

United States, Ex Parte Quirin et al.

[Source: Supreme Court of the United States, 317 US 1 (1942); footnotes omitted.]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

EX PARTE QUIRIN ET AL.; UNITED STATES EX REL. QUIRIN, ET AL. v. COX, PROVOST MARSHAL [...]

OPINION: MR. CHIEF JUSTICE STONE delivered the opinion of the Court. [...]

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship, or in any case that he has by his conduct renounced or abandoned his United States citizenship. [...]

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners [...] boarded a German submarine which proceeded across the Atlantic to [...] New York. The four were there landed from the submarine in the hours of darkness [...] carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned, and proceeded in civilian dress to New York City. [...]

All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. [...]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War [...]. On the same day, by Proclamation, the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ... through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals." [...]

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. [...]

Specification 1 states that petitioners, "being enemies of the United States and acting for [...] the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States [...] and went behind such lines, contrary to the law of war, in civilian dress [...] for the purpose of committing [...] hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [...] Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally

applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. [...] It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused. [...]

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied. [...]

Discussion

For the purposes of this discussion please consider the Geneva Conventions and Protocol I applicable.

1.
 - a. Who is entitled to prisoner-of-war status under IHL? Only combatants? (GC I, Art. 28(2); GC III, Art. 4; P I, Arts 44(4)-(5) and 45)
 - b. Does citizenship affect the status of persons otherwise entitled to prisoner-of-war status? Even if they have the citizenship of the Detaining Power? May they, even if they are prisoners of war, be punished for the act of treason consisting of having participated in a war against their country or having fought in the armed forces of the enemy? (GC III, Arts 4, 16 and 85; P I, Art. 43)
2. Why does the Court specifically mention the enemy combatant's absence of a uniform? What status do combatants have who fail to distinguish themselves from the civilian population? (HR, Art. 1; GC III, Art. 4(A)(2); GC IV, Art. 4; P I, Art. 44(3)-(4)) What purpose does this principle of distinction serve? Does this explain why IHL rules do not give combatant status to spies? (HR, Arts 29-31; P I, Arts 44(4), 45(3) and 46) Are saboteurs treated the same as spies under IHL? What is the difference between a saboteur and a spy?
3. Could this decision have been issued if Protocol I had been applicable?