been studied more from the angle of natural law principles than from the practical point of view of the procedure appropriate to secure international legal rights. There is no right without a remedy, and if the remedy be defective the right will suffer accordingly.

The Harvard Research in International Law does not fall into this error, for its draft convention on the Legal Position and Functions of Consuls contains in its Article 11 (d) the provision that the receiving state shall permit a consul, "To communicate with, to advise and to adjust differences between nationals of the sending state within the consular district; to visit such nationals especially when they are imprisoned or detained by authorities of the receiving state; to assist such nationals in proceedings before or relations with such authorities; and to inquire into any incidents which have occurred within the consular district affecting the interests of such nationals." [10]

This right to visit imprisoned nationals would *a fortiori* include the right of a member of the diplomatic mission to exercise a similar right of visit in appropriate cases, and this application or interpretation is made in President Roosevelt's letter quoted above. It will be noted that the permission to visit nationals in the Harvard Research draft convention is given "especially when they are imprisoned." Following the same course of reasoning, the comment on the draft text points out that this right of visit is especially important when the alien is held *incomunicado*.[11] Then, if ever, he is in need of the aid and protection of his diplomatic or consular representatives to prevent any disregard of his rights, whether intentional or not. ELLERY C. STOWELL

THE VILLA CASE

The *New York Times*, in a dispatch dated November 20, 1937, reported that a military court in Palma de Majorca had sentenced Antonio Fernandez Villa to twenty years imprisonment on charges of sympathizing with the enemy. His wife was sentenced to twelve years in prison. The dispatch added that both are naturalized American citizens, but that the court had refused to admit this plea; and that the American Vice-Consul at Leghorn had been sent to Majorca to protect the interests of the Villas.

As a matter of fact, the two had been held in jail since the end of 1936. The first notice of this was a home-made Christmas card received by his brother, Professor Pedro Villa Fernandez, of New York University, containing an acrostic with one word in English, "jail." Professor Fernandez at once took the matter up with the Department of State, which has been working assiduously on the matter since that time. The case presents some peculiarities and difficulties which make it worthy of discussion.

In April, 1937, it was reported by unofficial workers that Villa would be released if he had an American passport—his own was hidden away, and he

[10] Harvard Research in International Law, The Legal Position and Functions of Consuls, this JOURNAL, Supp., Vol. 26 (1932), pp. 267–268.

[11] *Ibid.*, p. 270.

was unable to produce it. Since the records of the State Department confirmed the fact that he was entitled to an American passport, the Consul General at Marseilles was instructed to issue one for him provided he had not meanwhile expatriated himself; and money was sent for his return. He was not, however, released; and the Department of State reported that it was unable to accomplish much because of the necessarily unofficial character of its efforts. Meanwhile, a number of agencies had become interested and were bringing pressure to bear upon the Department; and 400 college professors had sent in a petition on behalf of Villa. To such requests the Department replied, and justifiably, that it needed no spur. It had, indeed, gone to unusual lengths in dealing with an insurgent group. Vice-Consul Fisher was away from his family for several months on the case; the Consul at Seville saw General Quiepo de Llano and obtained from him a promise to take up the matter with the authorities at Salamanca; and even the Ambassador had interceded indirectly. In October, all concerned were confident of his release; the *Times* correspondent wrote Professor Fernandez that the authorities at Majorca were uncomfortable, but did not wish to release Villa for fear he would talk of conditions in Majorca. The Department, in a letter to Dr. Evelyn Seufert, reported that the trouble lay with the subordinate officials at Majorca, who would not obey, and that every step short of force had been taken to secure the release of the Villas.

The accusations made at the trial in November (before a court of eight military officers) were that an incriminating note had been found in Villa's desk; that he had been in a "Red" parade in May, 1936; that he belonged to a labor union and had promoted a strike; and that therefore he was an extreme Leftist. It was brought out during the trial that the man who found the note had left the country, and that the man who wrote the note denied having sent it to Villa. Both Villa and his wife admitted having been in the parade because of the pressure of local politics upon a business man; the parade, however, was perfectly legitimate at the time, and no effort had ever been made to prevent it, or to punish for participation in it. Mr. Villa said that he had been in a workingman's organization, but that he had resigned from it before hostilities started. Their property was confiscated, as well as property belonging to Professor Fernandez, his brother. There could be no doubt that Mr. and Mrs. Villa were convicted for actions which were not illegal at the time they were done—if they are now. Certainly, it would be the duty of aliens to respect the legitimate government of the state in which they were located, and they should not be penalized for so doing.

One phase of the problem which the Department of State faces in dealing with such a case is the pressure and criticism of uninformed groups. While Professor Fernandez himself willingly says that the Department has done everything in its power in behalf of his brother, the New York College Teachers' Union on January 14, 1938, adopted a resolution asserting that the "State Department has been shockingly inactive in behalf of these innocent Ameri-

cans, in striking contrast to its energetic defense of more questionable personages abroad"; and demanding "that the State Department order the diplomatic officers of the American people in Spain to secure the immediate release of Mr. and Mrs. Antonio Fernandez Villa and their safe conduct out of Spain to a destination of their own choice." If the resolution had contained some information as to how this could be done, doubtless it would have been welcomed at the Department of State. The Government of the United States has rarely resorted to force to protect a citizen abroad; and at the present time, when there is a popular clamor for American citizens to return home and cease constituting risks of war, the Department could have little hope that the American people would back it up if it wished to recommend the employment of force in this case.

It is the fact that American citizens are held by an insurgent group, and one which does not have sufficient control over its own local authorities, which makes this an especially difficult problem of diplomatic protection. Should the insurgent movement fail, it would of course be impossible to demand reparation from it; on the other hand, the parent government can usually disclaim responsibility on the ground that it has employed all the means at its disposal to restrain the insurgents—which would seem to be beyond doubt in this case. In such a situation, there is a certain amount of exigency; if one waits until the strife is ended, it may be too late.

But the ordinary means of pressing such an issue are not available. The United States has not recognized the Franco régime as belligerents, much less as a *de jure* and independent government. If the denial of recognition implies a denial of legal relationships, upon what grounds can demands for release or reparation be based? Aside from this, the ordinary channels for diplomatic action do not exist; if a diplomatic agent were sent to deal with General Franco, there is no doubt that he would attempt to seize upon it as an evidence of recognition. The Spanish imbroglio has kept Europe at the point of war for many months; the United States must step carefully. Nevertheless, and aside from such political considerations, which undeniably justify caution, too much attention may be given to formalities. Recognition is clearly an individual decision; the state which deals with an unrecognized group is able to make it clear that it does not thereby intend recognition. The signature of a treaty has usually been regarded as indicative of recognition; yet the United States was able to sign more than one treaty with Soviet Russia without thereby conferring recognition upon that government. Even if recognition were claimed by the pretending state, as a result of some formality, it could have no method of compelling the protecting state to deal with it on a footing of equality. The situation is one of fact and should be so treated. There is no good reason—aside from the involved political situation in this particular case—why American diplomats should not deal directly with insurgent authorities where necessary in caring for American interests; nor why the Department of State should not deal openly with the agents of

such a government in this country. It is unnecessary and undignified to act clandestinely through unofficial representatives.

It could be argued that the belligerency of the Franco régime should be recognized.[1] If this were considered, the possibility of recognition could be used for bargaining purposes; perhaps also other methods of approach or pressure might be opened through the new status. This course seems impracticable in the present situation, because of the extremely tangled and dangerous international problem of which Spain is the center.

The easiest solution would probably be a threat or use of force. Franco could not afford to take the risk of such losses as might befall him; a mere naval demonstration might be sufficient to secure the release of the Villas. There could be little risk of war, for interested nations would know that the United States would have no intention of doing more than securing the release of her citizens. It would be more than ordinarily justifiable, for here the injury is being committed by a group which cannot otherwise be held to responsibility; still more is this true where the authorities at the head of the insurgent movement are unable to secure obedience from subordinates. For all practical purposes, it is the local authorities at Majorca with whom we must deal; it should not require a great expenditure of our naval resources to coerce them. If the precedents of the United States are against such action, it is also true that this is an exceptional situation, involving unusually irresponsible elements. It is nevertheless probably true that the temper of the American people today would not permit such action to be taken.

Are there any other measures which could be undertaken to secure respect for the rights of American citizens in insurgent control? The Neutrality Act, as adopted on April 29, 1937, extends its provisions to cover civil strife, and they must be applied equally to both parties to the strife. If the Neutrality Act contained the clause often advocated, permitting revocation of its provisions in favor of one of the parties, it might be possible to take measures so injurious to the insurgent effort as to compel the release of these Americans. Again, it is the temper of the American people—doubtless including some of those who now criticize the Department of State for its failure to secure the release of the Villas—which restrict the efforts which can be made in their behalf.

Possibly the Executive Department could find some act of reprisal or penalty to employ against those who hold Mr. and Mrs. Villa. There is an agent of the Franco régime in New York who could be imprisoned with no more injustice than are the Villas. It is understood that the Franco régime has money deposited in New York banks; it might be possible to impound a sufficient amount of these moneys to cover a proper reparation for what Mr. and Mrs. Villa have lost and suffered. If existing legal authority is not sufficient to permit of such action, Congress should be able to provide the

[1] See editorial comment by James W. Garner, this JOURNAL, Vol. 32 (1938), pp. 106–113.

authority. The contemplation of such measures should be attended by careful study, for they might result in retaliation. It has been suggested by friends of the Villas that the United States might request the Government of Spain to exchange for the Villas some of its insurgent prisoners. If such a request were based upon the argument that the Villas deserved the support of the Loyalist Government, this would constitute an admission of guilt which would nullify any demand for reparation from the Franco régime, now, or if it should succeed; if it were requested as a favor from the Spanish Government, the United States might be embarrassed by a request for return of the favor. Perhaps some such reciprocal favor could be found; on the whole, it does not seem to offer a promising solution.

De facto régimes have always furnished difficulties for international lawyers and diplomats; the matter of diplomatic protection affords a particularly delicate illustration. The risk of conferring an unintentional recognition, which seems to have embarrassed statesmen in the past, can and should be disregarded. The absence of a responsible entity with whom one can deal on a basis of legal rights is the real difficulty. The tendency of the present day seems to be to put the parties to a civil war upon the same footing as belligerents at war. This tendency was discussed by Professor Garner in the last issue of this JOURNAL; it appears also, as has been remarked, in our neutrality legislation. Such an attitude has the advantage of common sense recognition of a state of fact—granted a sufficient degree of warfare—by outside states; it would provide some little basis of legal responsibility, and make somewhat more easy intercourse with the insurgents. A factual situation should be dealt with as a fact; if the recognition of the fact of belligerency is not sufficient, more direct action should be taken. We have in the past dealt directly and in drastic fashion with pirates and bandits, even though unrecognized. The Franco régime must be placed in a higher ranking; but if it, or other insurgent groups, behaves in reckless and irresponsible fashion toward other states, it should not be allowed to escape responsibility for the protection of aliens because of its uncertain legal status and transitory character.

It is bad enough that war should be permitted to change the legal rights of, and do injury to, third states; it is even more objectionable that a civil war, which is supposed to be a domestic affair, should give license to an unrecognized group to do harm to the citizens of another state.[2] Some rules exist concerning the responsibility of belligerents in case of formal war, and efforts are now being made to hold to greater responsibility states which impose war upon an unwitting world; perhaps an effort should be made also to build some international regulations for insurgent groups in civil war. The difficulties, but also the need, of such regulation is shown by the Spanish Civil War. An

[2] "The right to treat unlawful and unauthorized warfare as piratical, seems to me, therefore, clearly imbedded in the very roots of international law." *The Ambrose Light*, 25 F. 408 (1885). The court is here dealing with an unrecognized insurgent group.

international control has been suggested. Failing that, the only possibility seems to be "direct action," for there is no law to cover the case.

In the law and procedure of diplomatic protection today, as in other fields, foreign offices are being confronted with strange and incredible situations. If conventional and accepted methods of procedure and settlement are disregarded to our injury, it is not necessary to cling to established etiquette. It would seem reasonable to employ new and impressive measures in defense of rights when such measures are used to attack rights. CLYDE EAGLETON

THE CLOSE OF A CHAPTER IN THE HISTORY OF TRANSISTHMIAN TRANSIT

The termination of Article VIII of the Boundary Treaty between the United States and Mexico, concluded December 30, 1853 [Gadsden Treaty], is significant of the changes in international relations following changes in methods of transportation. This Article VIII stated that

> The Mexican Government having on the 5th of February 1853 authorized the early construction of a plank and railroad across the Isthmus of Tehuantepec, and to secure the stable benefits of said transit way to the persons and merchandise of the citizens of Mexico and the United States, it is stipulated that neither government will interpose any obstacle to the transit of persons and merchandise of both nations; and at no time shall higher charges be made on the transit of persons and property of citizens of the United States than may be made on the persons and property of other foreign nations, nor shall any interest in said transit way, nor in the proceeds thereof, be transferred to any foreign government.
>
> The United States by its agents shall have the right to transport across the Isthmus, in closed bags, the mails of the United States not intended for distribution along the line of communication; also the effects of the United States Government and its citizens, which may be intended for transit, and not for distribution on the Isthmus, free of customhouse or other charges by the Mexican Government. Neither passports nor letters of security will be required of persons crossing the Isthmus and not remaining in the country.
>
> When the construction of the railroad shall be completed, the Mexican Government agrees to open a port of entry in addition to the port of Vera Cruz, at or near the terminus of said road on the Gulf of Mexico.
>
> The two governments will enter into arrangements for the prompt transit of troops and munitions of the United States, which that government may have occasion to send from one part of its territory to another, lying on opposite sides of the continent.
>
> The Mexican Government having agreed to protect with its whole power the prosecution, preservation and security of the work, the United States may extend its protection as it shall judge wise to it when it may feel sanctioned and warranted by the public or international law.

That some means of convenient transisthmian transit should be devised had been advocated for more than three hundred years. During the nineteenth century three routes were under particular consideration, the Tehuantepec, Nicaragua, and Panama routes. The support for each route enlisted able engineers and varied arguments. For the Tehuantepec as regards the