose and put into operation a moot court devoted to an international legal problem. That Harvard Law School experiment was the seed of what became the Jessup Competition (named by him). He played a primary role in the conception and launching of *International Legal Materials*. He was a regular contributor to *International Law Reports*, under the editorship of Professor H. Lauterpacht and subsequently, Eli Lauterpacht. While serving as Counselor on International Law of the State Department, he was influential in the establishment of the annual *Digest of United States Practice in International Law*. Earlier Baxter conducted a recurrent, short and intensive course on international law for mid-level officers at the Naval War College at Newport. He assembled a band of experts from the United States and abroad, such as his great friend from his Cambridge days, Eli Lauterpacht. The seminar problems Baxter skillfully devised were demanding and the faculty and officers who participated in the Baxter short course enjoyed a stimulating intellectual experience.

Baxter distinguished himself during his year of State Department service as Counselor on International Law, and was a leading representative of the United States in the Geneva conferences that concluded the Protocols to the Geneva Conventions on the Law of War.

Baxter's nomination in 1978 for election to the International Court of Justice was universally supported in the international law community. But it was a close thing, because President Carter, unaware of the nominating procedures prescribed by the Statute of the Court, had promised the nomination to a former Justice of the Supreme Court of the United States. The then Legal Adviser of the State Department made strenuous efforts to persuade the U.S. National Group to give effect to President Carter's commitment, but the Group, responsive to the overwhelming support for Baxter in the international law community, stood firm for Baxter's nomination. Once nominated, he was handily elected.

Had Baxter not been struck down by cancer in his 59th year, he would have served as a judge of the International Court of Justice with the distinction that had marked every phase of his career. His bitterly premature death grieved his legions of friends and admirers and deprived the Court of a great mind and great heart.

Guide to Baxter's Scholarship on Humanitarian Law

Detlev F. Vagts

A full listing of Richard Baxter's writings would cover a broad range of international law, including such basic topics as treaties and the formation of customary law. They appeared in a wide variety of places—in law journals, popular magazines, congressional hearings, lectures at the Naval War College, the Harvard Law School and the Hague Academy. Many of his works are difficult to access at this time.

One of Baxter's achievements is not reproduced here. He made a major contribution to the 1956 revision of FM 27–10, the Army manual on the Law of Land Warfare. However, that was an institutional publication and Baxter, one infers, did not agree with all of it.[2] He played a significant role in getting the 1956 project under way. The then extant version of the Manual dated to 1940 and had been overtaken by events in many respects. Baxter attended a conference in Cambridge, England and spurred on the American Society of International Law to support the project.[3] Though amended, the 1956 version guided many American officers over the years and remains the basic text.

As one turns one's focus to his oeuvre on humanitarian law we find such wide-ranging pieces as his classic article on the life and work of Francis Lieber, the progenitor of modern humanitarian international law.[4] Much of his work can be grouped around two problem areas. The first was the issue of the applicability of humanitarian law during conflicts involving combatants who do not belong to a nation state. The other was the need to protect non-combatant civilians from death and injury during conflicts, an issue of critical importance during World War II that remains undeniably significant.

Despite the hope that World War II had been the war to end wars, a hope that discouraged many from studying the laws of war, conflicts persisted. In the Baxter period non-state conflicts arose in the context of what were called wars of national liberation.[5] The peoples of Dutch, English, French, and Portuguese colonies were rising to claim independence and nationhood. Their fighters did not operate like regular armies. They struck at moments of opportunity and then disappeared into the jungle or the forest or into the mass of the peaceful population. They wore no uniform and had no commanders who could be held responsible for violations of the laws of war. They committed acts regarded as treachery by orthodox observers

[2] We have on file an early typewritten draft dated March 1, 1954, which we could furnish to any interested scholar.

[3] On this history see Donald A. Wells, *The Laws of Land Warfare: A Guide to the U.S. Army Manuals* 11, 18–20,176–78 (1992).

[4] "The First Modern Codification of the Law of War; Francis Lieber and General Order No. 100". The works and legacy of Francis Lieber have recently been re-examined in John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (2012).

[5] "The Geneva Conventions of 1949 and Wars of National Liberation" (Chapter 15); The Geneva Conventions of 1949 and Wars of National Liberation, International Terrorism and Political Crimes (Item 187).

and were ruthless about the losses suffered by their non-combatant fellow citizens. The long struggle of Algeria for independence from France incorporated all of these elements. Such fighters were basically guerillas, labeled by Baxter as "unprivileged combatants" not entitled to prisoner-of-war status if captured.[6]

Somewhat similar to those clashes was the long war in Vietnam which could be classified in various ways—as an interstate clash between the United States and Vietnam, as an uprising by the Viet Cong against the Western-oriented government of the Republic of Vietnam in Saigon, or as a mixture of the two. The United States and Republic of Vietnam armies fought against both uniformed regulars from the North and non-uninformed guerillas indigenous to the South. The other protracted struggle involving the United States was the Korean War of 1950–53, which was a confrontation between the armed forces of two states and entailed the establishment of a United Nations Command comprising large American forces and lesser but significant contributions by more than a dozen other countries as well as the army of the Republic of Korea. It terminated without a peace treaty.[7]

The United States avoided direct participation in the long lasting wars between Israel, the Arab states, and the population of the territories occupied by Israel.[8] Other hostilities did not involve the United States, such as those between India and Pakistan, between Iran and Iraq, and between the Communist and Nationalist armies of China. More complications were introduced by the new phenomenon of conflicts in which United Nations forces participated. Forces for Compliance with the Law of War (Chapter 7). As noted above, Baxter reacted forcefully to the idea that they are somehow exempt from compliance with law.

As of 2012 learning about the comparable set of issues is concentrated on "terrorism" and the battles waged by the United States to repel it. The concept of terrorism is difficult to define and one sees why Baxter took a skeptical look at terrorism (Chapter 10). Al Qaeda is an even stranger foe than guerillas since it often operates without appearing in public. Who is a member may be quite unclear and people may commit terrorist acts without being in any way organizationally connected with it. U.S. courts have treated the battle against Al Qaeda as a "war" for various purposes.[9] We have established military commissions designed after a World War II model.[10] The rules establishing them were hastily drafted and unclear in a manner that would have exasperated Baxter's orderly mind. One of the puzzles they create is the question of what constitutes a violation of the laws of war, a prerequisite for a military prosecution.[11] Does conspiring to aid a terrorist

[6] "So-Called 'Unprivileged Belligerency' Spies, Guerrillas and Saboteurs" (Chapter 2).

[7] "Armistices and Other Forms of Suspensions of Hostilities" (Chapter 17). For a recent study of the end of wars see Note, "The End of Al Qaeda? Rethinking the End of the War on Terror", 110 Colum. L. Rev. 1865 (2010).

[8] "The Law of War in the Arab-Israeli Conflict: On Water and on Land" (Chapter 9).

[9] *Hamdan v. Rumsfeld*, 553 U.S. 557 (2006); compare *Boumediene v. Bush*, 553 U.S. 773 (2008) (detention of "terrorist" suspects).

[10] *Ex parte Quirin*, 317 U.S. 1 (1942).

[11] To extend military jurisdiction to other crimes would violate the constitutional guarantees of the right to trial by jury. See Detlev Vagts, "Military Commissions: Constitutional Limits on their Role in the War on Terror", 102 Am. J. Int'l L. 573 (2008).

amount to such an act? Baxter with his proclivity to adhere to established rules would probably not have thought so. We have denied terrorists prisoner of war status. Baxter would have been aghast at the cruelties inflicted by our agents at Abu Ghraib, Guantanamo, and elsewhere, as aghast as he was at the atrocities at My Lai in Vietnam.

Baxter took a deep interest in weaponry, old and new, and in the ways it could be controlled so as to minimize injury to non-combatants. He wrote about poison gas, its use during World War I and the 1925 Geneva Convention that outlawed its use.[12] Nuclear warfare also drew his attention. He addressed the devastation of civilian homelands during World War II, in particular through area bombing, that caused demands for a revisiting of those issues. Meeting in Geneva the nations produced Additional Protocols to the 1949 Geneva Conventions in 1977. Along with George Aldrich, Baxter participated actively in the negotiations.[13] Although the United States did not ratify them it has regarded important portions of them as representing customary international law binding on all nations. As a result Air Force operations during the two Gulf wars were carefully planned and monitored so as to minimize civilian losses. Technical advances making weaponry more precise helped. Baxter would have been gratified to see the intense involvement of lawyers in the targeting process in those wars and in the fighting in Afghanistan.

At the end of his career Baxter took part in creating a collective writing—the judgment in the Tehran Embassy case in the World Court.[14] The opinion was joined by all the Western judges. Baxter must have been embarrassed by the failure of the clumsy American attempt to rescue the hostages by force.

In all of his writings Baxter displayed a straightforward, economical style. He was always realistic and unsentimental in appraising the claims of contending parties. He could sense what restrictions different countries and armies could be persuaded to accept. He drew upon an intimate knowledge of military affairs built upon his service in the United States Army. Although he could not predict developments any more than the rest of us he was constantly aware of change as in his "Perspective—The Evolving Laws of Armed Conflicts" (Chapter 13). This volume constitutes the only published collection of Baxter's writings on the law of war available to the armed forces, government leaders, scholars, and the public. They are as important and timely now as when they were written.

[12] "Legal Aspects of the Geneva Protocol of 1925" (with Thomas Buergenthal) (Chapter 8); "Legal Aspects of the Geneva Protocol of 1925 in The Control of Chemical and Biological Weapons" (Item 137). The United States is now committed by treaty to destroying all of its stock of such weapons.

[13] See George Aldrich, "The Laws of Land Warfare", 94 Am J. Int'l L. 42 (1980).

[14] United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), 1980 I.C.J. Rep. 3.

1

The Duty of Obedience to the Belligerent Occupant*

When enemy territory has been subjected to belligerent occupation, the inhabitants of that area are commonly said to be under a duty not to commit acts which would jeopardize the security of the occupant. Violations of this duty of obedience are often described in terms of 'war treason' and 'war rebellion'. However, there has been no agreement on the questions whether the juridical basis for this obligation is to be sought in international law, in the municipal law of the occupied state, or merely in the superior force of the occupant and whether its violations may accurately be described in terms borrowed from municipal law. The ruthlessness and disregard for international law which have characterized the conduct of belligerent occupations during two world wars have raised these questions in a particularly acute form. Although the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 profited from experience gained since the adoption of Hague Convention No. IV of 1907, it did not purport to be a complete recodification of the law of belligerent occupation.[1] The fundamental question of the relationship existing between the inhabitant and the occupying Power remains for the most part a problem of the common law of war and is illuminated only fitfully by explicit provisions of the new Geneva Convention.

The protection of the civilian population of occupied areas against oppression by the occupant has consistently been a guiding principle of the law of belligerent occupation. In the changing tides of warfare it is essential that, to the maximum extent compatible with the conduct of hostilities, the civilian non-combatant should be safeguarded in his person, his property, his loyalties, and in the legal order to which he is subject. It is inevitable, however, that the inhabitants of an occupied area will chafe under enemy rule and under the restrictions placed upon them in the interest of the occupant's security and that they will in numerous instances, acting either singly or in concert, commit acts inconsistent with the security of the occupying forces. The occupant must undoubtedly have the means

* This article first appeared in *The British Year Book of International Law*, Vol. 27, 1950, pp. 235–266. This article originally featured footnote numbering which restarted at each new page. For this republication the footnotes now run sequentially.

[1] Art. 154. See Gutteridge, 'The Geneva Conventions of 1949', in this *Year Book*, 26 (1949), pp. 318–19.

of dealing, and dealing severely, with such acts, whether or not they arise from hostile intent. It must be recognized, on the other hand, that there is a tendency for the occupant to project his anger indiscriminately upon the guilty and innocent alike and to impose excessive penalties on the wrongdoers when he is exposed to conduct prejudicial to his safety. On what juridical basis the legitimate protection of the occupant against hostile or dangerous acts may best be reconciled with the protection of civilians against arbitrary and unwarranted penalties and punishments is the problem to which this article is directed. To this end it will be necessary to consider the nature of the duty which the inhabitant owes to the occupant and the propriety of describing acts of resistance as 'war treason' or as 'war rebellion'.

I. The inhabitant's duty to the occupant

As the law of belligerent occupation developed out of the law which was at one time applicable to conquered territory and ultimately attained an independent status, theories of the nature of the duty owed to the occupant by the inhabitants of the area he occupies have undergone a corresponding change.

1. Allegiance

Prior to the emergence of a distinct law of belligerent occupation during the second half of the eighteenth century and the early nineteenth century, enemy territory occupied by armed forces immediately became part of the territory of the occupying state.[2] The unqualified allegiance of the inhabitants of the area was, as a matter of course, demanded by the occupant, and their relationship to the occupant was left entirely to municipal law.[3] Thus when Louis XIV took Namur in 1692, the magistrates of the city came to him the next day to render him homage as his loyal subjects.[4] Although there were intimations in the great texts of the seventeenth century that mere belligerent occupation of territory is precarious and that the very uncertainty of the fortunes of war demands restraint in the exercise of belligerent 'rights',[5] it remained for Vattel and for Klüber and Heffter in the nineteenth century to assert that sovereignty over an occupied area does not pass to the occupant while hostilities are still in progress. Until a *debellatio*, normally in the form of a peace treaty, which determines the disposition to be made of the territory, the state whose territory it is is deprived only of the exercise of certain attributes of sovereignty.[6]

[2] Nys, *Le Droit international. Les principes, les théories, les faits*, vol. iii (1912), p. 223.

[3] See, e.g., Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764), § 892; Heffter, *Das europäische Völkerrecht der Gegenwart* (1st ed., 1884), § 132.

[4] Van Nispen tot Sevenaer, *L'Occupation allemande pendant la dernière guerre mondiale* (1946), p. 157.

[5] Grotius, *De Jure Belli ac Pacis* (1625), Book iii, Ch. vi, iv. 1; Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1688), Book viii, Ch. vi, § 7.

[6] Vattel, *Le Droit des gens* (1758), Book iii, Ch. xiii; Klüber, *Droit des gens moderne de l'Europe* (1831), § 256; Heffter, op. cit., §§ 131–3.

The theory that an occupied territory immediately becomes part of the occupying state was slow to die. An English court could state in 1814 that: 'No point is more clearly settled in the Courts of Common Law than that a conquered country forms immediately part of the King's dominions.'[7] In 1875 Sir Travers Twiss still maintained that a belligerent nation taking possession of an enemy's territory acquires sovereignty over it.[8] A revision of de Martens' text which was published a decade earlier contains a statement that a state which makes itself master of an enemy province may demand homage from the inhabitants.[9] During the war between the United States and Mexico, General Kearney issued a proclamation absolving all persons residing in the occupied portion of Mexico from their allegiance to that republic and claiming them as citizens of the United States—an act which did not pass without criticism in Congress.[10] However, these are but isolated instances during a period of change. Already, during several wars of the eighteenth century, new theories of belligerent occupation had been given application.[11] A demand by the occupant for unqualified and permanent allegiance gradually ceased to have the sanction of law or of general practice.

2. Temporary allegiance

In Anglo-American law, as distinguished from that of the Continent, the relationship of the population of an occupied area to the occupant was, during a large portion of the nineteenth century, described in terms of *temporary* allegiance. This view is particularly apparent in the American jurisprudence of the period. It received its first statement in *United States* v. *Hayward*,[12] in which Mr. Justice Story made his celebrated statement that by the military occupation of Castine, Maine, by British forces, the inhabitants thereof passed under a temporary allegiance to the British Government. Subsequent opinions of the United States Supreme Court adopted this principle,[13] but in 1830 the Court tempered its holding by suggesting that the occupation of James Island and Charleston by the British in 1780, while causing the inhabitants to owe temporary allegiance to Great Britain, did not 'annihilate their allegiance to the state of South Carolina'.[14] This judicial characterization of the effect of belligerent occupation represented the state

[7] *The Foltina* (1814), 1 Dods. 450, 451, 165 E.R. 1374, 1375. Cf. *The Gerasimo* (1857), 11 Moo. P.C. 88, 14 E.R. 628, which indicates that, at least with respect to the question of the enemy character of occupied territory, the principle enunciated in *The Foltina* had by 1857 ceased to prevail.

[8] *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War* (2nd ed., 1875), § 64.

[9] *Précis du droit des gens moderne de l'Europe* (2nd ed. by Vergé, 1864), § 280.

[10] *House Executive Document No. 19*, 29th Congress, 2nd Session, pp. 20 ff., cited in Thomas, *A History of Military Government in Newly Acquired Territory of the United States* (1904), p. 104. For a criticism of General Kearney's conduct, see the remarks of Mr. Holmes in *Congressional Globe*, 29th Congress, 2nd Session, p. 18.

[11] Nys, op. cit., vol. iii, p. 223. A number of historical instances are collected at pp. 227–33.

[12] (C.C. Mass. 1815), F. Cas. No. 15,336, 2 Gall. 485.

[13] *United States* v. *Rice* (1819), 4 Wheat. 246; *Fleming et al.* v. *Page* (1850), 9 How. 603; *Thorington* v. *Smith* (1868), 8 Wall. 1.

[14] *Shanks* v. *Dupont* (1830), 3 Pet. 242.

of the law during the war with Mexico and formed the basis of political pronouncements of the time.[15]

Repeated judicial affirmations of this principle left little room for dissent upon the part of American international lawyers. The duty of allegiance is, according to Halleck, writing in 1861, reciprocal to the duty of protection which rests on the occupant, but because of the incompleteness and instability of occupation, the allegiance is only a temporary or qualified one.[16] In fact, the civilian inhabitants of a place taken by the enemy who are allowed to lay down their arms and return to their peaceful pursuits are 'virtually in the condition of prisoners of war on parole'.[17] Other authors, in extending this characterization to the inhabitants of occupied areas generally, overlooked the fact that Halleck had been speaking of members of defending armed forces who had surrendered and been allowed to assume peaceful occupations.[18] The American writers often speak of an 'implied covenant' or an 'implied parole' to remain quiescent which is imputed to the inhabitants and forms the basis of their allegiance to the occupant.[19] During the nineteenth century Mr. Justice Story's remarks in *United States* v. *Hayward* were also quoted and approved by a number of British writers on the subject.[20]

The adoption of Article 45 of the Regulations annexed to Convention No. IV of The Hague of 1907, which forbade compelling the population of occupied territory to swear allegiance to the hostile Power, eventually made this theory untenable. The question of the exaction of an oath of allegiance had previously attracted relatively little attention. The United States *Instructions for the Government of Armies of the United States in the Field*, which came into use during the Civil War, had stated no more than that an oath of fidelity or temporary allegiance might be administered to civil officers in the occupied territory,[21] but Bluntschli's paraphrase of this provision carried an annotation to the effect that an 'oath of citizenship' could not be demanded in occupied territory until the conclusion of

[15] In replying to Congressional inquiries concerning the administration of the occupied portion of Mexico, President Polk, in a message to the House of Representatives on 24 July 1848, stated that the inhabitants of this area owed a temporary allegiance to the United States. He quoted extensively from *United States* v. *Rice* (Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789–1897* (1897), vol. iv, p. 595).

[16] *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (1861), p. 791.

[17] Ibid., p. 793.

[18] See, e.g., Rolin-Jaequemyns, 'Chronique du droit international. Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international', in *Revue de droit international et de législation comparée*, 3 (1871), p. 312.

[19] Field, *Draft Outlines of an International Code* (1872), vol. ii, p. 482; Birkhimer, *Military Government and Martial Law* (1892), pp. 38–41. Dana's notes in his edition of Wheaton state that the occupying forces have 'a right to require of the inhabitants an oath or parole, not inconsistent with their general and ultimate allegiance to their own state' to remain quiet and submit to the occupant's authority (Wheaton, *Elements of International Law* (8th ed. by Dana, 1866)), p. 436, note. Although Hannis Taylor believed that temporary or qualified allegiance is owed to the occupant, he adopted the view that there is no legal or moral impediment to insurrection by the inhabitants if they are willing to undergo the perils of such an enterprise (*A Treatise on International Public Law* (1901), pp. 585–92).

[20] Phillimore, *Commentaries upon International Law* (3rd ed., 1885), vol. iii, p. 869; Creasy, *First Platform of International Law* (1876), p. 512; Wheaton, op. cit. (3rd English ed. by Boyd, 1889), p. 469.

[21] Art. 26, General Orders No. 100, War Department, Adjutant General's Office, 24 April 1863.