

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood. . . . [and]

. . . have agreed upon the following:

Article 1. The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

Article 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

Article 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Article 4. The present Convention, duly ratified, shall as between the contracting Powers, be substituted for the Convention of the 29th July, 1899, respecting the laws and customs of war on land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.²⁵

Annex to the Convention

REGULATIONS RESPECTING THE LAWS AND CUSTOMS

OF WAR ON LAND

SECTION I. ON BELLIGERENTS

CHAPTER I. *The Qualifications of Belligerents*

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Article 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with

²⁵ [Ed.: In 1940 the following States were parties to The Hague Convention IV of 1907: Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Denmark, Finland, France, Germany, Great Britain, Guatemala, Haiti, Hungary, India, Ireland, Japan, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, Portugal, Rumania, Salvador, South Africa, Sweden, Switzerland, Thailand, U.S.S.R., United States. Austria and Ethiopia had also been parties. Cf. Lauterpacht's Oppenheim, II, Appendix.

States parties to The Hague Regulations as annexed to Convention II of 1899 but which were not parties to Convention IV of 1907 were: Argentina, Bulgaria, Chile, Colombia, Dominican Republic, Ecuador, Greece, Honduras, Italy, (Korea, 1903), Paraguay, Peru, Persia, Spain, Turkey, Uruguay and Venezuela. Scott, *Hague Conventions*, 129 ff.]

Article 1. shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Article 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II. *Prisoners of War*

[ED.: Articles 4-20 on Prisoners of War are omitted here. See Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War, below, p. 1008.]

CHAPTER III. *The Sick and Wounded*

Article 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

[ED.: The reference is to the Geneva Convention of August 22, 1864, which was revised in 1906, 1929 and 1949. See below, p. 1017.]

SECTION II. HOSTILITIES

CHAPTER 1. *Means of Injuring the Enemy, Sieges, and Bombardments*

Article 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden—

- (a.) To employ poison or poisoned weapons;
- (b.) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c.) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d.) To declare that no quarter will be given;
- (e.) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f.) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (g.) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- (h.) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Article 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Article 25. The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Article 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Article 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Article 28. The pillage of a town or place, even when taken by assault, is prohibited.

CHAPTER II. *Spies*

Article 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

Article 30. A spy taken in the act shall not be punished without previous trial.

Article 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

CHAPTER III. *Flags of Truce*

Article 32. A person is regarded as a *parlementaire* who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

Article 33. The commander to whom a *parlementaire* is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the *parlementaire* taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the *parlementaire* temporarily.

Article 34. The *parlementaire* loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

CHAPTER IV. *Capitulations*

Article 35. Capitulations agreed upon between the contracting Parties must take into account the rules of military honor. Once settled, they must be scrupulously observed by both parties.

CHAPTER V. *Armistices*

Article 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Article 37. An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Article 38. An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

Article 39. It rests with the contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Article 40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Article 41. A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

[ED.: Other portions of The Hague Regulations are printed below, p. 1022.]



**Geneva Convention Relative to the Treatment of
Prisoners of War of August 12, 1949**

U.S. Department of State, General Foreign Policy Series 34, p. 84²⁶



The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949,

²⁶ [ED.: This Convention is designed to replace the Convention on Prisoners of War signed at Geneva, July 27, 1929, *T.S.*, No. 846, and to complement Chapter II of The Hague Regulations of 1899 and 1907. Cf. Articles 134, 135. It was signed by the representatives of sixty-one States, including Soviet Russia and her satellites. See further Ivan S. Kerno, "Provisions of the 'Geneva Conventions'", *U.N. Bulletin*, IX (1950), 204; Joyce A. C. Gutteridge, "The Geneva Conventions of 1949," 1949 *B.Y.I.L.*, 294-326; Jean S. Pictet, "The New Geneva Conventions for the Protection of War Victims," 45 *A.J.I.L.* (1951), 462-475; and *D.S. Bull.*, XXIV, No. 621 (May 28, 1951), 866-879.]

for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

Article 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2. In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to

the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5. The present Convention shall apply to the persons referred to in

Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 7. Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

Article 12. Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Article 13. Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

Measures of reprisal against prisoners of war are prohibited.

Article 14. Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.

Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

Article 15. The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.

Article 16. Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power.

without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.

Article 17. Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Article 18. All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.

At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents to prisoners of war who possess none.

Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.

Such objects, likewise sums taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners, shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their captivity.

Article 19. Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

[ED.: Other articles treat in detail of such matters as conditions of internment, food, clothing, hygiene, medical and religious care, discipline, punishment, labor, transfer and repatriation, and protecting powers and organizations. The Convention contains 143 articles and 5 annexes.]

EDITOR'S NOTE: *Conduct of Hostilities. The Laws of War.* In the course of the Nuremberg Judgment in the Trial of the Major War Criminals, the International Military Tribunal observed, *Official Documents*, I, 221: "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 practiced by military courts. 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." Cf. U.S. Army Basic Field Manual (FM 27-10) on the *Rules of Land Warfare* (1940), 1 ff.: "Many of the rules of war have been set forth in treaties or conventions to which the United States and other nations are parties. These are commonly called the written rules or laws of war. . . . Some of the rules of war have never yet been incorporated in any treaty or convention to which the United States is signatory. These are commonly called the unwritten rules or laws of war, although they are well defined by recognized authorities on international law and well established by the custom and usage of civilized nations. . . . The unwritten rules are binding upon all civilized nations. . . . [The written rules] are in large part but formal and specific applications of general principles of the unwritten rules." For elaborate analysis, with citations, of the laws of war, see Lauterpacht's Oppenheim, II; Hyde, Vol. III; Hackworth, *Digest*, Vols. VI and VII; James W. Garner, *International Law and the World War*, 2 vols. (1920). For a discussion of the current utility of rules of warfare, see Major William G. Downey, J.A.G.D., "Revision of the Rules of Warfare," 1949 *Proceedings A.S.I.L.*, 102 ff., and comments by Prof. Charles G. Fenwick, Col. Archibald King and others. See also the thought-provoking suggestions of Philip C. Jessup on "Rights and Duties in Case of Illegal Use of Force" in his *A Modern Law of Nations*, 188-221, based upon the assumption that it is "a mistake to assume that acceptance of the concept of international police forces and their use against an 'outlaw,' with its consequent abolition of the concept of 'war' in a legal sense, eliminates the necessity for the legal regulation of the rights and duties of those who are active participants in the struggle and of those who for geographical or other reasons are not called on to take an active part." See further, Josef L. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision," 45 *A.J.I.L.* (1951), 37-61.

[Combatants and Non-Combatants.] In ancient times and in the Middle Ages little distinction was made between combatants and non-combatants. With the growth of nation-states and the establishment of government-controlled national armies, however, the principle was gradually evolved in practice that the persons and property of non-combatants should be spared as much as the exigencies of war permitted. By 1914 the distinction between combatants and non-combatants had become an established rule of international law. Cf. G. Butler and S. Maccoby, *The Development of International Law* (1928), 124-152. The theoretical basis of the distinction has been aptly summarized by Edgar Turlington, in 22 *A.J.I.L.* (1928), 270:

According to the theory accepted by the American and English courts, and by nearly all the American and English writers on international law, war between nations is war between their individual citizens. It makes of the citizens or subjects of one belligerent, enemies of the citizens or subjects of the other. . . . According to the rival theory, which, though first put forward by Rousseau merely as a philosophical principle, has been accepted by a large number of Continental jurists as a fundamental principle of international law, war is a relation between states in which individuals are enemies only accidentally, not as men nor even as citizens, but simply as soldiers. Under the Anglo-American theory, the private property of

the nationals of each belligerent, on land or sea, is in principle subject to capture and confiscation by the other belligerent. The application of the Continental theory, on the other hand, involves, at least in tendency, the exclusion of all interference with the persons and property of individuals, except in so far as they are engaged in the service of the state, or enrolled in its fighting forces, or, on a broader construction, except in so far as they contribute to the prosecution of the war.

In 1863 the noteworthy *Instructions for the Government of Armies of the United States in the Field*, General Orders, No. 100, also known as Lieber's Code, were issued. Of these Instructions, Garner writes: "They received high praise from international jurists, and undoubtedly exercised an important influence on the subsequent development of the laws of war. . . . As is well known the American instructions formed the basis of the *projet* adopted by the Brussels Congress of 1874, the basis of Bluntschli's proposed code, and to a considerable extent the basis of the Hague Conventions of 1899 and 1907." J. W. Garner, *op. cit.*, I, 2-3. From Lieber's Instructions the following articles may be quoted:

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country, and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions. [Reprinted from Moore, *Digest*, VII, 172-173.]

The distinction between combatants and non-combatants is likewise implied in Articles I and 2 of the Regulations annexed to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land.

During the First World War, however, the British Government developed the "nation-in-arms" theory as a justification for abolishing the distinction between absolute and conditional contraband. In the British Note of February 10, 1915, to the United States, Sir Edward Grey wrote: "The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such tremendous organization for war as now obtains in Germany there is no clear division between those whom the Government is responsible for feeding and those whom it is not." *U.S. For. Rel.*, 1915, *Supplement*, 332. Similarly the British Prize Court in the case of *The Kim*, [1915] P. 215, 285, quoted an editorial from the *American Journal of International Law*: "Again, in a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty,

and where the non-combatant population is organized so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband, especially if the government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field." In a number of other ways the distinction between combatants and non-combatants was disregarded during the First World War. For an illuminating refutation of the assumption that the nation-in-arms theory was peculiar to the First World War, see John Bassett Moore, *International Law and Some Current Illusions* (1924), Introduction and Chapter I.

The modern practice of total war, particularly in its tendencies to involve total populations in the war effort and correspondingly to expose them to saturation and atomic bombing, has further lessened, without entirely obliterating, the distinction between combatants and non-combatants. Cf. Hans J. Morgenthau, *Politics Among Nations* (1948), Ch. XX, "Total War," and citations, *id.* 484; Quincy Wright, *A Study of War* (1942), I, 291-356; Lester Nurick, "The Distinction between Combatant and Non-Combatant in the Law of War," 39 *A.J.I.L.* (1945), 680-697.

Aerial Warfare. International law has developed no code similar to the rules of land and naval warfare to regulate aerial warfare. Although attempts have been made to assimilate to aerial warfare the prohibition contained in Article 25 of The Hague Regulations on land warfare, above, against bombardment of undefended towns, the liberty of appreciation left to opposing belligerents to determine what constitutes an undefended place has rendered such attempts nugatory. Deliberate bombing of cities such as of Nanking by the Japanese in 1937 and of Rotterdam by the Germans in 1940 have called forth condemnations but have not deterred other States from resorting to pattern, saturation or atomic bombing of enemy cities. It would be difficult, in view of the practice of States and the absence of treaty regulation, to sustain the thesis that such aerial bombing is contrary to international law. As Schwarzenberger, I (2d ed.), 317, points out, "there was never a more indiscriminate weapon than the flying bombs and rockets which were used by Germany against Great Britain," yet there was no attempt at Nuremberg to stigmatize their use as a war crime. See further, Hyde, III, 1822-1836, "Aspects of Aerial Bombardment"; Lauterpacht's Oppenheim, II, §§ 214 a ff., and the works there cited.

Prohibited Weapons or Activities. Attempts by law to prohibit the use of particular weapons or to restrict the employment of others have varied in their success. On the use of expansive or explosive bullets and poison gas, see Lauterpacht's Oppenheim, II, §§ 111 ff.; Hyde, III, 1816 ff.; Garner, *op. cit.*, I, 262 ff. On June 17, 1925, a Protocol prohibiting the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare was opened for signature at Geneva, by which the High Contracting Parties agreed in part:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations.

The High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

Text from Hudson, *International Legislation*, III, 1671. This Protocol, containing no provisions for its termination, was in 1939 in force between some forty States, including all the Great Powers except Japan and the United States. It is noteworthy that States refrained from the employment of gas warfare during the Second World War.

A *procès-verbal* concerning Rules of Submarine Warfare, signed at London, November 6, 1936, incorporated Part IV of the London Treaty of April 22, 1930, T.S. 830, setting forth "as established rules of International Law" the following:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

Text from Hudson, *International Legislation*, VII, 491. By 1939 thirty-six States had become parties to this Protocol.

At the Nuremberg Trial, Admiral Dönitz, commander of the German submarine arm and later Commander-in-Chief of the German Navy, was charged, *inter alia*, "with waging unrestricted submarine warfare contrary to the Naval Protocol of 1936, to which Germany acceded . . ." In view of evidence that the British Admiralty had armed British merchant vessels and ordered them to ram U-boats, the Tribunal was "not prepared to hold Dönitz guilty for his conduct of submarine warfare against British armed merchant ships." However, the order of Dönitz to sink neutral ships without warning when found within proclaimed operational zones was held by the Tribunal to be "a violation of the Protocol." With reference to the rescue provisions of the 1936 Protocol, the Tribunal observed:

The evidence further shows that the rescue provisions were not carried out and that the Defendant ordered that they should not be carried out. The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmlessly before his periscope. These orders, then, prove Dönitz is guilty of a violation of the Protocol.

In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by

the United States from the first day that Nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare.

International Military Tribunal, *Official Documents*, I, 311-313.

International control of the production and utilization of atomic energy has been regarded by the United Nations as involving more than the mere prohibition of the manufacture and use of atomic weapons. See *Official Records and Supplements* of the U.N. Atomic Energy Commission.

Prisoners of War. International concern with the humane treatment of prisoners of war, foreshadowed in Lieber's Code of 1863, was manifested in Articles 4-20 of The Hague Regulations of 1899 and 1907 and firmly established in the Geneva Convention of July 27, 1929, concerning Treatment of Prisoners of War, *T.S.*, 846, 118 *L.N.T.S.*, 343, to which, in June 1949, forty-eight States were parties. Cf. *U.S.T.D.*, with notes and bibliography. See also materials and citations in Hudson, *International Legislation*, V, 20 ff.; Moore, *Digest*, VII, 215 ff.; Hackworth, VI, 273 ff.; Hyde, III, 1844 ff.; Lauterpacht's Oppenheim, II, §§ 125 ff.; Garner, *op. cit.*, II, 1 ff.; Herbert C. Fooks, *Prisoners of War* (1924); Ernst H. Feilchenfeld, *Prisoners of War* (1948). The Geneva Convention of 1949, above, is designed to replace the 1929 Convention.

Sick and Wounded. The humanitarian activities of Henri Dunant, who witnessed the unnecessary loss of life by the uncared wounded at the battle of Solferino in 1859, led indirectly to the conclusion of the Geneva or "Red Cross" Convention of August 22, 1864 for the Amelioration of the Condition of the Wounded in Time of War. Cf. Nussbaum, *Concise History of the Law of Nations* (1947), 218 ff. For the text of the Convention of 1864, see 55 *B. & F.S.P.*, 43; Malloy, *Treaties*, II, 1903. For the revision of July 6, 1906, see 99 *B. & F.S.P.*, 968; Malloy, II, 2183. Fifty-four States were, in June, 1949, parties to the further revision of July 27, 1929, *T.S.*, 847, 118 *L.N.T.S.*, 303. Cf. *U.S.T.D.* and citations there given. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature August 12, 1949, is designed to replace the Convention of 1929 and has been signed by representatives of sixty-one States. Text in Department of State General Foreign Policy Series 34 (1950), 25 ff. See materials and citations in Hudson, *International Legislation*, V, 1 ff.; Hackworth, VI, 310 ff.; Hyde, III, 1867 ff.; Lauterpacht's Oppenheim, II, §§ 118 ff. See also Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, designed to revise Hague Convention X of October 18, 1907. Department of State General Foreign Policy Series 34, pp. 55 ff. Cf. Lauterpacht's Oppenheim, II, §§ 204 ff. and works there cited; Hackworth, VI, 458 ff.; Hyde, III, 2067 ff.

On the rules governing property captured on the battlefield, see William G. Downey, "Captured Enemy Property: Booty of War and Seized Enemy Property," 44 *A.J.I.L.* (1950), 488 ff., and the works there cited.

V. WAR CRIMES

EDITOR'S NOTE: *War Crimes.* The literature on war crimes and cognate topics is overwhelming. Consult bibliographies in *History of the United Nations War*

Crimes Commission and the Development of the Laws of War, Compiled by the United Nations War Crimes Commission (London, H. M. Stationery Office, 1948), 557-573; Sohn, *Cases on World Law* (1950), 967-974. In addition to the forty-two volumes of official documents on the *Nuremberg Trial of the Major War Criminals before the International Military Tribunal* published by that Tribunal (1947-49), the United Nations War Crimes Commission has selected and edited eighty-nine additional cases, published in fifteen volumes as *Law Reports of Trials of War Criminals* (London, H. M. Stationery Office, 1947-49). Vol. XV of that series consists of a *Digest of Laws and Cases*. More complete texts, including transcripts, of some of these horrible cases have been published in a series entitled *War Crimes Trials* under the editorship of Sir David Maxwell Fyfe (London: Wm. Hodge and Co., 7 vols. to 1950). See also *Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials* (London, 1945, Department of State, I.O.C.S. II, European 1 (1949), 441 pp.); U.N. Secretariat, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*; U.N. Doc. A/CN.4/5, 3 March 1949, 99 pp. The judgment of the International Military Tribunal for the Far East in the trial of the major Japanese war criminals was delivered in November, 1948. The judgment, covering 1446 pages, and the record, comprising tens of thousands of pages, have not been published. See Solis Horwitz, "The Tokyo Trial," *International Conciliation*, No. 465 (Nov. 1950).

War crimes—i. e., violations of the laws and customs of war, have traditionally been regarded as acts entailing individual criminal liability which, by international law, a belligerent State may enforce through its national military tribunals. See George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," 37 *A.J.I.L.* (1943), 407-435; H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes," 1944 *B.Y.I.L.*, 58-95; A. Wigfall Green, "The Military Commission," 42 *A.J.I.L.* (1948), 832-848; and above under *The Individual as a Subject of International Law*, pp. 96-97. For an incomplete enumeration listing thirty-two types of war crimes, see Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties—Report Presented to the Preliminary Peace Conference, (Paris) March 29, 1919, 14 *A.J.I.L.* (1920), 95, 114, reprinted from Carnegie Endowment, Division of International Law Pamphlet No. 32, *Violation of the Laws and Customs of War* (1919).

By Article 6 of the Charter annexed to the London Agreement of August 8, 1945, war crimes were defined as "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." International Military Tribunal, Nuremberg, *Official Documents*, I, 173. In the course of its Judgment, the Tribunal observed (*id.*, 226):

The evidence relating to War Crimes has been overwhelming, in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany,

and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of "total war," with which the aggressive wars were waged. For in this conception of "total war," the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

On some occasions, War Crimes were deliberately planned long in advance. In the case of the Soviet Union, the plunder of the territories to be occupied, and the ill-treatment of the civilian population, were settled in minute detail before the attack was begun. As early as the autumn of 1940, the invasion of the territories of the Soviet Union was being considered. From that date onwards, the methods to be employed in destroying all possible opposition were continuously under discussion.

Similarly, when planning to exploit the inhabitants of the occupied countries for slave labor on the very greatest scale, the German Government conceived it as an integral part of the war economy, and planned and organized this particular War Crime down to the last elaborate detail.

Other War Crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of Commandos or captured airmen, or the destruction of the Soviet Commissars, were the result of direct orders circulated through the highest official channels.

The Tribunal proposes, therefore, to deal quite generally with the question of War Crimes, and to refer to them later when examining the responsibility of the individual defendants in relation to them. Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production, and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

Cf. also Count Three (War Crimes) of the indictment, *id.*, 42 ff. Of the major war criminals convicted at Nuremberg, all except three were found guilty of traditional war crimes. *Id.*, 366.

The novelty of the Nuremberg War Crimes Trial lay not in its proceedings and findings with reference to traditional war crimes, but in certain other features. By Article 6 of the London Charter, the crime of aggressive war and crimes against humanity were added to traditional war crimes as "crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility" as follows (*id.*, 173):

- (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) War Crimes. . . .
- (c) Crimes Against Humanity: namely, murder, extermination, enslavement

deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Although the Tribunal held that the London Charter had, for purposes of the Tribunal's jurisdiction, sufficiently established the criminal character of the acts charged (*id.*, 174, 218), which therefore made it "not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement," the Tribunal sought, *obiter dictum*, to establish that waging aggressive war was not merely illegal but criminal even before the London Charter (*id.*, 219 ff.). Cf. Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", 1 *I.L.Q.* (1947), 153-171; Schwarzenberger, I (2d ed.) 398-327; and analysis of the Nuremberg Charter and Judgment in U.N. Doc. A/CN.4/5, cited. See also Egon Schwelb, "Crimes Against Humanity," 1946 *B.Y.I.L.*, 178-226.

By Articles 7 and 8 of the London Charter, possible defences of "act of State" and "superior orders" were not to be considered by the Tribunal as freeing defendants from responsibility. On these points the Tribunal observed (*loc. cit.*, 223-224):

... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law. . . . The Charter specifically provides in Article 8:

"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment [if the Tribunal determines that justice so requires.]

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

See also *Law Reports of Trials of War Criminals*, cited, XV, 155-188, for an analysis of defence pleas such as "superior orders" in various war crimes trials. For German war crimes trials after First World War, including the *Case of Dithmar and Boldt (Llandover Castle Case)*, see 16 *A.J.I.L.* (1922), 674 ff., 708 ff.

The controversy over whether the Nuremberg Trial was an *ex post facto* application of alleged principles of international law of doubtful validity and under which individual responsibility was not clearly established at the time the acts charged were committed is less important than the possibility of establishing accepted principles of international law for future guidance. Pursuant to General Assembly Resolution 177 (II), adopted November 21, 1947, by a vote of 42 to 1, with 8 abstentions, the General Assembly directed the

United Nations International Law Commission to "(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and (b) Prepare a draft code of offences against the peace and security of mankind . . ." U.N. Doc. A/519, p. 112. The International Law Commission discussed and formulated these principles at its second session in 1950. See 44th to 49th and 54th Meetings, second session, A/CN.4/SR. The Principles formulated, without the accompanying comments of the Commission, are reproduced below.

See also Vespasien V. Pella; *Memorandum concerning a Draft Code of Offences Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/39, 24 November 1950, 220 pp.; the Reports of J. Spiropoulos, A/CN.4/25, 26 April 1950, and A/CN.4/44, 12 April 1951; the *Report of the International Law Commission* (3rd Session, 1951), A/1858; and *Crimes Against the Law of Nations*, above, p. 579.



Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal

REPORT OF THE INTERNATIONAL LAW COMMISSION,
2nd SESSION, 1950

U.N., G.A.O.R., 5th Session, Supp. No. 12 (A/1316), p. 11



Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI. The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

VI. MILITARY OCCUPATION



The Hague Regulations Respecting the Laws and Customs of War on Land,

ANNEXED TO THE HAGUE CONVENTION (IV) OF 1907

Scott, *The Hague Conventions*, 122 ²⁷



SECTION. III. MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter 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.

Article 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

Article 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Article 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property can not be confiscated.

Article 47. Pillage is formally forbidden.

²⁷ [ED.: See above, p. 1005, for other portions of these Regulations.]

Article 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Article 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Article 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.

Article 51. No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

Article 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Article 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Article 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.

Article 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

LEGAL REGULATION OF THE USE OF FORCE

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

United States, Rules of Land Warfare

War Department, *Basic Field Manual, FM 27-10 (1940)*, 73

Par. 273. . . . Being an incident of war, military occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. . . .

Par 275. . . . On the other hand subjugation or conquest implies a transfer of sovereignty. Ordinarily, however, such transfer is effected by a treaty of peace. . . .

EDITOR'S NOTE: *Military Occupation*. "The regulations annexed to Hague Convention IV provide only for 'belligerent' occupation, *i. e.*, the occupation of part or all of the territory of a country which continues to wage war against the occupying Power. . . . There are, however, three additional types of military occupation which are perhaps just as important as belligerent occupation for which the Hague Regulations do not provide and for which no specific rules exist: . . .

"First, '*Hostile occupation*,' which I define as the military government or occupation of the territory of a country which has completely and unconditionally surrendered, and which maintains no fighting force in the field, *e. g.*, Germany and Japan.

"Second, '*Pacific occupation*,' which I define as the military occupation of a neutral or friendly country in time of war in order to protect such country from, or to use such country as a base of operations against, a future or a common enemy, *e. g.*, Iceland and England. . . .

"The third type of occupation occurs only in time of peace. It is defined as '*Peaceful occupation*,' which is the military occupation of bases in friendly foreign countries in time of peace, *e. g.*, the U.S. bases in the British colonies and in the Philippines.

"None of these three types of occupation has been recognized or defined by general international law, although they have existed in international practice for many years." William G. Downey, Jr., "Revision of the Rules of Warfare," 1949 *Proceedings, A.S.I.L.*, 103.

On the international law of belligerent occupation, consult Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), with bibliography; Moore, *Digest*, VII, 257-315; Hackworth, VI, 385-414; Hyde, III, 1876-1913, with extensive bibliography; Lauterpacht's Oppenheim, §§ 166 ff., with bibliography; Schwarzenberger, I (2nd ed.), 286-298; Garner, *International Law and the World War* (1920), II, 58 ff.

See also Sir Arnold D. McNair, *Legal Effects of War* (3rd ed., 1948), 319-383; Martin Domke, *Trading with the Enemy in World War II* (1943), 181 ff. and *The Control of Alien Property* (1947) 127 ff.; Raphael Lemkin, *Axis Rule in Occupied Europe* (1944); *Occupation of Germany: Policy and Progress, 1945-46*, U.S. Department of State European Series 23 (1947); *Germany, 1947-1949: The Story in Documents*, *id.*, European and British Commonwealth Series 9 (1950); *Occupation of Japan: Policy and Progress*, *id.*, Far Eastern Series 17 (n.d.); R. Y. Jennings, "Government in Commission," 1946 *B.Y.I.L.*, 112-141 (on the juridical basis of the Allied occupation of Germany); Alwyn V. Freeman, "War Crimes by Enemy Nationals Administering Justice in Occupied Territory," 41 *A.J.I.L.* (1947), 579-610.

VII. LEGAL EFFECTS OF WAR

EDITOR'S NOTE: *Legal Effects of War*. While it would be incorrect to conclude that the occurrence of war confers upon a belligerent State an unlimited discretion over the lives and property of enemy aliens, international law sanctions the adoption by belligerent States of certain measures in relation to private rights which might be a violation of international law in time of peace. Although national courts have declared that "the law of nations . . . prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries" (*cf. Kershaw v. Kelsey*, 100 Mass. 561, 572 (1868)), such interdictions are not stipulated by any rules of international but are established by the municipal legislation of the belligerents. The so-called legal "effects" or "consequences" of war with reference to private rights must thus be sought in national practice. For an analysis of decisions of international tribunals confirming this conclusion, see Schwarzenberger, I (2d ed.) 268 ff.

For national practice on enemy aliens, their internment, their procedural standing in the courts and the liability of enemy private property to seizure, and for the effect of war on contracts and commercial relations and various tests employed to determine the enemy character of persons, corporations and property, consult *Annual Digests*, *passim*; A. D. McNair, *Legal Effects of War* (3rd ed., 1948); Martin Domke, *Trading with the Enemy in World War II* (1943) and supplement under title *The Control of Alien Property* (1947); Garner, *International Law and the World War* (1920), I, 56-146, 208-261; Lauterpacht's Oppenheim, II, §§ 97 ff.; Moore, *Digest*, VII, 237 ff.; Hackworth, VI, 314 ff.; Hyde, III, 1699 ff.; Robert M. W. Kempner, "The Enemy Alien Problem in the Present War," 34 *A.J.I.L.* (1940), 443-458; Robert R. Wilson, "Treatment of Civilian Alien Enemies," 37 *A.J.I.L.* (1943), 30-45 and 38 *id.* (1944), 397-406; Mitchell B. Carroll, "Legislation on Treatment of Enemy Property," 37 *id.* 611-630.

See also Pieter N. Drost, *Contracts and Peace Treaties: The General Clause on Contracts in the Peace Treaties of Paris 1947 and in the Peace Treaty of Versailles 1919*, etc. (1948).

VIII. NEUTRALITY



The Alabama Claims

UNITED STATES—GREAT BRITAIN, CLAIMS ARBITRATION, 1872

U.S. For. Rel., 1872, Pt. II, Papers Relating to the Treaty of Washington of 1871, IV, 49 (42d Cong. 3rd Sess., Ex. Doc. 1)



[ED.: During the Civil War a number of vessels were constructed in England for the Confederate navy. Although not armed when they left British ports, they were fitted out to mount big guns, and it was a common knowledge that they had been contracted for by Confederate agents in England, and that they were to be furnished with arms and naval equipment after leaving England, in order to prey upon American commerce. Despite the persistent and capable efforts of the American Ambassador, Mr. Charles Francis Adams, to convince the British authorities that the sailing of these vessels from England would constitute a violation of the neutral obligations of Great Britain, the vessels were permitted to leave. The sailing of the *Alabama*, the most notorious of these commerce-destroyers, was not without dramatic interest. For months before it sailed, Mr. Adams had furnished the British authorities with information as to its character and ownership. After disregarding American protests until the vessel (then known as No. 290) was about to sail, the British Foreign Office eventually referred the papers to the senior law officer of the Crown. It so happened that the senior law officer had just then been seized with a fatal mental disorder which the devotion of his wife had kept from the knowledge of the authorities. After a further delay, the Foreign Office, though ignorant of the facts, became alarmed and, recovering the papers, decided that No. 290 should be seized. In the meantime, the Confederate agents, suspecting trouble, organized a picnic, invited many ladies, and, with a small crew and no naval equipment, cruised happily down the Mersey River, disembarked the guests, and put to sea unmolested. The next night the rest of the crew joined the vessel, which showed up in the Azores two weeks later. In the Azores, No. 290 was joined, after a week, by the *Agrippina*, out of London with cannon, munitions, coal, and other naval equipment. Then arrived Captain Raphael Semmes, of the Confederate Navy, who, as commander of the *Sumter*, had already destroyed eighteen American vessels before the *Sumter* was shipwrecked in the North Sea. After a friendly visit from the British Consul, No. 290, now completely armed, left the Azores under the benevolent eye of the Portuguese authorities and, changing her name to the *Alabama*, embarked upon her destructive career, capturing or destroying more than sixty American vessels in the Atlantic and Indian Oceans before being destroyed by the Federal cruiser *Kearsarge* off Cherbourg, June 11, 1864. After the Civil War the United States redoubled its efforts to secure compensation from England for the damage done by these Confederate cruisers.