that his men lay down their arms and that, he in turn, turn over his sword. But he never intended to surrender his army. That army would be allowed to leave.

It was then up to Congress to "capture" Burgoyne's army. Gates had failed because he did not have either a capitulation or an unconditional surrender from Burgoyne. Congress did not repudiate the agreement. Still its "ratification" was in a sense up to Congress because Gates may have exceeded his authority as a commander in entering into it. So might have Burgoyne. Congress, therefore, asked Great Britain if she intended to ratify it. Great Britain did not reply, partially because such ratification may have implied recognition of the continental Congress and the force under its authority. On January 8, 1778, Congress suspended the execution of the treaty until "a distinct and explicit ratification of the convention of Saratoga shall be properly notified by the court of Great Britain to Congress." Ratification never came.

Burgoyne was permitted to return to Great Britain. His army remained behind. In formal communications the men of this army were not referred to as prisoners of war. Nevertheless, they were PW for all intents and purposes. Burgoyne was to charge that "the public faith is broke." It was if both he and Gates had bound their governments to a course of action. However, it is not clear that they had.

One of the chief sources of the difficulties encountered in executing the terms agreed upon in this case by the military commanders was the change of the title of the treaty from "capitulation" to "convention." As has already been noted, a capitulation is a convention. However, it is only one particular type of convention. Its subject matter is restrictive. It must concern itself with the *surrender* of troops, or fortified places. At Saratoga the terms agreed upon were not that of the surrender but of evacuation of territory. The political implications of the failure of Burgoyne to surrender his army were too much for Congress to allow. Burgoyne appears correct in insisting that Gates substitute the term "convention" for "capitulation" in the final draft. Gates complied. Nevertheless, Congress, by its actions, turned what Burgoyne regarded as a mere convention into a true capitulation.[12]

b. *The capitulation of General Hull at Detroit (1812).*

Brigadier General Hull surrendered the American fort and garrison at Detroit on August 16, 1812, according to the following agreement:

[12] There was a second nonhostile relation involved here, that of a suspension of arms while negotiations between Gates and Burgoyne were in progress. (See FM 27-10 (1956), para. 485 for material on suspension of arms.)

Camp Detroit, Aug. 16, 1812.

Capitulation of surrendering Fort Detroit, entered into between Major-General Brock, commanding his Britannic majesty's forces, of the one part, and Brig. General Hull, commanding the North-Western army of the U. States, of the other part:

Article 1st. Fort Detroit with all the troops, regulars as well as militia, will be immediately surrendered to the British forces under command of Major-General Brock, and will be considered as prisoners of war, with the exception of such of the Militia of the Michigan territory, who have not joined the army.

Article 2d. All public stores, arms, and public documents, including everything else of a public nature, will be immediately given up.

Article 3d. Private persons and private property of every description will be respected.

Article 4th. His excellency Brig. General Hull, having expressed a desire that a detachment from the state of Ohio, on its way to join the army, as well as one sent from Fort Detroit under the command of Col. M'Arthur, should be included in the above stipulation, it is accordingly agreed to. It is, however, to be understood, that such parts of the Ohio militia as have not joined the army, will be permitted to return home on condition that they will not serve during the war—their arms, however, will be delivered up if belonging to the public.

Article 5th. The garrison will march out at the hour of 12 o'clock this day, and the British forces will take immediate possession of the fort.

J. M'DOWEL, Lt. Col. Militia B. A. D. C.
I. B. GREGG, Major A. D. C.
(Approved) WILLIAM HULL, Brig. Gen.
JAMES MILLER, Lt. Col. 5th U. S. Infantry.
E. BRUSH, Col. 1st. Regt. Michigan Militia.
(Approved) ISAAC BROCK, Maj. Gen. . . .[13]

Isaac Brock, commanding the British forces, accurately summed up the terms of capitulation when he wrote:

. . . [T]he Territory of Michigan was this day by capitulation, ceded to the arms of his Britannic majesty, without any other condition than the protection of private property. . . .[14]

The United States Government officials were furious at the terms. In March 1814 General Hull was convicted by court-martial of the following specifications:

. . . Gen. Hull on the 15th of August, with personal fear and cowardice, by avoiding all personal danger, or making an attempt, to prevent the enemy's crossing the river, or to prevent the landing by avoiding all personal danger, from reconnoitering or encountering the enemy on their march towards Fort Detroit, and by hastily sending flags of truce to the enemy with overtures for capitulation, by anxiously withdrawing his person from the American troops to a place of safety; . . . . by calling in the troops, and crowding them into the fort; by a precipitate

[13] John Russell, *The War Between the United States and Great Britain*, (Hartford, 1815), p. 127.

[14] *Ibid.*, p. 134.

declaration to the enemy that he surrendered, before terms of capitulation were signed, considered, or even suggested.

. . . Gen. Hull . . . shamefully and cowardly surrendered a fine army, in high spirits, well supplied with ammunition, arms, and provisions, by a disgraceful capitulation with the enemy, containing no stipulation for the security and protection of such of the inhabitants of Upper Canada, as had joined the American standard; whereby the territorial sovereignty, rights and property, were shamefully ceded to the enemy; a brave and patriotic army wantonly sacrificed to the personal fear of the commander, and the service of the U. States suffered a great and afflicting loss. . . .[15]

He was sentenced to be shot to death. However, President Monroe reduced the sentence to dismissal.[16] On April 25, 1814, the following general order was published:

The roll of the army is not to be longer dishonored by having upon it the name of brigadier General William Hull.[17]

Three aspects of General Hull's surrender should be noted. The *first* is that his surrender was effected without any real terms. It was in fact a surrender without a capitulation. The protection of private property was a duty imposed by the international law of war. The agreement added nothing to the obligation already upon the British Commander. The *second* aspect is that Art. 4 includes in the terms troops from Ohio which have not yet joined General Hull's army. Para. 472, FM 27–10 states that "a commanding officer's powers [to capitulate] do not extend beyond the forces and territory under his command." A problem arises when, as here, troops may technically be under command of an officer but not under his control. Such troops may be tempted to disregard the capitulation and to join other forces in the field. Lastly, it must be noted that a shameful capitulation is still a crime punishable by a specific United States domestic law. Art. 99 (2) U.C.M.J. defines such an offense as follows:

Any member of the armed forces who before or in the presence of the enemy shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend shall be punished by death or such other punishment as a court-marital may direct.

c. *Johnston's Capitulation in North Carolina (1865).*

General Sherman and General Johnston met on April 17, 1865 to negotiate an armistice. General Sherman's first offer to General Johnston was that he accept the same terms of capitulation as were given General Lee. This Johnston refused to do, contending that General Lee was surrounded. He was not. Johnston then made a counteroffer to Sherman that they should draw up per-

15 *Ibid.*, p. 136.
16 *Ibid.*, p. 140.
17 *Ibid.*, p. 141.

manent terms of peace and then use their influence with their respective governments to obtain a confirmation of their action.[18]

They met the next day, Johnston being accompanied by Breckinridge, who attended as a major general because Sherman would admit none of the civil authorities to the meeting. They agreed to the following terms:

1. The contending armies now in the field to maintain the *status quo* until notice is given by the commanding general of any one to its opponent, and reasonable time—say forty-eight hours—allowed.

2. The Confederate armies now in existence to be disbanded and conducted to their several State capitals, there to deposit their arms and public property in the State arsenal; and each officer and man to execute and file an agreement to cease from all acts of war, and to abide the action of the State and Federal authority. . . .

3. The recognition by the Executive of the United States of the several State governments, on their officers and legislatures taking the oaths prescribed by the Constitution of the United States; . . .

4. The re-establishment of all the Federal courts in the several States, with powers as defined by the Constitution of the United States and of the States respectively.

5. The people and inhabitants of all the States to be guaranteed, so far as the Executive can, their political rights and franchises, as well as their rights of person and property, as defined by the Constitution of the United States and of the States respectively.

6. The Executive authority of the Government of the United States not to disturb any of the people by reason of the late war, so long as they live in peace and quiet, abstain from acts of armed hostility, and obey the laws in existence at the place of their residence. . . .[19]

Both officers were aware that they did not possess the authority to bind their governments to such an agreement. Therefore copies were sent out to the civil authorities on each side for ratification. The terms were rejected by the authorities in Washington. Therefore, on the 26th of April, the two officers met again. They soon agreed to the following capitulation:

1. All acts of war on the part of the troops under General Johnston's command to cease from this date.

2. All arms and public property to be deposited at Greensboro, and delivered to an ordnance officer of the United States Army.

3. Rolls of all the officers and men to be made in duplicate, one copy to be retained by the commander of the troops and the other to be given to an officer to be designated by General Sherman; each officer and man to give his individual obligation in writing not to take up arms against the Government of the United States until properly released from this obligation.

4. The side arms of officers and their private horses and baggage to be retained by them.

[18] Robert M. Hughes, *General Johnston*, (D. Appleton and Company, 1893), 273.
[19] *Ibid.*, pp. 274–275.

5. This being done, all the officers and men will be permitted to return to their homes, not to be disturbed by the United States authorities so long as they observe their obligation and the laws in force where they may reside.[20]

Capitulations have traditionally been agreements between military men about military matters. This concept was clear in the mind of General Sherman. He refused to admit Confederate civilians to the negotiations. He referred the first terms, which were political, back to the civilian authorities. No such referral was necessary for the second terms.[21]

d. *The surrender of General King on Bataan.*[22]

If the situation appeared critical to those on Corregidor and in Australia, how much blacker was the future to General King on whom rested the responsibility for the fate of the 78,000 men on Bataan. . . . It was then that he sent his chief of staff, General Funk, to Corregidor to inform Wainwright that the fall of Bataan was imminent and that he might have to surrender. . . . While he never actually stated during the course of his conversation with Wainwright that General King thought he might have to surrender, Funk left the USFIP commander with the impression that the visit was made "apparently with a view to obtaining my consent to capitulate."

Though Wainwright shared King's feelings about the plight of the men on Bataan, his answer to Funk was of necessity based upon his own orders. On his desk was a message from MacArthur which prohibited surrender under any conditions. When Wainwright had written ten days earlier that if supplies did not reach him soon the troops on Bataan would be starved into submission, MacArthur had denied his authority to surrender and directed him "if food fails" to "prepare and execute an attack upon the enemy." To the Chief of Staff he had written that he was "utterly opposed, under any circumstances or conditions to the ultimate capitulation of this command. . . . If it is to be destroyed it should be upon the actual field of battle taking full toll from the enemy." . . .

. . . With no relief in sight and with no possible chance to delay the enemy, General King then decided to open negotiations with the Japanese for the conclusion of hostilities on Bataan. He made this decision entirely on his own responsibility and with the full knowledge that he was acting contrary to orders. . . .

. . . The first task was to establish contact with the Japanese and reach agreement on the terms of the surrender. Col. E. C. Williams and Maj. Marshall H. Hurt, Jr., both bachelors, volunteered to go forward under a white flag to request an interview for General King with the Japanese commander. . . .

In the event the Japanese commander refused to meet General King, Williams was authorized to discuss surrender terms himself. These

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20 *Ibid.*, pp. 277–278.

21 Para. 478, FM 27–10 (1956) recognises that capitulations may be arranged by political authorities. In such an event, the terms would naturally not be limited to military matters.

22 Louis Morton, *The War in the Pacific, The Fall of The Philippines* (Washington: U.S. Gov. Printing Off., 1953), pp. 454–466, reprinted with permission of the Chief, Military History, Department of the Army.

terms were outlined in a letter of instructions King prepared for Williams. The basic concessions Williams was to seek from the Japanese was that Luzon Force headquarters be allowed to control the movement of its troops to prison camp. Williams was also instructed to mention specifically the following points if he discussed terms with the Japanese:

a. The large number of sick and wounded in the two General hospitals, particularly Hospital #1 which is dangerously close to the area wherein artillery projectiles may be expected to fall if hostilities continue.

b. The fact that our forces are somewhat disorganized and that it will be quite difficult to assemble them. This assembling and organizing of our own forces, necessary prior to their being delivered as prisoners of war, will necessarily take some time and can be accomplished by my own staff and under my direction.

c. The physical condition of the command due to long siege, during which they have been on short rations, which will make it very difficult to move them a great distance on foot. . . .

General Nagano, who spoke no English, opened the meeting by explaining through an interpreter that he was not authorized to make any arrangements himself but that he had notified General Homma an American officer was seeking a meeting to discuss terms for the cessation of hostilities. A representative from *14th Army* headquarters, he told King, would arrive very soon. A few minutes later a shiny Cadillac drew up at the building before which the envoys were waiting and Colonel Nakayama, the *14th Army* senior operations officer, emerged, accompanied by an interpreter. . . .

Nakayama had come to the meeting without any specific instructions about accepting a surrender or the terms under which a surrender would be acceptable. Apparently there was no thought in Homma's mind of a negotiated settlement. . . .

. . . The only basis on which he would consider negotiations for the cessation of hostilities, he asserted, was one which included the surrender of all forces in the Philippines. "It is absolutely impossible for me," he told King flatly, "to consider negotiations . . . in any limited area." If the forces on Bataan wished to surrender they would have to do so by unit, "voluntarily and unconditionally." . . .

. . . King's surrender, . . ., was interpreted [by the Japanese] as the surrender of a single individual to the Japanese commander in the area, General Nagano, and not the surrender of an organized military force to the supreme enemy commander. . . .

General King's attempt to capitulate was unsuccessful. He succeeded in accomplishing only his own individual surrender.

On 25 February 1947 an officer in the International Law Section of the Office of the Judge Advocate General was consulted by a representative of the Chief, Historian, Department of the Army, as to the legality of General King's surrender. The following memorandum of the verbal opinion given was prepared:[28]

. . .

[28] Memorandum for the Files, dated 25 February 1947, Subject: Seminar on the Surrender in the Philippines.

3. The question of the legality of General King's surrender and questions concerning the legality of Japanese action before and after accepting his surrender, as well as questions concerning the provisions of *Rules of Land Warfare*, were raised by Doctor Morton and were answered by the representative of the Judge Advocate General's Department.

4. I stated that it was my opinion that General King was reasonably well informed concerning the provisions of the *Rules of Land Warfare* and that he was deeply concerned about the order which he received from General Wainwright on 7 April not to surrender but to counter attack. He complied with this order and launched a counter attack on the 8th but after this counter attack failed and no further effective resistance was possible, he opened negotiations with the Japanese for surrender, taking full responsibility for his action. According to paragraph 246 of the *Rules of Land Warfare* (1940) which states:

> *Powers of commanders.*—Subject to the limitations hereinafter indicated, the commander of a fort or place, or the commander in chief of any army, is presumed to be duly authorized to enter into capitulations. If he capitulates unnecessarily and shamefully, or in violation of orders from higher authority, he is liable to trial and punishment by his own government (see A.W. 75), but the validity of the capitulation remains unimpaired. His powers are not presumed to extend beyond the forces and territory under his own command. He is not presumed to possess power to bind his government to a permanent cession of the place or places under his command, or to any surrender of sovereignty over territory, or to any cessation of hostilities in a district beyond his command, or generally to make or agree to terms of a political nature, or such as will take effect after the termination of hostilities.

General King was completely justified in taking this action after having complied with General Wainwright's orders to counter attack. The failure of the counter attack so materially affected his forces that the order of the 7th not to surrender no longer had validity. After the negotiators had entered the Japanese lines, General Wainwright learned of General King's proposed surrender and attempted to stop it, but it was too late. Due to the fact that all resistance had collapsed, the Japanese considered that General King and his troops were not prisoners of war but captives taken on the battlefield.

In this connection, I pointed out that the Japanese, in February of 1942, had informed the Swiss government that in respect of American troops captured by them, they would, *mutatis utandi*, abide by the terms of the Geneva Convention, which in Section 2 of Article I states that ". . . all persons belonging to the armed forces of belligerent parties, captured by the enemy in the course of military operations . . ." are to be treated as prisoners of war, and that the Japanese action in refusing to accord prisoner of war status to General King and his troops was clearly a violation of the convention with which they had agreed to comply.[24]

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[24] In this connection FM 27-10 (1956) at para. 478 makes the following statement: "An unconditional surrender is one in which a body of troops gives itself up to its enemy without condition. . . . *Subject to the restrictions of the law of war*, the surrendered troops are governed by the directions of the State to which they surrender." (Emphasis supplied.) Examples of instruments of conditional surrender of troops are contained in appendixes D and E, FM 27-1, Treaties Governing Land Warfare (1956).

e. *The capitulation of General Winkelman in Holland (1940).*

(1) *The Case of General Hans Rauter*

General Hans Rauter, the German commissioner for Security in occupied Holland, was tried by the Dutch special court (War Criminal) at The Hague in April and May 1948.[25] The accused put forward many grounds to justify his counter measures against the Dutch Resistance forces. Among the grounds for defense the accused maintained that the military capitulation of 15 May, 1940, by which General Winkelman surrendered the Dutch Armed Forces, obliged the Dutch Government in London to refrain from exhorting the Dutch population to offer resistance to the occupier, and from providing them with weapons for that purpose. General Rauter also maintained that the population was under a legal obligation, derived from the surrender instrument, to refrain from such resistance.

In rejecting this defense the court discussed the true nature of a military capitulation. Certain clauses of the capitulation had a bearing on the conduct of the civilian population in occupied Holland. The question was whether or not their inclusion was within the authority of General Winkelman. According to international law a capitulation is a convention between commanders of belligerent armed forces and is concerned with the surrender of specified troops or specified regions, towns or fortresses. However, a commander who enters into such a convention does not have the apparent authority to bind his Government to a cessation of hostilities occurring in regions not falling under his command, to a permanent cession of territory, or to provisions of a political nature. As a result, such provisions in a capitulation would be binding if they were ratified by the opposing Governments.

To determine if it were a capitulation agreement in the usual sense of the term the court examined the title of the document, "Conditions for the Surrender of the Dutch Armed Forces," and its contents. Both showed beyond doubt that it was a genuine capitulation. This conclusion was confirmed by the following passage in the explanatory memorandum: "At Rijsoord [the German] General von Kuchler asked if [the Dutch Commander-in-Chief] General Winkelman was empowered to speak in the name of the entire armed forces of the Netherlands and if his commands would be obeyed. General Winkelman declared himself entitled to act on behalf of all armed forces in the Netherlands

25 Reported in Lauterpacht, *Annual Digest and Reports of Public International Law Cases, 1948*, (London: Butterworth, 1953) pp. 500–502, and in *XIV Law Reports of Trials of War Criminals (1949)*, pp. 89–138.

territory in Europe with the exception of the province of Zeeland, and said that his commands would be carried into effect."

The difficulty was that General Winkelman acted as if he were more that just the commander in chief of the Dutch forces. For example in his address to the Dutch people he called himself the supreme representative of the Dutch Government, and it may have been assumed that he had been assigned far-reaching powers before the departure of the Government for England. This did not, the court thought, alter the fact that the conventions on which the defense relied were a capitulation pure and simple with an additional agreement dealing with measures for its execution as such they were agreements by which the Dutch forces under General Winkelman's command surrendered. Consequently, they imposed no obligations on the Dutch Government in London nor on the civilian population of the occupied territory of the Netherlands. The Court considered the conclusion to be correct because, all during the occupation, the Germans had never invoked these conventions to support a charge that the Government in London had committed anything illegal by its encouragement of the Dutch resistance movement. It would have been natural for them to have done so if the capitulation agreement was thought at the time to have had that effect. Not only is there a lack of any evidence that the Germans so regarded the document, but also there is nothing to indicate that the Dutch Government considered itself or the people of Holland bound by such an interpretation. On the strength of these arguments, the Court maintained the right of the Dutch Government in London to call for resistance against the Occupant in Holland. That Government could not be blamed for providing for weapons to be dropped from aeroplanes into occupied territory for this purpose. The Court therefore rejected the defence of the accused that the actions of the Dutch Government had given him the right subsequently to disregard the whole of the Hague Regulations. He was therefore held accountable under the terms of these 1907 Regulations.

(2) *The Case of Mr. Van Der Giessen*[26]

The accused was the director of a shipbuilding company which had built several vessels of war for Germany. He was tried for collaboration under a municipal statute of Holland before the Dutch Special Court of Cassation in June 1948. For a defense he relied upon the annex to the capitulation of the Dutch forces of May 15, 1940. This annex, he maintained, had imposed on

26 Reported in Lauterpacht, *Annual Digest of Public International Law Cases*, 1948 (1953) p. 503.

private port undertakings and shipping wharves the obligation to continue to work to full capacity.

The court rejected this defense. The main instrument, the "Conditions for the Capitulation of the Dutch Army," contained no such provision. However, there was included in the annex, the "Heads of Negotiations," a provision that the population must immediately resume the work which they were accustomed to do in time of peace (Article 8), and in addition the "Additional Protocol" included the provision that private port undertakings and shipping wharves must continue to work to full capacity (Article 5, para. 2). In rejecting the binding nature of these provisions the court did not state how far the powers of an army commander to conclude provisions in capitulations might extend. One thing is certain. Such provisions must be interpreted in accordance with the general rules of international law. They would not therefore be construed as imposing obligations on any person to begin to work for the direct benefit of the German war effort, contrary to Article 52 of the Hague Regulations. Such would be their effect if they intended to compel the accused to build war vessels for the German war effort. The defense was therefore rejected.

f. The surrender of General Choltitz in Paris (1944).[27]

General Choltitz was the German military commander in Paris. His situation prior to the Allied liberation of the city is interesting because it illustrates the difficulties that may arise when agreements are entered into with the commanders of irregular units. General Choltitz's troops were being fired upon by underground bands from the French Resistance. Fearful that such fighting would lead to the destruction of Paris the leaders of the FFI agreed to a truce. Isolated bands broke this truce, partly as a result of the difficulty of the Resistance in circulating the cease fire order.

Next General Choltitz agreed to recognize the insurgent city government of Paris if the French would cease firing. But, like the previous agreement, this armistice failed when Communist newspapers rushed to the streets demanding that Parisians reject any truce with the Germans. The Resistance was unable after that to enforce compliance with its truce. Surrender by the Germans was out of the question because General Choltitz stated, "I shall never surrender to an irregular army."[28]

In order to prevent further damage to the city a unit from the regular French Army was rushed to Paris to accept the unconditional surrender of the German forces.

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27 Bradley, *A Soldier's Story* (Henry Holt and Co., 1951), pp. 387–393.
28 *Ibid.*, at p. 390.

3. *Violations of Capitulations and Surrenders*

a *Johnson v. Eisentrager.*[29]

"Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of habeas corpus. They alleged that, prior to May 8, 1945, they were in service of German armed forces in China. They amended to allege that their employment there was by civilian agencies of the German Government. Their exact affiliation is disputed, and, for our purposes, immaterial. On May 8, 1945, the German High Command executed an act of unconditional surrender, expressly obligating all forces under German control at once to cease active hostilities. These prisoners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces.

* * * * * * *

"That there is a basis in conventional and long-established law by which conduct ascribed to them might amount to a violation seems beyond question. Breach of the terms of an act of surrender is no novelty among war crimes. 'That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations.[13] Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent Government, and a war crime if committed without such order.[30] Such violation may be met by reprisals or punishment of the offenders as war criminals.' 2 Oppenheim, International Law 433 (6th ed Rev Lauterpacht, 1944). Vattel tells us: 'If any of the subjects, whether military men or

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29 339 U.S. 763 at 765, 766 and 787; 94 L ed 1255, 70 S. Ct. 936 (1950).

[13] Article 35 of Convention IV signed at The Hague, October 18, 1907, 36 Stat. 2277, 2305, provides: "Capitulations agreed upon between the contracting parties must take into account the rules of military honour. Once settled, they must be scrupulously observed by both parties." And see 7 Moore, International Law Digest (1906) 330: "If there is one rule of the law of war more clear and peremptory than another, it is that compacts between enemies, such as truces and capitulations, shall be faithfully adhered to; and their non-observance is denounced as being manifestly at variance with the true interest and duty, not only of the immediate parties, but of all mankind. Mr. Webster, Sec. of State, to Mr. Thompson, Apr. 5, 1842, 6 Webster's Works, 438."

30 This statement is repeated in the 7th ed. of II Lauterpacht, *Oppenheim's International Law* (1952) at p. 546. It seems in part questionable. If the doctrine that superior orders is no defense is to be applied to this war crime and there seems to be no reason in principle why it should not—the fact that officials of a belligerent government ordered a violation of a capitulation would appear not to release the individual from responsibility, provided the other elements of criminality could be established. (See Baxter "Cambridge Conference on the Revision of the Law of War," 47 *A.J.I.L.* 702, at 703 (1953) for a report of the inconclusive discussions with the British representetives on this point. Conference was held prior to the publication of the U.S. and British manuals on the law of war in order to make them as uniform as possible.)

private citizens offend against the truce . . . the delinquents should be compelled to make ample compensation for the damage, and severely punished. . . .' Law of Nations, [788] Book, III, ch XVI, § 241. And so too, Lawrence, who says, 'If . . . the breach of the conditions agreed upon is the act of unauthorized individuals the side that suffers . . . may demand the punishment of the guilty parties and an indemnity for any losses it has sustained.' Principles of International Law 5th ed p. 566. It being within the jurisdiction of a Military Commission to try the prisoners, it was for it to determine whether the laws of war applied and whether an offense against them had been committed."

b. *The scuttled U-boats case.*[31]

The defendant was 1st Lt. Gerhard Grumpelt of the German Navy. He was charged with committing a war crime, in that he "at Cuxhaven, North-West Germany, on the night of 6–7th May, 1945, after the German Command had surrendered all Naval ships in that place, in violation of the laws and usages of war, scuttled U-boats 1406 and 1407."

The accused pleaded not guilty, claiming that he was not aware of the terms of the Instrument of Surrender. He maintained that there was a general order for the scuttling of all U-boats which was not countermanded. He was found guilty and sentenced to seven years, which was reduced to five years by higher military authority.[32]

The United Nations War Crimes Commission has summarized the principal legal issues as follows:[33]

"(a) *Capitulation and Armistices in International Law.* Defending Counsel, endeavouring to establish the absence of *mens rea* in the accused, made a distinction as to the character of certain different legal conceptions, namely 'cease fire,' 'armistice,' 'surrender' and 'capitulation,' and submitted that at the time when the scuttling took place the convention of 4th May, 1945, agreed upon between the two belligerent parties, was known to the German people and the accused as signifying 'cease fire' and nothing else. Therefore, he contended, the accused's actions should be judged from the point of view of what the 'cease fire' conception implied.

"International Law recognises and distinguishes between capitulations and simple surrender on the one hand, and different kinds of armistice on the other.

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31 Trial of Oberleutnant Gerhard Grumpelt, British Military Court, Hamburg, Germany, 12–13 Feb. 1946, 7 *Law Reports of Trials of War Criminals* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, 1947), pp. 65–70.

32 *Ibid.*, p. 65.

33 *Ibid.*, pp. 67–69.

"As to the first category, capitulation or *stipulated* surrender in contradistinction to *simple* surrender is a convention between the armed forces of belligerents stipulating the terms of surrender of defended places, or of men-of-war, or of troops. With regard to the character and contents of capitulations, Oppenheim-Lauterpacht, *International Law*, Volume II, Sixth Edition (Revised), p. 431, contains the following passage: 'Unless otherwise expressly provided, a capitulation is concluded under the obvious condition that the surrendering forces become prisoners of war, and that all war material and other public property in their possession, or within the surrendering place or ship, are surrendered in the condition in which they were at the time when the capitulation was signed. Nothing prevents forces fearing surrender from destroying their provisions, munitions, arms, and other instruments of war which, when falling into the hands of the enemy, would be useful to him. Again, nothing prevents a commander, even after negotiations regarding surrender have begun, from destroying such articles. But when once a capitulation has been signed, such destruction is no longer lawful and if carried out, constitutes perfidy, which may be punished by the other party as a war crime.'

"As to the second category, armistices or truces are all agreements between belligerent forces for a temporary cessation of hostilities. Under this category comes all kinds of cessation of hostilities, including suspensions of arms (referred to by the Defence as 'cease fire'), general armistices, and partial armistices.

"The common feature of all kinds of armistices is that hostilities between the belligerent parties must cease. The legal consequences of an armistice are in some respects the subject of much dispute in legal literature, as the Hague Regulations do not mention the matter. This controversy has been summarised as follows:

'Everybody agrees that belligerents during an armistice may, *outside the line where the forces face each other*, do everything and anything they like regarding defence and preparation of offence; for instance, they may manufacture and import munitions and guns, drill recruits, build fortresses, concentrate or withdraw troops. But no unanimity exists regarding such acts as must be left undone, or may be done, *within the very line where the belligerent forces face each other.*'

"It seems therefore that the legal issue is in doubt, but in any case it must be argued that the above-mentioned controversy and the differentiation put forward by the Defence Counsel, as well as the meaning which according to him should have been laid

upon the 'cease fire' conception, was not relevant to the case, because it must have been obvious to the accused, as it must have been to the most rudimentary intelligence, that the German Naval Authorities could not have issued a general order for scuttling all naval craft if only a simple 'cease fire' was agreed upon temporarily, after which, as the Defence contended, hostilities might have been resumed.

"(b) *Violation of the Terms of Surrender viewed as a War Crime.* That capitulations, surrender conventions and armistices must be scrupulously observed is an old customary rule strengthened by the provisions of Article 35 of the Hague Regulations which expressly provides that 'capitulations agreed upon between the contracting parties must . . . be scrupulously observed by both parties.'

"It would therefore appear as beyond doubt that any violation of a capitulation or armistice is prohibited and if committed constitutes a violation of the customary and conventional rules of the laws and usages of war. There is no doubt that any act contrary to a capitulation and any violation of an armistice would also constitute a war crime if committed by individuals on their own account. This point of view finds confirmation, in addition to the above-mentioned provision, also in Article 41 of the Hague Regulations, which says that 'a violation of the terms of the armistice by individuals acting on their own initiative . . . entitles the injured party to demand the punishment of the offenders . . .'

"(c) *The Instrument and Terms of Surrender.* The charge against Grumpelt was based on the Instrument of Surrender signed on 4th May, 1945, which, in paragraph 1, provided that 'the German Command agrees to the surrender of all German armed forces. . . . This to include all naval ships. . . .'

"This Instrument, however, did not provide any conditions with regard to scuttling or damaging the instruments of war, conditions which are usually embodied in the conventions between armed forces of belligerents stipulating terms of surrender. Such conditions were, for instance, provided in two further Conventions signed with the German Command after 4th May, 1945. Paragraph 2 of the Unconditional Surrender of the German Forces signed at Rheims on 8th May, 1945, contains the words: 'No ship, vessel or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment.' Paragraph 2 of the Unconditional Surrender of German Forces at Berlin on 9th May, 1945 contains the words 'No ship, vessel or aircraft is to be scuttled or any damage done to their hulls, machinery, or equipment, nor to machines of all kinds, armament, apparatus,

and all the technical means of prosecution of war in general.'

"Irrespective of whether the omission of such a specification in the Instrument of 4th May was accidental or not, the Court would seem to have acted on the assumption that this does not affect either the legal or the practical question of what is to be involved in the surrendering of enemy armed forces. Any surrender convention is concluded under the implied condition that all war material in the possession of the surrendering forces is surrendered in the condition in which is was at the time when the instrument was signed. Therefore, such an explanatory provision need not necessarily be embodied in the surrender agreement. It was also of no avail for the Defence to argue that at the material time the accused did not know the exact terms of the Instrument of Surrender, as the necessary conditions of any surrender must be obvious at least to any military person of the rank of officer."[34]

B. Armistices

Meaning

An armistice is defined as "the cessation of active hostilities for a period agreed upon by the belligerents."[35] An armistice does not of itself end a state of war.[36] This characteristic of an armistice may well cause difficulties where in fact the armistice does have that effect. To understand the circumstances where it may do so it is necessary to distinguish between the various types of armistices, such as suspensions of arms, local armistices, and general armistices. It is this third type which, as Stone aptly observed, has stretched the concept of war into the realm of peace.[37]

a. *Suspension of arms.* For the first time, FM 27–10 has made a distinction between a suspension of arms and a local armistice.[38] A suspension of arms is restricted to some pressing local interest such as to bury the dead, to collect the wounded, to

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34 A parallel trial was that of Kapitanleutnant Ehrenrich Stever by a British Military Court at Hamburg, 17–18 July 1946. Here the accused was found guilty of "Committing a war crime in that he, in the Atlantic Ocean off Portugal on or about 2 July, 1945, when commander of U-Boat U. 1277 after the German Command had surrendered all naval ships to the Allied Forces, in violation of the laws and usages of war, scuttled U-Boat U. 1277." The sentence of five years' imprisonment was confirmed (XV, *Law Reports of Trials of War Criminals*, 181).

35 FM 27–10, *op. cit.*, n. 1, para. 479. Article 36 of The Hague Regulation has a similar definition: "An armistice suspends military operations by mutual agreement between the belligerent parties."

36 *Re Scarpato*, (Italy 1951), *Annual Digest 1951*, p. 625; *Ariel v. Seymond*, (France, 1948) *Annual Digest 1948*, p. 487; *Re Suarez* (France, 1944) *Annual Digest 1943–1945*, p. 412; Lauterpacht, *op. cit.*, n. 1, pp. 546–547.

37 Stone, *Legal Controls of International Conflict*, (New York: Rinehart, 1954), p. 646.

38 FM 27–10, (1956), *op. cit.*, n. 1, paras. 484 and 485.

enable opposing commanders to confer,[39] or to enable a commander to communicate with his government or superior officer.[40]

The 1949 Geneva Conventions, because of their humanitarian character, contain numerous provisions for nonhostile relations between the belligerents.[41] A suspension of arms is called for in three instances, to remove wounded from the battlefield,[42] to remove wounded from besieged areas,[43] and to permit the evacuation of children, maternity cases and the elderly from besieged areas.[44]

b. *Local armistices.* Local armistices suspend military operations over a wider area and affect more troops than does a suspension of arms. A local armistice may also involve a suspension of the fighting between a less number than all of the belligerents at war.[45]

Military commanders are presumed competent to conclude local armistices.[46] This presumed authority does not extend to the inclusion of political items in such armistices. These armistices contain military stipulations and, unless special authority is given, are devoid of a political character. An example of such an armistice occurred when Italy withdrew from the war in 1943.[47]

(1) *The Italian Military Armistice.* The events leading up to the signing of the Armistice have been summarized as follows:[48]

"Since Italian peace overtures might be nullified by German interference, General Eisenhower, wishing to be prepared to act quickly, secured authority from the CCS to conclude any armistice as soon as approached. The question of the type of armistice was more controversial. The Post-Hostilities Subcommittee of the British Chiefs of Staffs had prepared a comprehensive draft armistice, stern in content and tone which had been approved by the British Government and submitted to the CCS. General

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39 As was noted in footnote 12, *supra*, a suspension of arms preceded the "capitulation" of Burgoyne and enabled Gates and Burgoyne to work out the terms.

40 FM 27-10 (1956), *op. cit.*, para. 485.

41 See Section III following where the provisions of the conventions pertaining to such relations are outlined.

42 Art. 15(2), of the *Geneva Convention on the Wounded and Sick in the Field.* See Freeman, *R. E. Lee* (New York: Scribner's Sons, 1935), III, pp. 391-392 for a graphic description of the suffering of the wounded caused by the lack of a suspension of arms at Cold Harbor. Art. 15(2) of the Geneva Convention is designed to prevent such unnecessary suffering.

43 *Ibid.*, Art. 15(3); and Art. 18(2) of the *Geneva Convention on Wounded, Sick and Shipwrecked at Sea.*

44 Art. 17., *Geneva Convention Relative to the Protection of Civilian Persons.*

45 FM 27-10 (1956), para. 484.

46 *Ib.* See also II Lauterpacht, *Oppenheim's International Law*, 7th ed., *op. cit.*, p. 550.

47 The Italian armistice could as easily be classified as a general armistice. For Italy it was a general armistice because it ended the fighting for that State. However, for the Allies it was in a sense both general and local.

48 Komer, *Civil Affairs and Military Government in the Mediterranean Theatre* (Dept. of Army; Office of Chief of Military History, 1950), Chapt. III, p. 25.

Eisenhower believed that such an instrument, with it stringent political and economic terms, would be signed only by an Italian Government which was ready to surrender under any conditions. He believed that Italy was not yet desperate to that extent, and in any case he feared that lengthy terms might involve prolonged negotiations when it was important to lose no time. As a means of separating Italy from the Axis, he desired simple, straightforward terms which would appear more attractive to the Italians. Although the CCS at first wished full terms to be signed, General Eisenhower obtained permission to negotiate on a short, twelve-point armistice concerned only with military matters, on the understanding that Italy would be required to sign more detailed terms later.

"The Badoglio government opened peace negotiations of 17 August by sending a representative to Lisbon. Italy signed the armistice on 3 Septmeber 1943 at Cassabile, Sicily."

The Military armistice contained the following terms:[40]

"The following conditions of an Armistice are presented by

General DWIGHT D. EISENHOWER,

Commander-in-Chief of the Allied Forces, acting by authority of the Governments of the United States and Great Britain and in the interest of the United Nations, and are accepted by

Marshall PIETRO BADOGLIO

Head of the Italian Government.

1. Immediate cessation of all hostile activity by the Italian armed forces.

2. Italy will use its best endeavors to deny, to the Germans, facilities that might be used against the United Nations.

3. All prisoners or internees of the United Nations to be immediately turned over to the Allied Commander-in-Chief, and none of these may now or at any time be evacuated to Germany.

4. Immediate transfer of the Italian Fleet and Italian aircraft to such points as may be designated by the Allied Commander-in-Chief, with details of disarmament to be prescribed by him.

5. Italian merchant shipping may be requisitioned by the Allied Commander-in-Chief to meet the needs of his military-naval program.

6. Immediate surrender of Corsica and of all Italian territory, both islands and mainland, to the Allies, for such use as operational bases and other purposes as the Allies may see fit.

7. Immediate guarantee of the free use by the Allies of all airfields and naval ports in Italian territory, regardless of the rate of evacuation of the Italian territory by the German forces. These ports and fields to be protected by Italian armed forces until this function is taken over by the Allies.

8. Immediate withdrawal to Italy of Italian armed forces from all participation in the current war from whatever areas in which they may now be engaged.

[40] 40 *American Journal of International Law Supplement* (1946); 18 *Dept. of State Bulletin* 748 (1945).

9. Guarantee by the Italian Government that if necessary it will employ all its available armed forces to insure prompt and exact compliance with all the provisions of this armistice.

10. The Commander-in-Chief of the Allied Forces reserves to himself the right to take any measure which in his opinion may be necessary for the protection of the interests of the Allied Forces for the prosecution of the war, and the Italian Government binds itself to take such administrative or other action as the Commander-in-Chief may require, and in particular the Commander-in-Chief will establish Allied Military Government over such parts of Italian territory as he may deem necessary in the military interests of the Allied Nations.

11. The Commander-in-Chief of the Allied Forces will have a full right to impose measures of disarmament, demobilization and demilitarization.

12. Other conditions of a political, economic and financial nature with which Italy will be bound to comply will be transmitted at later date." [50]

(2) *Attempt of Italian Forces To Comply with the Armistice in Yugoslavia.* Art. 8 of the armistice required that all Italian armed forces withdraw to Italy from whatever areas in which they were engaged. The following excerpt from the judgment in the war crimes trial of General Von List illustrates the difficulties that arose.[51]

"The evidence shows that the 9th Italian Army was occupying the coastal area jointly with the German Armed Forces as an ally until the collapse of Italy. That danger existed in the possibility of the area becoming an enemy bridgehead cannot be denied. Even though the German troops were outnumbered as much as 20 to 1, the defendant Rendulic saw the necessity of controlling the area. By cleverly maneuvering his numerically inferior troops and taking advantage of the uncertainties of the situation in which the Italian commanders found themselves, the defendant Rendulic was able to coerce a surrender of the 9th Italian Army by its commander General Dalmazzo. Most of the troops of the 9th Army complied with the terms of the surrender. Among those which refused to comply was the Bergamo Division of the 9th Army stationed at Split, a seaport on the Adriatic Sea. The defendant was able to marshall forces sufficient to capture the troops of the Bergamo Division. Thereafter, the order to shoot the guilty officers of the Bergamo Division after summary court martial proceedings was carried out.

"It is the contention of the defendant Rendulic that the surrender of the 9th Italian Army, commanded by General Dal-

[50] The political conditions anticipated by Article 12 were signed on September 29, 1943. These terms are set forth in 40 *A.J.I.L. Supp.* 2–10 (1946) and in 13 *Dept. of State Bulletin* 749 (1945). See Graham, "Two Armistices and a Surrender," 40 *A.J.I.L.* 148–158 (1946) for an analysis of the Italian armistices of 8 and 29 Sept. (1943).

[51] *U.S. v. List,* XI *Trials of War Criminals Before the Nuremberg Military Tribunals* (Wash.: U.S. Gov. Printing Office, 1950), pp. 1293–1294.

mazzo, brought about *ipso facto* the surrender of the Bergamo Division in Split, and that elements of this division by continuing to resist the German troops became *francs- tiereurs* and thereby subject to the death penalty upon capture.

"It must be observed that Italy was not at war with Germany, at least insofar as the Italian commanders were informed, and that the Germans were the aggressors in seeking the disarmament and surrender of the Italians forces. The Italian forces which continued to resist met all the requirements of the Hague Regulations as to belligerent status. They were not *francs-tiereurs* in any sense of the word. Assuming the correctness of the position taken by the defendant that they became prisoners of war of the Germans upon the signing of the surrender terms, then the terms of the Geneva Convention of 1929, regulating the treatment of prisoners of war were violated. No representative neutral power was notified nor was a 3-month period allowed to elapse before the execution of the death sentences. Other provisions of the Geneva Convention were also violated. The coercion employed in securing the surrender, the unsettled status of the Italians after their unconditional surrender to the Allied forces, and the lack of a declaration of war by Germany upon Italy creates grave doubts whether the members of the Bergamo Division became prisoners of war by virtue of the surrender negotiated by General Dalmazzo. Adopting either view advanced by the defense, the execution of the Italian officers of the Bergamo Division was unlawful and wholly unjustified."

c. *General Armistices.*

(1) *Meaning.* General Armistices are usually of a combined military and political nature. The fact that they suspend all hostilities in the war makes them of vital political importance. If concluded by the military all political terms must be made under authorization of the governments concerned or subject to approval by them.[52]

These armistices have in the past usually preceded the formal treaty of peace. Such was the case in the Spanish American War, and in World Wars I and II. In addition, there was no long nego-

[52] FM 27–10 (1956), para. 488. Korea offers an example of the difficulty of conceiving a general armistice that does not have political implications. On 24 March 1951 General MacArthur made the following release: "Within the area of my authority as military commander, however, it should be needless to say I stand ready at any time to confer in the field with the commander-in-chief of the enemy forces in an earnest effort to find any military means whereby the realization of the political objectives of the United Nations in Korea, to which no nation may justly take exceptions, might be accomplished without further bloodshed."

The Joint Chiefs of Staff immediately sent the following message to General MacArthur: "The President has directed that in the event Communist military leaders request an armistice in the field, you immediately report that fact to the JCS for instructions." (MacArthur's release and the JCS directive are quoted in Hunt, *The Untold Story of General MacArthur* [N.Y.: Devin-Adair, 1954], pp. 509, 510.)

tiation between the belligerents preceding the signing of the general armistice. The terms were, for the most part, dictated by one side to the other. In Korea, all that changed. There was no dictation of terms by either side. The military man was called upon to be the skilled negotiator.[53] Also the prospects of a peace treaty following shortly after the armistice were remote. The result was that the armistice left two large armies, facing each other in a state that could not accurately be described as either peace or war.

(2) *Provisions.*[54] The 1956 edition of FM 27–10 lists seven provisions that should be incorporated in an armistice. They are:[55]

(a) Precise date, day, and hour of commencement.
(b) Duration.
(c) Principal lines and all other marks of signs necessary to determine the locations of the belligerent troops.
(d) Relation of the armies with the local inhabitants.
(e) Acts to be prohibited.
(f) Disposition of prisoners of war.
(g) Consultation machinery.

The first five enumerated are a repeat from the 1940 edition of the manual. The last two are new. Prisoners of war was inserted because of the appearance of this item in armistices after the Second World War.[56] The last item listed above makes reference to the desirability of consultative machinery to carry out the provisions of the armistice. Recent practice has included such a provision. For example, the Armistice Agreement between the Commander-in-Chief, United Nations Command, and the Supreme Commanders of the Korean and Chinese Armies, signed on 27 July 1953[57] contains stipulations relating to a Military Armistice Commission and a Neutral Nations Repatriation Commission. Another example is the Israel-Egyptian Armistice Agreement on Palestine, signed on 24 February 1949 which provides for a Mixed Armistice Commission.

Because of the recent tendency to utilize a general armistice as a means of settling a number of matters which are not exclusively military in nature, FM 27–10 has inserted an entirely

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53 See Joy, *How Communists Negotiate* (New York: Macmillan, 1955), for an account by the Chief delegate to the Korean Armistice Conference of the negotiating techniques used by both sides during the two years of discussions at Panmunjom.

54 See FM 27-10 (1956), para. 487 and 488 for provisions usually contained in an armistice. These provisions are explained and amplified in Levie, "The Nature and Scope of the Armistice Agreement," 50 *A.J.I.L.* 880 at 886–901 (1956).

55 FM 27-10 (1956), para. 487.

56 For example, art. 3 of the Military Armistice agreement with Italy of 3 Sept. 1943 (TIAS 1604).

57 *T.I.A.S.* 2782; 29 *Dept. of State Bulletin* 132 (1953); DA Pam 27–1, *Treaties Governing Land Warfare* (1956), appendix B.

new paragraph containing a number of political and other military stipulations.[58]

These provisions cover such matters as the evacuation of territory, the cooperation in the punishment of war crimes, civil administration, the restitution of captured or looted property, the disposition of aircraft and shipping, etc. The enumerations for the new paragraph were based on the Armistices with Italy, Bulgaria, Rumania and Hungary in World War II.[59]

Account was also taken of the Armistices between France and Italy, 24 June 1940,[60] and between France and Germany, 22 June 1940.[61]

II. NONHOSTILE RELATIONS OF A MINOR NATURE

A. Cartels

Cartels have two meanings. In the narrow sense they refer only to agreements for the exchange of prisoners of war.[62] They are also often given a broader meaning covering any type of agreement between belligerents concerning their non-hostile relations.[63]

The practices of exchanging able bodied PWs during the war has fallen into disuse in the Twentieth Century.

The 1949 Geneva Conventions provide in several articles for exchange of sick and wounded prisoners of war. The seriously wounded and sick in PW camps must be returned,[64] and the wounded may be exchanged on the battlefield or from besieged areas.[65]

The manner of the exchange of prisoners of war in Korea after hostilities provided one of the principal points of discussion. Here the cartel became one section of a much wider armistice agreement.

B. Military Passports

Military passports are issued by a military commander to persons *already within his lines* in order to permit them to travel unmolested within such territory.[66] Such passports may also contain permission to pass out of the lines and to return at certain

58 FM 27–10 (1956), para. 488.

59 See Graham, "Armistices—1944 Style" 39 *A.J.I.L.* 286 (1945) for a discussion of the Armistices with the Balkan States. The Armistice with Hungary is set out at Appendix C of DA Pam 27–1, *Treaties Governing Land Warfare* (1956).

60 34 *A.J.I.L.* Supp. 178 (1940).

61 *Ibid.*, at p. 173.

62 FM 27–10 (1956), para. 469.

63 *Id.* See also Lauterpacht, *op. cit.*, n. 1, p. 542.

64 *GPW*, Art. 110 and Annex I to that convention.

65 *GSW*, Art. 15(2)(3).

66 FM 27–10 (1956), para. 455.

designated points.[67] Such passports are matters of internal administrative security and are only a matter of international law when granted by arrangements with the enemy or when required by an international agreement.[68]

The 1949 Geneva Conventions contain several situations where a military passport could be used. For example "retained" personnel such as chaplains and medics, may be permitted to visit PWs on work details outside the regular PW camp.[69] These same individuals must be returned through the lines when their services are no longer required.[70] Another example concerns the representatives of the Protecting Power and the representatives of relief organizations. They should have such passports to enable them to move about freely.[71] Enemy aliens may also be permitted to leave the domestic territory of a belligerent.[72] Finally, certain goods such as Red Cross supplies[73] and supplies for the sick, young children and expectant mothers[74] should be allowed to leave an area controlled by one belligerent and to enter the area controlled by another.

C. Safe-Conducts

Safe-conducts are very similar to military passports. The distinguishing feature pointed out in FM 27–10 is the fact that they are issued to persons *outside* of the area controlled by the authority issuing the safe-conduct.[75] As was stated in regard to military passports, these documents also do not come within the control of international law except when they are granted by arrangement with the enemy or when required by a prior international agreement. Safe-conducts are also given for the admission of goods into the militarily controlled area.[76]

The 1949 Geneva Conventions contain illustrations of safe-conducts for both persons and goods. Persons in besieged areas may be given a safe conduct in order to pass from such area

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67 An form of military passport is illustrated at Appendix A, DA Pam 27–1, *Treaties Governing Land Warfare*, (1956).

68 FM 27–10 (1956), para. 454; II Lauterpacht, *Oppenheim's International Law*, 7th ed. (1952), *op. cit.*, p. 538.

69 *GPW*, Art. 33 (2a).

70 *GWS*, Art. 30(1); *GWS Sea*, Art. 37(1).

71 *GWS*, Arts. 8(2)(3) and 9, *GWS Sea*, Arts. 8(2)(3) and 9; *GPW*, Arts. 8(2)(3) and 9; *GC* Arts. 9(2)(3) and 10.

72 *GC*, Arts. 35(1), 48, and 132(2).

73 *GC*, Art. 59(3).

74 *GC*, Art. 23(1).

75 This distinction between military passports and safe-conducts is the creation of the Army Manual on the Rules of Land Warfare first made in the 1940 edition of FM 27–10 at para. 238. Lauterpacht does not make this same distinction, restricting a safe conduct to a "written permission . . . to proceed to a particular place for a defined object" (Lauterpacht, *op. cit.*, n. 1, p. 537). Lauterpacht's definition appears to have been followed when drafting the model form for safe-conducts which appears at Appendix A, DA Pam 27–1, *Treaties Governing Land Warfare* (1956).

into area controlled by the besieger.[77] Foreign relief organizations may be admitted into an area in order to care for civilian internees[78] or for PWs.[77] Free passage and safe-conduct must also be given by belligerents to various PW supplies, such as foodstuffs, clothing, and medicine.[79]

D. Safeguards

A safeguard is an arrangement made by a military commander to protect from his forces certain enemy or neutral persons or property within the territory he controls.[80] It may be done either by a written order properly posted on the property or left with the individual protected, or by the stationing of a guard.[81] The forcing of such a safeguard by an individual subject to the Uniform Code of Military Justice is a serious court-martial offense.[82]

The safegurad is not an international commitment unless made by agreement with the opposing belligerent or made pursuant to a prior international agreement.[83]

If the enemy overruns the territory it is customary not to take soldiers acting as safeguards as prisoners of war, but to return them to their own lines.[84]

The 1949 Geneva Conventions on the wounded and sick require that the wounded and sick, particularly after an engagement, be protected against pillage and ill-treatment.[85] Soldiers detailed for such protection would be acting as safeguards if the wounded and sick were members of the enemy forces.

III. NONHOSTILE RELATIONS PROVIDED BY THE 1949 GENEVA CONVENTIONS

There are many ways of viewing the 1949 Geneva Conventions because these conventions have codified a wide area of the law. The summarization that follows deals only with nonhostile relations and demonstrates the importance of such relations if these conventions are to work effectively.[86]

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76 FM 27-10 (1956), para. 456a.
77 *GWS*, Art. 15(3); *GWS Sea*, Art. 18(2); *GC*, Art. 17.
78 *GC*, Art. 142(1).
79 *GPW*, Art. 72(1) and 75(1).
80 FM 27-10 (1956), para. 457; Lauterpacht, *op. cit.*, p. 537-538.
81 *Id.*
82 *U.C.M.J.*, Art. 102, discussed at p. 336, *Manual for Courts-Martial United States*, 1951.
83 FM 27-10 (1956), para. 454; Lauterpacht, *op. cit.*, p. 538.
84 FM 27-10 (1956), para. 457; Lauterpacht, *op. cit.*, p. 538.
85 *GWS*, Art. 15(1); *GWS Sea*, Art. 18(1).
86 Judge Lauterpacht has summarized the task for lawyers in regard to the 1949 Geneva Conventions as follows: "the lawyer is confronted with the task of incorporating in a systematic manner, their stupendous positive achievement in military manuals, in textbooks, and in international law generally" (Lauterpacht, "The Problem of the Revision of the Law of War," 29 *B.Y.B.I.L.* 360 at p. 379 [1952]).

A. Wounded and Sick in the Field (WS.)

Art. 6(1)——In addition to the special agreements provided for in Arts. 10, 15, 23, 28, 31, 36, 37, and 52, the parties may make any special agreement provided such agreement proves not adversely affect the rights conferred upon protected persons by this convention. Similar to Art. 6(1) *WSSea*, Art. 6(1) *PW*, and Art. 7(1) *CIV*.

Art. 10(1)——Agreement as to the protecting power. Similar to Art. 10(1) *WSSEA*, Art. 10(1) *PW*, and Art. 11(1) *CIV*.

Art. 10(5)——Limitations on the contractual ability of a defeated nation in matters concerning the protecting power. Similar to Art. 10(5) *WSSea*, Art. 10(5) *PW*, and Art. 11(5) *CIV*.

Art. 11(2)——Meeting to settle disagreements on the interpretation of the convention. Similar to Art. 11(2) *WSSea*, Art. 11(2) *PW*, and Art. 12(2) *CIV*.

Art. 15(2)——Armistice or suspension of fire to remove wounded from battlefield.

Art. 15(3)——Arrangements for removal of sick and wounded from besieged or encircled areas.

Art. 16(3)——Forwarding of death certificates, personal belongings, and dog tags of dead.

Art. 17(4)——Exchange of information as to the location of graves.

Art. 21——Medical facilities which are misused shall not be attacked without a warning containing a reasonable time to correct such misuse.

Art. 23(2)——Agreements as to location of hospital zones. Model agreement is contained in Annex to this convention.

Art. 26(2)——Notification of names of relief societies which are authorized to assist regular medical services.

Art. 27(2)——Notification of acceptance of assistance from a relief society of a neutral country.

Art. 28(3)——Arrangements for the relief of medical personnel "retained" by the enemy.

Art. 31(2)——Agreement as to percentage of personnel to be "retained."
See also Resolution 3 for request to Red Cross to prepare such an agreement.

Art. 36(2)——Agreement as to marking of medical aircraft.

Art. 36(3)——Agreement as to medical flights over enemy or enemy occupied territory.

Art. 37(1)——Agreement as to routes, heights, and times of flights medical aircraft.

Art. 37(3)——Agreement as to disposition of wounded or sick disembarked on neutral territory.

Art. 40(3)——Notification of model identity cards in use.
See also Resolution 4 and Annex 2 on these identity cards.

Art. 48——Notification of official translation of convention used and laws and regulations adopted to ensure application thereof.

Art. 52 ——— Agreement as to method of investigation of violations of the convention. Similar to Art. 53 WSSEA, Art. 132 *PW*, and Art. 149 *CIV*.

B. Wounded, Sick, and Shipwrecked at Sea (W S Sea)

Art. 6(1) ——— In addition to the special agreements provided for in Arts. 10, 18, 31, 38, 39, 40, 43, and 53, the parties may make any special agreement provided such agreement does not adversely affect the rights conferred upon protected persons by this convention. Similar to Art. 6(1) *WS*, Art. 6(1) *PW*, and Art. 7(1) *CIV*.

Art. 10(1) ——— Agreement as to the protecting power. Similar to Art. 10(1) *WS*, Art. 10(1) *PW*, and Art 11(1) *CIV*.

Art. 10(5) ——— Limitations on the contractual ability of a defeated nation in matters concerning the protecting power. Similar to Art. 10(5) *WS*, Art. 10(5) *PW*, and Art. 11(5) *CIV*.

Art. 11(2) ——— Meeting to settle disagreements on the interpretations of the convention. Similar to Art. 11(2) *WS*, Art. 11(2) *PW*, and Art. 12(2) *CIV*.

Art. 18(2) ——— Arrangement for removal of the wounded and sick by sea from a besieged or encircled area. Similar to Art. 15(3) *WS* and Art. 17 *CIV*.

Art. 19(3) ——— Forwarding of death certificates, personal belongings, and dog tags of death. Similar to Art. 16(3) *WS*.

Art. 22(1) ——— Notification of names and descriptions of military hospital ships.

Art. 31(4) ——— Agreements as to neutral observers on hospital ships.

Art. 34(1) ——— Warning on misuse of hospital ships and sickbays. Somewhat similar to Art. 21 *WS*.

Art. 38(2) ——— Agreements as to neutral observers on medical transports.

Art. 39(2) ——— Agreement as to marking of medical aircraft. Similar to Art. 36(2) *WS*.

Art. 39(3) ——— Agreement as to medical flights over enemy or enemy occupied territory. Similar to Art. 36(3) *WS*.

Art. 40(1) ——— Agreement as to routes, heights, and times of flight of medical aircraft. Similar to Art. 37(1) *WS*.

Art. 42(3) ——— Notification of model identity cards in use. Similar to Art. 40(3) *WS*. See Annex to WSSea convention for model card.

Art. 43(8) ——— Agreements as to methods of identification of hospital ships. See also Resolution 6 and 7 and Italian Declaration regarding both Resolutions.

Art. 44 ——— Agreement as to other protective sign than the red cross.

Art. 49 ——— Notification of official translation of convention used and laws and regulations adopted to ensure application thereof. Similar to Art. 48 *WS*.

Art. 53 ——— Agreement as to methods of investigation of violations of the convention. Similar to Art. 52 *WS*, Art. 132 *PW*, and Art. 149 *CIV*.

C. Prisoners of War (PW.)

Art. 6(1)——In addition to the special agreements provided for in Arts. 10, 23, 28, 33, 60, 65, 67, 72, 73, 75, 109, 110, 118, 119, 122, and 132, the parties may make any special agreement provided such agreement does not adversely affect the rights conferred upon protected persons by this convention. Similar to Art. 6(1) *WS*, Art. 6(1) *WSSea*, and Art. 7(1) *CIV*.

Art. 10(1)——Agreements as to the protecting power. Similar to Art. 10(1) *WS*, Art. 10(1) *WSSea*, and Art. 11(1) *CIV*.

Art. 10(5)——Limitations on the contractual ability of a defeated nation in matters concerning the protecting power. Similar to Arts. 10(5) *WS*, Art. 10(5) *WSSea*, and Art. 11(5) *CIV*.

Art. 23(3)——Notification of location of PW camps and their markings.

Art. 28(3)——Agreement as to profits from PW canteens.

Art. 33(2b)——Notification of corresponding rank of medical personnel.

Art. 33(3)——Agreement as to relief of "retained" personnel.

Art. 43(1)——Notification of the ranks of all persons who may become prisoners of war.

Art. 60(2)——Agreement as to amount of pay due prisoners of war.

Art. 61——Acceptance of supplementary pay.

Art. 62(1)——Notification of amount of pay a PW receives for labor.

Art. 63——Allotment of prisoners pay. See annex V for Model Regulation.

Art. 65(4)——Notification of amount in the accounts of PWs.

Art. 66(1)——Transmission of lists of PWs repatriated, released, escaped, or died.

Art. 67——Arrangements as to disposition of advances in pay.

Art. 68(1)——Referral of claims of PWs.

Art. 72(4)——Agreements for the sending of relief parcels to PWs.

Art. 73(1)——Sample rules for relief shipments in absence of agreement. See also Annex III.

Art. 74(4)——Agreement on cost of shipment of relief supplies.

Art. 75(4)——Agreement on cost of shipments by the Red Cross.

Art. 94——Notification of recapture of an escaped prisoner.

Art. 109(2)——Agreement for internment of sick and wounded PWs in a neutral country.

Art. 110(3)——Model Agreement in Annex I for repatriation of sick and wounded if no agreement under Art. 109(2).

Art. 111——Machinery for concluding agreements for internment in a neutral country of PWs.

Art. 115(3)——Communication as to PWs detained to serve out punishment.

Art. 118(2)——Agreement on repatriation of PWs to own country.

Art. 118(4b)——Agreement as to cost of repatriation.

Art. 119(4)——Agreement as to the forwarding of personal effects of PWs after their repatriation.

Art. 119(6)——Communication as to PWs detained to serve out punishment after hostilities.

Art. 120(6)——Transmittal of lists of PW graves.
Art. 122(9)——Agreements as to transportation of personal effects of PWs.
Art. 132——Agreement as to method of investigation of violations of the convention. Similar to Art. 52 *WS*, Art. 53 *WSSea*, and Art. 149 *CIV*.

D. Civilians (CIV.)

Art. 7(1)——In addition to the special agreements provided for in Arts. 11, 14, 15, 17, 36, 108, 109, 132, 133, and 149, the parties may make any special agreement provided such agreement does not adversely affect the rights conferred upon protected persons by this convention. Similar to *WS*, Art. 6(1), *WSSea*, Art. 6(1), and *PW*, Art. 6(1).
Art. 11(1)——Agreement as to protecting power. Similar to *WS*, Art. 10(1), *WSSea*, Art. 10(1), and *PW*, Art. 10(1). See also Resolution 2 and the second Declaration of the Soviet Union.
Art. 11(5)——Limitations on the contractual ability of a defeated nation in matters concerning the protecting power. Similar to *WS*, Art. 10(5), *WSSea*, Art. 10(5), and *PW*, Art. 10(5).
Art. 12(2)——Meeting to settle disagreements on the interpretation of the convention. Similar to Art. 11(2) *WS*, Art. 11(2) *WSSea*, and Art. 11(2) *PW*.
Art. 14(2)——Agreement as to the location of safety zones in rear areas.
Art. 15(2)——Agreement as to the location of neutralized zones in the combat areas.
Art. 17——Agreements for the removal of certain personnel from besieged and encircled areas. Similar to Art. 15(3) *WS* and Art. 18(2) *WSSea*.
Art. 19——Warning on misuse of civilian hospitals. Somewhat similar to Art. 34(1) *WSSea* and Art. 21 *WS*.
Art. 22(1)——Agreement as to routes, heights, and times of flight of medical aircraft. Similar to Art. 37(1) *WS* and Art. 40(1) *WSSea*.
Art. 22(3)——Agreement as to medical flights over enemy or enemy occupied territory. Similar to Art. 36(3) *WS* and Art. 39(3) *WSSea*.
Art. 36(1)——Agreement as to practical details of departure of enemy aliens.
Art. 36(2)——Special agreements as to exchange and repatriation of enemy aliens.
Art. 77——Handing over of convicted civilians at close of occupation.
Art. 87(3)——Agreement as to disposition of profits from internee canteens. Similar to Art. 28(3) *PW*.
Art. 105——Notification of measures taken to comply with internment provisions of the convention.
Art. 108(3)——Agreements for the sending of relief parcels to internees. Similar to Art. 72(4) *PW*.

Art. 109(1)_____Sample rules for relief shipment in the absence of an agreement. See also Annex II. Similar to Art. 78(1) *PW*.

Art. 111(1)_____Safe-conduct to Red Cross vehicles and vessels.

Art. 130(3)_____Transmittal of lists of internee graves.

Art. 132(2)_____Agreement for release and repatriation of internees during hostilities.

Art. 133(2)_____Agreement creating a committee to search for dispersed internees.

Art. 135(4)_____Special agreements for exchange and repatriation of internees.

Art. 149_____Agreement as to method of investigation of violations of the convention. Similar to Art. 52 *WS*, Art. 53 *WSSea*, and Art. 132 *PW*.

CHAPTER 8

WAR CRIMES

I. EVENTS PRECEDING THE WORLD WAR II CRIMES TRIALS

A. The Leipzig Trials (1921).

Pursuant to articles 228–230 of the Versailles Treaty Germany agreed to turn over suspected war criminals to the Allies for trial by Allied tribunals. At the Paris Peace Conference on February 6, 1920 the Allies formally demanded of Germany the extradition of 896 Germans accused of violating the laws of war. England demanded 97 for trial, France and Belgium 344 each, Italy 29, Poland 47, Rumania 31, and Serbia 4. Kurt von Lersner, head of the German peace delegation, refused to accept the extradition list. The German Government was not very stable and compliance with the demand might have led to its overthrow. Von Lersner resigned from the Peace Conference and returned to Berlin.

As a compromise, the Allies, at the suggestion of Great Britain, agreed to accept an offer by Germany to try a selected number of individuals before the Criminal Senate of the Imperial Court of Justice of Germany. Forty-five names were selected. Of these forty-five only twelve were actually brought to trial, six at the insistence of the British, five accused by France, and one by Belgium.

The name of each accused, the charge, and the finding and sentence are as follows:

Accused	*Charge*	*Finding*	*Sentence*
Sgt. Karl Heymen	Mistreatment of PW's	Guilty	10 months
Capt. Emil Muller	Mistreatment of PW's	Guilty	6 months
Pvt. Robert Neumann.	Mistreatment of PW's	Guilty	6 months
Lt. Capt. Karl Neumann.	Torpedoing the hospital ship, the Dover Castle.	Not Guilty	
1st Lt. Ludwig Dithmar.	Firing on survivors in lifeboats of hospital ship, Llandovery Castle.	Guilty	4 years
1st. Lt. John Boldt	Firing on survivors in life boats of hospital ship, Llandovery Castle.	Guilty	4 years

Accused	Charge	Finding	Sentence
Max Ramdahr	Mistreatment of Belgian children.	Not Guilty	
Major Benno Crusius.	Passing on the alleged order of Gen. Stenger.	Guilty through negligence.	2 years
1st Lt. Adolph Laule	Killing a PW	Not Guilty	
Lt. Gen. Hans von Schock.	Mistreatment of PW's	Not Guilty	
Maj. Gen. Benno Kruska.	Mistreatment of PW's	Not Guilty	
Lt. Gen. Karl Stenger.	Ordering the killing of prisoners of war.	Not Guilty	

The trials resulted in six convictions and six acquittals. Most of the acquittals resulted from a failure of the court to accept certain evidence as creditable. Disappointment was expressed not only over the comparatively light sentences meted out but also over the fact the trials dealt almost exclusively with the treatment of shipwrecked survivors of submarine activity and with the treatment of prisoners of war. No trials were held on the actual conduct of hostilities, such as the use of weapons and the destruction of life and property in combat. Another objection was the fact that the court itself was under pressure from the German press and German public opinion. Both were very hostile to the trials. For example, after the sentence was announced in the Llandovery Castle case the British observers had to leave by a side door under police escort.[1]

B. The Moscow Declaration of 30 October 1943[2]

This Declaration made two principal announcements:

(1) That those Germans guilty of war crimes would be tried by the people and at the spot where the crime was committed;

(2) Those whose crimes had no specific locale would be tried pursuant to a joint decision to be later published by the Allies.

Both of these announcements negated a repetition of the Leipzig trials. They also intimated that there would be two types of trials, one local and one general.

C. U.S. Army Planning in 1944

In 1944 the U.S. Army started to plan for the war crimes trials

[1] See generally Mullins, *The Leipzig Trials* (London: Witherly, 1921) for an account of these trials. The position of many Germans is reflected in Gallinger, *The Counterharge: The Matter of War Criminals from the German Side* (Munich: 1922). Gallinger's thesis is that if Germany is guilty then the French were equally as guilty, particularly in their treatment of prisoners of war.

[2] 9 *Dept. of State Bulletin* 310–311 (1943).

envisaged by the Moscow Declaration of 30 October 1943.[3] This planning concerned war crimes in their traditional sense only.

The following definition was approved by the The Judge Advocate General, United States Army:

> The term "war crimes" covers those violations of the laws and customs of war which constitute offenses against person or property, committed in connection with military operations or occupation, which outrage common justice or involve moral turpitude.[4]

D. Broadening of the Charges in Early 1945

While the Combined Chiefs of Staff were considering traditional war crimes, the focus of American policy-making shifted to other levels resulting in a broadening of the scope of the charges.

1. *Crimes Against Peace.* By 18 January 1945 at a meeting between the Secretary of War, the Attorney General and Judge Rosenman, the personal representative of the President, the concept of the criminality of aggressive war had emerged.[5]

2. *Crimes Against Humanity.* Acting Secretary of State Grew, on 1 February 1945, made the following announcement:

> They [discussions among the Allies] provide for the punishment of German leaders and their associates for their responsibility for the whole broad criminal enterprise devised and executed with ruthless disregard of the very foundation of law and morality, including offenses wherever committed against the rules of war and against minority elements, Jewish and other groups, and individuals.[6]

This statement by Acting Secretary Grew was one of the first utterances concerning crimes against humanity. As Germany was overrun and the concentration camps uncovered this crime received added importance.

There were now three charges to be preferred by the Allies, war crimes, crime against peace (aggressive war), and crimes against humanity.

E. The Establishment of the War Crimes Tribunals

1. *The International Military Tribunal at Nuremberg.* Pursuant to the Moscow Declaration of 30 October 1943, an agreement was reached in London on 8 August 1945 which provided for the establishment of an International Military Tribunal for

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[3] The first trial under this Declaration was that at Kharkov from December 10–18, 1943. Here the Soviets conducted a war crimes trial of captured Gestapo men charged with killing Russian Civilians (reported in *Pravda*, Dec. 16–20, 1943) and reprinted in *The Peoples' Verdict*, [London: Hutchison] pp. 80–110.

[4] Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10* (Washington: U.S. Gov. Printing Office, 1949), p. 2, hereinafter cited as Taylor, *Final Report*.

[5] *Ibid*, p. 2, citing Stimson and Bundey, *On Active Service in Peace and War* (N.Y.: Harpers, 1948), pp. 585–587.

[6] 12 *Dept. of State Bulletin* 154–155 (1945).

the trial of Nazi officials whose alleged crimes had no geographic location. The Charter of this IMT was annexed to the London Agreement. This Charter actually established the IMT, set out the crimes over which it was to have jurisdiction, the number of judges, and the states from which they were to be drawn.

2. *The Subsequent Proceedings at Nuremberg.* Allied Control Council Law No. 10, 20 December 1945, was promulgated in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal. The American courts established under this law tried twelve cases, known as "The Subsequent Proceedings." These twelve cases, plus the single cases tried by the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East make up the war crimes cases tried by international courts to which the United States was a party. The United States, acting alone, tried many more cases before military commissions.

3. *The International Military Tribunal for the Far East.* The legal basis for the establishment of the IMT for the Far East will be discussed in connection with the trial itself in Part II following.

II. THE WORLD WAR II WAR CRIMES TRIALS

A. The International Military Tribunal at Nuremberg

The International Military Tribunal at Nuremberg consisted of four judges, one each from France, the United Kingdom, the U.S.S.R. and the United States.[7] Each judge had an alternate from his own country.

One trial of 24 German defendants was conducted by this court.

Count One of the Indictment charged the 24 defendants with conspiring to commit crimes against peace, war crimes, and crimes against humanity.

Count Two charged them with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against Poland, Denmark, Norway, Belgium, the Netherlands, Luxemburg, Yugoslavia, Greece, the USSR, and the U.S.A.

The court struck out so much of Count One as charged the defendants with conspiracy to commit war crimes and crimes against humanity. It then considered the remainder of Count One in conjunction with Count Two.[8]

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[7] Art. 2, Charter of the International Military Tribunal.

[8] *Nazi Conspiracy and Aggression, Opinion and Judgment* (Washington: U.S. Gov. Printing Office, 1947) pp. 16, 56; hereinafter cited as *Opinion and Judgment.*

Count Three concerned traditional war crimes. The specific charges were (a) murder and ill-treatment of prisoners of war, (b) murder and ill-treatment of civilian populations in occupied areas, (c) pillage of public and private property in occupied areas, (d) deportation of civilian populations in occupied areas to slave labor in Germany, and (e) persecution of Jews in occupied areas.

Count Four was in a sense a novel crime to level against public officials. It concerned primarily the slave labor policy of the Germans and their persecution of the Jews. It is novel because the count made no distinction between victims who were nationals or those who were aliens. It also made no distinction between acts committed in peace and those committed in war. The court qualified this count in three respects. First, it restricted its scope to acts committed during the war. Second, traditional war crimes committed in occupied areas that were so vast in scope that the participation of the State was required were considered crimes against humanity. Third, acts committed against German nationals were linked to the aggressive war. Therefore, Count four was reduced to an elaboration of Counts Two and Three. This is evident from the following construction given to Count four by the Court:

> . . . The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.[9]

The court also had to judge the criminal character of certain organizations. It found that the Leadership Corps of the Nazi Party, the Gestapo, and the SS to be criminal organizations.[10] It did not find criminality in the SA (Brown Shirts).[11] It also found that the Reich Cabinet and the General Staff and High

9 *Opinion and Judgment, Ibid.*, p. 84.

10 *Ibid.*, pp. 87–102.

11 *Ibid.*, pp. 102–104. The principal reason for such a finding was that the power of the SA was broken in the Roehm purge of June 30—July 2, 1934.

Command were not strictly speaking organizations and therefore membership in them was not membership in criminal organizations.[12] The findings and the sentences on each defendant are as follows:

Defendant	*Finding on Counts*	*Sentence*
Goering	Guilty 1, 2, 3, 4	Hanging
Hess	Guilty 1, 2	Life
Ribbentrop	Guilty 1, 2, 3, 4	Hanging
Fritzsche	Not guilty	
Keitel	Guilty 1, 2, 3, 4	Hanging
Kaltenbrunner	Guilty 3, 4	Hanging
Rosenberg	Guilty 1, 2, 3, 4	Hanging
Frank	Guilty 3, 4	Hanging
Frick	Guilty 2, 3, 4	Hanging
Streicher	Guilty 4	Hanging
Funk	Guilty 2, 3, 4	Life
Schacht	Not guilty	
Von Neurath	Guilty 1, 2, 3, 4	15 years
Doenitz	Guilty 2, 3	10 years
Raeder	Guilty 1, 2, 3	Life
Von Schiroch	Guilty 4	20 years
Sauckel	Guilty 3, 4	Hanging
Jodl	Guilty 1, 2, 3, 4	Hanging
Bormann	Guilty 3, 4 [tried in absentia]	Hanging
Von Papen	Not guilty	
Seyss-Inquart	Guilty 2, 3, 4	Hanging
Speer	Guilty 3, 4	20 years
Krupp	Not tried because of old age	
Ley	Suicide	

B. The "Subsequent Proceedings" at Nuremberg (August 1946—April 1949)

1. *The Nature of the Tribunals*

Control council Law No. 10 established procedure for the prosecution of persons accused of war crimes other than those persons tried by the International Military Tribunal. An essential prerequisite to the initiation of any trials under Control Council Law No. 10 was the setting up of tribunals for this purpose.

Acting under this Control Council Law the United States promulgated Military Government Ordinance No. 7. This ordinance provided that each tribunal was to consist of three members and an alternate.[13] All were to be civilian lawyers from the United States. Six tribunals were formed composed of 18 judges and six

[12] *Ibid.*, pp. 104–107.

[13] In *Flick v. Johnson*, 85 App. D.C. 70, 174 F. 2d 983, *cert. den.* 338 U.S. 879, *reh. den.* 338 U.S. 940 (1949) the federal court held that it did not have authority to review the findings of one of these tribunals created under Control Council Law No. 10 because they were international tribunals that tried aliens outside the United States and incarcerated those it sentenced outside the United States.

alternates. These six tribunals heard twelve cases. The twelve cases heard by these tribunals set up by the United States will now be briefly described.

2. *The Twelve Subsequent Proceedings*

a. *U.S. v. Karl Brandt, et al.* (The Medical Case).[14] The indictment named twenty-three defendants. The chief defendant, Karl Brandt, had, for a time, been one of Hitler's personal physicians and had risen to become Reich Commissioner for Health and Sanitation, the highest medical position in the Reich. The other defendants were the Chief of the Medical Service of the Luftwaffe, Chief Surgeon of the SS, Dean of the Medical Faculty of the University of Berlin, a specialist in tropical medicine, and lesser doctors in the military and civilian hierarchy.

The principal count of the indictment charged the defendants with criminal responsibility for cruel and frequently murderous "medical experiments" performed without the victims' consent, on concentration camp inmates, prisoners of war, and others. The trial lasted from 9 December 1946 to 19 July 1947. The tribunal's judgment of 19 August 1947 convicted 16 defendants and acquitted seven. Karl Brandt, Gebhardt, Rudolf Brandt, Mrugowsky, Seivers, Brack, and Hoven were sentenced to hang. Imprisonment was given to Becker-Freyseng (20 years), Beiglboeck (10 years), Handloser (life), Schroeder (life), Genzken (life), Rose (life), Fischer (life), Oberheuser (20 years), and Poppendick, (10 years). Rostock, Blome, Ruff, Romberg, Weltz, Schaefer, and Pokorney were acquitted.[15]

b. *U.S. v. Joseph Altstoetter et al.* (The Justice Case).[16] The fourteen defendants were all officials, as judges, prosecutors, or ministerial officers, of the judicial system of Nazi Germany. The main point of the prosecution's charge was that the defendants were guilty of "judicial murder and other atrocities, which they committed by destroying law and justice in Germany, and then utilizing the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale."[17] The court, in its judgment, concluded that "The dagger of the assassin was concealed beneath the robe of the jurist."[18] The sentences imposed were as follows: Schlegelberger (life), Klemm (life), Rothen-

14 Case 1, reported in Vols. I and II of *Trials of War Criminals Before the Nuernberg Military Tribunals* (Wash.: U.S. Gov. Printing Off., 1950–51); hereinafter cited as *Trials of War Criminals.*

15 The case is examined thoroughly in Deutsch, *Doctors of Infamy—The Story of the Nazi Medical Crimes* (N.Y.: Schuman, 1949).

16 Case 3, reported in Vol. III *Trials of War Criminals* and in VI *Law Reports of Trials of War Criminals* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, 1948).

17 Prosecution's opening statement. Transcript, p. 36, cited in Taylor, *Final Report, op. cit.*, n. 4, p. 169.

18 *Ibid.*, p. 172.

berger (7 years), Lautz (10 years), Mettgenberg (10 years), Von Ammon (10 years), Joel (10 years), Rothaug (life), Oeschey (life), Altstoetter (5 years).[19] Four of the fourteen defendants were acquitted. They were Bannickel, Petersen, Nebelung, and Cuhorst.[20]

c. *U.S. v. Milch.*[21] This is the first of two cases dealing with government ministers. It is also the only subsequent proceeding with only one defendant. Erhard Milch was indicted on the basis of his activity as member of the Central Planning Board, established by a Hitler decree of 29 October 1943. The chief of this Board, Albert Speer, was tried by the International Military Tribunal. This Board had authority to instruct Saukel, also tried by the IMT, to provide slave laborers for industries under its control. Milch was also accused of complicity in the medical experiments for the German Air Force.

The court's judgment, rendered on 16 April 1947, found Milch not guilty of implication in the medical experiments[22] but guilty of complicity in the slave labor program.[23] He was sentenced to life in prison.

d. *U.S. v. Ernst Weizsaecker, et al* (The Ministries Case).[24] This is the second of the two cases dealing with ministers. It was the longest and last of the Subsequent Proceedings. Seventeen months elapsed from the filing of the indictment to the rendering of the judgment, 15 Nov. 1947—14 April 1949. There were twenty-one defendants, eighteen of whom were ministers or high functionaries in the civil administration of the Third Reich. The defendants were the lower echelon of the higher dignitaries who sat in the dock before the IMT.

The indictment consisted of eight counts: crimes against peace (1 and 2), mistreatment of PW's, against only seven defendants (3), crimes against humanity before the war (4), crimes against humanity and war crimes after the war started (5), plunder of property in occupied areas (6), deportation of slave labor (7), membership in criminal organizations (8). Count Four was dismissed. The trial continued on the remaining seven counts.[25] The sentences were as follows:

Berger	25 yrs
Lammers	20 yrs
Veesenmayer	20 yrs

19 III *Trials of War Criminals, op. cit.* n. 14, pp. 1200–1201.
20 *Ibid.*, pp. 1158–1159.
21 Case 2, reported in II *Trials of War Criminals, op. cit.*, pp. 355–889.
22 *Ibid.*, p. 857.
23 *Ibid.*, pp. 854, 857.
24 Case 11, reported in Vols. XII, XIII and XIV *Trials of War Criminals, op. cit.*
25 The opinion and judgment is contained in XIV *Trials of War Criminals, op. cit.*, pp. 308–866.

Koerner	15 yrs
Pleiger	15 yrs
Kehrl	15 yrs
Krosigk	10 yrs
Keppler	10 yrs
Darre	7 yrs
Woermann	7 yrs
Dietrich	7 yrs
Weizsaecker	7 yrs
Rasche	7 yrs
Von Mayland	7 yrs
Schellenberg	6 yrs
Bohle	5 yrs
Puhl	5 yrs
Ritter	4 yrs
Meissner	NG
Stuckart	Time served
Erdmannsdorff	NG

e. *U.S. v. Flick.*[26] Three of the twelve cases concerned industrialists. They were the Flick, I.G. Farben, and Krupp trials. Flick will be discussed first. Flick was a powerful steel magnate and industrial promoter. He was indicted along with his five principal associates. The indictment contained five counts: (1) deportation of slave labor, (2) plunder of property in occupied areas, (3) crimes against humanity in the pre-war years, (4) financial support of the SS (two defendants only) and (5) membership in the SS (one defendant only). The indictment was filed on 8 February 1947 and the judgment rendered on 22 December 1947.

The results of this trial are as follows:[27]

Defendant	*Counts* 1	2	3	4	5	*Sentence*
Flick	G	G	Dismissed	G		7 years
Weiss	G	NG				2½ years
Steinbrinck	NG	NG		G	G	5 years
Burkart	NG	NG				Acquitted
Kaletsch	NG	NG				Acquitted
Terberger	NG	NG				Acquitted

f. *U.S. v. Krauch* (I.G. Farben Case).[28] Twenty-four individuals were indicted, twenty of whom were members of I.G. Farben's governing body, the "Vorstand." The other four were important officers of the corporation. Twenty-three were actually tried. The indictment contained five counts: (1) crimes against peace (aggressive war); (2) plunder of property in occupied areas, (3) slave labor; (4) membership in the SS; and (5) conspiracy to wage aggressive war. The judgment of the tribunal was handed down in July 1948. All twenty-three of the defend-

26 III *Trials of War Criminals, op. cit.*, n. 14, pp. 1200–1201.

27 *Ibid.*, pp. 1194–1223.

28 Case 6, reported in Vols. VII and VIII, *Trials of War Criminals op. cit.*, n. 14, and in X *Law Reports of Trials of War Criminals op. cit.*, n. 16 pp. 1–68.

ants were acquitted on counts 1 and 5.[29] All three who were indicted under Count 4 were acquitted.[30] Only five were found guilty under Count 3: Krauch, Ambros, Buetifisch, Duemfeld, and Ter Meer.[31] Nine were convicted and fourteen acquitted on Count 2.[32] Ter Meer was the only defendant found guilty under two counts. Ten defendants were acquitted and thirteen convicted.

Sentences were as follows:[33]

Ambros	8 yrs
Duemfeld	8 yrs
Ter Meer	7 yrs
Krauch	6 yrs
Buetifisch	6 yrs
Von Schnitzler	5 yrs
Schmitz	4 yrs
Ilgner	3 yrs
Haefliger	2 yrs
Oster	2 yrs
Buergin	2 yrs
Kugler	1½ yrs
Jaehne	1½ yrs

g. *U.S. v. Krupp.*[34] This is the third and last trial of the industrialists. Gustav Krupp was indicted before the IMT. However, he was too infirm to stand trial. Here his forty-year-old son was indicted along with eleven other officials. The Krupp organization was the largest manufacturer in Germany. The indictment indicated that the officials of this firm were engaged in the slave labor program (Count Three) and in the economic plunder of occupied areas (Count Two) similar to the defendants in the *Flick* case. Two additional counts were added, that of crimes against peace (Count One) and conspiracy to commit crimes against peace (Count Four), because it was alleged that the Krupp firm took the lead in secret rearmament, supported Hitler's seizure of power, and cooperated willingly in the rearmament of Germany for foreign conquest.

The trial lasted from early December 1947 to the end of June 1948. On April 5, 1948 the Tribunal granted a motion for a finding of not guilty on Count One and Count Four.[35] The following are the findings and sentences:[36]

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29 VIII *Trials of War Criminals, op. cit.*, p. 1128.
30 *Ibid.*, p. 1204.
31 *Ibid.*, pp. 1187–1196.
32 *Ibid.*, pp. 1158–1167.
33 *Ibid.*, pp. 1206–1210.
34 Case 10, reported in IX *Trials of War Criminals, op. cit.* and X *Law Reports of Trials of War Criminals, op. cit.*, pp. 69–177.
35 IX *Trials of War Criminals, op. cit.*, p. 1339.
36 *Ibid.*, pp. 1449–1451.

Defendant	Counts 2	3	Sentence
Alfried Krupp	G	G	12 yrs
Loeser	G	G	7 yrs
Houdremont	G	G	10 yrs
Mueller	G	G	12 yrs
Janssen	G	G	10 yrs
Ihn	NG	G	9 yrs
Eberhardt	G	G	9 yrs
Korschan	NG	G	6 yrs
Buelow	NG	G	12 yrs
Lehmann		G	6 yrs
Kupke		G	Time served
Pfirsch	NG	NG	Acquitted

h. *U.S. v. Von Leeb* (The High Command Case).[37] The cases of Generals Von Leeb and List comprise, from the military point of view, two of the most important of the twelve Subsequent Proceedings. Here were the trials of high military figures for the manner in which they conducted the war and the manner in which they governed unruly occupied areas.

The first was the trial of the high command of the German Army. Fourteen general officers were indicted under four counts: (1) crimes against peace; (2) war crimes; (3) crimes against humanity, and (4) conspiracy to commit these three crimes. The court dismissed charges 1 and 4. This was in line with the pattern in the Subsequent Proceedings. Rarely was an individual convicted of crimes against peace.[38] The principal war crimes charged concerned the Commissar Order for the killing of Communist political advisors in the Russian Army, the Barbarossa Jurisdiction Order for the suppression of guerrilla warfare, the Commando Order for no quarter against British raiding parties, and the Night and Fog Decree for the secret deportation of individuals. Crimes against humanity (Count Three) dealt with the activities of race execution teams operating in areas controlled by the defendants. The following findings and sentences were handed down on 28 October 1948:[39]

Defendant	Counts 2	3	Sentence
Von Leeb	NG	G	3 yrs
Schniewind	NG	NG	Acquitted
Sperrle	NG	NG	Acquitted
Kuechler	G	G	20 yrs
Hoth	G	G	15 yrs
Reinhardt	G	G	15 yrs

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37 Case 12, reported in Vols. X and XI *Trials of War Criminals* and in XII *Law Reports of Trials of War Criminals.*

38 The exception was the conviction of von Weizsaecker and three other defendants for crimes against peace in *U.S.* v. *Weizsaecker* XIV *Trials of War Criminals*, pp. 343, 389, 416, 435.

39 Individual findings are in XI *Trials of War Criminals, op. cit.*, pp. 553–695. The sentences are at pp. 695, 696 of the same volume.

Defendant	Counts 2	3	Sentence
von Salmuth	G	G	20 yrs
Hollidt	G	G	5 yrs
Roques	G	G	20 yrs
Reinecke	G	G	Life
Warlimont	G	G	Life
Woehler	G	G	8 yrs
Lehmann	G	G	7 yrs

i. *U.S. v. List* (Hostages Case).[40] This second military case dealt principally with the actions of the occupation authorities in Yugoslavia and Greece. A second element was the destruction of property during the evacuation of Finland and Norway. The case receives its name from the widespread use of hostages and reprisal prisoners in order to discourage partisan warfare in Yugoslavia and Greece.

Twelve German Army generals were indicted on four counts: (1) excess shooting of hostages, (2) plunder and destruction of property, (3) ill treatment of prisoners of war, and (4) slave labor. On 19 February 1948 the court handed down the following findings and sentences:[41]

Defendant	Counts 1	2	3	4	Sentence
List	G	NG	G	NG	Life
Weichs	----------				Not tried because of illness.
Rendulic	G	NG	G	G	20 yrs
Kuntze	G	NG	G	G	Life
Foertsch	NG	NG	NG	NG	Acquitted
Boehme	----------				Suicide
Felmy	G	G	NG	NG	15 yrs
Lanz	G	NG	G	NG	12 yrs
Dehner	G	NG	NG	NG	7 yrs
Leyser	NG	NG	G	G	10 yrs
Speidel	G	NG	NG	NG	20 yrs
Geitner	NG	NG	NG	NG	Acquitted

j. *The SS Cases.* The SS Cases comprise the three remaining Subsequent Proceedings. They were *U.S. v. Ohlendorf* ("Einsatzgruppen Case"),[42] *U.S. v. Pohl* (Concentration Camps),[43] and *U.S. v. Greifelt* (The RuSHA Case).[44]

The Einsatzgruppen were extermination units whose mission was to kill minority races in occupied areas, particularly Jews and Gypsies. Twenty-two were indicted. Twenty-one were convicted of serious participation in this murder program. The remaining defendant was sentenced to time already served. The

40 Case 7, reported in XI *Trials of War Criminals*, pp. 759–1326.
41 Individual findings are in *ibid.*, pp. 1262–1317. The sentences are in the same volume at 1318–1319.
42 Case 9, reported in IV *Trials of War Criminals*, pp. 3–598.
43 Case 4, reported in V *Trials of War Criminals*, pp. 195–1260.
44 Case 8, reported in Vols. IV and V *Trials of War Criminals*.

sentences were severe compared to those handed down by the other tribunals. However, the enormity of the crime called for such punishment. Fourteen were sentenced to hang, two to life in prison, three to twenty years, and the remaining two to ten years each.[45]

Oswald Pohl and seventeen others were indicted principally for their administration of the concentration camps. Three were sentenced to hang, three to life in prison, two to 20 years, one to 15 years, and six to ten years each. Three were acquitted.[46]

The third SS case, known as the *RuSHA* case is a peculiar mixture of race hatred and pseudo-science. *RuSHA* is the German abbreviation for the race and settlement Main Office, an SS agency. Its purpose was to strengthen biologically and territorially the German nation at the expense of conquered countries. Fourteen were indicted. One was acquitted. Of the remaining thirteen one was sentenced to life in prison, two to twenty-five years, one to twenty years, three to fifteen years, one to ten years, and five to time served.[47]

C. The International Military Tribunal for the Far East

This tribunal was the Far Eastern counterpart of the International Military Tribunal which sat at Nuremberg. However, it did not base its jurisdiction on documents pertinent to the European Tribunal such as the Inter-Allied Declaration signed at St. James's Palace, London, at 13 January 1942, the Moscow Declaration of Oct. 30, 1943, the London Agreement of 8 August 1945, and the Charter annexed thereto.

The basic policy for the trial and punishment of Japanese war criminals was the Potsdam Declaration of 26 July 1945 jointly issued by China, the United Kingdom, and the U.S.A. The U.S.S.R. subsequently adhered to it. By the Instrument of Surrender, signed on 2 September 1945, Japan accepted the provisions of the Potsdam Declaration. General MacArthur, as Supreme Commander of the Allied Powers, was then directed by the United States to proceed with the trial of Japanese war criminals.[48] Though approved by other nations this action was unilateral on the part of the United States. General MacArthur, acting under the authority of the Moscow Conference of 26 December 1945, established the International Military Tribunal for the Far East on 19 January 1946.[49] Because of the fundamen-

45 IV *Trials of War Criminals*, pp. 587–589.
46 V *Trials of War Criminals*, pp. 1062–1064, 1233.
47 *Ibid.*, pp. 165–167.
48 13 *Dept. of State Bulletin* 423–427, at p. 425 (1945).
49 *Judgment of the International Military Tribunal for the Far East*, November 4–12, 1948, pp. 5–6. This judgment has not been printed and published on the scale of the judgment at Nuremberg. The 1218 page majority opinion has been printed in six paper bound volumes.

tally international character of such a trial it was felt that the original United States directive should be followed by a truly allied directive.[50] This was done on 3 April 1946 by a policy decision of the Far Eastern Advisory Commission entitled "Apprehension, Trial and Punishment of War Criminals in the Far East."[51] Based on this policy decision a new directive was issued to General MacArthur on 23 April 1946.

The tribunal consisted of 11 judges, one each from Australia, Canada, China, France, Great Britain, India, Netherlands, New Zealand, Philippines, Soviet Union, and the United States.

Twenty-eight were indicted. Two died and one became ill. Trial proceeded as to the remaining twenty-five. All twenty-five were found guilty on one or more of 10 counts of the 55 count indictment.[52] Seven were sentenced to hang, sixteen to life in prison, one to twenty years, and one to seven and one-half years in prison.[53]

There was nothing in the Far East comparable with the Subsequent Proceedings at Nuremberg. The remaining group of reported war crimes trials are those at the national level.

D. National War Crimes Trials

Many of the national war crimes trials are unreported. The most valuable assembly of these trials was made by the United Nations War Crimes Commission. This commission summarized and analyzed 89 such trials.[54] Five were from the 12 Subsequent Proceedings, the *Justices, Flick, Krupp, I.G. Farben,* and the *High Command* cases. The other 84 were mostly national in character, the majority being U.S. and British cases.

The United States trials were largely conducted by military commissions, whose jurisdiction is based on the customary international law of war.[55] These commissions limited themselves to

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50 In *Hirota* v. *MacArthur*, 338 U.S. 197, 93 L. Ed. 1902, 69 S. Ct. 197 (1948) the Supreme Court refused to hear a plea for a writ of habeas corpus because of the international character of the IMT for the Far East.

51 Horwitz, *The Tokyo Trial*, International Conciliation Pamphlet 465 (N.Y.: Carnegie Endowment for International Peace, Nov. 1950) pp. 479–482.

52 The ten counts and the number convicted under each one are as follows: *Count 1*, conspiracy to commit crimes against peace, 24 convicted; *Count 27*, aggressive war against China, 22 convicted; *Count 29*, aggressive war against the U.S.A., 18 convicted; *Count 31*, aggressive war against the British Commonwealth, 18 convicted; *Count 32*, aggressive war against the Netherlands, 18 convicted; *Count 33*, aggressive war against France, 2 convicted; *Count 35*, aggressive war against the U.S.S.R. in 1938, 2 convicted; *Count 36*, aggressive war against the U.S.S.R. in 1939, 3 convicted; *Count 54*, war crimes against PW's and civilians in occupied areas, 5 convicted; *Count 55*, failure to correct or to prevent the commission of war crimes by subordinates, 7 convicted.

53 *Ibid.*, pp. 1187–1218.

54 The 89 cases are contained in the 15 Volume *Law Reports of Trials of War Criminals*, *op. cit.*, n. 16.

55 See FM 27–10, *The Law of Land Warfare*, 1956, para. 13, for a comparison of the jurisdiction of a military commission and a court-martial. See also Green, "The Military Commission," 42 *Am. J. Int'l L.* 832 (1948).

war crimes in the traditional sense. They sat both in Europe and Asia.

The Supreme Court has had occasion to hear pleas for writs of habeas corpus from the accuseds before three American military commissions. The first was *Ex parte Quirin*[56] wherein the Supreme Court granted a hearing because of the fact that the commission sat in the United States. It upheld the jurisdiction of the commission despite the fact that the civil courts were functioning, because the charges against the defendants involved what the court considered to be a war crime.

In Re Yamashita[57] the Supreme Court also granted the petitioner a hearing because the commission was sitting in the Philippines, then under the jurisdiction of the United States. However, in *Johnson v. Eisentrager*[58] the Supreme Court refused a petition from the defendant because the commission sat in China and sentenced the German accused to incarceration in Germany.

No tabulation has ever been made of the actual number of trials and the number of defendants tried at the national level by States during and since World War II. As late as January 1961 West Germany was averaging one trial every three weeks. On January 13, 1961, a Warsaw court sentenced an accused for war crimes committed during the Nazi occupation. In December 1961 the Israeli court convicted Eichmann of what were essentially war crimes. At Dachau, Germany, alone, the American military commissions tried 489 cases involving 1672 accused. 1416 were convicted.[59]

III. LEGAL PROBLEMS IN THE WAR CRIMES TRIALS

A. The Charges

1. *Crimes Against Peace*

a. *The Pact of Paris, 1928.* The damage, destruction and the staggering number of casualties in World War I led to a severe reaction against the concept that nations could resort to war for any reason. In 1928 a conference was convened at Paris for the purpose of drafting an international agreement by which States would renounce the use of war as an instrument of international policy. When this treaty known both as the Pact of Paris and the Kellogg-Briand Pact, became effective July 24, 1929,

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56 *Ex parte Quirin*, 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942).

57 *Re Yamashita*, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946); analyzed in IV *Law Reports of Trials of War Criminals*, pp. 1–95.

58 *Johnson* v. *Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950); analyzed in XIV *Law Reports of Trials of War Criminals*, pp. 8–22.

59 "The Simpson Report" to the Secretary of the Army, 14 Sep. 1948, p. 1, subject: Survey of the Trials of War Crimes Held at Dachau, Germany.

15 signatories (including Germany, United States, France, United Kingdom, Italy, and Japan) and 31 adhering states (including China, Ethiopia, Finland, Hungary, and the U.S.S.R.) had become parties.[60] By 1938 seventeen other parties had adhered. Various qualifications and interpretations were placed upon the proposed treaty in the correspondence, perhaps the most important being the United States note delivered to the principal Foreign Offices on June 20, 1928, that "It believes that the right of self-defense is inherent in every sovereign state and implicit in every treaty. No specific reference to that inalienable attribute of sovereignty is therefore necessary or desirable. It is no less evident that resort to war in violation of the proposed treaty by one of the parties thereto would release the other parties from their obligations under the treaty towards the belligerent states."[61] It was this Pact of Paris which formed the cornerstone of the crime of aggressive war charged at Nuremberg and Tokyo.

b. *Arguments against the crime of aggressive war.* Four principal arguments were advanced at the trials against the crime of aggressive war. These objections are: (1) "No crime without a law"; (2) "You also"; (3) No definition of aggressive war; and (4) The difficulty of linking a particular defendant with a crime of such a nature.

(1) *Nulla Peona Sine Legis.* This was the first occasion in modern times in which individuals had been punished for their participation in the acts of a State which had unjustifiably initiated war. Consequently it was argued that if the acts of individuals who planned, initiated, or waged aggressive war were to be punished then such a law should be promulgated to be operative in the future and not to be retroactively applied to past acts. The International Military Tribunal answered this objection as follows:[62]

> The Charter [which stated that such a crime exists] is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation.
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> * * * * * * *
>
> It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the

[60] *IV Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and other Persons, 1923–1937*, p. 5130.

[61] Note of the Government of the United States to the Governments of Belgium, Czechoslovakia, France, Germany, Great Britain, Irish Free State, Italy, Japan and Poland, contained in I *Foreign Relations of the United States* 1928, p. 91.

[62] *Nazi Conspiracy and Aggression, Opinion and Judgment* (Washington: U.S. Government Printing Office, 1947) pp. 48–51.

alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

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This view [that such a crime existed] is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy, and Japan at the outbreak of war in 1939. In the preamble the signatories declared that they were:

"Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated. . . . all changes in their relations with one another should be sought only by pacific means. . . . thus uniting civilised nations of the world in a common renunciation of war as an instrument of their national policy. . . ."

The first two articles are as follows:

"Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another."

"Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:

"War between nations was renounced by the signatories of the Kellogg Briand Treaty. This means that it has become throughout practically the entire world . . . an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law. . . . We denounce them as law breakers."

But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of

flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military course. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it. . . .[63]

(2) *Tu Quoque.* This doctrine which means literally "you also," was urged by the Germans in justification of their acts. They argued that at least one (the U.S.S.R.) and possibly more of the prosecuting nations had themselves waged aggressive wars contemporaneous with those of the Reich. The court answered as follows:

Under general principles of law an accused does not exculpate himself from a crime by showing that another committed a similar crime either before or after the alleged commission of the crime by the accused.[64]

(3) *Definition of the term "aggression."* The defendants argued that states possess the right to determine unilaterally whether or not their decision to wage war is justified. Consequently this term has not acquired a sufficient objective meaning in international law.[65] The IMT dismissed such an argument.[66]

(4) *The identity of those guilty.* The question that proved most troublesome to the courts was not whether the war by

63 The court, in relating this history, put particular emphasis upon the draft Treaty of Mutual Assistance of 1923, the Protocol for the Pacific Settlement of International Disputes (Geneva Protocol) of 1924, the Assembly of the League of Nations Declaration of 1927, and the Havana Resolution of 18 February 1928, all of which underscored the emerging concept of the criminal nature of aggressive war (*Ibid.*, pp. 51–53).

64 *U.S.* v. *Von Leeb*, *op. cit.*, n. 37, p. 462.

65 The term is hard to define in the abstract. See the discussion of efforts between 1920 and 1950 to define "aggression" in Stone, *Legal Controls of International Conflict* (N.Y.: Rinehart, 1954) pp. 330–334. Concrete cases are another matter. As far as Germany's wars were concerned the following observation is in point: "No one can read the accounts of the Hitler conferences with his generals without concluding that the wars of the Third Reich were aggressive wars under any conceivable definition of that expression" (Taylor, *Final Report*, *op. cit.*, p. 220).

66 *Opinion and Judgment*, *op. cit.*, n. 62, p. 38.

Germany and Japan was aggressive or not, but how to assess each defendant's relation to the crime.[67] Tribunal Va, set up under Control Council Law No. 10 and U.S. Military Government Law No. 7, employed the following standard for determining the guilt or innocence of a defendant accused of crimes against peace.[68]

> We are of the opinion that as in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality. There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.
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> If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offense. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.
>
> If, and as long as, a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. It is not a person's rank or status which is the relevant issue for determining his criminality under the charge of crimes against peace, but his power to shape or influence the policy of his state.

c. *The Crime of Aggressive War Before Tribunals Other than the IMT.* The charge of aggressive war did not fare as well at the Subsequent Proceedings as it did at the trial of the major war criminals. Telford Taylor has summarized the result as follows:

> Since the IMT judgment, six additional cases involving this charge have been determined. In the four such cases at Nuremberg, the accusation failed against the military leaders and the Farben and Krupp directors, but prevailed against five highly placed diplomats and government ministers. On 30 June 1948, a tribunal sitting at Rostatt (in the French Zone) convicted the prominent Saar industrialist Hermann Roechling of waging, but not of planning, aggressive wars, but upon review of the judgment, in January 1949 this charge was quashed. At Tokyo, however, the International Military Tribunal for the Far East convicted all of the twenty-five Japanese defendants of "crimes against peace."[69]

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67 Taylor, *Final Report*, *op. cit.*, n. 4, pp. 221–222.
68 *U.S. v. Von Leeb*, *op. cit.*, n. 37, pp. 488–489.
69 Taylor, *Final Report*, *op. cit.*, n. 4, p. 221.

d. *The Future of the Crime of Aggressive War.* The Nuremberg Trials are a precedent for the condemnation of aggressive war and the punishment of those individuals responsible for such war. Thus future defendants are in a poor position to argue the applicability of the doctrine *nulla peona sine legis* if they are tried for similiar crimes. However, there are a number of serious problems which remain unsolved.

For example, there is a problem as to how criminal prosecution under the aggressive war count can be conducted in the future by anyone except the victor.[70]

A further problem arises from the fact that the crime relies on a careful and detailed understanding and record of the inner processes of the Government in question unless the entire responsibility is to be imputed to a certain echelon of leadership. It is not likely that the future victors will find such meticulous records as were awaiting the victorious Allies when they entered Germany in 1945.[71] Consequently the difficulty of obtaining evidence which may establish the criminality of the acts of certain individuals may be a substantial one.

A final problem is that prosecution of the aggressor for such a crime presupposes something close to total defeat of him. In limited wars neither side is reduced to such a state of defeat. Consequently prosecutions may only occur in the future where there is a total rather than a limited war.

2. *War Crimes*

Individual responsibility for war crimes. The term "war criminals" may be understood to include persons who (i) have committed war crimes, or (ii) have aided, abetted or encouraged the commission of war crimes.[72] The nature of the military organization makes the application of this rule difficult in some circumstances. Four such circumstances will now be disclosed.

(1) *Responsibility of Superiors for Acts of their Subordinates.* One of the *causes celebre* of the war crimes trial which followed World War II was the *Yamashita Case.*[73] Yamashita was accused of the following war crime:

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70 Finch has pointed out in "The Nuremberg Trial and International Law," 41 *A.J.I.L.* pp. 20–37 (1947) that a victorious power would hardly allow the defeated to establish or to participate in Tribunals to try the leaders of the victor, however clear their aggressive intent or acts. Such an observation points not to the defects in the law but to defects in the political and judicial organization of the international community.

71 The proof of individual implication would have proven more difficult in Japan had it not been for the discovery of the complete diary of Marquis Kido, Lord Keeper of the Privy Seal. The diary covered the entire period under investigation and became the working bible of the prosecution (Horwitz, *The Tokyo Trial, op. cit.*, n. 51, p. 494).

72 Cir. 132, "Investigation of War Crimes," Headquarters, U.S. Forces, European Theater, 2 October 1945.

73 *Re Yamashita, op. cit.*, n. 57.

While a commander of the armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war.

The evidence indicated that a considerable number of atrocities were committed by Japanese troops under Yamashita's command. Yamashita contended that most of these atrocities were committed or caused to be committed in units or by commanders who were remote from his headquarters, both physically and in terms of the chain of command and that there was no evidence presented that he had expressly commanded or knowingly permitted any of the charged crimes.

The Supreme Court of the United States saw an affirmative duty on the part of a commander in Yamashita's position.[74]

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above articles are properly carried out," 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commander-in-chief of the belligerent [16] armies to provide for the details of execution of the foregoing articles [of the convention] as well as for the unforeseen cases." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect

74 *Ibid.* at p. 16.

prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. . . .

The court in *U.S. v. Von Leeb* has discussed the problem of responsibility of commanders of occupied territories as follows:[75]

. . . Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Convention, a military commander of an occupied territory is *per se* responsible within the area of his occupation, regardless of orders, regulations, and the laws of his superiors limiting his authority and regardless of the fact that the crimes committed therein were due to the action of the state or superior military authorities which he did not initiate or in which he did not participate. In this respect, however, it must be borne in mind that a military commander, whether it be of an occupied territory or otherwise, is subject both to the orders of his military superior and the state itself as to his jurisdiction and functions. He is their agent and instrument for certain purposes in a position from which they can remove him at will.

In this connection the Yamashita case has been cited. While not a decision binding upon this Tribunal, it is entitled to great respect because of the high court which rendered it. It is not, however entirely applicable to the facts in this case for the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the state, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly commited at the instance of higher military and Reich authorities.

It is the opinion of this Tribunal that a state can, as to certain matters, under international law limit the exercise of sovereign powers by a military commander in an occupied area, but we are also of the opinion that under international law and accepted usages of civilized nations that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own state within his area. He is the instrument by which the occupancy exists. It is his army which holds the area in subjection. It is his might which keeps an occupied territory from reoccupancy by the armies of the nation to which it inherently belongs.

75 *Op. cit.*, n. 37, pp. 543, 544.