# GUERRILLA WARFARE IN SOUTH AMERICA AND THE FUTURE DEVELOPMENT OF THE LAW OF WAR

*This is the title of an interesting survey recently submitted to the ICRC by Dr. Karl-Alexander Hampe of Bonn for publication in the* International Review.

*Although, owing to lack of space, we cannot publish the whole article, we do not wish to postpone any longer the publication of extracts by way of information. This is a very topical subject and furthermore it is on the agenda of Conferences which are today being organized to reaffirm and develop humanitarian international law applicable in armed conflicts.*[1] *These extracts are supported by bibliographical references, not all of which appear here.*

*We would, moreover, draw your attention to the article which we published in our March 1971 issue on recent humanitarian action taken by the Bolivian Red Cross to help guerrilleros.*

. . . Much has been written on the strategy, tactics, political aims and sociology of the revolutionary movement in the Third World. However, as often as not, the only idea concerning the status of the guerrilleros to be found in the works of authors dealing with guerrilla warfare is the following: wars of liberation are legitimate since their aim is progress and their purpose is to eliminate certain existing social structures and the established international order; consequently, acts of individual fighters must be considered to be legitimate. Therefore, in the struggle against « reaction » and " imperialism ", neither side would be bound by any hard-and-fast rules. Guerrilla warfare would not be covered by the existing legal order and each guerrillero would be compelled not to lay down his arms but to fight to the bitter end . . .

. . . In 1967, the Bolivian Minister of Foreign Affairs stated before the Twelfth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States that, with reference to the

[1] See *International Review*, March and April 1971.

guerrilla war in Bolivia, the legal question arose as to whether captured guerrilleros and foreign agents were to be judged as nationals under the laws in force in the places in which the fighting took place and, in particular, whether they could be found guilty of high treason, rebellion or other crimes [1] . . .

In 1968, the Organization of American States adopted the following resolution:

WHEREAS:

There is no international regulation specifically related to the various aspects of the juridical status of the subversive elements now called " guerrillas "; and

It is therefore desirable to study all the legal situations that may arise in connection with the juridical status of so-called foreign " guerrillas " in the territory of any member state,

THE COUNCIL OF THE ORGANIZATION OF AMERICAN STATES RESOLVES:

To entrust the Inter-American Juridical Committee with making a detailed study on all the problems that may arise in connection with the juridical status of so-called foreign " guerrillas " in the territory of any member state and with remitting it to the Council so that it may transmit it to the governments for consideration. [2]

The following points arise from the examination of the legal status of those participating in revolutionary guerrilla warfare and from similar endeavours made during the forties as a result of the partisan movements and the resistance during the Second World War. The scope of international law currently in force should be broadened in order to cover the treatment of irregular troops. Furthermore, in Latin America the tradition of humanising war has remained alive. In the field of international law, Spanish authors such as Vitoria and Suarez have already defended the idea that the doctrine of the " just war " should be limited. An example of this attitude may be seen in the fact that all South American

[1] XIIth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States, meeting of 24.9.1967.

[2] Resolution of the Council of the Organization of American States adopted 19 September 1968 (OEA/Ser. G/III/C-sa-682 (5)).

Governments respect the diplomatic right of asylum for political refugees.

The trial of Debray was the first internationally noted example of penal procedure relating to participation in guerrilla warfare and the first to raise the question of the legal definition of acts of violence committed by guerrilleros. Are such acts of a political nature, are they acts of war, or should they be punished in accordance with the provisions of penal law?

Latin America is not alone in seeking to elucidate the problem raised by the legal aspects of guerrilla warfare and the limits to be placed on the repression of such warfare. In fact, there are numerous other parties and movements in many parts of the world which are organized from outside the country and which are in the same situation...

... It would be timely here to retrace briefly the evolution of the notion of guerrilla warfare. When Napoleon waged his campaign against Spain, voluntary "guerrilla fighters" or "guerrilleros", not belonging to the regular fighting forces, rose up against the French. During the war of liberation in Latin America, those who fought against Spanish domination all called themselves by a similar name. Irregular combatants, in other XIXth century wars, did not influence the tide of war to any considerable degree. However, resistance movements against the Germans (partisans, maquis, etc.) did play an important role during the Second World War, and were absolutely decisive in the Chinese civil war. All these armed encounters had one thing in common: they took place during a war. Guerrilla warfare is, then, one of the operations of war. Its methods, it is quite true, are different from those employed in conventional warfare but guerrilla war itself, nevertheless, falls within the ambit of war. That is why organized resistance movements have all been increasingly featured in the law of war, first in Article 1 (2) of the Hague Regulations on the Laws and Customs of War and then in Article 13 of the First and Second Geneva Conventions of 1949 and in Article 4 of the Third. As far as what one could call traditional guerrilla warfare is concerned, the law of war is applicable in its entirety, and in particular that part relating to the protection of prisoners and wounded. Only those guerrilleros not complying with

the special conditions of the said regulations, that is to say illegal combatants who can be held penally responsible and even taken as war criminals, are not covered by those provisions [1] . . .

. . . At a time when the trend towards settling violent conflicts by guerrilla warfare has appeared as alternative to atomic warfare, the efforts of Latin American Governments call for the utmost attention. Terrorism opposes counter-terrorism, man becomes beast, events follow events, especially during revolutionary conflicts carried out in the form of guerrilla warfare, to such an extent that many are those who, for humanitarian reasons, would find an extension of the law of war desirable. There are some who would like to keep alive a state of guerrilla warfare in Latin America. It is still to be seen whether certain ideas will find practical expression, that is, the ideas of those in that part of the world who consider that it is necessary to grant legal combatant status to those who take part in guerrilla warfare (which takes place so to speak within a situation of non-international armed conflict) and that certain conditions and restrictions should be applied to such status.

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[1] Oppenheim-Lauterpacht, *International Law*, 7th Ed., p. 574; Strupp-Schlochauer, Wörterbuch des Völkerrechts. Vol. II, de Gruyter, Berlin 1961.