RESISTANCE MOVEMENTS AND INTERNATIONAL LAW [1]

by W. J. Ford

III

16. Administration of Justice

The legal status of members of resistance movements cannot be discussed but in the light of previous court rulings, some of which are very instructive within the scope of the present study. They have been set out below.

The Hostages Trial [2].

The military authorities in the U.S. zone of Germany set up military tribunals to try war criminals. The judgment given by American Military Tribunal No. 5 in the Hostages Trial deals to a large extent with the legal status of members of resistance movements. On trial were Field-Marshal Wilhelm List and others.

The third charge related to the issuance and distribution of unlawful orders, which provided, *inter alia*, that captured resistance fighters should not be regarded as prisoners of war and were to be executed without trial.

In his opening statement the prosecutor for the United States Military Government, Brigadier General Telford Taylor, established that the German intelligence service in Yugoslavia had reported the presence of partisan units and the names of their

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

[2] *Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No 10*, US Government Printing Office, Washington.

leaders, describing the distinctive emblems, the size of the units and the arms they used. Although the German authorities had received this information, they did not order the discontinuance of the execution of prisoners. On the contrary:

> " There was no trial, hearing, or court martial for these men who fought as honorable and patriotic soldiers for their nation. The orders distributed to the lowest of units were unmistakably clear. Lueters' (General Lueters was the German Commander in Croatia) directive to his troops of 7 January 1943 is representative—" Execute and hang partisans, suspects, and civilians found with weapons. No formal proceedings are necessary. "

Nor were the Andartes, the Greek partisans, who by 1943 had begun to constitute a serious threat to the German troops, recognized as privileged combatants.

When dealing with the question whether the Yugoslav and Greek partisans should have been regarded as privileged combatants, the prosecutor took the view that they had not observed the generally accepted rules of Article 1 of the Hague Regulations.

> " We may concede that the Germans would have been within their rights in denying them the status of prisoners of war and executing them."

But the prosecutor seriously doubted whether the Germans, who had committed the crime of launching an offensive war and had violated the law of war themselves, had not forfeited their right to demand that the partisans observe Article 1. It was beyond doubt that in time of war civilians had duties as well as rights. They were obliged to preserve their peaceful character and not to endanger the position of the occupying army if the latter observed the rules of the law of war. But if the occupying troops resorted to a system of terror the civilian population could never be blamed for resisting.

The German Laternser, who conducted Field-Marshal List's defence, based his argument on Articles 1 and 2 of the Hague Regulations. He referred to the American prosecutor's statement that the Germans were entitled to deny captured partisans, who had not complied with the generally accepted conditions of Article 1, the status of lawful combatants, and to execute them.

The Yugoslav Government had surrendered unconditionally on 15 April 1941. The defence counsel was of the opinion that this entitled the Germans to rule that any further resistance constituted a violation of the law of war. Of course a military commander might deem it useful to recognize unlawful fighters as lawful combatants if they were under the command of a responsible leader and observed the rules of the law of war or if they fought in large numbers and had formed a *de facto* government. But the question whether and when recognition was to take place was left entirely to the discretion of the military commander, contended defending counsel.

He went on to state that a popular revolt in occupied territory was unlawful. Article 2 of the Hague Regulations recognized as lawful combatants only persons taking part in a levy en masse in non-occupied territory who carried arms openly and observed the rules of the law of war. Defending counsel was of the opinion that the occupation of Yugoslavia and Greece was effective. The Germans had deployed their troops in such a way as to enable them to dispatch contingents to any place where they were needed within a comparatively short time.

After having heard the arguments of the prosecutor and defending counsel, the tribunal ruled as follows. The question whether certain acts are punishable or not can generally be solved by answering the practical question: When was the invasion over and when did occupation commence? The term " invasion " should be taken to mean " military operations ". A territory can be said to be occupied only if and to the extent to which organized resistance has been broken, the civilian government can no longer perform the duties legitimately entrusted to it and some form of administration has been set up to maintain law and public order. The tribunal ruled that the occupation of Yugoslavia had been completed by the middle of April 1941 and that of Greece by the end of April 1941.

A resistance movement began to develop in the summer of 1941. It spread quickly until resistance operations had acquired the character of a military campaign. But the tribunal was of the opinion that there was no doubt whatsoever that until its departure in 1944 the German army had been capable of controlling Greece and Yugoslavia:

> " While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German forces of its status of an occupant. These findings are consistent with Article 42 of the Hague Regulations of 1907 which provide— ' Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' "

The tribunal was of the opinion that the evidence made it clear that the members of the resistance movements—with the exception of some of their groups—had not observed the laws of war. True, some partisan groups were organized in a military fashion and placed under some central authority but instead of uniforms they wore civilian clothes with parts of German, Italian and Serbian outfits. The Soviet star which most of them wore could not be distinguished at a certain distance.

> " This means of course that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for killing such captured members of the resistance forces, they being francs-tireurs."

The tribunal considered that guerilla warfare was waged in Greece and Yugoslavia while these countries were occupied. This indicated the manner in which soldiers or civilians harassed the enemy with their unorganized forces after the government and the bulk of the armed forces had surrendered and the country had been occupied. These guerilla forces are generally not strong enough to engage in open battle. The position of the guerilla fighter resembles that of a spy.

> " Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerillas may render great services to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes

> of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance."

The tribunal further considered that the prosecution had alleged that the civilian population was not held to fulfil its obligations under the law of war towards the occupying power if the latter had invaded and occupied the country in a criminal manner—as in the present case. The tribunal did not share this view. It stated that in judging the actions of the population the question whether the occupation was lawful or not was irrelevant, or to quote Oppenheim/Lauterpacht in *International Law* (II, 1952):

> " The rules of international law apply to war from whatever cause it originates ".

The standpoint adopted by the American tribunal can be summarized as follows:

1. The law of war must be applied irrespective of the cause from which the war originates;
2. Members of resistance movements who do not fulfil the conditions laid down in Articles 1 and 2 of the Hague Regulations should accept the greater risk—inherent in their struggle—of their not being treated as prisoners of war when captured;
3. The guerilla resembles the spy in that his actions are considered lawful by his own country and unlawful by the enemy country;
4. Temporary domination by the partisans does not detract from the effectiveness of the occupation if the occupying power is in a position to restore its authority at any moment.

The Trial of the Field-Marshals.

The status of members of resistance movements was also referred to during the trial of Field-Marshal Wilhelm von Loeb and others before U.S. Military Tribunal No. V A. The prosecutor alleged that the accused had issued or distributed orders—such as the Barbarossa order—depriving partisans of the status and rights of prisoners of war. With regard to the Barbarossa order the prosecutor

observed that murder could not have been made easier for German soldiers. The prosecutor quoted a German order issued on 11 November 1942 by the office of General Warlimont, stating that the Russian partisan units were military forces that had been organized long before the war. Their leaders were officers and commissars, who had been left behind the German lines on purpose. They carried out their operations in conformity with a plan drawn up by the Russian High Command. Nevertheless the German order stated that partisans were not entitled to be recognized as lawful combattants. Furthermore, the prosecutor argued that the resistance of the civilian population was the inevitable reaction to the crimes perpetrated by the German armed forces.

Just as in the foregoing case, the U.S. Military Tribunal ruled that the status of members of resistance movements was governed by Articles 1 and 2 of the Hague Regulations. Anyone ignoring the conditions laid down in these articles would lose the status of prisoner of war.

When dealing with the Barbarossa order, the tribunal observed that defence counsel had argued that there was no rule of international law stipulating that captured members of resistance movements were to be tried in court. Therefore defence counsel contended that the Barbarossa order, which left the decision on the fate of partisans to an officer, was not unlawful. The tribunal did not share this view. It agreed that it was doubtful whether a trial was required under the provisions of international law but in the light of the great variety of charges it did not doubt the criminal nature of an order authorizing a junior officer to order prisoners to be shot.

The trial of Carl Bauer and others [1].

In 1945 the French Permanent Military Tribunal at Dijon tried three German officers who were accused of having ordered, in September 1944, captured members of the Forces françaises de l'Intérieur (F.F.I.) to be shot as a reprisal for their having opposed the German army. The all-important question was the status of the F.F.I. If it could be established that they were privileged combatants,

[1] *Law Reports of Trials of War Criminals*, selected and prepared by the UN War Crimes Commission, 1949 Case No 45.

captured members of the F.F.I. should have been treated as prisoners of war.

The prosecutor argued that Article 2 of the Hague Regulations was applicable. This meant that he was of the opinion that two conditions had been complied with:

1. the territory in which the resistance movement had carried out its operations was not occupied,

2. the civilians had not had time to choose their leaders and to don distinctive emblems.

As regards the first condition it should be noted that the definition of " non-occupied territory " is important. In Article 42 of the Hague Regulations it is stated that a territory is regarded as " occupied " if and to the extent to which the enemy army is capable of exercising its authority. Therefore if the enemy army is not in a position to do so the territory cannot be regarded as occupied. This circumstance obtains when the advancing liberation army gains control of certain parts of the occupied territory. But there is some uncertainty regarding the status of the parts of the occupied territory where the occupying power can no longer exercise complete authority due to the military actions of its opponents. Can the resisting inhabitants concerned be looked upon as privileged combatants? In the case in question the territory where the captured and executed members of the F.F.I. had fought had been liberated by the inhabitants and by units of the army of liberation. But at the time they were taken prisoner the enemy's power had not yet been broken.

It is not clear whether the French tribunal based its ruling on Article 1 or on Article 2 of the Hague Regulations. In this trial the essential fact would seem to have been that the civilians had fought side by side with the invading French troops. The F.F.I. fought against the German army in the ranks of the regular armed forces thus complying with the requirement of responsible leadership. They carried their arms openly. Since witnesses had stated that the captured members of the F.F.I. observed the laws of war (they carried distinctive emblems such as armbands, helmets or overalls)

the annotator wonders if it would not have been better to apply Article 1 of the Hague Regulations.

> " The whole issue of whether the F.F.I. combatants were or were not in territory ' not under enemy occupation ', would have then been immaterial."

However, it must be remembered that during the weeks when France was liberated large numbers of civilians joined the F.F.I. so very often there was no time to subordinate these new members to leaders and give them distinctive emblems. This may have induced the prosecutor to invoke Article 2 of the Hague Regulations in spite of the fact that the F.F.I. was an officially recognized organization.

The Trial of Field-Marshal Albert Kesselring [1].

During this trial, which took place before a British Military Tribunal in Venice in the first few months of 1947, it was established that in his capacity of commander-in-chief of the German forces in Italy Field-Marshal Kesselring had issued an order on 17 June 1944, which said among other things:

a) " Der Kampf gegen die Banden muss daher mit allen zur verfügung stehenden Mitteln und mit grösster Schärfe durchgeführt werden."

b) " Ich werde daher jeden Führer decken, der in der Wahl und Schärfe des Mittels über das bei uns übliche zurückhaltende Mass hinausgeht."

The prosecutor alleged that the order of 17 June 1944 was contrary to the law of war. He referred in particular to the undertaking contained in paragraph b). He argued that this promise incited the troops to commit excesses.

Defending counsel, however, alleged that the order was meant to make the troops overcome their reticence in their struggle against the partisans. How did the German commanders react to the order of 17 June 1944? According to the prosecutor there was a

[1] *Law Reports 1949*, Case No. 44, H. Laternser, Verteidigung deutscher Soldaten, 1950.

causal connection between the orders and the crimes with which the German troops were charged. Obviously the German troops interpreted the order as something more than a mere change of battle tactics.

The documents available do not disclose the tribunal's attitude. But there is the view of the British prosecutor:

> " There are some war crimes which are only war crimes in respect to one side. The partisans, for instance (and I say it quite openly), by attacking the German forces in the rear, were guilty of a crime against the German law; I say advisedly against the German law. So far as the Italian and Allied law was concerned they were heroes. They did commit a war crime and if they were captured by the Germans, the Germans were undoubtedly entitled to try them for committing a war crime, and if found guilty of committing that war crime, the Germans were entitled to sentence them to death."

The Trial of Bruns and others [1].

Bruns and others were tried before a Norwegian court in 1946. One of the charges against them was that in their capacities of German police officials they had ill-treated Norwegian civilians during the occupation.

The defence counsel was of the opinion that the illegal military organization of which these civilians were members had violated international law. Therefore the accused had been entitled to resort to retaliatory measures.

The court considered that this military organization received its orders from the Norwegian High Command in Britain and that their task consisted in taking part in the war of liberation and committing acts of sabotage. The court ruled that the resistance fighters involved could not claim the privileges accorded to the combatants referred to in Article 1 of the Hague Regulations since they had no uniforms and no distinctive emblems and did not carry their arms openly. Therefore it was permissible to execute them when they were taken prisoner.

[1] *Annual Digest and Reports of Public International Law Cases*, Case No. 167.

The trial of Christiansen [1].

The former commander of the German forces in the Netherlands was tried before a Special Tribunal at Arnhem, which stated in its verdict of 12 August 1948 that in the rules of international law dealing with warfare and occupation no distinction is made between wars started lawfully and unlawful wars, nor between a lawful and an unlawful occupation. The tribunal did not deny that this section of international law was inconsistent. On the one hand it prohibits wars of aggression and on the other hand it guarantees impunity to those who violate this prohibition by starting a war. But the Special Tribunal considered that this inconsistency of international law which, as far as it governed warfare and occupation, was still in full force during World War II, should be seen as a consequence of:

> " . . . the imperfection of the international community at the time the acts proven were committed, which imperfection will have to be accepted by the court as existing law."

Since in international law no distinction is made between lawful and unlawful occupation, the Court ruled in its verdict that civilians did not violate any legal obligation by committing acts of resistance.

The Trial of Rauter [2].

The former " Höhere SS- und Polizeiführer " in the Netherlands was tried before the Special Tribunal in The Hague, which stated in its verdict of 4 May 1948:

> " . . . . . that seen from the German point of view resistance against the occupying power in the Netherlands should be regarded as unlawful since the members of the Dutch resistance movement did not comply with the requirements laid down in the Hague Regulations to be fulfilled by lawful armed forces. "

On the other hand the Tribunal emphasized:

> " . . . . . that the matter allows of a different interpretation when viewed from the Dutch angle since the occupying power exerci-

[1] *Het Proces Christiansen*, Bronnenpublicaties Processen No. 4, 1950.

[2] *Het Proces Rauter*, Bronnenpublicaties Processen No. 5, 1952.

ses *de facto* authority which is not legitimate so that in general the population of an occupied territory does not owe the occupying power any obedience either ethically or legally; that as a result underground resistance against the enemy in occupied territory may be lawful; that there is no question of inconsistency in this because there are other similar contingencies in the laws of war, in particular in espionage, which is regarded as lawful although the belligerent party that captures an enemy spy is entitled to punish him, even kill him."

Therefore the population of an occupied territory is not obliged by law to obey the occupying power. The Hague Regulations are based on the principle that international law does not express an opinion on the question whether or not a war or occupation is lawful and consequently on the question whether or not the resistance is lawful.

The Special Court of Cassation, too, ruled in its judgment of 12 January 1949 in the case of the former police commander that " there can be no question of any legal obligation on the part of individual civilians to obey the enemy ".

The Trial of Quirin and others [1].

Warfare not protected by the laws of war is not only the type waged by means of arms but includes other forms such as psychological warfare and sabotage. Persons who indulge in these forms of warfare do not belong to the regular armed forces as a rule. But in some cases members of the regular forces do operate as agents or saboteurs, which makes it necessary for them to conceal their military identity. In the trial of Quirin and others, the Saboteur Trial, an American court had given a ruling on the position of members of the armed forces who, by engaging in such activities, give up their status of protected persons under the laws of war.

Quirin and his colleagues were trained as saboteurs in Germany and were subsequently smuggled into the United States with stocks of explosives. Immediately after they had been put on shore they

[1] *Annual Digest and Reports of Public International Law Cases 1941-1942*, Case No. 168.

buried their uniforms and explosives and proceeded to various places in the United States. Within a month they had all been rounded up. The prisoners were brought before a military court and accused of having violated the laws of war.

> " . . . . by passing through our defence lines in civilian dress in order to commit sabotage, espionage and other hostile acts . . . . "

The Supreme Court considered that it was not improper to apply the laws of war to this case. The laws of war were taken to mean

> " . . . . that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals ".

By committing acts that violated the laws of war the accused had qualified themselves as unlawful combatants who, according to the Supreme Court, distinguished themselves from lawful combatants in that

> " 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 ".

Spies, who stealthily collect military information on behalf of the enemy, and persons who penetrate the enemy lines in civilian dress to bring death and destruction to the country of the enemy are not privileged combatants; they violate the law of war and should be tried before a military tribunal. The Supreme Court quoted a number of cases tried before military tribunals from which it appears that this view was generally held in the past, both before and after the adoption of the U.S. Constitution.

Spies and saboteurs are most certainly not privileged under the laws of war. But must they be regarded as people who violate the law of war? It can hardly be said that they should. The practice of using spies and saboteurs, one adopted generally by belligerent States, is not regarded as a violation of the law of war, so it would seem contradictory to maintain that espionage and sabotage are

violations of the law of war. The reason for not treating captured spies and saboteurs as prisoners of war cannot be found in any rule of the law of war. They are regarded as outlaws merely because the injured State wishes to protect itself against espionage and sabotage. The State concerned is anxious to render such dangerous and clandestine activities ineffective. Therefore invoking the law of war in such cases would hardly seem defensible.

A peculiar case was that of a Yugoslav businessman who was arrested in 1961 by order of the public prosecutor at Constantz. He was accused of having killed two German soldiers in Zagreb in 1941. The public prosecutor maintained that he did not belong to the army. According to the indictment he was a member of a group of partisans when he and two others killed two German sentries. The German courts were thought to be entitled to deal with the case. The West German Minister of the Interior declared that if the accused could prove that he was in the regular army at the time of the alleged offence, he would immediately be released.

After a vigorous protest by the Yugoslav Government, the man was set free. The matter was not carried far enough to enable the court to give a ruling on the legal status of Yugoslav partisans.

In his article, L. C. Green observes that many resistance movements did not fulfil the conditions laid down in Article 1 of the Hague Regulations.

> " Néanmoins, puisque l'occupation des territoires en cause était illégale comme constituant un acte d'agression contraire au pacte Briand-Kellogg, on pouvait soutenir que l'occupant n'avait pas à se plaindre si ceux contre lesquels il menait une guerre illégale n'apportaient pas une attention scrupuleuse aux lois de la guerre, dans la mesure où leur activité contre les forces occupantes était en jeu. D'autre part on ne pouvait s'attendre à ce qu'un seul belligérent — l'agresseur — acceptât d'être lié par les lois de la guerre alors que son adversaire ne l'aurait pas été. "

(To be continued).

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