

LEGAL ASPECTS OF ARMED RESISTANCE

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Summary. The aim of this article is to analyse legal aspects of armed resistance movements with a focus on the legal status of the partisan and the legal nature of a civil war. In the light of the norms of international law, both the status of a partisan and the nature of a civil war is, from the point of view of this analysis, connected with, *inter alia*, international recognition and military occupation, which constitute a significant part of the investigations in this article, synthetically analysing the activity of the Polish resistance movement against the illegal communist rule after 1945 (the so-called “cursed soldiers”). Apart from the analysis of international and domestic legal norms and their interpretation, the article refers to the history of the evolution of the legal status and the theory of the partisan.

Key words: right to resistance, international law, law of war, civil war, resistance movements, partisan, Polish Underground State, cursed soldiers

I

The armed resistance movement we usually encounter during wars, political revolts or other tensions connected with an armed conflict of external or internal nature is a direct result of an institution known for a long time in the legal science, namely the institution of the right of resistance¹. The right of resistance originated in the medieval political system; it was theoretically developed in the Monarchomach’s doctrines in the 16th century² and had its

¹ I discussed it further elsewhere, see: M. Konarski, *Challenging the legitimacy of the law*, “Teka Komisji Prawniczej. Oddział PAN w Lublinie” vol. VIII (2015), pp. 54–57.

² Z. Radwański, *Prawa kardynalne w Polsce*, Poznańskie Towarzystwo Przyjaciół Nauk, Poznań 1952, p. 185; I. Schöffner, *The Dutch Revolt Anatomized. Some Comments*, “Comparative Studies in Society and History” 3 (1961), pp. 470–477; A. Sucheni–Grabowska, *Walka o demokrację szlachecką*, in: *Polska w epoce Odrodzenia: państwo, społeczeństwo, kultura*, ed. A. Wyczański, Wiedza Powszechna, Warszawa 1970, pp. 58–59; G.L. Seidler, *Myśl polityczna czasów nowożytnych*, Wydawnictwo Literackie, Kraków 1972, pp. 168–171; J. Baszkiewicz, F. Ryszka, *Historia doktryn politycznych i prawnych*, Państwowe Wydawnictwo Naukowe, Warszawa 1973, pp. 201–203; G.L. Seidler, *Przedmarksowska myśl polityczna*, Wydawnictwo Literackie, Kraków 1974, p. 466; H. Olszewski, M. Zmierzak, *Historia doktryn politycznych i prawnych*, Wydawnictwo Ars boni et aequi, Poznań 1993, pp. 109–110; J. Oniszczyk, *Prawo do oporu i Radbrucha wizja nieposłuszeństwa obywateli. Opór jako odtworzenie nowoczesnej*

renaissance during the American Revolution. In all these cases the right of a community to resist against the ruler was in the foreground and this right was, in the first place, related to the dualistic structure of the state (the ruler – the estates, those in power – the subjects represented by their bodies). It was only in the French declarations that this right becomes separate from the dualistic structure of the state and also from approaching it, theoretically, as the right of the society (i.e. the estates) and, technically, as certain forms; it becomes a sacred, inalienable right of every individual, not put in any forms – “it becomes, as a dogma, a force above any positive law”³. The nature of the right of resistance may vary. It may have a repressive nature (e.g. punishment for bad governance) but also a defensive nature (as defence of a community against a bad government). In addition, the right to resist against widely-understood repression may be exercised either by a collective action (e.g. a revolution) or expressed in individual resistance⁴. The right of resistance was discussed by, *inter alia*, Thomas Hobbes, who is considered to be a strong opponent of any resistance against a sovereign authority but who occasionally accepted such active resistance, in particular to defend life, health and personal freedom of individuals⁵.

Thomas Hobbes also allowed collective self-defence and even a criminal's right to self-defence. What we see here is an opposition between the right of an individual and the rights of the government as a right to self-defence gives rise to the legalisation of a revolt⁶, because “members of the opposition may always refer to such right to collective self-defence when the sovereign wants

polis, in: *Nieprzeciętność. Dylemat wolności*, ed. A. Rossmanith, M. Szyszkowska, Dom Wydawniczy tCHu, Warszawa 2013, pp. 24–25; D. Pennington, *Europe in the Seventeenth Century*, Routledge, New York 2015, p. 218; cf. W. Voisé, *Frycza Modrzewskiego nauka o państwie i prawie*, Wydawnictwo Książka i Wiedza, Warszawa 1956, pp. 136–139; E. Opaliński, *Postawa szlachty polskiej wobec osoby królewskiej jako instytucji w latach 1587-1648*, “Kwartalnik Historyczny” 4 (1983), pp. 791–808.

³ K. Grzybowski, *Demokracja francuska*, Wydawnictwo Czytelnik, Kraków 1947, pp. 24–25.

⁴ J. Baszkiewicz, *Z zagadnień nowożytnej koncepcji prawa do oporu*, in: J. Baszkiewicz, *Państwo. Rewolucja. Kultura polityczna*, Wydawnictwo Poznańskie, Poznań 2009, p. 622. Individual resistance often manifested itself in resistance constituting *crimen maiestatis acts*. The catalogue of these acts comprised two groups of acts constituting *crimen maiestatis acts*: one comprises acts detrimental to the interest of the state and the other – coups against the ruler, see: M. Dyjakowska, *Subsidiarne stosowanie prawa rzymskiego w Polsce przedrozbiorowej na przykładzie zbrodni obrazy majestatu*, “Teka Komisji Prawniczej. Oddział PAN w Lublinie” vol. V (2012), p. 62.

⁵ See: T. Hobbes, *Leviathan*, J.M. & Sons, London 1953, I, 11; cf. W. Wudel, *Filozofia strachu i nadziei. Teoria społeczna Tomasza Hobbesa*, Wydawnictwo Książka i Wiedza, Warszawa 1971, p. 232 and following; D. Dyzenhaus, *Hobbes and the Legitimacy of Law*, “Law and Philosophy” 20 (2001), pp. 461–498; P.J. Steinberger, *Hobbesian Resistance*, “American Journal of Political Science” 4 (2002), pp. 456–465; S. Sreedhar, *Hobbes on Resistance: Defying the Leviathan*, Cambridge: Cambridge University Press 2010, pp. 7–52.

⁶ T. Hobbes, *Leviathan*, II, 21.

punish their actions against the government”⁷. Armed resistance during a war or a political coup seems to be of such nature. However, of crucial importance will be the problem of acceptability of war in general and the nature of war before the law⁸.

Henryk Dembiński notices the ideas of the German authors who in the 19th century accepted the theory of an unlimited right to a war. This theory demanded that is only permitted as a last resort. However as it does not presents any objective features of a last resort, such purely subjective limitation does not have any legal meaning and comes down to a tautology “I am allowed to fight a war when I decide I am allowed to”⁹.

Immanuel Kant, when discussing the original right of free states in the state of nature to go to war, asked a question: what is the right of the state to use its own citizens in a war against other states, taking advantage of and causing danger to their property or even life, and in such way that going to war does not depend on their judgement but that they may forced to do so by the superordinate authority? According to I. Kant, the justification of this right can be inferred from the right that allows anybody to do anything he wants with what belongs to him, i.e. his property¹⁰.

However, the philosopher from Königsberg concludes that in the natural state of states, a right to war (military activities) is a permissible way to pursue by one state its rights against another state, using force if one state feels to be a victim of the other state. This is because in the state of nature pursuing the rights is not possible by a trial before a court – a trial is the only way of settling conflicts but only in the legal state¹¹.

Without assessing this problem let us move on to detailed analysis of the issues we are interested in. For the purposes of this discussion, we will define the concept of an armed resistance movement as military units and formations of units created in order to fight against the occupying power or the government without enough legitimacy to exercise its powers. However we will not analyse the institute of the legitimacy of governments and the law as it was analysed elsewhere¹².

⁷ J. Baszkiewicz, *Z zagadnień nowożytnej koncepcji prawa do oporu*, p. 624.

⁸ This is analysed in detail by H. Dembiński, *Wojna jako narzędzie prawa i przewrotu*, Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego, Lublin 1938, pp. 13–38.

⁹ Ibidem, p. 30.

¹⁰ I. Kant, *Metafizyczne podstawy nauki prawa*, Wydawnictwo Marek Derewiecki, Kęty 2006, pp. 148–149.

¹¹ Ibidem, p. 150.

¹² See: M. Konarski, *Kwestionowanie legitymacji prawa*, “Studia Prawnicze i Administracyjne” 11 (2015), pp. 3–8; Idem, *Kwestionowanie legitymacji prawa jako forma ochrony godności człowieka i obywatela*, “Prawo Kanoniczne” 58 (2015) no. 3, pp. 153–175.

II

An armed resistance movement is usually associated with a period of war between states. However, such view is not entirely justified because partisan activities are also present during revolutions and internal revolutionary events, often with a larger scale and range than in the case of classical warfare in the areas seized by the occupying army¹³.

The concept of occupation in the modern sense appears as late as in the 18th century. Previously, a foreign territory under military occupation simply became a part of the invading state. However such view is not entirely justified as military occupation, understood as the temporary seizure and administration of a foreign territories had been present in international relations for a long time¹⁴.

The way the enemy territory seized during a war was treated always certainly depended on political considerations. When the aim of the invasion was to annex the seized territory, it was often done during the war and the local population was demanded to swear loyalty to the new government. This happened for example during the Seven Years' War, the wars in the Vendée and

¹³ See: M. Flemming, *Jedni w wewnętrznych konfliktach zbrojnych*, "Wojskowy Przegląd Prawniczy" 2 (1995), pp. 3–17; W. Laqueur, *Guerilla Warfare. A Historical and Critical Study*, Little, Brown & Co., Boston 1977; Z.M. Kowalewski, *Guerilla latyno-amerykańska*, Wydawnictwo Ossolineum, Wrocław 1978, p. 9 and following. Guerilla is a type of partisan warfare and its victory gives a result similar to an effective coup – as the political elite and the government system change but there is no complete social and economic change, see: M. Bankowicz, *Zamach stanu: studium teoretyczne*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2009, p. 62; cf. M. Konarski, *Zamach stanu jako forma kwestionowania legitymacji prawa*, "Studia Prawnicze i Administracyjne" 3 (2015), p. 12.

¹⁴ I discussed war occupation in more detail elsewhere, see: M. Konarski, *Godność osoby ludzkiej a wojna lądowa w świetle prawa międzynarodowego*, in: *Normatywny wymiar godności człowieka*, ed. W. Lis, A. Balicki, Wydawnictwo KUL, Lublin 2012, pp. 308–313.

the other rebel departments during the French Revolution¹⁵, and also during the Napoleonic Wars¹⁶.

For a long time, the right of the occupation governments and armies was not subject to any clear limitations in international law and it was quite commonly thought that the population in the occupied territory was at the mercy of the invader. Such approach changed during the Enlightenment and the spread of the view that there are natural, basic and inalienable rights of every human being and entire communities. Jean-Jacques Rousseau formulated a thesis, disseminated to this day, that a war is of interstate and not-people-to-people nature, which made it possible to separate the civilian population and the armed forces thus creating a basis to regulate relations in occupied territories. The aim of such separation is to observe certain rules during a war, which should prevent entrenching hatred between nations and states and also facilitate restoring peace¹⁷.

¹⁵ In the Vendée there was a popular uprising against the revolution and in Brittany, Maine or Normandy – only a counter-revolutionary “small war”, partisan warfare known as the Chouannerie. The Chouannerie covered mainly the regions with isolated fields and dispersed settlements. Towns, villages with open fields, weaving and wine-production regions remained loyal to the Republic. The Chouannerie maintained a peasant character; the role of the nobility here was less important than in War in the Vendée. The War in the Vendée had the character of a “great war” for less than a year. War flickered continuously from 1793 till 1799. The failure of the War in the Vendée and the capitulation in February 1795 did not prevent the spread of Chouannerie partisan warfare also here, in the area of the former “great war”, until 1799, see: J. Baszkiewicz, *Wrogowie. Kontrrewolucja*, in: J. Baszkiewicz, S. Meller, *Rewolucja francuska 1789-1794. Społeczeństwo obywatelskie*, Państwowy Instytut Wydawniczy, Warszawa 1983, p. 272 and following. A large scale war was eliminated through the defeat of the Vendeeans at Savenay on 23 December 1793. Partisan war then started which lasted, with pauses, for many years, and stopped during the Consulate. Jerzy Machlejd presents interesting conclusions, emphasising the fact that the war reduced the population of the Vendée by approx. 200 000 inhabitants, i.e. by 33%. Although it was undoubtedly one of the bloodiest wars of the modern era, the losses were not as high as in rough estimates of some historians. In the western departments the number of deaths was nearly half a million. Granier de Cassagne in *Histoire du Directoire* cites the general Hoche’s letter to the minister of interior in which he writes out of five people in 1789 one person stayed alive (1796). The Chouannerie and pre-revolutionary riots were small with negligible losses and by no means depopulated the country. The numbers cited by Taine and other authors should be considered to be exaggerated. As far as Hoche’s letter is concerned, he gave a rough estimate and made a considerable mistake because not 1 person but over 4 people stayed alive see: J. Machlejd, *Rewolucja francuska w świetle statystyki*, Wydawnictwo Gebethner i Wolff, Warszawa 1934, p. 67.

¹⁶ The partisans of the Spanish guerilla in 1807 were the first partisans who dared to start irregular fighting with first modern, regular army – the Napoleon’s army. This army evolved from the first republican army in the world based on conscription which was a result of the reform of the military system during the French Revolution.

¹⁷ J.J. Rousseau, *Umowa społeczna*, transl. A. Peretiatkowicz, Wydawnictwo Naukowe PWN, Warszawa 2010, pp. 18–19.

According to the norms of international law, international legitimacy is based on two fundamental premises: (1) the government's power in the territory of a state should be effective, (2) the government should be of indigenous character. Since the 19th century, the term "effectiveness" has been subject to particular attention in the international law science. In the most general terms, effectiveness can be defined as a principle, according to which the actual existence or non-existence of certain factual situation provided for by international law either produces *ipso facto* legal effects or is a necessary condition to give rise to legal effects. The effectiveness principle is not formulated by some specific norm but is rather generalised – by a common denominator – by a number of norms. This principle has an important role to play in the law by maintaining the necessary link with the reality, which eases the tension between facts and their legal regulation and, on the other hand, by legalising, by means of law-making, the consequences of certain conflict situations, if these proved to be effective¹⁸.

In the case of more complicated situations, concerning the representation of the state in international relations, when both external and internal factors affect its power, the effectiveness principle should be supplemented by the principle of indigeneity of governments. Such indigenous nature of a government consists not only in the origins of its members but also in a sufficient degree of its independence from the governments of other states. In a situation when power is lost to a rival internal political force, other states should recognise the government in the entire territory or at least its major part. One should remember however, that the government does not lose its right to represent the state even if the entire territory is occupied by another state or other states, especially if there is evidence that it is still supported by its society.

The possible reactions of international law entities to non-constitutional changes of the government can be divided into three types: (1) there may be no official reactions – further diplomatic relations may continue, which is considered a tacit form of recognising a given government; (2) a statement recognising the new government may be issued; (3) severance of diplomatic relations may take place, meaning a clear lack of recognition.

It should be emphasised, however, that when states – members of the international community – make a political assessment whether to recognise the new government, they use different criteria, which may result from factors such as (1) the internal political make-up or personal preferences taking the recognition decision; (2) the relations between the state taking the decision and the state in which the government has changed; (3) the character of the

¹⁸ J. Symonides, *Zasada efektywności w prawie międzynarodowym*, Wydawnictwo Uniwersytetu Mikołaja Kopernika, Toruń 1967, p. 3.

regional subsystem (if both states belong to it); (4) the character of the international system¹⁹.

In the case of a government in exile we face a situation in which such government does not control its territory and consequently does not control its inhabitants; therefore it cannot fulfil international obligations which are expected from governments²⁰. Governments in exile, incidentally just like domestic governments, seek international approval to ensure the international community that their claims are legitimate and to discredit the rival candidates as “illegitimate”²¹. We will discuss again the institution of recognition in the further part of the article and we will analyse the situation of those Polish partisans who were subordinate to the Polish government in exile.

III

The issue of recognising a government is related to the recognition of a belligerent and insurgents, an issue which will often be fundamental for the further discussion. The institution of the recognition of belligerents developed in the first half of the 19th century during independence movements in America and Europe. The application of this institution, especially by the USA, England and France, meant that an independence movement, civil war or uprising underwent transformation from an internal conflict into an a conflict of international character. This happened because in practice – as emphasised by Janusz Symonides – it proved to be impossible to treat revolutionary colonies, organised into independent states and fighting to become independent from the metropolis, as rebel groups without any status in international law.

Generally speaking, the cases in which a group can be considered to be a belligerent do not constitute a controversial issue. Two groups of criteria are used, namely objective and subjective criteria.

Objective criteria include the following conditions: insurgents have their own government and military organisation; a certain part of the territory of a state at civil is effectively controlled by their government, i.e. this area must be occupied and administered by the insurgent authorities.; finally, the uprising or the revolution took the form of military activities in which the insurgent forces, acting in an organised way under a unitary leadership, observe the rules of warfare provided by international law. In the event when of these conditions in absent, any recognition is premature.

¹⁹ Zob. E. Dynia, *Uznanie rządu w prawie międzynarodowym*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, Lublin 1995, p. 96.

²⁰ Ibidem, p. 97.

²¹ Ibidem.

Subjective conditions include the probability of insurgents' success and the existence of own direct interest. The consequence of a decision to grant recognition as a belligerent is that an insurgent group acquires the right and obligation of a state at war, whereas the recognising entities are obliged to remain neutral. Simultaneously, the responsibility for events in the territory outside its control is replaced, due to its actual power, by the responsibility of the government of the belligerent.

The difference between the recognition as insurgents and as a belligerent comes down to the range and the size of a civil war and also to the degree of organisation. An insurgent group is not entitled to the status of a belligerent if: it still fights to create conditions for appointing its own government bodies, does not effectively control a part of the territory, its forces do not act under a unitary leadership or do not observe the binding ways of fighting a war. It is noteworthy to remember here that the recognition as insurgents is an institution of American origin and was first adopted in judicial decisions by the district court in New York in the *Ambrose Light* case in 1885. The United States applied it in late 19th century *inter alia*: to Chilean insurgents in 1891, during the civil war in Venezuela in 1892, to the revolutionary movement in Brazil between 1893 and 1894 and during the Cuban War of Independence (1895-1897).

As far the legal effects of the recognition as insurgents is concerned, the difference on the factual situation – which is a basis for the recognition as insurgents and a belligerent – is reflected in legal consequences, which are narrower in the first case. The recognition as insurgents means, in the first place, they are not treated by the recognising state as criminals but the third states are not obliged to remain neutral. The decision to recognise as insurgents usually stems from a will to protect, by the recognising state, their citizens and interests and may be qualified as partial recognition. Let us make a brief reference here to the concept of neutrality itself²².

Despite the fact the institution of neutrality is not homogeneous, as we can distinguish between its several forms, a multitude of distinction and isolating types of neutrality in an disorderly fashion does not help to properly understand this institution of international law. The types of neutrality which are most frequently mentioned in literature include: temporary, ordinary, perpetual, permanent, traditional, modern, military and passive neutrality as well certain terms which seem related such as: perpetual neutralisation, neutralised

²² I discussed it in more detail elsewhere, see: M. Konarski, *Neutralność w prawie międzynarodowym*, in: *Neutralność państw europejskich. Aspekty prawne, międzynarodowe i polityczne*, ed. J. Smoliński, Z. Tomkowski, Wydawnictwo Wyższej Szkoły Menedżerskiej w Warszawie, Warszawa 2012, pp. 27–43.

states, the state of non-participation in a war, neutralism, policy of neutrality, non-alignment, etc.²³

If we adopt the concept of neutrality forms which was once proposed by J. Sutor, we can identify three basic forms of neutrality. These forms will constitute the basis for the further discussion: a) wartime neutrality, b) permanent neutrality, c) non-alignment policy²⁴.

Neutrality as a legal (normative)²⁵, and also political concept, understood in general as impartiality, was already present in antiquity. Although the contemporary status of neutral states is considerably different than in the past, the analysis of how this institution evolved leads to a view that the “forms” of neutrality known in antiquity may constitute the basis for the concepts adopted at present. We should remember that the Middle Ages, especially in Europe, knew legal institutions that in some ways may resemble modern forms of neutrality but their range and nature was somewhat different. What I have in mind here is the period in European history when at the time of feudal fragmentation, there was a non-judicial way of settling disputes, namely a private war. Let us notice that that a right to fight wars, which only sovereign states have today²⁶ was a right of every feudal lord. At that time, private wars were a common way to exercise one’s own right was linked to old primitive concepts of clan-based revenge²⁷.

The only factor which, in the situation of the atrophy of state authority, could counteract or mitigate private wars was the Church, which enjoyed moral authority and could use sanctions in the form of ecclesiastical censures. In the 11th century two ecumenical councils specified measures mitigating the practice of private wars by introducing the institutions of Peace of God and Truce of God, which, for the purposes of this discussion, I interpret as the nucleus of contemporary forms of neutrality.

²³ J. Sutor, *Państwa neutralne i niezaangażowane*, Wydawnictwo Wiedza Powszechna, Warszawa 1972, p. 11.

²⁴ Ibidem, p. 12.

²⁵ A. Kość, *Historyczne modele relacji prawa, państwa i religii w niemieckiej filozofii prawa*, Wydawnictwo Polihymnia, Lublin 1995, pp. 108–111. As A. Kość writes: “legal order is the order of norms which regulates manners of behaviour in interpersonal relations, in organisations as well as the relationship between an individual and the society and the state and vice versa” (ibidem, p. 108).

²⁶ Compare the definition of the state in international law, L. Antonowicz, *Podręcznik prawa międzynarodowego*, Wydawnictwo Naukowe PWN, Warszawa 2006, pp. 13–16; see: Idem, *Narodziny Drugiej Rzeczypospolitej ze stanowiska prawa międzynarodowego*, “Przegląd Sejmowy” 5 (1998), pp. 22–28.

²⁷ M. Szczaniecki, *Powszechna historia państwa i prawa*, Wydawnictwo Naukowe PWN, Warszawa 1994, pp. 97–98.

Peace of God (*pax Dei*) constituted a protection against the war for people not taking part in it, i.e. the clergy, ploughmen, monks and for material assets, such as public institutions, churches, mills, etc.²⁸

Truce of God (*treuga Dei*) forbade fighting a war on particularly solemn days, such as Advent and Lent, and then also on certain days of the week²⁹. Those guilty of these prohibitions were subject to excommunication and had to appear before peace tribunals which were created by *inter alia* leagues of bishops. In the event the guilty did not accept the sentences of the tribunal the league declared war against him³⁰.

It follows from the above that Peace of God, as an institution of a protective nature, may be considered as closer in its legal structure to the institution of modern neutrality because of its entities and, in particular, because of the territorial range of the protection³¹.

The form of neutrality which is the oldest also most interesting for us, applicable in the case of a military conflict, and which applies to both a precisely defined conflict and precisely defined states, has the traditional name of wartime neutrality. Wartime neutrality only covers the duration of a specific armed conflict and a state with the status of wartime neutrality may simultaneously be a belligerent in relation to certain states and maintain the neutral status in relation to the other states. The basis condition of the neutrality concept, going back to the period of slavery, is refraining from participation in an armed conflict, i.e. not taking part in a war. In subsequent centuries, during feudalism, a vassal, who was obliged not to take any actions which were harmful for his lord, should, in the event of an armed attack, help him or remain neutral.

In 17th and 18th centuries, first legal norms protecting neutrality started to appear while previously such statute was regulated in a customary way. States begin to sign treaties in which a state fighting a war deems the other party to the agreement to be a neutral state and undertakes not to extend acts of war to its territory³². As R. Bierzaniek points out, "a significant development of

²⁸ Cf. H.J. Berman, *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*, Wydawnictwo Naukowe PWN, Warszawa 1995, p. 569. The provisions in the statutes issued by German emperors and princes in the 12th and 13th centuries summoned the entire local population to swear that they would obey peace. Such oaths were compulsory to all people who were under the jurisdiction of the person who announced them, without any temporal limitations (ibidem, pp. 569–570).

²⁹ M. Szczaniecki, *Powszechna historia państwa i prawa*, p. 98.

³⁰ Ibidem, p. 98. In France in 1258 king Louis IX issued general prohibition of private wars in the whole kingdom but private war disappeared completely as late as in the 15th century, cf. J. Baszkiewicz, *Historia Francji*, Wydawnictwo Ossolineum, Wrocław 1995, pp. 108–109.

³¹ Cf. also: H.J. Berman, *Prawo i rewolucja*, pp. 563, 569–571, 587.

³² During the War of the Polish Succession (1733–1735), "the Netherlands, unwilling to engage in a new war and in conflict with the emperor, announced a declaration of neutrality (24 November 1733)", E. Rostworowski, *Historia powszechna. Wiek XVIII*, Wydawnictwo Naukowe PWN, Warszawa 1994, p. 322. According to international agreements which put an end to the

the norms of wartime neutrality was the formulation, by the USA and Great Britain of the so-called Washington rules according to which a neutral government is obliged to (1) make every effort regarding its ports not to allow arming or sailing away ships which intend to fight against the state with which this government is at peace; (2) not allow or tolerate a situation in which one of the belligerents turns its ports or territorial waters into a base for military acts against another state or for restoring or enlarging its military resources or recruiting soldiers; (3) make every effort to prevent the violation of these obligation”³³.

The process of systematising the regulations concerning the rights and obligations of neutral states began during the Second Hague Conference in 1907, when rights and duties of neutral states in naval war and war on land were codified, and signing the London Declaration of 1909. The law of wartime neutrality comprises of legal provision regulating relations between belligerents and states not taking part in a war. One should remember that infringing a right of a neutral state does not mean that its neutrality ceases to exist until this state joins the war. Neutrality during civil wars is also possible, especially because such wars are increasingly of international significance. In such a case neutrality begins when the insurgents are recognised as a belligerent³⁴.

The basis condition to recognise a certain state as using wartime neutrality is that this state observes the fundamental norms of international law. The principle which is still valid is that once a war breaks out, a state which does not intend to take part in it declares neutrality in the war and submits such declaration, via diplomatic channels, to other states, mainly to the belligerents. During the Second World War neutrality was declared by 21 out of 40 neutral states³⁵.

However, what frequently happens in international practice is that some states already declare neutrality during peace and issue normative acts containing detailed provisions on neutrality in case of war³⁶. Announcing a declaration is not considered to be a binding condition because a state which does not declare neutrality and does not take part in a war is still obliged to observe international law, especially the rules of neutrality. One should be aware that a neutrality declaration usually has the character of a formal act – despite the fact that a declaration was announced the state can still join the war. An

main stage of the War of Spanish Succession (1702–1714) “the Netherlands obtained a barrier in Belgium due to the fortresses at the French border and the limitation of trade of Belgian Countries coming under the Hapsburg rule” (ibidem, p. 209).

³³ R. Bierzanek, *Wojna a prawo międzynarodowe*, Wydawnictwo Ministerstwa Obrony Narodowej, Warszawa 1982, p. 310.

³⁴ See: R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, ed. 8, Wydawnictwo Prawnicze LexisNexis, Warszawa 2005, pp. 146–147.

³⁵ J. Sutor, *Państwa neutralne i niezaangażowane*, p. 19.

³⁶ Ibidem.

example of violating wartime neutrality during the Second World War is the aggression of Germany against Belgium and Luxembourg³⁷.

Although the modern institution of neutrality is still based on the Hague Conventions and the Swiss tradition, advances in military technology as well as increased importance of certain military formations in the battlefield created a need to modify the legal norms applicable to the rights and obligations of neutral states in warfare on land, at sea and in the air, an example of which are those contained in the Geneva Conventions of 1949³⁸.

The right and duties of neutral states during a land war are included in the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, signed in 1907 (Hague Convention V)³⁹.

According to this Convention the territory of neutral states is inviolable, which also means that belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral state. In addition, belligerents are forbidden to erect on the territory of a neutral state a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea and also to use any installation of this kind established by them before the war on the territory of a neutral state for purely military purposes, and which has not been opened for the service of public messages. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral state to assist the belligerents and a neutral state is obliged to punish acts in violation of its neutrality but only if such acts have been committed on its own territory. A neutral state is obliged to intern the belligerents which it receives on its own territory, as far as possible, at a distance from the theatre of war⁴⁰.

It should be emphasised that a neutral state is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet. It is also not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals. In addition, a neutral state which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence⁴¹. The same rules apply, in accordance with article 13 of Hague Convention V,

³⁷ Cf. I. Kulikowska, *Niemcy wobec państw neutralnych w czasie II wojny światowej*, in: *Neutralność*, pp. 183–197.

³⁸ “Journal of Laws” of 1956 No. 38, item 171.

³⁹ “Journal of Laws” of 1927 No. 21, item 163.

⁴⁰ During the Second World War, Polish troops which crossed the Swiss border after France had been defeated in 1940 were interned in Switzerland.

⁴¹ See *inter alia* M. Flemming, *Traktowanie jeńców wojennych*, “Wojskowy Przegląd Prawniczy” 1 (1991), pp. 3–27; Idem, *Ucieczki jeńców wojennych*, “Wojskowy Przegląd Prawniczy” 2 (1991), pp. 70–80.

to prisoners of war brought by troops taking refuge in the territory of a neutral state. The Convention also provides that a neutral power may authorize the passage over its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material.

According to article 2(5) of the Charter of United Nations, signed during the UN Conference in San Francisco on 26 June 1945, all member states undertook to give the United Nations every assistance in any action it takes in accordance with the UN Charter, and to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action⁴². According to article 43 of the UN Charter all members undertook to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage⁴³.

In 1991, when military action was conducted against Iraq on the basis of a resolution of the Security Council, “some of the member states declared neutrality, while some other member states, without making any relevant declarations, either acted in compliance with the legal status of neutral states or treated the coalition fighting with Iraq in a more friendly way, providing it with non-military assistance”⁴⁴.

IV

A partisan has a clearly defined enemy and not only, as every regular combatant, does he risk his life but also knows and accepts the fact that the enemy will treat him as an outlaw and someone devoid of honour – which happened in the case of the so called cursed soldiers. A revolutionary does the same and treats any concepts of enemy, law, statutes and dignity as an ideological lie. This contrast is still present today, despite numerous connections and the confusion characteristic for the Second World War and the post-war period, which are related to two types of a partisan: a defensive indigenous protector of the fatherland and an aggressive cosmopolitan revolutionary activist⁴⁵.

⁴² See A. Przyborska-Klimczak, *Prawo międzynarodowe publiczne. Wybór dokumentów*, Wydawnictwa Prawnicze, Lublin 1998, p. 9.

⁴³ Ibidem, p. 17.

⁴⁴ R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, p. 440.

⁴⁵ C. Schmitt, *Teoria partyzanta*, Wydawnictwo Krytyki Politycznej, Warszawa 2016, p. 46; cf. Mao Tse-tung, *Dzieła wybrane*, vol. I, Wydawnictwo Książka i Wiedza, Warszawa 1953, p. 245. Carl Schmitt emphasises that Mao Tse-tung was the greatest practitioner and the best known theoretician of the modern revolutionary war. He also emphasises Lenin, who was the first to understand the importance of partisans as an element of national and international civil war and tried to transform them into an active instrument of the central leadership of the com-

This contrast is however solely based on two fundamentally different ways of understanding war and hostility, which manifest themselves in two different types of partisan warfare. Whenever a war is on both sides fought as non-discriminatory war of one state against another state, a partisan is a marginal figure who does not demolish the framework of war and does not change the general structure of political actions⁴⁶.

If the enemy is totally criminalised, as is the case when for example a class enemy fights a civil war against another class enemy and its main objective is to beat the government of the enemy state, then the revolutionary criminalisation has a demolishing effect because the partisan becomes a true war hero. He is the one who executes a criminal and risks that he himself will be treated as a criminal or a wrong-doer⁴⁷.

This constitutes the logic of a war based solely on just cause, without taking account the legitimacy of the enemy. Polish partisans who fought the illegal government brought in Soviet tanks were protected by the Hague Convention (IV) of 1907. According to this Convention a soldier in irregular troops (a partisan) observing the principles of chapter I is a belligerent within the meaning of international law⁴⁸.

The definition of belligerents in international law is unambiguous: according to Article 1 of the Convention “the laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: to be commanded by a person responsible for his subordinates; to have a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war”. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army”. According to Article 2 of the Convention “the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war”. According to Article 3 of the Convention “the armed forces of the belligerent parties may

munist party. For Lenin, partisan warfare was one of the tools to fight a civil war but could not be only measure of revolutionary combat, see: W.I. Lenin, *Wojna partyzancka*, in: Idem, *Dzieła wszystkie*, vol. XIV, Wydawnictwo Książka i Wiedza, Warszawa 1986, pp. 1–11. K. Kraj provides an interesting analysis of the concept of violence in Lenin’s political thought, *Terroryzm w Rosji i ZSRR: Terror w myśli politycznej Włodzimierza Lenina*, “Bezpieczeństwo. Teoria i praktyka” 3 (2011), p. 81 and following.

⁴⁶ C. Schmitt, *Teoria partyzanta*, p. 46.

⁴⁷ Ibidem.

⁴⁸ Cf. L. Gelberg, *Zarys prawa międzynarodowego*, Państwowe Wydawnictwo Naukowe, Warszawa 1967, p. 245. This topic is discussed in more detail by A. Klafkowski, *Prawo międzynarodowe publiczne*, Państwowe Wydawnictwo Naukowe, Warszawa 1969, pp. 350–352.

consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war”.

These provisions were reiterated in the Geneva Convention of 27 July 1929 relative to the treatment of prisoners of war (ratified by Poland in 1932) and the Third Geneva Convention relative to the treatment of the prisoners of war of 1949 (ratified by Poland in 1956) and Amendment Geneva Protocols of 1977 relating the victims of international and non-international victims of war⁴⁹.

Despite the fact that article 1(4) of Amendment Protocol 1 of 1977 constitutes an outstanding achievement in the field of strengthening human rights during armed conflicts, there are still no binding norms in international law regarding combat for national liberation and independence which does not take place within the metropolitan centre-colony system⁵⁰.

Let us come back however to the Hague Regulations of 1907, which constitute the key normative act in the field of the legal status of partisans. The wording of the Regulations, in particular Articles 1 and 2, were a result of a compromise between the position of superpowers – with huge armies and usually fighting wars in foreign territories – which wanted to reserve the status of a legal combatant only for regular armies and the position of certain smaller states, which demanded that a “right of insurrection” is clearly recognised and, consequently, that citizens who take up arm to defend their homeland are also granted the status of legal combatants⁵¹.

Concessions to the position of the smaller states included Article 2 regarding a mass uprising during an enemy invasion and the *Martens Clause* in the preamble to the Hague Convention (IV), which stated that the belligerents and the inhabitants not covered by the Convention “remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of

⁴⁹ It should be emphasised that Geneva Conventions of 1929 and other international agreements did not regulate internal armed conflicts. The only normative act which partially addressed this issue was the “Convention concerning the Duties and Rights of States in the Event of Civil Strife” adopted by the regional sixth Pan-American Conference in Havana in 1928 but it only concerned asylum seekers and not captured combatants. See: M. Perkowski, *Definicja konfliktu zbrojnego nie mającego charakteru międzynarodowego w międzynarodowym prawie humanitarnym*, in: *Międzynarodowe prawo humanitarne*, ed. T. Jasudowicz, Wydawnictwo Dom Organizatora TNOiK, Toruń 1997, pp. 43–56.

⁵⁰ According to Article 1(4) of the Amendment Protocol of 1977, protection during international armed conflicts covers the armed conflicts in which people fight against colonial rule, foreign occupation racist regimes, exercising their right for self-determination in the UN Charter in the Declaration of 24 October 1970 (Resolution no. 2625/XXV) on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

⁵¹ Cf. G. Grabowska, *Partyzanci*, in: *Wielka Encyklopedia Prawa*, ed. B. Hołyst, Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa 2005, p. 609.

humanity, and the dictates of the public conscience” and that “this how the adopted regulations, particularly Articles 1 and 2 should be understood”.

This type of regulation did not define the status of partisan units clearly enough. In the practice of, especially German, occupation armies partisans were denied the status of legal combatants and, when captured, they were shot as “bandits”⁵². The argumentation was that the provisions of the Hague regulations should be interpreted strictly, just like the provisions of other international agreements which limit the freedom of states; that the *Martens Clause* included in the preamble to the Hague Convention (IV) does not have the nature of a legal obligation but is only of purely moral nature; that failing to meet just one of the four conditions listed in Article 1 of the regulations deprives of the rights pertaining to legal combatants.

Such was the position of the American military court hearing the case of the German officer Wilhelm List and his companions accused of war crimes in Yugoslavia and Greece⁵³. The court assumed that everything that is not prohibited is permitted and discharged the accused from the criminal liability for killing partisans and hostages. The court concluded that although certain units in Yugoslavia and Greece met the international law requirements which entitled them to the belligerent status, most units did not meet the required conditions. The groups were marked in ways corresponding to a military organisation but nonetheless the members of the units did not wear the same uniforms and usually wore civilian clothes, using elements of Germans, Italian or Serb uniforms if these were available. Although the Soviet star was worn as a distinguishing mark, adduction of evidence was not able to prove that it could be

⁵² For example, during the French Revolution the National Assembly issued a decree (4 May 1791) which stated that “prisoners of war are under the protection of the state” and that “violence against a prisoner of war and offence to his honour shall be punished in the same way as in the case of French citizen. However, it only concerned prisoners in international wars. During the suppression of the royalist uprising in the Vendée (1793-1800) captured insurgents were often killed on a mass scale, see: P. Jasienica, *Rozważania o wojnie domowej*, Wydawnictwo Czytelnik, Warszawa 1993. One should remember that the French revolutionary legislation regulated the treatment of prisoners of war in much less detail than the instruction of the Kościuszko’s government and the instructions in the same vein issued by the uprising authorities in 1794, see: E. Gomułski, *Instrukcja rządu Kościuszki o traktowaniu jeńców wojennych*, “Czasopismo Prawno-Historyczne” 1 (1966), pp. 182–200. In contrast, member of Polish national uprising did not obtain the rights enemy soldiers customarily had. They were sent to Russian, German and Austrian prisons and were often sentenced to death. Even the soldiers in regular wars of 1794 and 1831 were treated in such a way. It should be emphasised that in the field of armed conflicts the rules of customary law had played a great role for a long time. Already in the medieval times there were attempts to codify these norms. It was the custom which was the origin of the basic principles of the law of war, namely military necessity, the principle of humanitarianism and chivalry – principles which, as I mentioned above, were not always observed, see: M. Flemming, *Międzynarodowe prawo zwyczajowe*, “Wojskowy Przegląd Prawniczy” 3–4 (1995), p. 11.

⁵³ R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, p. 419.

seen from a distance and the partisans did not carry arms openly unless it was beneficial for them. Therefore the court concluded that in such situations the members of these illegal groups were not entitled to be treated as prisoners of war⁵⁴.

The third Geneva Convention – as has already been mentioned above – granted, according to Article 4, the status of prisoners of war to “members of organised resistance movements belonging to one of parties in a conflict”, providing that the four conditions in the Hague regulations are met⁵⁵. A fundamental change in this respect was introduced by article 43 of the Amendment Protocol in 1977. It defined the armed forces of a party in a conflict as “all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict”⁵⁶. The parties in a conflict should be notified if a paramilitary or armed law enforcement agency is incorporated into the armed forces, and members of the armed forces which have the right to participate directly in warfare are entitled to the status of prisoners of war. In contrast, mercenaries are not entitled to a status of combatants, therefore they are not entitled to the status of prisoners of war.

According to Article 47 of the Amendment protocol of 1977, a mercenary is any person who: (1) is specially recruited locally or abroad in order to fight in an armed conflict; (2) does, in fact, take a direct part in the hostilities; (3) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (4) is neither a national of a Party to the conflict nor a resident of territory controlled by a party to the conflict; (5) is not a member of the armed forces of a Party to the conflict; and (6) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.

⁵⁴ Ibidem; see also: M. Flemming, *Traktowanie*, pp. 3–27.

⁵⁵ I discussed the legal status of prisoners of war elsewhere, see: M. Konarski, *O statusie jeńców wojennych w świetle prawa międzynarodowego*, “Studia Społeczne” 2 (2012), pp. 173–190.

⁵⁶ Cf. M. Byers, *War Law. Understanding International Law and Armed Conflict*, Grove Press, New York 2005, pp. 127–135.

V

Another issue closely related to the subject of our discussion in the criminal liability of partisans, particularly its most drastic form, i.e. the death penalty. Since time immemorial, combatants, whether they were legal combatants or deprived of the legal status, were vulnerable to the frequently used death penalty⁵⁷ or torture and corporal punishment⁵⁸.

According to Marian Flemming, during the Second World War the prevailing opinion in German law was that partisans are illegal combatants who do not have the right to obtain the status of prisoners of war; as a result in 1939 the death penalty for partisan activity was laid down and there were instructions that every case should be heard by a court. However, the universally approved but not always applied principle that a criminal penalty, especially a death penalty, may only be imposed by a court was subject to significant limitations, particularly in the actual practice in the occupied areas⁵⁹.

Partisans were already punished by death, without any legal proceedings, during the French-German war of 1870-1871 but the Germany-wide military criminal code removed such a possibility in 1872⁶⁰. During the Second World War – more or less from 1943 – through the efforts of the International Committee of the Red Cross (ICRC), which aimed to grant the captured partisans the status of prisoners of war and therefore not to punish them for their active participation in warfare – led, according to ICRC reports, to the situation that partisans were indeed treated in such a way. Unfortunately, in many cases partisans – mainly Yugoslav, Greek and Albanian partisans – were sent not to prisoner-of-war camps but to concentration camps and camps for interned civilians⁶¹. There were also cases of exchanging partisans for German soldiers captured by partisan formations. The position of German authorities

⁵⁷ M. Flemming, *Postępowanie karne i dyscyplinarne przeciwko jeńcom wojennym*, "Wojskowy Przegląd Prawniczy" 1–2 (1990), pp. 3–19. One should remember that according to Article 101 of the Geneva Convention (II), a prisoner of war sentenced to death must not be executed for 6 months after the day the protecting was notified of such sentence. This period is intended to allow intervention on behalf of the convict.

⁵⁸ See: K. Słaboń, *Sytuacja jeńców wojennych w konflikcie iracko-irańskim (1980-1988)*, Wydawnictwo Akademii Obrony Narodowej, Warszawa 2001, pp. 65–66 and 74–76; J. Sawczuk, S. Senft, *Obozy jenieckie w Łamsdorf w latach II wojny światowej: traktowanie jeńców wojennych*, in: *Obozy w Łamsdorf/Łambinowicach (1870-1946)*, ed. E. Nowak, Centralne Muzeum Jeńców Wojennych w Łambinowicach–Opolu, Opole 2006, pp. 167–210; J. Anderson, A. Williams, V. Head, *Rzezie, masakry i zbrodnie wojenne od starożytności do współczesności*, transl. L. Hess, Wydawnictwo Bellona, Warszawa 2009, pp. 294–298.

⁵⁹ M. Flemming, *Zbrojny ruch oporu w okresie II wojny światowej. Aspekty prawnomiędzynarodowe*, "Wojskowy Przegląd Prawniczy" 1 (1995), p. 14.

⁶⁰ Ibidem.

⁶¹ Ibidem, p. 18.

also changed in the East, which was confirmed by the guidelines, issued on 6 May 1944, for fighting partisan units, according to which all “bandits” captured wearing enemy uniforms or civilian clothes should generally be treated as prisoners of war⁶².

The same applied to all persons captured in the combat area, even if it was not possible to prove that they took part in combat. According to these guidelines, bandits in German, or their allied forces, uniforms should be shot after careful interrogation if caught during combat, while fugitives, regardless of their clothes, should generally be treated well. As emphasised by M. Flemming, from the point of view of international law, these guidelines may only be criticised for their requirement to shoot, without trial, persons wearing German uniforms or uniforms of their allied armed forces – although this constitutes a war crime, each case should be heard by a court and followed by a sentence⁶³.

However, the German practice did not always follow the guidelines of 6 May 1944 – as we know, during the first month of the Warsaw Rising (August 1944) the insurgents captured by the Germans were usually shot on the spot without any trial. It was later that they were treated as prisoners of war⁶⁴.

Poland, a country which during the course of its history was frequently a theatre of war and subject to different forms of occupation, has a rich tradition of armed resistance. The examples that are most often mentioned include the armed resistance movement in the occupied Poland during the Second World War and – recently – the partisan activities of the so-called cursed soldiers against the communist authorities in Poland, between 1944 and 1963. Nevertheless, these Polish traditions go back to the much more distant past. For instance, we may mention partisan warfare in certain regions of Poland during the Swedish invasion of 1655–1660, during the invasion of Russian and Saxony troops in 1943, Józef Zaliwski’s partisan troops in the Lublin region

⁶² Ibidem, p. 19.

⁶³ Ibidem.

⁶⁴ Ibidem. A different view is presented by Szymon Datner, who gives as an example the events after the Warsaw district of Mokotów capitulated. On 27 September, a group of 60 insurgents left through a manhole in ulica Dworkowa (Dworkowa Street) and was captured and shot. The following day another group was in similar circumstances captured by Germans and shared the fate of the first group. In total, about 150 insurgents were shot in ulica Dworkowa. S. Datner, *Zbrodnie Wehrmachtu na jeńcach wojennych armii regularnych w II wojnie światowej*, Wydawnictwo MON, Warszawa 1961, p. 81.

in 1833⁶⁵, Szymon Konarski's partisans in Lithuania and Podolia known as *konarszczyna*⁶⁶, or Father Piotr Ściegienny's partisans⁶⁷.

Particularly interesting, especially for the Polish reader, is the armed resistance, after the war finished in western Europe, against the illegal – in the light of the Constitution of Poland of 1935 – Polish government which could exist due to foreign (Soviet) military aid⁶⁸. The resistance movement that existed in Poland between 1945 and 1963 is known as the partisan movement of the so-called cursed soldiers, i.e. former regular units subordinate to the Polish Government in Exile in London. Lines of action of the Polish Underground State were already determined during the German occupation of Poland⁶⁹.

One of the basic acts is the Instruction of the Government of the Republic of Poland of 16 October 1943 for general T. Bór-Komorowski, the Commander-in-Chief of the Home Army. The Instruction discusses different possible variants of the development of the international and strategic situation. It contains the assumptions for either starting a general uprising or just intensified sabotage action and also discusses different approaches in case the Soviet Army enters Poland. Another basic act is the Order of the Commander-in-Chief of

⁶⁵ L. Zalewski, *Z dziejów partyzantki r. 1833 w województwie Lubelskiem*, Dom Książki Polskiej, Lublin 1934 and the literature therein.

⁶⁶ *Pamiętnik obchodu ku uczczeniu prac i męczeństw Szymona Konarskiego rozstrzelanego w Wilnie*, Wydawnictwo Gustaw Silbermann, Strasburg 1839; S. Konarski, *Przykazania narodowe według Szymona Konarskiego*, drukiem Jakubowskiego i Sp., Warszawa–Lwów 1914; S. Szpotański, *Konarszczyna: przygotowania powstańcze w Polsce 1835-1839*, Spółka nakładowa Książka, Kraków 1916; S. Konarski, *O obowiązkach Polaka: program działań narodowych skreślony w roku 1838*, foreword by H. Mościcki, Wydawnictwo G. Gebethner i Spółka, Warszawa 1918; *Stowarzyszenie Ludu Polskiego na Litwie i Białorusi: Szymon Konarski*, ed. A. Brus, Wydawnictwo DiG, Warszawa 2015. Particularly interesting, and providing direct knowledge about Szymon Konarski's partisan troops, are protocols of his statements before the Vilnius Committee of Inquiry on 4 June 1838, 6 June 1838, 26 August 1838, 3 September 1838, 17 September 1838, 19 September 1838, 25 September 1838, 12 and 18 October 1838, 7 and 17 November 1838, and also 2, 3, 5, 7 and 10 December 1838, see: *Stowarzyszenie Ludu Polskiego*, pp. 203–521.

⁶⁷ M. Tyrowicz, *Sprawa ks. Piotra Ściegiennego*, Spółdzielnia Wydawnicza Książka, Warszawa 1948; W. Dżakow, *Piotr Ściegienny: ksiądz-rewolucjonista*, Wydawnictwo Książka i Wiedza, Warszawa 1974; P. Ściegienny, *Ewangelia i rewolucja. Wybór pism*, Wydawnictwo Książka i Wiedza, Warszawa 1981; E. Niebielski, *Mieczysław Żywczyński o księdzu-spiskowcu*, in: *Ksiądz Piotr Ściegienny – epoka, dzieło, pokłosie*, ed. W. Caban, Kieleckie Towarzystwo Naukowe, Kielce 1996, pp. 269–278.

⁶⁸ W. Góra, K. Grünberg, *Geneza i pierwsze lata Polski Ludowej 1944-1949*, Instytut Krajów Socjalistycznych Polskiej Akademii Nauk, Warszawa 1985, p. 63 and following.

⁶⁹ G. Górski, *Polskie Państwo Podziemne 1939-1945*, Fundacja Archiwum Pomorskiej Armii Krajowej, Toruń 1998, p. 42 and following; D.G. Williamson, *Polski ruch oporu 1939-1947*, Dom Wydawniczy Rebis, Poznań 2015, p. 30 and following.

the Home Army of 26 November 1943. This Order clarifies the assumptions in the Instruction of 26 October 1943⁷⁰.

What was the legal basis for sentencing Polish partisans who fought the self-proclaimed government after the Second World War? In the first place, one of the first normative acts issued by the illegal, self-proclaimed government of Polish communists, supported by the power and violence of the Red Army in Poland, i.e. the Decree of the Polish Committee of National Liberation of 24 August 1944 on the dissolution of secret military organisations in the liberated areas⁷¹, and the subsequent Decree of the Polish Committee of National Liberation of 31 August 1944 on the penalty for fascist-Nazi criminals guilty of murder and abuse of civilian population and prisoners of war and the traitors of the Polish Nation⁷², for which the legal basis was the Act of the State National Council of 16 August 1944 on the temporary procedure for issuing decrees-laws⁷³, the Decree of the Polish Committee of National Liberation of 23 September 1944 – Civil Code of the Polish Army⁷⁴ and the Decree of the Polish Committee of National Liberation of 30 October on the protection of the state⁷⁵.

In the above-mentioned Code, particularly interesting are Articles 85-103 on “high treasons”, which included depriving the Polish State of independent existence or detaching a part of its territory; attempting to forcibly remove the established superior authorities of the Nation or taking over their powers, etc. It would seem there is nothing, except for the semantics, extraordinary about them as there similar regulations in the Code of 1932 and the subsequent codes. There is, however, one difference. It was the only Polish criminal code which provided the death penalty for such crimes – according to Article 86 § 1 of the Decree a person who attempts to violently overthrow the established superior authorities of the Nation or take over their powers is subject to at least 5 years in prison or the death penalty.

In the Decree of 30 October 1944, punishable by prison or the death penalty were the persons who established an association whose aim was to overthrow the “democratic” system of the Polish State or the persons who took part in or led such an association, provide it with weapons or other assistance (Article 1); the persons who prevented or hindered the implementation of the agrarian reform or provoked to acts against it or praised such acts in public (Article 2); who violently attacked a government or a local government body, a person

⁷⁰ See: *Koniec Polskiego Państwa Podziemnego. Wybór dokumentów*, Wydawnictwo Pokolenie, Łódź 1987, p. 14 and following.

⁷¹ “Journal of Laws” of 1944 No. 3, item 12.

⁷² “Journal of Laws” of 1944 No. 4, item 16.

⁷³ “Journal of Laws” of 1944 No. 1, item 3.

⁷⁴ “Journal of Laws” of 1944 No. 6, item 27.

⁷⁵ “Journal of Laws” of 1944 No. 10, item 50.

cooperating with a body, a unit of the polish Armed Forces or Allied Forces or a person who is their member (Article 3). In addition, the Decree also listed acts of sabotage and other crimes defined as war crimes⁷⁶.

These were the provisions which were the basis for sentencing the accused partisans who fought the illegal communist government after the war⁷⁷. Because of the length of this article, it is not possible here to describe the structure of the military courts and details of the court procedure. An excellent source in this respect is a publication by Marcin Zaborski⁷⁸.

Finally, it is worth mentioning in what circumstances and on what doubtful legal basis the authorities judging the partisans (the so called cursed soldiers) based its legitimacy. This was very clearly explained by the self-proclaimed Polish Committee of National Liberation in its manifesto of 22 July 1944: "Compatriots! The people who fought with the German occupier for freedom and independence created their representation, their underground parliament – the State National Council. Representatives of democratic parties entered the State National Council – members of the peasant movement, democrats, socialists, members of the polish Workers' Party and other organisations. Polish foreign organisations and primarily the Polish Patriotic Association and the Army created by it submitted to the Polish National Council. The Polish National Council, established by the fighting nation, is the only legal source of power in Poland. The immigration 'government' in London and its delegation in the country is a self-proclaimed, illegal power, based on the unlawful fascist constitution of April 1935. This 'government' hindered the fight against the Nazi occupation, and its rash policy pushed Poland towards a new catastrophe. At the moment of the liberation of Poland, at the moment when the allied Red Army with the Polish Army is expelling the occupant from Poland, at that moment a legal centre of power must be created, which will lead the nation's struggle for ultimate liberation. That is why the Polish State Council, the interim parliament of the Polish nation, appointed the Polish Committee of National Liberation as a legal temporary executive power to direct the struggle for the liberation of the people, to gain independence and to rebuild the Polish state".

From the legal point of view, assuming there was legal continuity between the Second Republic and the People's Republic of Poland, it seems obvious and indisputable that only the April Constitution of 1935 was valid from 1944, and not the March Constitution, which was re-established under a doubtful

⁷⁶ Cf. T. Żenczykowski, *Polska Lubelska 1944*, Spółdzielnia Wydawnicza Profil, Wrocław 1989, pp. 84–85.

⁷⁷ Cf. M. Kielasiński, *Raport o zabijaniu. Zbrodnie sądów wojskowych na Zamku w Lublinie*, Wydawnictwo Test, Lublin 1997, p. 22 and following.

⁷⁸ M. Zaborski, *Ustrój sądów wojskowych w Polsce w latach 1944-1955*, Towarzystwo Naukowe KUL, Lublin 2005.

(and in fact not clearly specified) procedure after the period of nine years during which it had not been in force. It should be emphasised that the April Constitution was recognised and applied by the Polish Government in Exile and its delegations in Poland⁷⁹.

The government that was formed in Poland in 1944 did not formally abolish the April Constitution and did not even attempt to do so. This government was not, by the way, authorised to do so. The phrases in the Manifesto of the Polish Committee of National Liberation – calling the 1935 Constitution an “illegal fascist Constitution” or those declaring that the Polish National Council and the Polish Committee of National Liberation act “on the basis of the only legal binding constitution, legally abolished” – must not be considered to be the abolishment of the April Constitution⁸⁰.

The legal basis for issuing decrees by the Polish Committee of National Liberation was the Act of 15 August 1944 mentioned above. According to Article 1 of this Act – because of the war conditions in Polish territory hindering the activity of legislative bodies – the Polish National Council established a procedure of issuing decrees-laws in all cases in which the 1921 Constitution provided for a statute. These decrees were issued by the Polish Committee of National Liberation for approval and then submitted to the Presidium of the Polish National Council for approval; they were signed by the Chairman of the Polish National Council and the Chairman of the Polish Committee of National Liberation. All decrees had to be presented by the Presidium of the Polish National Council during the forthcoming meeting of the Polish National Council and if the Council refused them by a simple majority of votes, they immediately ceased to be legally binding. As was mentioned above, in its Manifesto of 22 July 1944 the Polish Committee of National Liberation unjustifiably deemed the 1935 Constitution unlawful, which was the basis to reject the legal continuity of the Polish Government in Exile resulting from the appointment of Władysław Raczkiewicz as the President of Poland by President Ignacy Mościcki under the procedure of Chapter II of the 1935 Constitution⁸¹.

VI

In conclusion, three most important elements of the analysis above should be emphasised.

⁷⁹ See: W. Rostocki, *Stosowanie Konstytucji Kwietniowej w okresie drugiej wojny światowej 1939-1945*, Redakcja Wydawnictw KUL, Lublin 1988, p. 9 and following.

⁸⁰ For example M. Zaborski, *Ustrój sądów wojskowych*, pp. 32–34.

⁸¹ Cf. R. Bierzanek, *Międzynarodowe uznanie Polskiego Komitetu Wyzwolenia Narodowego i Rządu Jedności Narodowej*, “Sprawy Międzynarodowe” 7 (1964), pp. 37–61.

Firstly, one should remember about the armed character of this form of the right of resistance, which makes it different from such forms of resistance as a protest, refusal to cooperate, boycott and strike⁸². Violence used in a civil war, which is usually part of partisan reality, may be considered to the highest, armed manifestation of the right of resistance. Although there are usually two government centres which claim to have the legitimacy to represent power in a given state territory. In the light of international law – as was emphasised above – the principle of effectiveness will be ultimately applicable, despite the fact that from the point of view of the norms of the national law each party to the conflict will obviously refer to other sources of the legitimacy of its power and will attempt to convince the international community⁸³.

Secondly, partisans, regardless of their intention and reasons of political nature, remain in most cases under the protection of international law and the guarantees of these right and, in the general the status of partisans, is a duty which is not only of legal nature⁸⁴ but also moral, if only because of its pragmatic nature related to the principle of reciprocity and the possible repressions on the part of the enemy.

Thirdly, one should remember a thesis which is present in legal literature and raises doubts about norms of international law as being legal norms, that is to say asking a question whether international law is actually law. The basic sources of these doubts are related to the binding force of the norms of international and the conviction that states are fundamentally unable be entities subject to legal obligations, which leads to contrasting the nature of the international law entities to the entities of internal law⁸⁵. The absence of a system

⁸² See: G. Sharp, *Od dyktatury do demokracji. Drogi wolności*, Wydawnictwo Fundacja Wolność i Pokój, Warszawa 2013, p. 98 and following.

⁸³ Worth highlighting is the resistance of the Catholic Church during the few years following the end of the Second World War, see: J. Żaryn, *Kościół wobec władzy komunistycznej w Polsce 1945-1953*, in: *Polacy wobec przemocy 1944-1956*, ed. B. Otwinowska, J. Żaryn, Wydawnictwo Edicions Spotkania, Warszawa 1996, pp. 179–219.

⁸⁴ Cf. F. Bańkowska, *Kobiety-żołnierze AK w Powstaniu Warszawskim. Wyjście do niewoli po kapitulacji*, „Łambinowicki Rocznik Muzealny” 8 (1985), pp. 5–20; W. Piklikiewicz, *Arbeitskommando Schlade i Lager XXI (twarda walka dziewcząt-powstańców o utrzymanie statusu jeńca)*, „Łambinowicki Rocznik Muzealny” 8 (1985), pp. 41–43.

⁸⁵ Cf. S. Grzybowski, *Dzieje prawa*, Wydawnictwo Ossolineum, Wrocław 1981, pp. 318–323. In the case of accepting the primacy of the legal order of the independent state, there is the problem of recognising the order of international law by an individual state as the direct basis of the order of international law. In contrast, accepting the primacy of the order of international law – as the only binding law – results in a situation in which the fundamental basis for the validity of the state legal order consists in a positive nor of international law. One should remember that the decisive factor for accepting the primacy of the state legal order is sovereignty, see: A. Kość, *Historyczne modele*, pp. 149–150. One should also remember that formal differences between international law and internal law are often determined by qualifying the norms of international law as moral norms, see: H.L.A. Hart, *Pojęcie prawa*, Wydawnictwo Naukowe PWN, Warszawa 1998, p. 304 and following; see also: A. Sylwestrzak, *Historia doktryn politycznych i prawnych*, Wydawnictwa Prawnicze PWN, Warszawa 1995, p. 387. About

of centrally organised sanctions is one of sources of doubts about the nature of the norms of international law. As H. Hart wrote “the argumentation that international law is not binding because it does not have a system of organised sanctions tacitly assumes an analysis of duties contained in theory which considers the law to orders supported by coercion”⁸⁶. One should remember that the existence of a specific legal norm, contrary to what those who negate international law assume, is independent of sanction, as also in internal law not every norm has a sanction. However, in contrast to internal law, coercion in international law has special forms. The international community has no power over authorities that would establish norms and ensure their application by means of a special apparatus because norms are created and applied by states and it is the responsibility of state to use coercion. Such coercion can be applied by states on their initiative or as retaliatory measures for the infringement of the law, i.e. individually or on the basis of a decision of an international body, i.e. collectively. Taking into account the above remarks one should aim, in an even more effective way, to reach such a factual state that would ensure the members of an armed resistance movement such legal protection that would guarantee, in the first place, saving life when they are captured by the enemy. The interest that is dynamically growing in recent years in both legal and international safety⁸⁷ should in the future bring new *de lege ferenda* solutions in differentiating between a partisan war and terrorist activities performed by various groups which do not have the status guaranteed by international law to the members of armed resistance movements.

It seems that this distinction will be of fundamental significance in future armed conflicts. Under no circumstances should the international community use the normative solutions concerning protection of partisans to their disadvantage, justifying it only by the so-called war on terrorism⁸⁸.

the mutual relationship between law and morality see *inter alia*: M. Ossowska, *Podstawy nauki o moralności*, Państwowe Wydawnictwo Naukowe, Warszawa 1957, pp. 278–285; A. Kość, *Podstawy filozofii prawa*, Wydawnictwo Petit s.c., Lublin 1998, pp. 137–140; Cz. Martyniak, *Obiektywna podstawa prawa według św. Tomasza z Akwinu*, in: Czesław Martyniak. *Dzieła*, ed. R. Charzyński, M. Wójcik, Wydawnictwo KUL, Lublin 2006, pp. 145–152. L. Antonowicz clearly distinguishes between the concept of international law and international morality, see: *Podręcznik prawa międzynarodowego*, p. 19; J. Gilas ad a similar opinion, *Systemy normatywne w stosunkach międzynarodowych*, Państwowe Wydawnictwo Naukowe, Toruń 1981, pp. 44–58.

⁸⁶ See: H.L.A. Hart, *Pojęcie prawa*, p. 292.

⁸⁷ See: J. Potrzebszcz, *Legal security – synthetic presentation*, “Teka Komisji Prawniczej. Oddział PAN w Lublinie” vol. IX (2016), pp. 140–152; A. Przyborowska-Klimczak, *Bezpieczeństwo międzynarodowe*, “Teka Komisji Prawniczej. Oddział PAN w Lublinie” vol. IX (2016), pp. 153–165.

⁸⁸ See: A. Khan, *A Theory of International Terrorism*, “Connecticut Law Review” 19 (1987), p. 945 and following; B. Hołyst, *Terroryzm*, vol. I and II, Wydawnictwo LexisNexis, Warszawa 2001; P. Chomentowski, W. Kaczorowski, Z. Muszyński [et al.], *Organizacje międzynarodowe wobec zjawiska terroryzmu*, in: *Terroryzm w poglądach społeczeństwa polskiego*, ed. B. Ho-

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PRAWNE ASPEKTY ZBROJNEGO RUCHU OPORU

Streszczenie. Celem niniejszego opracowania jest analiza zagadnień dotyczących prawnych aspektów zbrojnego ruchu oporu ze szczególnym uwzględnieniem statusu prawnego partyzanta oraz charakteru prawnego wojny domowej. Status prawny partyzanta, jak i charakter wojny domowej w świetle norm prawa międzynarodowego związany jest z punktu widzenia przedmiotowego m.in. z uznaniem międzynarodowym i okupacją wojenną, co stanowi istotny element niniejszych dociekań, które obejmują syntetyczną analizę działalności polskiego ruchu oporu przeciwko nielegalnej władzy komunistycznej po 1945 r. (tzw. żołnierze wyklęci). Opracowanie odwołuje się poza analizą norm prawa międzynarodowego i prawa krajowego oraz ich wykładni do historii ewolucji statusu prawnego i teorii partyzanta.

Słowa kluczowe: prawo do oporu, prawo międzynarodowe, prawo wojenne, wojna domowa, ruch oporu, partyzant, Polskie Państwo Podziemne, żołnierze wyklęci