EDITORIAL COMMENT

QUESTIONS OF INTERNATIONAL LAW IN THE SPANISH CIVIL WAR

Several important questions of international law have been raised by the armed struggle now going on in Spain. It may be remarked at the outset that the contest has the character of both a "rebellion" and a "civil war." It began on July 17 as an "insurrection," led by General Franco, Commander of the Spanish Foreign Legion in Morocco, against the established legitimate government. As the "insurrection" spread to Spain and acquired the proportions of an armed contest on a large scale it became a "rebellion." [1] Its character as a "civil war" is derived from the fact that it is a struggle in which the contending parties are people of the same state, that is, it is an interfratricidal or internecine war.[2] In case the insurrection succeeds it will go down in history as a "revolution." Since the belligerency of the insurgents does not appear to have ever been formally recognized either by the Spanish Government or by any third Powers—certainly not before November 1936—the struggle did not acquire the character of a "war," in the technical or legal sense of the term, at least not prior to the latter date. The status of those arrayed against the government was therefore that of insurgents rather than belligerents. Nevertheless, it is admitted by all writers on international law that as insurgents they had certain limited rights for the purpose of carrying on the war—rights which belong equally to recognized belligerents,[3] and in general the rules of international law governing the conduct of war in the technical sense apply equally in case of an insurrection. Certainly the statement of Fauchille, that the conduct of civil war is not governed by the same laws that apply in international war,[4] cannot be accepted—at least not without qualification. Consequently such reported acts as the wanton killing of hostages and prisoners and the indiscriminate dropping of bombs upon private houses and the non-combatant population during the present contest was as much contrary to international law as they would have been had the struggle been a war in the technical sense.

An important question of international law raised during the present contest is that raised by the conduct of Germany and Italy in assisting the

[1] Compare the distinction made by Lieber, "Instructions for the Government of Armies of the United States in the Field," Articles 149 and 151, and Hyde, International Law, Vol. 2, p. 193.

[2] Rougiers' criticism (*Les Guerres Civiles et le Droit des Gens*, p. 18) of Pufendorf's and Martens' definition of a civil war as a contest between members of the same state but that it is rather a war between a state and certain portions of its population, is a fine distinction more technical than practical.

[3] Hershey, Essentials of International Public Law and Organization (rev. ed.), p. 203; Wilson, "Insurgency and International Maritime Law," this JOURNAL, Vol. 1 (1907), p. 56; and the decision of the U. S. Supreme Court in the case of the *Three Friends*, 166 U. S. 1.

[4] *Traité de Droit International Public*, t. II, *Guerre et Neutralité* (1921), p. 11.

insurgent forces, and particularly in supplying them with bombing planes (some of which appear to have been manned by German and Italian pilots), tanks, armored trucks and machine guns, or permitting their nationals to do so. That such assistance was rendered the insurgents on a considerable scale there is much evidence, although the German and Italian representatives at the meeting in London of the international committee on non-intervention in Spain denied the truth of the accusations. Portugal also rendered substantial assistance to the insurgents by allowing its territory and ports to be made a base for the importation and dispatch to Spanish territory of munitions and implements of war for the use of the rebel forces. In notes addressed to the governments of these three countries by the Spanish Government on September 15, a protest was made against the rendering of such aid to the insurgents, and the Spanish Minister of Foreign Affairs laid before the Secretariat of the League of Nations detailed evidence in support of the charge. Is such aid legitimate under the generally recognized rules of international law? It is believed that the answer must be in the negative.

The Government of Spain, for the overthrow of which this aid was intended, was the established legitimate government of the country, whatever might be said in criticism of its character or policies. It had been set up in conformity with the constitution and laws of the country and as a result of free popular elections. It had been recognized by all the other Powers, including Germany, Italy and Portugal, as the *de jure* government, and continued to be so recognized by all of them, at least during the first three months of the insurrection when the assistance complained of was being rendered. Juridically, therefore, the aid furnished by the three Powers mentioned to the rebels arrayed against the Spanish Government was an act of intervention of a kind which cannot be justified on the ground of self-preservation, protection of nationals, or any of the other reasons commonly recognized as justifying intervention by one state in the internal affairs of another state.

The outbreak of insurrection in a state has no effect on its juridical status as a member of the international community. It does not alter the duty of non-intervention in its affairs which other states are under. It confers no right of intervention upon them which they did not have prior to the outbreak of the insurrection. No question of neutrality is involved because neutrality is a status which is created only when war in a technical sense exists, that is, where, in the case of civil war, the belligerency of the insurgents has been recognized. Until then the status of other Powers is that of non-intervening states, not that of neutrals.

The conclusion of the whole matter is that the assistance furnished the Spanish rebels by Germany, Italy and Portugal, assuming of course that the charges of the Spanish Government against them are true, is an act of unjustifiable intervention in the internal affairs of Spain for which they may be held responsible in case the insurrection fails and the present government remains in power. This view is in accord with the conclusions of the In-

stitute of International Law as expressed in its *projet* on the rights and duties of foreign Powers as regards established and recognized governments in case of insurrection, adopted at Neuchâtel in 1900. Among the obligations of foreign Powers in respect to the legitimate government which the Institute's *projet* enumerates is the duty "not to furnish to the insurgents either arms, munitions, military supplies or financial aid" or to "allow a hostile military expedition against an established and recognized government to be organized within their domains." [5] Among the jurists who supported the resolutions were Holland, Westlake, Rolin-Jaequemyns, Pierantoni, Brusa, Renault and Von Bar. This also appears to be the view of all reputable text-writers who have discussed the subject, among whom may be mentioned Rougier,[6] Hyde,[7] Oppenheim,[8] Weisse,[9] Féraud-Giraud,[10] Fiore,[11] and La Pradelle.[11a]

If it be said that the duty of non-intervention has reference only to the conduct of governments in directly assisting the rebels and has no application to the conduct of private individuals, it can be said in reply that this distinction, if it was ever applicable in civil wars, is now antiquated, and is today repudiated by the best writers on international law, and has been rejected by the most recent legislation, such as the American neutrality legislation of 1935 and 1936.

Finally, if it be said that Russia and possibly France have rendered the same sort of assistance to the Spanish Government, and consequently Germany and Italy cannot be justly reproached for having assisted the rebels or for having permitted their nationals to do so, it can be said in reply that this argument ignores the sound distinction between the rights and duties of a state *vis-à-vis* the recognized legitimate government of another state and rebel forces engaged in the effort to overthrow it. There is no rule of international law which forbids the government of one state from rendering assistance to the established legitimate government of another state with a view of enabling it to suppress an insurrection against its authority. Whether it shall render such aid is entirely a matter of policy or expediency and raises no question of right or duty under international law. If assistance is rendered to the legitimate government it is not a case of unlawful intervention as is the giving of assistance to rebels who are arrayed against its authority. Assuming, therefore, that the Government of Russia rendered military or financial assistance to the Spanish Government, and that the Government of

[5] 18 *Annuaire de l'Institut*, p. 227.

[6] *Les Guerres Civiles et le Droit des Gens* (1903). See p. 83 ff. where the whole matter is discussed in great detail.

[7] 2 International Law, p. 782. [8] 2 International Law (5th ed.), p. 524.

[9] *Le Droit International Appliqué aux Guerres Civiles* (1898).

[10] "*La reconnaissance du belligérance dans les Guerres Civiles*," 3 *Revue Générale de Droit International Public* (1896), p. 277 ff.

[11] International Law Codified (trans. by Borchard), Sec. 1468.

[11a] "*Les Événements d'Espagne*," 18 *Revue de Droit International* (July–Sept., 1936), p. 165 ff.

France knowingly permitted its nationals to do likewise, both governments acted within their right under international law and their conduct afforded no legal justification for the action of other governments in assisting the rebels. This is not intended to be an expression of opinion on the merits of the Spanish insurrection or upon the moral or political aspects of the cause for which the insurgents are fighting; it is simply a juridical conclusion based on the rules of international law applicable to the case and involves no expression of sympathy for one side or the other.

It is believed that the Government of the United States adopted the view required by international law when, during the course of an insurrection in New Granada in 1862, Secretary Seward said: "It [the United States] regards the government of each state as its head until that government is effectually displaced by the substitution of another. It abstains from interference with its domestic affairs in foreign countries, and it holds no unnecessary communication, secret or otherwise, with revolutionary parties or factions therein." [12] It is believed also that the conduct of the Government of the United States during the present insurrection in Spain has been in accord with the proper conception of the duty of all foreign states toward the Spanish Government. Although the American Government had no authority under the Neutrality Resolution of February 29, 1936, to place an embargo on the shipment of munitions of war to Spain, since that Act applies only to international wars, and although it was not a party to the agreement for non-intervention in Spain, the government used strong moral pressure to prevent American manufacturers and exporters from sending such supplies to either of the contending forces in Spain, and it does not appear that the Munitions Control Board has issued any licenses for such exports since the outbreak of the insurrection or that in fact there have been any shipments. On August 7 Acting Secretary of State Phillips dispatched telegraphic instructions to all American consular representatives in Spain informing them that "in conformity with its well established policy of non-interference with internal affairs in other countries, either in time of peace or in the event of civil strife, this government will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation." [13]

There is a popular belief, and it apparently has the support of some text-writers, that when the belligerency of rebel forces has once been recognized and the struggle has passed from a state of insurgency to a state of technical war, the rights of the recognizing Power *vis-à-vis* the rebel forces undergo a change. This is an error. Both the contending forces acquire a new status

[12] Dispatch to Mr. Burton, Oct. 25, 1862. 6 Moore, Digest of International Law, p. 20. See also the strong statement of Charles Francis Adams to Earl Russell in 1865 (1 *ibid.*, p. 188) where he said among other things "Whenever an insurrection against the established government of a country takes place, the duty of governments . . . appears to be, at first, to abstain carefully from any step that may have the smallest influence in affecting the result."

[13] Text in New York Times, Aug. 23, 1936.

as a result of recognition and certain additional rights which they did not have prior thereto, but the recognizing state itself acquires no new rights so far as its relations with the insurgents are concerned. Its duty changes from that of non-intervention on the side of the insurgents to that of neutrality in respect to both belligerents. It loses the right which it had during the period of insurgency to assist the legitimate government and henceforth must treat both belligerents alike. From that time on it cannot assist either party without violating its duties of neutrality. It can no more render aid to the former insurgents without violating the law of neutrality than it could have aided them before recognition without violating the law of non-intervention. If recognition of belligerency conferred on the recognizing state the right to aid the insurgents, all Germany or Italy would have needed to do in the present struggle to legalize their assistance to the rebels would have been to recognize their belligerency. Within a few weeks after the insurrection began it had acquired a magnitude and an organization which would have legally justified any foreign government in recognizing a state of belligerency had it desired to do so.[14] But it does not appear that up to the present any European government has formally at least recognized the belligerency as such of the Spanish insurgent military forces. The news dispatches report that Guatemala, Salvador, Germany and Italy in November recognized the insurgent organization as the *de facto* if not the *de jure* government of Spain. At the same time the Italian Government withdrew its diplomatic representative accredited to the legitimate government of Spain and appointed a chargé d'affaires to the government set up by the Franco régime. This is not a recognition of belligerency but a recognition of the insurgent Power as a member of the international community. It goes much further, therefore, than a recognition of the existence of a status of belligerency. There is a distinction between the recognition of the belligerency of the two contending parties and the recognition of the rebel organization as the *de facto* government of the country. Recognition of belligerency is a declaration of intention on the part of the recognizing government to treat both parties alike and in fact it is usually in the form of a neutrality proclamation. Recognition of one of the parties as the established government is a very different matter. It is the antithesis of neutrality. If the usual tests laid down to justify recognition of this kind are applied in the present case, the legitimate government will undoubtedly be justified in considering it as premature and therefore as being an act of unjustifiable intervention.[15] The Spanish Government was therefore legally justified when, in a telegram addressed to the League of Nations, it declared the recognition by Germany and Italy of the rebel organization as the *de facto* government of the country to be an act of aggression

[14] See a statement of the conditions which are deemed to justify recognition of belligerency, as formulated by the Institute of International Law in its Neuchâtel *projet*, 18 *Annuaire*, p. 229; Rougier, *op. cit.*, p. 384, and Hershey, *op. cit.*, p. 203.

[15] As to these tests, see Hershey, *op. cit.*, p. 207 ff.

against the Spanish Republic.[15a] Had Great Britain during the American Civil War, instead of recognizing the belligerency of the Southern Confederate Government, recognized it as the *de facto* government of the United States, it certainly would have been regarded by the government at Washington as an act of intervention and probably a cause for war. But even assuming that recognition of the Franco régime as the *de facto* government of Spain carried with it a recognition of the belligerency of the insurgent forces, it did not create a right on the part of the recognizing governments to furnish them aid, because it would be a violation of the obligations of neutrality which they assumed by the act of recognition. It may be observed that, in addition to their duties as neutrals, Germany and Italy are also bound by their obligations as members of the non-intervention committee referred to above not to intervene on behalf of the rebel forces.

One of the advantages which insurgents acquire as a result of recognition of their belligerency, in case they possess naval forces, is the right to blockade the ports and coasts in possession of the legitimate government. It is admitted by all writers on international law, and this view is confirmed by abundant practice, that prior to the acquisition of the status of belligerency they have no such right. When, therefore, the British Government was informed on November 17 by the insurgent authorities of their intention to prevent in the future the importation through the port of Barcelona of munitions and implements of war for the benefit of the government forces, and was warned that unless all foreign ships in the harbor left within a very short time they would be exposed to the danger of destruction or damage, apparently from bombardment, the question was raised in the House of Commons whether this interference with foreign shipping in the port of Barcelona, which was understood to be tantamount to a blockade by the insurgents, could be regarded as lawful, considering that their belligerency had never been recognized either by Great Britain or the Government of Spain. In the House a question was put to Mr. Eden whether interference with foreign vessels by the naval forces of unrecognized insurgents would not be acts of piracy. Mr. Eden, without answering categorically the question, stated that a distinction must be made between interference with British ships on the high seas and interference with them in port. Evidently the government being anxious to avoid taking a definite position at that time on the matter and without challenging the lawfulness of the insurgent blockade, the British Ambassador to Spain was requested to inquire of the insurgent commander, General Franco, as to his exact intentions and whether neutral safety zones could not be provided in the port of Barcelona, as had been promised in other ports, where foreign vessels might anchor under a guarantee of immunity from bombardment.[16] In case the measures adopted by the insurgents take the form of a blockade in the technical sense, the question may also be raised whether, if notification is not given to neutrals in accordance with practice

[15a] Text in New York Times, Nov. 28, 1936. [16] New York Times, Nov. 19 and 20.

and the rules of the Declaration of London and a period allowed during which neutral vessels are allowed to leave, it could be regarded as a lawful blockade. A more important question still is whether the naval forces of the insurgents are sufficient to enable them to establish an effective blockade, especially if it should be extended to the entire coast of Spain under the control of the Madrid government. It may be doubted whether without the aid of foreign vessels they would be able to do so.

It was just at this juncture that Germany and Italy recognized the rebel government as the *de facto* if not the *de jure* government of Spain. Did this recognition have the effect of conferring upon the rebel authorities the right of blockade when neither the legitimate government nor those of any other European countries had done so? It may be doubted whether any such right was acquired as a consequence of German and Italian recognition, even assuming that their recognition of the rebel government was also a recognition of the status of belligerency. Whatever the facts as to this may be, it is unnecessary to examine the question since the British Government, as stated above, by the inquiry which it caused to be addressed to General Franco relative to the concession of safety zones for neutral ships in the roads leading to Barcelona, indicated that it would not contest the legality of the blockade—at least not if provision were made for such zones.

While the Spanish insurgents, so long as their belligerency was unrecognized, could not establish a lawful blockade of the enemy ports and coasts, the legitimate government had a right to blockade those in the possession of the insurgents even though the status of belligerency had never been recognized, provided the blockade were an effective one. The Spanish Government was therefore entirely within its rights when on August 20, 1936, it informed foreign governments that it had declared a war zone around certain ports in control of the insurgents on the Spanish peninsula, in Spanish Morocco and the Balearic Islands, in order that the governments so notified might give warning to their merchant vessels and "possible incidents be avoided." Construing the war zones as being in the nature of a blockade, since the Spanish note of August 20 had stated that foreign merchant vessels would not be permitted to enter the ports situated within the said war zones, the Secretary of State of the United States on August 25 instructed Mr. Wendelin in charge of the American Embassy at Madrid to inform the Spanish Government that the United States could not admit "the legality of any action on the part of the Spanish Government in declaring such ports closed unless that government declares and maintains an effective blockade of such ports." The instruction added that in taking this position the Government of the United States was "guided by a long line of precedents in international law with which the Spanish Government is familiar." [17] While the United States has never formally adhered to the Declaration of Paris of 1856 which lays down the rule that a blockade to be lawful must be effective, it had acted in ac-

[17] Text in New York Times, Aug. 27, 1936, p. 2.

cordance with the rules of the Declaration during its own civil war and the war with Spain in 1898. In fact as early as 1834 during the Don Carlos insurrection when the Spanish Government had declared a blockade of a certain part of the coast of Spain, the Secretary of State informed the Spanish Government that the United States "cannot acknowledge the legality of any blockade which is not confined to particular designated ports, each having stationed before it a force competent to sustain the blockade." [18] On other occasions the American Government has declared its unwillingness to recognize the legality of ineffective blockades,[19] and the rule maintained by the United States is now regarded as a well-settled one in international law.[20] In the present case the Secretary of State did not actually deny the effectiveness of the Spanish blockade, but having good reason to believe that the naval forces of Spain were insufficient to maintain an effective blockade of the ports mentioned in the Spanish note, he wished to serve notice on the Spanish Government that the United States would not recognize its validity in case it should turn out to be ineffective. In adopting this position the Government of the United States did not of course depart in any degree from the policy of non-interference in the internal affairs of Spain which had already been declared by Acting Secretary of State Phillips on August 7.

The question may be raised in this connection whether the action of the Spanish Government in declaring a blockade of certain ports and coasts held by the insurgents did not have the effect of a recognition by it of the belligerency of the insurgent forces from which they derived the right to institute a blockade of the coastal territories in the possession of the government forces. If so, the doubt expressed in the British House of Commons regarding the unlawfulness of the rebel blockade was not well founded. It will be recalled that when, in 1861, the Government of the United States complained of the alleged premature recognition of the belligerency of the Southern Confederacy, the Government of Great Britain replied that President Lincoln's proclamation of April 19, 1861, instituting a blockade of certain Southern ports, was in effect a recognition of the belligerency of the Confederacy which fully justified British recognition.[21] If the establishment of a blockade by the Spanish Government involved a recognition by it of the belligerency of the insurgent Power, it would seem that thereafter the insurgents had as good a right to employ the weapon of blockade as did the opposing party, and this quite independently of whether other governments had or had not recognized a state of belligerency.

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[18] Note of Nov. 18, 1834, of Mr. Forsyth to Chevalier Tacon. 7 Moore, Digest, p. 803.
[19] *Ibid.*, p. 797 ff.
[20] 2 Hyde, *op. cit.*, p. 647 ff.; 2 Oppenheim, *op. cit.*, p. 635 ff.; and Garner, Prize Law During the World War, p. 625 (for a summary of the jurisprudence).
[21] Hershey, *op. cit.*, p. 207, and 1 Moore, Digest, p. 184 ff.