RESISTANCE MOVEMENTS AND INTERNATIONAL LAW[1]

by W. J. Ford

IV

17. Opinions of authors

In his article quoted last month, L. C. Green raises a question which is of paramount importance in the context of the present study, namely whether members of resistance movements have to observe the law of war and more specifically Articles 1 and 2 of the Hague Regulations in their struggle against the aggressor. In other words: does the fact that partisans fight to defend their country legitimate their status? The question is so important that it merits further discussion.

When the German armies had invaded the Soviet Union and had occupied a large part of the country, Marshal Stalin declared that the war against National Socialist Germany was a war of the Russian people against the German troops. Now, what is a " people's war " of this sort really? Trainin was of the opinion that it was a war waged by a people with its army and its partisan units.[2] The Russian author goes on to say that a real " people's war " is one waged by a nation to defend its rights, honour, freedom and independence. Such a war is lawful in contrast with a war waged with a view to conquering countries and subjugating peoples. Trainin says that since the 18th century the law of war has been influenced by the principles of democracy. The inhabitants of an

[1] See *International Review*, October, November, December 1967.

[2] I. P. Trainin, " Questions of guerilla warfare in the law of war ", *American Journal of International Law*, Vol. 40, 1946.

invaded country now have the right to defend themselves not only with their army but also with groups of partisans. This right may be exercised whether or not the partisans wear uniforms.

> " To link the right of the people to defend its native land and its honor to a uniform would be to carry the question of defense to an absurdity. Patriotism is not packed only in a military uniform, just as it is impossible for the activities of the spontaneous hurricane to be set forth in the rules of a meteorological observatory. "

Nor can partisans justly be required to carry their arms openly. In these days when camouflaging arms is the rule such a requirement is out of place.

Trainin's views can be summarized as follows: members of resistance movements are not required to fulfil the conditions laid down in Articles 1 and 2 of the Hague Regulations as they struggle against the aggressor. Their war of defence legitimates their status.

The Russian author Korovin held different views.[1] In a book on international law he points out that under the provisions of Article 2 of the Hague Regulations the inhabitants of a belligerent country are only entitled to rise in arms against the approaching enemy if they carry their arms openly and observe the customs and laws of war. But the inhabitants of an effectively occupied territory are not entitled to make a stand against the enemy since Article 43 of the Hague Regulations authorizes the enemy to maintain public order and security in the territory. Accordingly the enemy is allowed to crush any resistance and to punish any person involved in it. Korovin denies that the Germans had the right to punish the Russian partisans as if they were criminals because he was of the opinion that the German occupation was not effective. Mankovsky sharply criticized Korovin's contentions at a meeting of the Legal Department of the Academy of Social Science at Moscow on 20 April 1950. He rejected the argument that the occupation had not been effective. Mankovsky was of the opinion that Marshal Stalin's call on the inhabitants of the occupied territories to form

[1] W. W. Kulski, " Some Soviet comments on International Law ", *American Journal of International Law*, Vol. 45, 1951.

partisan units removed any doubt as to the effectiveness of the occupation.

The ruling of American Military Tribunal No. V in the Hostages Trial caused the Polish author Sawicki to question whether inhabitants defending themselves against an aggressor have to fulfil the requirements of the law of war.[2] Unlike the tribunal, Sawicki decided that there was no need for them to do so. He argued that the Hague Conferences did their codification work in a period when a war of aggression was not regarded as an international crime. It is now felt that a war of aggression is a crime and that it is lawful for the inhabitants of the invaded country to defend themselves collectively.

> " L'agresseur qui n'est pas un occupant légal, n'a pas et ne peut avoir aucun droit pour garantir ses intérêts, pas plus que n'en a un bandit qui s'introduit par effraction dans une maison. Ainsi la résistance contre l'activité de l'agresseur, même s'il observe les principes de la Convention de la Haye, aurait toujours les caractères d'une légitime défense collective de la population. "

Sawicki refers to L. Ehrlich's explanation before the Supreme National Court of Poland in the Greiser trial. Ehrlich argued that the war between Poland and Germany which started in 1939 could not be regarded as a war from the point of view of international law. It was a violation of accepted international obligations. Therefore Poland could not be regarded as occupied. It could only be viewed as a matter of " l'accaparement d'un territoire étranger par voie de viol et de contrainte ».

To say that the inhabitants of an invaded country may use any means at their disposal to defend themselves and that the unlawful occupier should not in any way be supported by international law may seem an understandable and acceptable theory but the dangerous consequences of not applying the laws of war in cases of aggression should not be ignored, for the principle of reciprocity in international law may result in neither party observing it. The kind of warfare that was not subject to any rules and the resulting state

[1] G. Sawicki, " Châtiment ou encouragement? *Revue de Droit international*, Sottile, No. 3, 1948.

of affairs were the very things that induced Grotius to draw up his *De iure belli ac pacis, libri tres* (1625).

Against the idea that the applicability of the laws of war always depends on the causes of the war there is the view that the laws of war must be applied irrespective of the cause of the war.

Kunz states:

" La guerre entreprise en violation de ce Pacte (the Kellogg Pact) est une guerre illicite, mais néanmoins une guerre et le droit de la guerre reste en vigueur. "[1]

Oppenheim expresses the same view in his Manual:

" Ex injuria jus non oritur is an inescapable principle of law. At the same time, in view of the humanitarian character of a substantial part of the rules of war it is imperative that during the war these rules should be mutually observed regardless of the legality of the war. "[2]

Nurick and Barrett come to the same conclusion when discussing the question whether or not partisans should be regarded as combatants: they merely point out the formal requirements of the law of war that partisans must fulfil if they are to be recognized as privileged combatants.[3]

Many other authors share the view that the causes of the war are irrelevant as far as the application of the law of war is concerned.[4]

The writer of the present study is of the opinion that the relationship between the occupying power and the civilian population

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[1] J. L. Kunz, " Plus de lois de la guerre? ", *Revue générale de droit international public*, XLI, 1934.

[2] L. Oppenheim-H. Lauterpacht, *International Law* (II, 1952), p. 218

[3] L. Nurick and R. W. Barrett, " Legality of guerilla forces under the laws of war ", *American Journal of International Law*, Vol. 40, 1946.

[4] Namely: P. Fauchille in his *Traité de droit international public* II, 1921, 12; K. Strupp-J. Hatschek in their *Wörterbuch des Völkerrechts und der Diplomatie* I, 1924, 763; E. H. Feilchenfeld in his *The International Economic Law of Belligerent Occupation*, 1942, 6; A. D. McNair in his *Legal Effects of War*, 1948, 322; C. M. O. van Nispen tot Sevenaer in his *La prise d'otages*, 1949, 42 and 43; J. P. A. François in his *Handboek can het Volkenrecht* (Manual of International Law) II 1950, 311; R. R. Baxter in his " So-called ' Unprivileged Belligerency ': Spies, Guerillas and Saboteurs ", *British Year Book of International Law*, 1951 (1952), 324.

should be regarded as one based on the do-ut-des principle. If the population on the whole is hostile to the occupying power, the latter is by this very fact automatically relieved of its obligation to protect the population and take care of it. It is unreasonable to expect the occupying power to treat the civilians in the territory occupied by it as non-combatants if the latter do not behave like non-combatants. On the other hand, the occupying power must fulfil its obligations and thereby bring about a situation in which it can demand of the civilian population that it remain passive.

In so far as international law gives rules governing warfare and occupation, it does not distinguish between wars lawfully started and wars unlawfully started nor between lawful and unlawful occupation. Time will tell whether this widely held view will ever change. For the time being the principle will have to be maintained that any occupying power—irrespective of whether or not its aggression is lawful—may invoke the laws of war in so far as they grant him impunity while punishing members of resistance movements.

This does not mean, however, that the civilian population is obliged to refrain from acts of resistance. There is no rule in the law of war making it incumbent upon the population to obey the occupying power.

Consequently, the position is this: the laws of war do not demand of the civilian population that it shall obey the occupying power, whereas they allow the occupying power to lay down rules governing the behaviour of the civilian population and to punish those that violate these rules provided they are given a fair trial.

It is the problem of unresolved conflicts in law; two legal systems that have not been harmonized exist side by side. International law will have to be interpreted in relation to the position of the civilian population and in relation to the position of the occupying power. So we have a situation in which resisting the enemy in occupied territory is legal whereas the occupying power can with impunity punish members of resistance movements. The problem of unresolved conflicts in law presents itself not only in the relation between the occupying power and members of resistance movements but also in armed conflicts not of an international character, in which members of resistance movements do not fight a foreign enemy but

their own government. In these conflicts members of resistance movements are punished in accordance with the rules of domestic law. This does not alter the fact that international law—through the identical Article 3 in the four Geneva Conventions—accords the insurgent party certain minimum rights, which are based on humanitarian considerations. Here, too, there are two legal systems—the national and the international—which have not been harmonized, side by side.

The trials referred to in the foregoing have shown that everybody concerned with the subject is fully alive to the problem: resistance is allowed ethically and juridically, but the occupying power is juridically allowed to punish those who resist.

Under the laws of war in force nowadays, the occupying power can hardly be expected to accept patriotism as an excuse for acts of resistance. If we realize the relativity of law we shall concur with Baxter, who wrote in the article referred to above:

> " ... it is possible to envisage a day when the law will be so retailored as to place all belligerents, however garbed, in a protected status."

18. Conclusions and recommendations

Hardly a century ago war was a matter involving but small numbers of people. The situation changed when national consciousness and democracy began to develop. Since then the number of people affected by war has constantly increased so the important dividing line between combatants and non-combatants laid down in the law of war has gradually become blurred. More and more civilians who are not members of the armed forces are taking part in war operations, and they suffer in increasing measure from air raids and from shortages of food and raw materials due to blockades. Wars are developing into struggles between the masses. Sir Winston Churchill said:

> " When democracy forced itself upon the battlefield war ceased to be a gentleman's game. "

Then there is another factor that influences war. As a result of the diametrically opposed views on political, economic and social matters held by various nations, the citizens of one country regard the citizens of another country as perpetrators of crimes. If war breaks out the citizens of the other country add to their crimes the crime of aggression. War is waged with unparalleled fanaticism, because each party is convinced that it is fighting criminal elements against whom all means, fair and foul, may be used. " Träger der feindlichen Einstellung nicht konservieren, sondern erledigen "—those were the words of the Barbarossa order of May 1941 given to the German army, navy and air force. If the opponents are regarded as criminals, the war becomes a " crusade against evil " in which anything goes. Civilians will be involved in such wars, actively as soldiers, members of resistance movements, workers or in any other capacity, passively as victims of enemy operations on land, at sea and in the air.

Both the fact that wars have developed into wars between the masses and the fact that many wars have become ideological wars blur the dividing line between combatants and non-combatants. This important distinction made in the law of war sprang from the consideration that in time of war certain groups of people had to be protected. Originally the distinction was not clear. It was Rousseau, who in his *Du contrat social* (1762) formulated views which helped to make the distinction clearer. In his opinion war must be regarded as a relationship between states. Citizens of opposing states are only enemies if they serve in the organ of the state, the army. This view underlies the wording of conventions aimed at defining the status of combatants and non-combatants in time of war and their rights and duties. Experience gained during World War II showed that their status was less clearly defined than people had thought. Civilians who do not belong to the regular army carry arms and peaceful civilians suffer more from military operations than they used to.

No matter how the nature of war changes (the number of armed conflicts not of an international character may increase, for instance) it remains essential that we insist on the observance of the laws of war and the underlying humanitarian considerations. What is said in the preamble to the Convention regarding the Laws and

Customs of Land Warfare of 1907, namely that the rules governing warfare were drawn up " in obedience to a desire to diminish the evils of war as far as military expediency permits ", is still true.

We have not yet reached the stage at which

> " ... at least for the present, patriotism alone should be expected to be a sufficient reason to place resistance movements in a protected status ".

We still have some way to go, as will be seen from the following propositions:

I. Civilians in occupied territory who rise in arms against the enemy forfeit their status of peaceful citizens. The enemy has a right to know whether they are dealing with peaceful citizens or with civilians who resist them.

II. If civilians who resist the enemy are to be treated as prisoners of war when they are captured, they must comply with the laws of war.

The present laws of war as they bear upon this matter can be summarized as follows:

1. The laws of war (jus in bello) must be applied regardless of the cause of war. The question whether a war is lawful or not is therefore irrelevant with respect to the legal status accorded to members of resistance groups.
2. Articles 1 and 2 of the Hague Regulations and Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War 1949, lay down the conditions which members of resistance groups must meet in order to be treated as privileged combatants.
3. Members of resistance movements who do not conform to the requirements mentioned in 2 above cannot be considered as privileged combatants. In case of capture they will be treated as common criminals and not as prisoners of war. They may claim a certain amount of protection by virtue of the Fourth Geneva Convention and of general principles of law.

4. For the opposing party in armed conflicts not of an international character a minimum protection has been included in Article 3 common to the four Geneva Conventions of 1949.
5. International law does not forbid the civilian population to commit acts of resistance, but leaves the Occupying Power free to punish these acts.
6. A study of the legal conviction underlying the laws of war relative to the conditions included in Articles 1 and 2 of the Hague Regulations and Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War is necessary. The results of such a study should be made known.
7. The military manuals in the respective countries should be adjusted to each other as much as possible in order to eliminate difficulties arising from different texts.

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