

# MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS IN GUERRILLA WARFARE

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*At the International Colloquium held by the International Institute of Humanitarian Law, at Sanremo last September<sup>1</sup>, a paper was submitted on military instructions concerning the treatment of prisoners in situations arising from guerrilla warfare. In view of the importance of the subject and of the interesting references made to history, we are publishing the introduction and conclusion of this study, which will later appear in the official records of the International Institute of Humanitarian Law, as well as some of the historical examples given by the author. (Ed.)*

## I. Introductory remarks

The considerations which follow do not claim to be exhaustive, and we hope the reader will forgive us if some of the points raised in this brief outline have been superseded by more recent developments. It is not the purpose of this paper to encompass a wide subject such as this, but, by means of a few recent or earlier examples, to try to pinpoint a certain trend in military instructions on the treatment of prisoners in situations arising from guerrilla warfare. In addition to regular army manuals or instructions, we felt it might be worth while to quote from similar texts issued by guerrilla forces. We should

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<sup>1</sup> See *International Review*, November 1971.

like to add that the views expressed here are purely personal and in no way imply that a definitive position has been adopted on the actual application of the texts mentioned.

Owing to the fact that they are more flexible than the international conventions, that they are often unofficial <sup>2</sup>, and that a party issuing them is not committed beyond the international obligations it may have contracted, military instructions—which are so close to the realities of war—are often a field for legal experimentation that serves as a basis for future codification. The example of Lieber's "Instructions" ("Instructions for the Government of Armies of the United States in the Field", General Orders, No. 100, April 24, 1863) and their effect on the codification of the law of war at the end of the nineteenth century is so well known that there is no need to dwell on it.

## II. Examples from history

### 1. Spanish War (1807-1814)

While guerilla warfare is an extremely ancient form of struggle, since it was formulated long ago by the Chinese strategist Sun-Tsu, it took its modern name from the Spanish people's resistance to French occupation forces. <sup>3</sup> It therefore seems appropriate to start this brief survey with a reference to that war which, at the beginning of the era of conscript armies, showed the trend towards popular resistance. Needless to say, this war was fought relentlessly on both sides, and the tendency at first was simply to execute all prisoners, often under atrocious conditions. The relations between the regular troops and the guerrillas affected relations between the regular troops. After the battle of Baylen, 20,000 French soldiers due to be repatriated under the treaty of capitulation were held prisoner on prison-ships. In reply to the French general who protested against that decision, the Spaniards said: "Your Excellency, you say that you are merely obeying orders, but he who serves a bandit chieftain is no less responsible for the crimes he commits under those orders".

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<sup>2</sup> cf. *British Manual*, Part I, 1956, p. 1, and *U.S. Field Manual*, 1956, p. 3.

<sup>3</sup> Obviously there is no lack of synonyms for the term guerrilla: people's war, war of resistance, revolutionary war, insurrectionary war, subversive war, etc.

The Spanish officers had immense difficulty in protecting the prisoners from the population who were thirsting for revenge, and General Castaños had to lay down that “anyone insulting a Frenchman shall be tried by court martial”. At first the French treated all groups as irregular combatants. Many of them were shot, until reprisals by guerrilla fighters resulted in their semi-recognition as belligerents.

## 2. Tyrol

In the Tyrol uprising of 1809, Andreas Hofer, “leader of the rebellion”, was arrested and shot. The Duke of Danzig issued the following proclamation on 15 May 1809:

“Der grossmütige König von Bayern hatte durch sein gutes Herz den kaiserlichfranzösischen und königlichbayerischen Generälen befohlen, sie sollten die Untertanen von Tirol verschonen, nur durch Gutmütigkeit an ihre Pflicht erinnern. Weil aber alle ihre Mühe verloren ist, so hat der grosse Kaiser von Frankreich, der Beschützer der Religion, heute, den 15. Mai ordiniert, dass alle Tiroler, die mit Waffen versehen, gefangen, erschossen und aufgehängt werden, und wo in dem Bann oder in einem Dorf, Kreis oder Landgericht ein Soldat totgefunden wird, soll das ganze Tal oder Bann oder das ganze Gericht in 24 Stunden verbrannt und die Vornehmsten davon, wenn sie auch ohne Waffen getroffen werden, an den nächsten Baum aufgehängt werden.”<sup>4</sup>

## 3. War of Secession (1861-1865)

On 3 July 1862, General Grant, then commanding the army in Tennessee, issued the following order:

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<sup>4</sup> Our translation: “Out of the goodness of his heart, the magnanimous King of Bavaria ordered the imperial French and royal Bavarian generals to spare his subjects in Tyrol and to remind them of their duty only with kindness. But as all their efforts were in vain, the great Emperor of France, Defender of the Faith, has this day, 15 May, ordered that any Tyrolese carrying arms shall be arrested, shot and hanged; that where a soldier is found dead in the *Bann* or in a village, *Kreis* or *Landgericht*, the entire valley or *Bann* or the entire *Gericht* shall be burned within twenty-four hours, and that the noblest of them, even if not found to be carrying arms, shall be hanged from the nearest tree.”

## MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS

“ The system of guerilla warfare now being prosecuted by some troops organized under the authority of the so-called Southern Confederacy, and others without such authority, being so pernicious to the welfare of the Community where it is carried on, and it being within the power of the Communities to suppress this system, it is ordered that wherever loss is sustained by the Government, collections shall be made by seizure of a sufficient amount of personal property from persons in the immediate neighbourhood sympathizing with the rebellion to remunerate the government for all loss and expense of collection. Persons acting as guerillas without organization and without uniform to distinguish them from private citizens are not entitled to treatment as prisoners of war when caught and will not receive such treatment.”

In the same vein, General Sherman issued the following order to General Burbridge, in June 1864:

“ You may order your post and district commanders that guerillas are not soldiers, but wild beasts, unknown to the usage of war. To be recognized as soldiers, they must be enlisted, enrolled, officered, uniformed, armed, and equipped by some recognized belligerent power and must, if detached from the main army, be of sufficient strength, with written orders from some army Commander to do some military thing.”

The most striking document, however, is undoubtedly Francis Lieber’s *Instructions for the Government of Armies of the United States in the Field* (General Orders, No. 100, War Department, Adjutant General’s Office, Washington, April 24, 1863). Articles 81 to 85 (Section IV: Partisans, Armed Enemies not belonging to the Hostile Army, Scouts, Armed Prowlers, War-Rebels) have a more direct bearing on the treatment of guerrilla fighters:

“ 81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence."

#### **4. Franco-German War (1870-1871)**

At the beginning of the war, the German army issued the following proclamation:

"Tout prisonnier qui réclame le traitement de prisonnier de guerre doit prouver sa qualité de soldat français par la représentation d'un ordre émané d'une autorité légitime et adressé

## MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS

à lui-même, en vertu duquel il a été appelé sous les drapeaux et incorporé dans une unité militaire organisée par le gouvernement français.”<sup>5</sup>

The order was further clarified by a proclamation by Prince Friedrich Karl at Pont-à-Mousson on 31 August 1870, which was posted up in a great many boroughs:

### PROCLAMATION

“ Le commandant en chef de la 11<sup>e</sup> armée allemande fait connaître derechef par le présent arrêté, que tout individu qui ne fait pas partie ni de l’armée régulière française, ni de la garde nationale mobile, et qui serait trouvé muni d’une arme, portât-il le nom de franc-tireur ou autre, du moment où il sera saisi en flagrant délit d’hostilité vis-à-vis de nos troupes, sera considéré comme traître et pendu ou fusillé sans autre forme de procès.

Par ordre du commandant de la 11<sup>e</sup> armée  
Le chef d’état-major.”<sup>6</sup>

### 5. Brussels Conference (1874)

The delegates of the fifteen European countries assembled in Brussels at a meeting sponsored by Russia, in 1874, adopted the “ Project of an International Declaration concerning the Laws and Customs of War ”, Article 9 of which laid down that:

“ The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

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<sup>5</sup> Our translation: “ Any prisoner who demands to be treated as a prisoner of war must prove that he is a French soldier by submitting an order issued by a lawful authority and addressed to him, whereby he was called up to serve with the colours and incorporated in a military unit organized by the French government.”

<sup>6</sup> Our translation: “ Proclamation. The commander-in-chief of the 11th German Army by this order again proclaims that any individual not a member of the regular French army or of the mobile national guard who is found to be in possession of a weapon, whether he goes by the name of *franc-tireur* or under any other description, if caught committing a hostile act against our troops, shall be considered a traitor and hanged or shot without any form of trial. By order of the commander-in-chief of the 11th Army, The Chief of the General Staff.”

## MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination army.”

According to Schmid<sup>7</sup>, the delegates of Austro-Hungary, France, Switzerland, Belgium and the Netherlands, supported by the chairman, denied the exclusive nature of these four conditions, which were no more than a presumption.

### 6. Oxford Manual (1880)

In view of the governments' failure to ratify the “Declaration of Brussels”, the Institute of International Law, to quote its rapporteur Gustave Moynier, offered the governments “a *Manual*<sup>8</sup> suitable as the basis for national legislation in each State and in accord with both the progress of juridical science and the needs of civilized armies”.

Article 2 of the Manual reads thus:

“The armed force of a State includes:

1. The army properly so called, including the militia;
2. The national guards, landsturm, commandos, and other bodies which fulfil the following three conditions:
  - (a) That they are under the direction of a responsible chief;
  - (b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps;
  - (c) That they carry arms openly;

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<sup>7</sup> Jürg H. Schmidt, *Die völkerrechtliche Stellung der Partisanen im Kriege*, Zürich, 1956, p. 36.

<sup>8</sup> *The Laws of War on Land*. Manual published by the Institute of International Law, Oxford Session, 1880.

## MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS

3. The crews of men-of-war and other military boats;

4. The inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves.”

### 7. Philippines (1899) <sup>9</sup>

During the Philippine insurrection which followed upon the ceding of the islands by Spain, the Government of the Philippines gave open support to guerrilla warfare. The United States made a distinction between guerrilleros fighting for the government, who were granted prisoner-of-war status, and guerrilleros engaged in the struggle although not authorized to do so by the government, who were treated as outlaws. An official report by General MacArthur stated:

“ Of course everything is being done consistent with American civilization and the laws of war to terminate the crisis in its present form . . .

The bands of insurgent guerillas are not soldiers in the true sense of the word, but it is a mistake to classify them as ladrones or armed robbers. There is considerable evidence of record to the effect that the insurgent leaders have themselves suffered at the hands of the latter, who are outlaws pure and simple.”

### 8. Boer War (1899-1901)

On 7 August 1901, the British forces issued the following proclamation:

“ Marauding is an offence punishable by death. Marauding consists of acts of hostility committed by persons not belonging to an organized body authorised by a recognised government.”

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<sup>9</sup> Schmid, *op. cit.* pp. 39 and 40.  
R. D. Powers, “ Guerillas and the Laws of War ”, *U.S. Naval Institute Proceedings*, 1963, p. 85.

**9. (U.S.) Rules of Land Warfare (1914)**

In 1914, Lieber's "Instructions" were replaced by a Manual entitled "Rules of Land Warfare", Article 40 of which laid down that the status of prisoners must be decided by legal process, and that summary executions were unlawful.<sup>10</sup>

**10. Russian Civil War (1917-1920)**

At Smarodino, on 18 July 1919, the President of the Military Revolutionary Council of the Republic and of the People's Commissariat for War and the Navy, issued Order of the Day No. 126 to the armies on the southern front. It read thus:

" I order:

That in no case shall prisoners be shot; that they shall be sent to the rear, in accordance with the orders of the nearest command. That commanding officers and commissars shall ensure that this order is strictly carried out.

That any infringement of the present order shall be reported without delay, so that the military revolutionary court may immediately proceed to the scene of the offence."

On 1 May 1919, the same organ issued Order of the Day No. 92 to the troops on the eastern front, as follows:

" ...

In no case shall prisoners who have surrendered or who have been captured be shot.

...

The military revolutionary councils of the armies in the east shall give the widest possible publicity to this order, shall disseminate it throughout the army units on the eastern front, and shall hand it to commanding officers and commissars so that no one may claim to have been unaware of it. At the same time, steps must be taken to ensure that the order is made known to

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<sup>10</sup> See J. W. Ford, "Resistance Movements and International Law", *International Review of the Red Cross*, Geneva, October, November and December 1967, and January 1968.

## MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS

all soldiers and commanding officers in Kolchak's counter-revolutionary army. Let them decide their own fate!"

A similar order of the day (No. 64) had already been issued to all the armies on the southern front, on 21 November 1918.<sup>11</sup>

### III. Conclusions

More than a century and a half now separate the Spanish people's guerrilla warfare against French occupation from urban guerrilla operations, and guerrilla fighting has never ceased to rouse controversy and passion. While guerrillas proclaim the justice of their cause in leaving the beaten track of war and sometimes even of law, their opponents invoke those very laws and customs of war in outlawing guerrilla fighters. And, within a few months, the roles are sometimes reversed: when war spread to the other side of the Pyrenees, the French fighting Spanish guerrillas conducted a "little war" against the Spanish guerrilla formations invading France. Further recent examples might be mentioned.

As people have short memories, such reversals of history have unfortunately not led to as broad and general an understanding of the guerrilla phenomenon as might have been desired. Perhaps guerrilla warfare has been regarded as being the last resource of desperate peoples with their backs to the wall, and therefore valid only in exceptional situations. History has undoubtedly confirmed the exception rather than the rule: guerrilla warfare, which had been the exception, has now become the rule, while the "conventional warfare" conducted by regular armies of constituted and recognized States has become the exception, especially because of its nuclear implications. One may therefore wonder whether the practices and the resulting laws established during a period roughly extending from 1800 to 1950 still have any meaning in the second

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<sup>11</sup> Here we must pay tribute to the remarkable set of documents compiled by Madame P. Pierson-Mathy (from which these texts are quoted), in *Cahier de Documentation* No. III (*L'application du droit de la guerre et des principes humanitaires dans les opérations de guérilla*). This was supplied to the delegates attending the Conference on Humanitarian Law and Armed Conflicts, held in Brussels from 28 to 30 January 1970.

half of the twentieth century. The international laws established by Europeans in a European context hardly “budded” between 1874 (the Declaration of Brussels) and 1949 (the Geneva Conventions). Nor have the minor adjustments which have since been made altered the general approach to the problem.

Admittedly, “execution in accordance with the customs of war”, i.e. the summary and immediate execution of captured guerrilla fighters, is a thing of the past<sup>12</sup>, and Article 3 common to the four 1949 Geneva Conventions expressly prohibits:

“the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

Again, the second paragraph of Article 5 of the Third Geneva Convention of 1949 contains the following requirement:

“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

These, like the more general guarantees contained in Article 3<sup>13</sup>, are necessary but insufficient: the execution of a prisoner following regular judgment often has the same consequences as summary execution besides involving publicity: it is an irresistible call for reprisals.<sup>14</sup>

<sup>12</sup> Schmid, *op. cit.*, p. 167.

<sup>13</sup> It prohibits, besides summary sentences and executions:

- “ (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment.”

<sup>14</sup> cf. Execution of eighty German prisoners by the FFI (*Forces françaises de l'intérieur*) in 1944 (*Report of the International Committee of the Red Cross on its Activities during the Second World War*, Vol. I, p. 523); execution of three French prisoners by the ALN (*Armée de libération nationale*) in Algeria in May 1958 (ICRC Annual Report for 1958, p. 10); and execution of two United States prisoners by the FNL (*Front national de libération*) in South Vietnam.

## MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS

In the aforementioned examples taken from history, it is interesting to note that, whatever the legal definition of the conflict and of the opposing parties, once a certain balance is struck between the parties, the treatment of prisoners is laid down under arrangements, not to say agreements, far transcending the strict rules of positive law: prisoner-of-war status (cf. United States directives in Vietnam), the treatment of prisoners of war (cf. "PAM" = *prisonniers armés à la main*<sup>15</sup>, in Algeria), the exchange of prisoners, and unilateral release, all of which are more liberal than the minimum conditions which the law has tried, in vain, to impose on guerrilla warfare.

As W. Meier wrote, following the conference held by the International Society of Penal Military Law and Law of War, in Dublin in May 1970:

"Die Macht des Faktischen zugunsten einer nicht privilegierten Personengruppe hat sich damit stärker erwiesen als eine alte Übung des Kriegsrechts."<sup>16</sup>

It remains to be seen whether the same tragic experience will have to be lived through in conflict after conflict and whether reprisals can alone put an end to the execution of prisoners or to torture. It would seem to be the purpose of humanitarian law to prevent useless and unnecessary suffering, to lay down the limits which practice has shown to be useful and necessary. There is, therefore, need for more realistic regulations concerning the treatment of prisoners in situations arising from guerrilla warfare. Where States do not as yet feel that they can engage in the international codification suggested by the International Committee of the Red Cross<sup>17</sup>

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<sup>15</sup> Captured carrying arms.

<sup>16</sup> Our translation: "A *de facto* situation favouring a group of non-privileged persons has thus proved more powerful than an ancient practice of the law of war". Walter Meier, *Kriegsvölkerrecht und moderne Konfliktformen. Ergebnisse einer Konferenz in Dublin, Neue Zürcher Zeitung*, 12.6.70, *Mittagsausgabe*, No. 267, p. 3.

<sup>17</sup> cf. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971), Document VI, Rules Applicable in Guerrilla Warfare, documentation submitted by the ICRC, Geneva, January 1971, 55 + 17 pp.

## MILITARY INSTRUCTIONS ON THE TREATMENT OF PRISONERS

or the United Nations Division of Human Rights<sup>18</sup>, it would be advisable for them to convince themselves, by means of careful historical study, of the urgent need to reach a solution which may safeguard the essential rights of the human person—even if he is the worst criminal—and their overriding political needs. There can be no doubt that the humane treatment of prisoners entails considerable advantages, not only from the standpoint of reciprocity (and sometimes even without reciprocity), but also for a return to domestic and international peace.

Such a solution might, like nineteenth century codification, be based on the military instructions of States which have realized the need.

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<sup>18</sup> cf. Reports of the Secretary-General of the United Nations on “Respect for Human Rights in Armed Conflicts” submitted to the twenty-fourth, twenty-fifth and twenty-sixth sessions of the United Nations General Assembly (documents A/7720, A/8052 and A/8370).