RESISTANCE MOVEMENTS AND INTERNATIONAL LAW [1]

by W. J. Ford

II

14. Practice of War

A number of instances will now be given to show the status accorded to persons taking part in fighting without being members of the regular forces.

The Boer War (1899-1902) [2]

In this war the British troops found themselves confronted with Boers who had united to form commandos. They were under the command of persons appointed by the government; some of them wore uniforms and they carried their arms openly. According to Spaight the Boers observed the rules of the law of war. From reports, both from the British and from the Boers, it may be deduced that the Boers were treated as prisoners of war, provided they were captured before the British proclaimed that they had annexed the Boer Republics. The British authorities took the view that after the annexation the belligerents could no longer be regarded as regular combatants but only as rebels. Theoretically, this point of view was correct but it is doubtful whether the actual

[1] Continued from our October issue.

[2] J. M. Spaight, *War Rights on Land*, 1911.

situation warranted the annexation. At the moment annexation was proclaimed there was no peace treaty in which annexation had been agreed upon. Nor were the facts such as to warrant the unilateral British proclamation.

The Russo-Japanese War (1904-1905) [1]

Both parties reported incidents which were judged under the provisions of Articles 1 and 2 of the Hague Regulations. In one case the Japanese court martial refused to recognize the right of prisoners to invoke Article 2 of the Hague Regulations, because it felt that the prisoners concerned could not be regarded as patriotic citizens, since they were convicts. The court ruled that such persons could not be expected to observe the law of war. Against this it may be argued that there is no rule depriving members of resistance movements of the status of privileged combatants because they have been convicted by a national court.

World War I

In 1915 the German Ministry of Foreign Affairs published a report on the manner in which the Belgian population had resisted the German forces.[2] It was particularly the operations of the ' garde civique ' that were considered to be unlawful. The Germans considered that Article 1 was not applicable, since the resistance fighters had not been placed under the command of a person who was responsible for his subordinates. Moreover, they did not wear any distinguishing mark. According to the German report, Article 2, could not be invoked either, since this Article recognizes a levy en masse only in non-occupied territory. This line of reasoning condemned the resistance in towns like Aerschot, Andenne and Louvain.

In 1916 Belgium officially responded to the German publication [3]. According to the Belgian authorities a distinction should be made between the garde civique active and the garde civique

[1] Nagao Ariga, *La guerre Russo-Japonaise au point de vue continental et le droit international d'après les documents officiels du grand Etat-major japonais, 1908.*

[2] *Die völkerrechtswidrige Führung des belgischen Volkskriegs.*

[3] Reply to the German White Book of May 10, 1915 " Die völkerrechtswidrige Führung des belgischen Volkskriegs ", 1916.

non active. The former were regarded as constituting an armed force. The latter had to be regarded as militias who could be—and were—called up by Royal Decree. Members of the garde civique non active had to subject themselves to the rules of Article 1 of the Hague Regulations. Although the garde civique non active were originally intended to play a part in the defence of national indepedence, their eventual task amounted to little more than policing the non-occupied part of the country. Since the garde civique non active were no longer regarded as militias it was no longer necessary for them to comply with the requirements of Article 1 of the Hague Regulations.

World War II

France. — In the course of 1943 the Forces françaises de l'intérieur (F.F.I.) were organized in such a way that they were ready to carry out strategic duties. In its ordinance of 9 June 1944 the Comité français de la Libération nationale defines the F.F.I. in the following manner:

> Les forces françaises de l'intérieur « F.F.I. », sont constituées par l'ensemble des unités combattantes ou de leurs services qui prennent part à la lutte contre l'ennemi sur le territoire métropolitain, dont l'organisation est reconnue par le Gouvernement, et qui servent sous les ordres de chefs reconnus par lui comme responsables. Ces forces armées font partie intégrante de l'armée française et bénéficient de tous les droits et avantages reconnus aux militaires par les lois en vigueur. Elles répondent aux conditions générales fixées par le règlement annexé à la convention de la Haye du 18 octobre 1907 concernant les lois et coutumes de la guerre sur terre.

The German military authorities stated in a proclamation that captured members of the F.F.I. would be executed in accordance with the rules of military criminal law. The provisional government of the French Republic pointed out that Article 1 of the Hague Regulations of 1907 were being observed and that captured members of the F.F.I. would therefore have to be treated as prisoners of war. General Einsenhower decreed:

"1. The French Forces of the Interior constitute a combatant force commanded and directed by General Koenig, and form an integral part of the Allied Expeditionary Force.

2. The French Forces of the Interior in the maquis bear arms openly against the enemy and are instructed to conduct their operations against him in accordance with the rules of war. They are provided with a distinctive emblem and are regarded by General Eisenhower as an army under his command."

The ICRC intervened and the German authorities declared orally that members of the F.F.I. would be treated as prisoners of war. This oral declaration was never confirmed in writing.

Italy. — After the armistice of September 1943 groups of partisans sprang up in Northern Italy. They took up arms against the Germans. The ICRC tried to induce the German authorities to regard captured partisans as prisoners of war, but their attempts failed.

Netherlands. — The resistance undertaken in the Netherlands was unique. Fighting against the Germans was restricted to small-scale skirmishes like in Belgium. In addition the underground resistance movement performed acts of sabotage. The legal status of the underground army, the Forces of the Interior, was established on 5 September 1944 (Royal Decree). The Decree ruled that every one actively engaged in repelling the enemy was from then on a member of the Royal Netherlands Army. This decision removed any uncertainty as to the status of the persons concerned under the law of war.

Poland and Slovakia. — In October 1944 the German authorities declared that captured members of the Polish underground army would be treated as prisoners of war.[1] Under the provisions of the Warsaw capitulation agreement, captured Polish partisans were regarded as prisoners of war: they were subject to the 1929 Red Cross Convention. (cf. Schmid)

[1] Schmid, *Die völkerrechtliche Stellung der Partisanen im Kriege*, 1956.

Slovak partisans were treated differently. It was decided that the 1929 Red Cross Convention did not apply to them and when captured they were not regarded as prisoners of war but were deported to Germany.

U.S.S.R. — Russian partisans did not wear any definite uniforms.[1] Those who had been in the army wore their old uniforms or parts of them. According to a political commissar assigned to a partisan unit the partisans were members of the Red Army. They were instructed to operate in the rear of the enemy.

Trainin asserts that Soviet warfare was not a private affair of volunteers.[2] According to Trainin the population, which belonged either to the regular army or to partisan units, used all the defensive and offensive methods in defending their country. The Russian author goes on to say that this emphasized the fact that the struggle against fascism was a people's war. Therefore the leaders of resistance groups subordinated their operations to those of the Red Army, Soviet Russia's main military machine. They were accountable to the people, i.e. to the Red Army and its General Staff. Trainin emphasizes the fact that the orders of the highest commander, field-marshal Stalin, were directed not only to the Red Army but also to the men and women fighting in the partisan units.

Yugoslavia. — The struggle carried on in the Balkans by the partisans partook of the nature of military operations. The centre of Yugoslav resistance was in Serbia. The resistance fighters carried out surprise raids on the German occupation forces to capture arms, food and clothing. There was no uniformity whatsoever in the way the partisans dressed. A newcomer was instantly recognizable as such because his clothes marked him as a farmer or as a townsman. But after a few weeks he was wearing a German fatigue cap or an Italian tunic. However, they all wore the Red Star on their fatigue caps. By 1943 their number had increased to 250,000. The German and affiliated forces undertook seven large-scale offensives against the Yugoslav partisans in all. The fifth was carried out in

[1] S. A. Kovpak, *Les partisans soviétiques*, 1945.

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

the latter half of May and in the first few days of June 1943. During this offensive General Kuebler, commander of the German 118th division, issued an order that every partisan taken prisoner was to be shot immediately and that all wells be poisoned. According to Marshal Tito, leader of the partisans, wounded partisans were mercilessly killed.

It may be gathered from the foregoing that the fighting of the partisans was not as a rule limited to incidental resistance operations. More often than not their resistance consisted of large-scale, well-organized operations carried out by disciplined combatants. This should have induced the Germans to control themselves when dealing with captured partisans. Instead prisoners were shot. There is no evidence that captured partisans were tried and granted all the rights essential to the proper administration of justice.

15. Practice in armed conflicts not of an international character

The subject of the preceding chapter was the status of combatants not belonging to regular armies in international conflicts. The present chapter deals with the status to be accorded to combatants in armed conflicts not of an international character.

The Spanish Civil War (1936-1939).

The fact that the conflict was essentially a civil war made the parties to the conflict decide not to apply the law of war. Siotis reports that hundreds of thousands of civilians and soldiers were killed and executed.[1] Hostages were shot and women and children were not spared. The parties to the conflict treated one another as murderers. The insurgents were not accorded the status of belligerents, because the government feared that by doing so they would weaken the position of the Spanish Republic. People may wonder whether the position of the Spanish Republic was really at stake and whether it would not have been better to recognize the rebels as belligerents, because it would probably have had a moderating effect on the fighting, which went far beyond local disturbances. This

[1] Jean Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-international.*

alternative would have been all the more apposite, since the position of the Spanish Republic would not have suffered if its opponents had been accorded the status of belligerents. Had been possible to grant the insurgents the minimum rights provided for in Article 3 of the 1949 Geneva Conventions, it is reasonable to assume that many lives would have been saved on both sides.

The Greek Civil War (1946-1949)

According to Siotis the law of war was completely ignored during the conflict in Greece. Aiding the insurgents was a crime punishable by death. Insurgents captured with weapons in their hands were brought up before a court martial. Most of them were sentenced to death. Prisoners who refused to join the insurgents met with the same fate. The ICRC attempted to mitigate the conflict by invoking the resolution of the Preparatory Conference of Red Cross Societies of 1946. In this resolution it was suggested that in the case of an armed conflict not of an international character the convention be equally applied by each of the parties unless one of them explicitly refused to do so. According to Siotis, the Greek Government argued that the conflict was not a civil war. The ICRC persisted in its view and by its tenacity succeeded in securing certain results. The Greek Government allowed the Committee to do its humanitarian work for the Greek people, which actually took the form of aid to the Hellenic Red Cross Society. The ICRC launched a large-scale drive to help people taken prisoner by Government troops. Attempts to organize similar activities among the insurgents failed, their leader claiming that war time conditions prevented him from getting into contact with the ICRC direct.

Vietnam (1946-1954)

In spite of the fact that Vietnam was " un Etat libre ayant son gouvernement, son parlement, son armée et ses finances " the conflict was regarded as an " armed conflict not of an international character " because Vietnam was not an independent state in the international intercourse of states. France prevented Vietnam from having contact with other powers. According to Siotis the parties to the conflict seem to have been prepared, at all events initially,

to apply the rules of the law of war. But this gradually faded when it became apparent that it was impossible to reach a compromise. The ICRC could not properly perform its duties, such as visiting and exchanging prisoners, because of material and other difficulties. Although the conflict was regarded as an armed conflict not of an international character, the French authorities felt that it did not fall entirely outside the scope of the rules of international law.

Guatemala (1954)

An international struggle broke out in Guatemala in 1954. Right from the beginning the extent of the conflict was such as to make the Red Cross Society of Guatemala accept intervention by the ICRC. This intervention consisted mainly of activities after the short-lived conflict proper had come to an end. They included visits to prisons and the submission of a report on these visits to the Minister of the Interior of Guatemala. This procedure constituted a precedent for intervention by the ICRC during and after hostilities.

Algeria

At first the Algerian conflict was just a matter of maintaining public order, but soon its scope widened, so that the regular French army began to take part in the fighting. The result was that measures based on criminal law no longer sufficed and that the conflict developed into an armed conflict not of an international character to which Article 3 of the 1949 Geneva Conventions was applicable. The French Government recognized this development and, according to Siotis, the Algerian nationalists, too, declared that they intended to apply the Geneva Conventions. This meant that both parties had pronounced themselves in favour of applying Article 3 to this armed conflict not of an international character.

But Siotis reports that in actual practice things left much to be desired. The two parties committed many acts that were contrary to the humanitarian principles on which Article 3 was based. But the two parties repeatedly urged the persons concerned to observe the provisions of Article 3. The violations of Article 3 caused Siotis to state that the new rules of conventional law contained in this article

were " en dernière analyse " not regarded as having obligatory force. This standpoint does not seem very satisfactory as the obligatory force of legal provisions does not depend on the number of times these provisions are violated. The competent authorities that accept the rules contained in Article 3 may be expected to be able to ensure their practical application and enforcement, which may be interpreted as proof of discipline and organisational maturity. The rules of Article 3 are of considerable importance in the case of an armed conflict not of an international character, because the national legislations, which are adapted to normal conditions, may prove to be inadequate in the event of internal disturbances, so the possibility of excesses must not be ruled out.

(To be continued).

Dr. W. J. FORD