



Volunteers of the 14th Texas Cavalry (left) and 3d Texas Cavalry (right) (Bob Shamburger collection, courtesy L.T. Jones III Confederate Calendar)

Rebels without uniform

by Dr. Francis Lieber

HEADQUARTERS OF THE ARMY,
Washington, August 6, 1862.
Dr. FRANCIS LIEBER,
New York.

MY DEAR DOCTOR : Having heard that you have given much attention to the usages and customs of war as practiced in the present age, and especially to the matter of guerrilla war, I hope you may find it convenient to give to the public your views on that subject. The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war ; they also threaten that if such persons be punished as marauders and spies they will retaliate by executing our prisoners of war in their possession. I particularly request your views on these questions.

Very respectfully, your obedient servant,

H. W. HALLECK,
General-in-Chief U.S. Army.

[Doctor Lieber's reply.]

The position of armed parties loosely attached to the main body of the army, or altogether unconnected with it, has rarely been taken up by writers on the law of war. The term guerrilla is often inaccurately used, and its application has been particularly confused

at the present time. From these circumstances arises much of the difficulty which presents itself to the publicist and martial jurist in treating of guerrilla parties. The subject is substantially a new topic in the law of war, and it is, besides, exposed to the mischievous process, so often employed in our day, of throwing the mantle of a novel term around an old and well-known offense, in the expectation that a legalizing effect will result from the adoption of a new word having a technical sound ; an illustration of which occurred in the introduction of the Latin and rarer term repudiation to designate the old practice of dishonestly declining the payment of debts - an offense with which the world has been acquainted ever since men united in the bonds of society. We find that self-constituted bands in the South, who destroy the cotton stored by their own neighbors, are styled in the journals of the North as well as in those of the South guerrillas ; while in truth they are, according to the common law - not of war only, but that of every society - imply armed robbers, against whom every person is permitted, or is in duty bound, to use all the means of defense at his disposal ; as, in a late instance, even General Toombs, of Georgia, declared to a certain committee of safety of his State that he would defend the planting and producing of his cotton ; though, I must own, he did not call the self-constituted committee guerrillas, but, if memory serves me right, scoundrels.

The term guerrilla is the diminutive of the Spanish word *guerra*, war, and means petty war ; that is, war carried on by detached parties, generally in the mountains. It means, further, the party of men united under one chief engaged in petty war, which, in the eastern portion of Europe and the whole Levant is called a *capitanery*, a band under one *capitano*. The term guerrilla, however, is not applied in Spain to a single man of the party ; such a person is called *guerrillero*, or more frequently *partida*, which means partisan. Thus, Napier, in speaking of the guerrilla in his History of the Peninsular War, uses, with rare exception, the term *partidas* for the chiefs and men engaged in the petty war against the French. It is worthy of notice that the dictionary of the Spanish academy gives, as the first meaning of the word guerrilla, “*A party of light troops for reconnaissance, and opening the first skirmishes*”. I translate from an edition of 1826, published, therefore, long after the Peninsular war, through which the term guerrilla has passed over into many other European languages. Self-constitution is not a necessary element of the meaning given by the Spaniards or by many writers of other nations to the word guerrilla, although it is true that the guerrilla parties in the Peninsular war were nearly all self-constituted, since the old government had been destroyed ; and the forces which had been called into existence by the provisional government were no more acknowledged by the French as regular troops than the self-constituted bands under leading priests, lawyers, smugglers, or peasants ; because the French did not acknowledge the provisional Junta or Cortes. Many of the *guerrilleros* were shot when made prisoners, as the guerrilla chiefs executed French prisoners in turn. It is the state of things these bands almost always lead to, according to their inherent character ; yet, when the *partidas* of Mina and Empecinado had swelled to the imposing number of twenty thousand and more, which fact of itself implies a certain degree of discipline, Mina made a regular treaty with the French for the passage of certain French goods through the lines, and on these the partisan leader levied regular duties according to a tariff agreed upon between the belligerents arrayed against one another in fierce hostility.

What, then, do we in the present time understand by the word guerrilla. In order to ascertain the law or to settle it according to elements already existing, it will be necessary ultimately to give a distinct definition ; but it may be stated here that whatever may be our final definition, it is universally understood in this country at the present time that a guerrilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerrilla party, to carry on what the law terms a regular war. The irregularity of the guerrilla party consists in its origin, for it is either self-

constituted or constituted by the call of a single individual, not according to the general law of levy, conscription, or volunteering ; it consists in its disconnection with the army as to its pay, provision, and movements, and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time. These are, I believe, constituent ideas of the term guerrilla as now used. Other ideas are associated with the term, differently by different persons.

Thus many persons associate the idea of pillage with the guerrilla band, because, not being connected with the regular army, the men cannot provide for themselves, except by pillage, even in their own country acts of violence with which the Spanish *guerrilleros* sorely afflicted their own countrymen in the Peninsular war. Others connect with it the idea of intentional destruction for the sake of destruction, because the guerrilla chief cannot aim at any strategic advantages or any regular fruits of victory. Others, again, associate with it the idea of the danger with which the spy surrounds us, because he that to-day passes you in the garb and mien of a peaceful citizen, may to-morrow, as a guerrillaman, fire your house or murder you from behind the hedge. Others connect with the *guerrillero* the idea of necessitated murder, because guerrilla bands cannot encumber themselves with prisoners of war ; they have, therefore, frequently, perhaps generally, killed their prisoners, and of course have been killed in turn when made prisoners, thus introducing a system of barbarity which becomes intenser in its demoralization as it spreads and is prolonged. Others, again, connect the ideas of general and heinous criminality, of robbery and lust with the term, because the organization of the party being but slight and the leader utterly dependent upon the band, little discipline can be enforced, and where no discipline is enforced in war a state of things results which resembles far more the wars recorded in Froissart, or Comines, or the thirty-years' war, and the religious war in France, than the regular wars of modern times. And such a state of things results speedily, too ; for all growth, progress, and rearing, moral or material, are slow ; all destruction, relapse, and degeneracy fearfully rapid. It requires the power of the Almighty and a whole century to grow an oak tree ; but only a pair of arms, an ax, and an hour or two to cut it down.

History confirms these associations, but the law of war as well as the law of peace has treated many of these and kindred subjects - acts justifiable, offensive, or criminal - under acknowledged terms, namely: The freebooter, the marauder, the brigand, the partisan, the free corps, the spy, the rebel, the conspirator, the robber, and especially the highway robber, the rising en masse, or the "arming of peasants".

A few words on some of these subjects will aid us in coming to a clearer understanding of the main topic which occupies our attention.

Freebooter is a term which was in common use in the English language at no very remote period ; it is of rare use now, because the freebooter makes his appearance but rarely in modern times, thanks to the more regular and efficient governments and to the more advanced state of the law of war. From the freebooter at sea arose the privateer, for the privateer is a commissioned freebooter, or the freebooter taken into the service of the government by the letter of marque. The Seagueux, in the revolution of the Netherlands, were originally freebooters at sea, and they were always treated when captured simply as freebooters. Wherever the freebooter is taken, at sea or on land, death is inflicted upon him now as in former times, for freebooters are nothing less than armed robbers of the most dangerous and criminal type, banded together for the purposes of booty and of common protection.

The brigand is, in military language, the soldier who detaches himself from his troop and commits robbery, naturally accompanied in many cases with murder and other crimes of violence. His punishment, inflicted even by his own authorities, is death. The word brigand, derived as it is from *brigner*, to beg, meant originally beggar, but it soon came to

be applied to armed strollers, a class of men which swarmed in all countries in the middle ages. The term has, however, received a wider meaning in modern military terminology. He that assails the enemy without or against the authority of his own government is called, even though his object should be wholly free from any intention of pillage, a brigand, subject to the infliction of death if captured. When Major von Schill, commanding a Prussian regiment of hussars, marched in the year 1809 against the French without the order of his government, for the purpose of causing a rising of the people in the north of Germany, while Napoleon was occupied in the south with Austria, Schill was declared by Napoleon and his brother a brigand, and the King of Westphalia, Jerome Bonaparte, offered a reward of 10,000 francs for his head. Schill was killed in battle ; but twelve young officers of his troop, taken prisoners, were carried by the French to the fortress Wesel, where a court-martial declared them prisoners of war. Napoleon quashed the finding, ordered a new court-martial, and they were all shot as brigands. Napoleon is not cited here as an authority in the law of war ; he and many of his generals frequently substituted the harshest violence for martial usages. The case is mentioned as an illustration of the meaning attached to the word brigand in the law of war, and of the fact that death is the acknowledged punishment for the brigand.

The terms partisan and free corps are vaguely used. Sometimes, as we shall see further on, partisan is used for a self-constituted *guerrillero* ; more frequently it has a different meaning. Both partisan corps and free corps designate bodies detached from the main army ; but the former term refers to the action of the troop, the latter to the composition. The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army ; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on the flanks of the enemy. Rapid and varying movements and surprises are the chief means of his success ; but he is part and parcel of the army, and, as such, considered entitled to the privileges of the law of war, so long as he does not transgress it. Free corps, on the other hand, are troops not belonging to the regular army, consisting of volunteers, generally raised by individuals authorized to do so by the government, used for petty war, and not incorporated with the *ordre de bataille*. They were known in the middle ages. The French *compagnies franches* were free corps ; but this latter term came into use only in the eighteenth century. They were generally in bad repute, given to pillage and other excesses ; but this is incidental. There were many free corps in Germany opposed to Napoleon when that country rose against the French, but the men composing them were entitled to the benefits of the law of war, and generally received them when taken prisoner. These free corps were composed in many cases of high-minded patriots. The difficulty regarding free corps and partisans arises from the fact that their discipline is often lax, and used to be so especially in the last century, so that frequently they cannot cumber themselves with prisoners ; and that even for their own support they are often obliged to pillage or to extort money from the places they occupy. They are treated, therefore, according to their deserts, on the principle of retaliation ; but there is nothing inherently lawless or brigand-like in their character.

The spy, the rebel, and conspirator deserve notice in this place simply with reference to persons acting as such, and belonging to the population of the country or district occupied by a hostile force. A person dwelling in a district under military occupation and giving information to the government of which he was subject, but which has been expelled by the victorious invader, is universally treated as a spy - a spy of a peculiarly dangerous character. The most patriotic motives would not shield such a person from the doom of the spy. There have been high-minded and self-sacrificing spies, but when captured, even if belonging to the armies themselves, they have never been treated otherwise than as common spies. Even mere secret correspondence of a person in an occupied district with the enemy, though the contents of the correspondence may have been innocent, has

subjected the correspondent to serious consequences, and sometimes to the rigor of martial law, especially if the offense be committed after a proclamation to the contrary. Prince Hatzfeld was appointed by the King of Prussia, on his leaving the capital after the battle of Jena, to conduct public affairs in Berlin until the city should be occupied by the French, and to send a report to the king every morning until the occupation by the enemy should have taken place. Prince Hatzfeld sent such a report to his own government, giving the number of the French who had arrived at Potsdam on the 24th of October, at 5 o'clock a.m. - that is, seven hours before the French vanguard entered Berlin. The letter fell into the hands of Napoleon. It is well known that the emperor, at the supplication of the princess, allowed her husband to escape the penalty of a spy. Whatever may be thought of the question, whether the prince, by sending the letter at the hour mentioned became a spy or not, no one has ever doubted that, had he secretly corresponded with his government after the occupation of Berlin by the French, giving information of the occupants, the French would have been justified in treating him as a spy. The spy becomes, in this case, peculiarly dangerous, making hostile use of the protection which by the modern law of war the victor extends to the persons and property of the conquered. Similar remarks apply to the rebel, taking the word in the primitive meaning of *rebellare* - that is, to return to war after having been conquered ; and to conspiracies - that is, secret agreements leading to such resumption of arms in bands of whatever number, or, which is still worse, plans to murder from secret places.

This war-rebel, as we might term him, this renewer of war within an occupied territory, has been universally treated with the utmost rigor of the military law. The war-rebel exposes the occupying army to the greatest danger, and essentially interferes with the mitigation of the severity of war, which it is one of the noblest objects of the modern law of war to obtain. Whether the war-rebel rises on his own account, or whether he has been secretly called upon by his former government to do so, would make no difference whatever. The royalists who recently rose in the mountains of Calabria against the national government of Italy, and in favor of Francis, who had been their king until within a recent period, were treated as brigands and shot, unless, indeed, pardoned on prudential grounds.

The rising en masse, or "the arming of peasants", as it used to be called, brings us nearer to the subject of the guerrilla parties. Down to the beginning of the first French revolution, toward the end of last century, the spirit which pervaded all governments of the European continent was, that the people were rather the passive substratum of the State than an essential portion of it. The governments were considered to be the State ; wars were chiefly cabinet wars, not national wars--not the people's affairs.

Moser, in his Contributions to the Latest European Law of Nations in Times of War (a German work, in 3 vols., from 1779-1781), gives remarkable instances of the claims which the conqueror was believed to have on the property and on the subjects of the hostile country. They were believed to be of so extensive a character that the French, when in Germany, during the seven-year war, literally drafted Germans for the French army, and used them as their own soldiers - although, it must be added, loud complaints were made, and the French felt themselves obliged to make some sort of explanation. The same work contains instances of complaints being made against arming the peasants, or of levies en masse, as contrary to the law of nations ; but Moser also shows that the Austrians employed the Tyrolese (always familiar with the use of the rifle) in war without any complaint of the adversary.

Since that time most constitutions contain provisions that the people have a right to possess and use arms ; everywhere national armies have been introduced, and the military law of many countries puts arms into the hands of all. Austria armed the people as militia in 1805 ; Russia in 1812 ; and Prussia introduced the most comprehensive measure of arming the people in 1813. The militia proper was called *landwehr*, and those who were too old for service in the *landwehr* were intended to form the *landsturm* - citizens armed as

well as the circumstances might permit, and to be used for whatever military service within their own province they might be found fit. It is true that the French threatened to treat them as brigands - that is to say, not to treat them as prisoners of war if captured. The French, however, were expelled from Germany and no opportunity was given to test their threat.

I believe it can be said that the most recent publicists and writers on international law agree that the rising of the people to repel invasion entitles them to the full benefits of the law of war, and that the invader cannot well inquire into the origin of the armed masses opposing him - that is to say, he will be obliged to treat the captured citizens in arms as prisoners of war so long as they openly oppose him in respectable numbers and have risen in the yet uninvaded or unconquered portions of the hostile country.

Their acting in separate bodies does not necessarily give them a different character. Some entire wars have been carried on by separate bands or *capitaneries*, such as the recent war of independence of Greece. It is true, indeed, that the question of the treatment of prisoners was not discussed in that war, because the Turkish Government killed or enslaved all prisoners ; but I take it that a civilized government would not have allowed the fact that the Greeks fought in detached parties and carried on mountain guerrilla to influence its conduct toward prisoners.

I may here observe that the question how captured *guerrilleros* ought to be treated was not much discussed in the last century and, comparatively, the whole discussion in the law of war is new. This will not surprise us when we consider that so justly celebrated a publicist as Bynkershoek defended, as late as the beginning of last century, the killing of common prisoners of war.

It does not seem that, in the case of a rising en masse, the absence of a uniform can constitute a difference. There are cases, indeed, in which the absence of a uniform may be taken as very serious prima facie evidence against an armed prowler or marauder, but it must be remembered that a uniform dress is a matter of impossibility in a levy en masse ; and in some cases regulars have had no uniforms, at least for a considerable time. The Southern prisoners made at Fort Donelson, whom I have seen at the West, had no uniforms. They were indeed dressed very much alike, but it was the uniform dress of the countryman in that region. Yet they were treated by us as prisoners of war, and well treated, too. Nor would it be difficult to adopt something of a badge, easily put on and off, and to call it a uniform. It makes a great difference, however, whether the absence of the uniform is used for the purpose of concealment or disguise, in order to get by stealth within the lines of the invader, for destruction of life or property, or for pillage, and whether the parties have no organization at all, and are so small that they cannot act otherwise than by stealth.

Nor can it be maintained in good faith, or with any respect for sound sense and judgment, that an individual - an armed prowler - (now frequently called a bushwhacker) shall be entitled to the protection of the law of war simply because he says that he has taken up his gun in defense of his country, or because his government or his chief has issued a proclamation by which he calls upon the people to infest the bushes and commit homicides which every civilized nation will consider murders. Indeed, the importance of writing on this subject is much diminished by the fact that the soldier generally decides these cases for himself. The most disciplined soldiers will execute on the spot an armed and murderous prowler found where he could have no business as a peaceful citizen. Even an enemy in the uniform of the hostile army would stand little chance of protection if found prowling near the opposing army, separate from his own troops at a greater than picket distance, and under generally suspicious circumstances. The chance would, of course, be far less if the prowler is in the common dress worn by the countryman of the district. It may be added here that a person proved to be a regular soldier of the enemy's army found in citizens' dress within the lines of the captor is universally dealt with as a spy.

It has been stated that the word guerrilla is not only used for individuals engaged in petty war, but frequently as an equivalent of partisan. General Halleck, in his *International Law, or Rules Regulating the Intercourse of States in Peace and War*, San Francisco, 1861, page 386 et seq., seems to consider partisan troops and guerrilla troops as the same, and seems to consider "self-constitution" a characteristic of the partisan ; while other legal and military writers define partisan as I have stated, namely, a soldier belonging to a corps which operates in the manner given above. I beg the reader to peruse that passage, both on account of its own value and of the many important and instructive authorities which he will find there. They are collected with that careful industry which distinguishes the whole work.

Dr. T. D. Woolsey, page 299 et seq., of his *Introduction to the Study of International Law*, Boston, 1860, says :

"The treatment which the milder modern usage prescribes for regular soldiers is extended also to militia called out by public authority. Guerrilla parties, however, do not enjoy the full benefit of the laws of war. They are apt to fare worse than either regular troops or an armed peasantry. The reasons for this are, that they are annoying and insidious ; that they put on and off with ease the character of a soldier, and that they are prone themselves to treat their enemies who fall into their hands with great severity."

If the term partisan is used in the sense in which I have defined it, it is not necessary to treat of it specially. The partisan in this sense is, of course, answerable for the commission of those acts to which the law of war grants no protection, and by which the soldier forfeits being treated as a prisoner of war if captured.

It is different if we understand by guerilla parties, self-constituted sets of armed men in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will therefore generally give no quarter.

They are peculiarly dangerous because they easily evade pursuit, and by laying down their arms become insidious enemies ; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands. The Spanish guerrilla bands against Napoleon proved a scourge to their own countrymen, and became efficient for their own cause only in the same degree in which they gradually became disciplined. The Royalists in the north of France during the first Revolution, although setting out with sentiments of loyal devotion to their unfortunate king, soon degenerated into bands of robbers, while many robbers either joined them or assumed the name of Royalists. Napoleon states that their brigandage gave much trouble and obliged the Government to resort to the severest measures.

For an account of the misdeeds and want of efficiency of the Spanish *guerrilleros*, the reader is referred to Napier's *Peninsular War*, and especially to Chapter II, Book XVII, while he will find, in Guizot's *Memoirs*, Volume IV, page 100 et seq., that in the struggle between the Christinos and Carlists the guerrilla parties under Mina and Zumalacareguy regularly massacred their mutual prisoners, until the evil became so revolting to the Spaniards themselves that a regular treaty was concluded between the parties, stipulating the exchange of prisoners immediately after being made. How the surplus on the one or the other side was dealt with I do not know, but the treaty, concluded after the butchering of prisoners had been going on for a long time, is mentioned in all the histories of that period.

But when guerrilla parties aid the main army of a belligerent it will be difficult for the captor of guerrillamen to decide at once whether they are regular partisans, distinctly authorized by their own government ; and it would seem that we are borne out by the conduct of the most humane belligerents in recent times, and by many of the modern writers, if the rule be laid down, that guerrillamen, when captured in fair fight and open

warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them, leaving the question of self-constitution unexamined.

The law of war, however, would not extend a similar favor to small bodies of armed country people, near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits, and to brigandage. The law of war would still less favor them when they trespass within the hostile lines to commit devastation, rapine, or destruction. Every European army has treated such persons, and it seems to me would continue, even in the improved state of the present usages of war, to treat them as brigands, whatever prudential mercy might decide upon in single cases. This latter consideration cannot be discussed here ; it does not appertain to the law of war.

It has been stated already that the armed prowler, the so-called bushwacker, is a simple assassin, and will thus always be considered by soldier and citizen ; and we have likewise seen that the armed bands that rise in a district fairly occupied by military force, or in the rear of an army, are universally considered, if captured, brigands, and not prisoners of war. They unite the fourfold character of the spy, the brigand, the assassin, and the rebel, and cannot - indeed, it must be supposed, will not - expect to be treated as a fair enemy of the regular war. They know what a hazardous career they enter upon when they take up arms, and that were the case reversed they would surely not grant the privileges of regular warfare to persons who should thus rise in their rear.

I have thus endeavored to ascertain what may be considered the law of war or fair rules of action toward so-called guerrilla parties. I do not enter upon a consideration of their application to the civil war in which we are engaged, nor of the remarkable claims recently set up by our enemies, demanding us to act according to certain rules which they have signally and officially disregarded toward us. I have simply proposed to myself to find a certain portion of the law of war. The application of the laws and usages of war to wars of insurrection or rebellion is always undefined, and depends upon relaxations of the municipal law, suggested by humanity or necessitated by the numbers engaged in the insurrection. The law of war, as acknowledged between independent belligerents, is at times not allowed to interfere with the municipal law of rebellion, or is allowed to do so only very partially, as was the case in Great Britain during the Stuart rebellion, in the middle of last century ; at other times, again, measures are adopted in rebellions, by the victorious party or the legitimate government, more lenient even than the international law of war. Neither of these topics can occupy us here, nor does the letter prefixed to this tract contain the request that I should do so. How far rules which have formed themselves in the course of time between belligerents might be relaxed with safety toward the evil-doers in our civil war, or how far such relaxation or mitigation would be likely to produce a beneficial effect upon an enemy who in committing a great and bewildering wrong seems to have withdrawn himself from the common influences of fairness, sympathy, truth, and logic - how far this ought to be done at the present moment must be decided by the executive power, civil and military, or possibly by the legislative power. It is not for me in this place to make the inquiry. So much is certain, that no army, no society engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation without the deepest injury to itself and disastrous consequences which might change the very issue of the war.

* * * * *