DOCUMENTS ON PRISONERS OF WAR

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edited with annotations by
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PREFACE

While working on the manuscript of a volume dealing with the law relative to the treatment of prisoners of war (PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, Naval War College Press, 1979), I discovered that although the great majority of the treatises and articles on various aspects of the subject were readily available on the shelves of most university and law school libraries, the same could not be said with respect to many of the official documents (treaties, agreements, statutes, decrees, judicial decisions, military orders, regulations, etc.). In some instances I encountered great difficulty, or was even unsuccessful, in identifying an available published source for documents of which I had, over the years, accumulated copies of the originals in my own files. For others, I located a place of publication, but in some esoteric volume which would be found on only a very few library shelves.

This situation led me to consider the possibility of bringing the relevant documents together so as to make them readily available in today's libraries. The present collection is intended to accomplish that purpose. Documents which do not fall within the category of "hard to find" have been included so that this volume might be an entity complete in itself. The subject dealt with has, of course, evolved over the course of centuries and is still very much in a state of evolution. Accordingly, in order to understand the historical implications of a particular document it is often absolutely essential to read it in the context of the era in which it originally appeared. For this reason the methodology employed is one of strict chronology. (When a document included herein covers events occurring over a period of time, the beginning date has been used for the purposes of the chronology. For lengthy trials the date of the rendering of the judgment by the court is used.)

Each document included herein has a three-part introduction: (1) the TITLE; (2) the SOURCE or SOURCES; and (3) a NOTE. Not infrequently, there is really no "official" title for an official document. When this is so, I have attempted to select the title which appears to be the one most frequently used; or, if that was not possible, the most descriptive. The TITLE also includes other identifying matter, as appropriate, such as the place where signed, the date, the parties, the name of the court, the issuing authority, etc.

The documents contained herein are from the official records. Where the official document has not been found in another published form, the SOURCE given is the office or institution in which an original version is held in the archives; where the document has been found in only one or two published forms, they are given in the SOURCES, even though they may have been published in a language other than English; and, where the document has appeared in numerous published forms, I have selected a limited number of those most widely available in order to make recourse to an entire original as simple as possible. Thus, where a particular document has been widely published, such as, for example, the 1949 Geneva Prisoner-of-War Convention, I have limited the citations under SOURCES to a maximum of six works and I have selected those which I believe to be the most generally

available. These SOURCES are: (1) LNTS or UNTS, as appropriate; (2) Stat. or UST, as appropriate; (3) Bevans; (4) BFSP; (5) AJIL [Supp.]; and (6) Parry. Where one or more of the foregoing is unavailable (Parry's tremendous project has, for example, just entered the fourth quarter of the nineteenth century), some substitutions have been made, but only where deemed necessary.

Because some of the documents are so extremely difficult to find in their official form, and because only the portions of such documents relating to prisoners of war have been reproduced herein, unofficial, but reliable and more readily available, publications have sometimes been cited as secondary sources. However, it must be borne in mind that frequently these secondary sources are themselves only extracts of lengthy official documents and it may even be that they do not include all of the portions of the original document which are reproduced in this volume. Thus while these volumes are excellent, and often almost unique sources of material for the researcher, it was felt that the abstracts contained therein were often too abbreviated for the purposes of this collection of documents.

It has been assumed that the Resolutions of the Security Council and of the General Assembly need no official citation, that given the resolution number, the session and the date, anyone having access to any type of United Nations document collection will have no need of further information., However, because there are undoubtedly many to whom even a limited collection of United Nations documents may not be available, an unofficial source (Djonovich, UNITED NATIONS RESOLUTIONS) is given. Unfortunately, at this writing that set of volumes only covers the period 1945-1971. (A number of resolutions adopted by the quinquennial meetings of the International Conference of the Red Cross have been included herein, not because they have any official significance, but because so often the actions of this Conference are harbingers of provisions subsequently to be found embodied in international humanitarian conventions — or of the conventions themselves.)

Finally, all of the documents included herein are presented in English no matter what the original language used may have been; and, with rare exceptions, the versions cited in the SOURCES are also in English. When the only available version was in French, a situation which occurred in only a handful of instances, the editor has presumed to act as translator as well. It might be well to point out also that footnotes appearing in the originals have been omitted. There are no editorial footnotes.

The NOTE has sometimes been used to give not only the historical background of the document, but also to tie it to other related documents; and, occasionally, the prerogative of editorial comment has been exercised. Finally, when the original document is presented *in toto* in this collection, it is labeled TEXT; when less than the entire document is presented, it is labeled EXTRACT or EXTRACTS, as appropriate.

If the student of the subject of the law governing the treatment of prisoners of war follows these documents through the centuries of recorded history which they represent, there can be little doubt that he will observe that there has been, on the whole, a fairly steady improvement in the legal status of these unfortunates. By unilateral, bilateral, and multilateral acts, nations have accepted voluntarily-imposed self-restraints in this area and have made commitments for affirmative action which unquestionably exceed self-restraints accepted and affirmative commitments made in any other area of international law, including other areas of the law of war. This is not to say that all nations have at all times complied with the self-restraints so accepted and the voluntary commitments so made. A number of documents included herein demonstrate gross disregard of legal obligations voluntarily assumed. But, hopefully, these are only temporary aberrations and are not indicative of a trend. If anything, it will be contended by some that the trend of the ongoing lawmaking in this area is moving in the direction of "too far, too fast," a process which could, in the long run, result in converting what have been the aberrations of a few individual law-defying nations into the customs and usages of many nations. At this point in history the great need is not so much for the development of new and additional rules protecting prisoners of war as it is for the development of methods of ensuring and securing compliance with already existing rules. It is the sincere hope of the editor that this volume may, in some small part, contribute to that goal by its almost graphic display of the promises that nations have made and how, at times, these promises have been totally disregarded with little or no reaction on the part of the rest of the members of the world community of nations.

It will be noted that a number of the documents included herein are concerned with the subject of war crimes. It has been deemed appropriate to include those documents in this volume for two reasons: (1) because prisoners of war have been and, unfortunately, will probably continue to be the victims of so many conventional war crimes; and (2) because so often the individual charged with having committed a conventional war crime will claim to be entitled to the status of prisoner of war and to the judicial safeguards which accompany that status. (It is for this latter reason that a number of countries were, and continue to be, concerned lest reservations to Article 85 of the 1949 Geneva Prisoner-of-War Convention, such as those made by the members of the Communist bloc, were intended to permit a Detaining Power to deny an individual the protection of prisoner-of-war status by merely labeling him a "war criminal." While the Soviet Union has impliedly denied any such intention, this was clearly the policy followed by the Chinese Communists in Korea and by the North Vietnamese in Vietnam.)

Maltreatment of prisoners of war was among the charges preferred in more than fifty percent of the war crimes trials conducted after World War II. Unfortunately, there are available, in a true sense, only a very limited number of reports of those trials. The multi-volumed trial record, opinion, and judgment of the International Military Tribunal (the Nuremberg court) has been widely printed and is easily found. The comparable record of the

International Military Tribunal for the Far East (the Tokyo court) has never been printed but it can be found on microfilm and the majority opinion and the judgment have been distributed in mimeographed form. The trial records, opinions, and judgments of the "Subsequent Proceedings," the trials conducted before United States Military Tribunals in Nuremberg pursuant to Control Council Law No. 10, have been printed and copies are not difficult to locate. But at this point we have just about completed listing the trials as to which full coverage is available. There is, of course, the 15-volume set of LAW REPORTS OF TRIALS OF WAR CRIMINALS, the invaluable work published by the United Nations War Crimes Commission between 1947 and 1949. These volumes contain substantial reports of 89 war crimes trials conducted by a number of countries after World War II of which 49, or approximately 55%, include prisoners of war among the victims of the criminal actions charged against the accused. However, these are not really case "reports" as that word is normally understood, but are summarizations of the trial records by the staff of the Commission. As they are the sole available source of specific data with respect to many of the war crimes trials conducted after World War II, those involving important legal questions relating to prisoners of war have been included herein. Except in the very rare instance where it was absolutely essential to an understanding of the case, the so-called "Notes on the Case" have been omitted as being merely a personal legal analysis by a lawyer on the staff of the Commission and as having no binding legal significance. (In all of the war crimes trial reports reproduced herein, any discussion of the question of the jurisdiction of the particular tribunal to hear the case before it has been omitted where the jurisdictional problem involved an issue under domestic law only.)

One final comment: it is not anticipated that any individual making use of this collection of documents will agree entirely with the decisions made by the editor as to which documents should be included and which should be omitted. However, it is believed that every document in this area which we would all agree is of prime importance is included herein; and that we would all agree that a substantial number of other documents warranted inclusion. No editor can hope for more than that.

The selection of documents to be included herein and the contents of the Notes are, of course, the personal responsibility of the editor and should not be construed as representing decisions or opinions of the United States Government or of the Department of the Navy.

Howard S. Levie

Newport, September 1979

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147	9 October 1965	Resolution XXIV, "Treatment of Prisoners of War," adopted by the XXth International Conference of the Red Cross (Vienna) .	715
148	9 October 1965	Resolution XXV, "Application of the Geneva Conventions by the United Nations Emergency Forces," adopted by the XXth International Conference of the Red Cross (Vienna)	717
149	9 October 1965	Resolution XXVI, "Repression of Violations of the Geneva Conventions," adopted by the XXth International Conference of the Red Cross (Vienna)	719
150	9 October 1965	Resolution XXVII, "Protests Regarding Alleged Violations of the Humanitarian Conventions," adopted by the XXth International Conference of the Red Cross (Vienna)	721
151	21 September 1966	United States Military Assistance Command, Vietnam, Directive No. 20-5, Inspections and Investigations: Prisoners of War	

DOC. NO.	DATE	TITLE	PAGE
		—Determination of Eligibility (as Amended)	722
152	5 October 1966	Stanislaus Krofan & Anor. v. Public Prosecutor (Singapore Federal Court)	732
153	4 December 1967	Public Prosecutor v. Oie Hee Koi (and Associated Appeals) (Privy Council, United Kingdom)	737
154	14 December 1967	Resolution 2312(XXII), "Declaration of Territorial Asylum," adopted by the General Assembly of the United Nations	747
155	27 December 1967	United States Military Assistance Command, Vietnam, Directive No. 381-46, Military Intelligence: Combined Screening of Detainees	748
156	2 July 1968	United States v. Staff Sergeant Walter Griffin (U.S. Army Board of Review)	752
157	28 July 1968	Mohamad Ali and Another v. Public Prosecutor (Privy Council, United Kingdom)	757
158	13 January 1969	Resolution 2444(XXII), "Respect for Human Rights in Armed Conflicts," adopted by the General Assembly of the United Nations	767
159	February 1969	Proposed System of Standard Telegram Messages To and From Prisoners of War	769
160	13 April 1969	The Military Prosecutor v. Omar Mahmud Kassem and Others (Israeli Military Court, Ramallah)	771
161	13 September 1969	Resolution XI, "Protection of Prisoners of War," adopted by the XXIst International Conference of the Red Cross (Istanbul)	781
162	13 September 1969	Resolution XIII, "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts," adopted by the XXIst International Conference of the Red Cross (Istanbul)	783

DOC. NO.	DATE	TITLE	PAGE
163	22 September 1970	United States Military Assistance Command, Vietnam, Directive No. 190-6, Military Police: ICRC Inspections of Detainee/ Prisoner of War Facilities	785
164	16 December 1971	Instrument of Surrender by the Pakistani Eastern Command to the Indian and Bangladesh Forces	787
165	11 April 1973	Telegraph Regulations (Geneva, 11 April 1973) Annexed to the International Telecommunications Convention (Malaga—Torremolinos, 25 October 1973): and Recommendations of the International Telegraph and Telephone Consultative Committee (Geneva, December 1972)	788
166	27 January 1973	Agreement on Ending the War and Restoring Peace in Vietnam between the United States of America, The Republic of Vietnam, The Democratic Republic of Vietnam, and the Provisional Revolutionary Government of the Republic of Vietnam; With A Protocol concerning the Return of Captured Military Personnel and Foreign Civilians and Detained Vietnamese Civilian Personnel (Paris)	791
167	28 August 1973	Delhi Agreement between India and Pakistan for the Repatriation of Prisoners of War	796
168	14 November 1973	Resolution XII, "Implementation and Dissemination of the [1949] Geneva Conventions," adopted by the XXIInd International Conference of the Red Cross (Teheran)	798
169	14 November 1973	Resolution XIII, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,"	

DOC. NO.	DATE	TITLE	PAGE
		adopted by the XXIInd International Conference of the Red Cross (Teheran)	800
170	3 December 1973	Reservations to the 1949 Geneva Prisoner-of-War Convention Made by the "Provisional Revolutionary Government of South Vietnam" at the Time of Accession	802
171	21 December 1973	United States v. William L. Calley, Jr. (U.S. Court of Military Appeals)	804
172	9 April 1974	Agreement between Bangladesh, India, and Pakistan (New Delhi)	817
173	5 July 1974	Universal Postal Convention, Part I. Rules Applicable in Common Throughout the International Postal Service (Lausanne)	820
174	7 June 1977	Resolution 21, "Dissemination of Knowledge of International Humanitarian Law Applicable in Armed Conflicts," adopted by the Diplomatic Conference on the Reaffirmation and Developoment of International Humanitarian Law Applicable in Armed Conflicts (Geneva)	822
175	10 June 1977	Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva)	824

ABBREVIATIONS

A.C.	Law Reports (Appeal Cases) [United Kingdom]
AJIL [Supp.]	American Journal of International Law [Supplement]
All E.R.	All England Law Reports
Ann. Dig.	Annual Digest and Reports of Public International Law Cases (renamed International Law Reports since 1950: see ILR)
Bevans	Treaties and Other International Agreements of the United States of America, 1776-1949
BFSP	British and Foreign State Papers
Can. C.C.	Canadian Criminal Cases
CMR	Court-Martial Reports [United States]
DeClercq	Recueil des traités de la France
Djonovich	United Nations Resolutions
D.L.R.	Dominion Law Reports [Canada]
Fed. Reg.	Federal Register [United States]
F. 2d	Federal Reporter, Second Series [United States]
F. Supp.	Federal Supplement [United States]
Final Record	Final Record of the Diplomatic Conference of Geneva of 1949
For. Rel.	Foreign Relations of the United States
Friedman	The Law Of War: a Documentary History (1972)
German Regulations	Regulations Pertaining to Prisoners of War: Translation of a Collection of Orders Issued by the Supreme Command of the Wehrmacht from 16 June 1941 to 15 January 1945 (prepared in the Office of the Provost Marshal General of the United States Army) (mimeo., 1945)
ICRC	International Committee of the Red Cross
ILM	International Legal Materials
ILR	International Law Reports (formerly known as Annual Digest and Reports of Public International Law Cases)
IMT	Trial of the Major War Criminals before the International Military Tribunal (1947)
IMTFE	Judgment of the International Military Tribunal for the Far East (mimeo., 1948; microfilm)
IRRC	International Review of the Red Cross
Israel	Major Peace Treaties of Modern History, 1648-1967 (1967)
JAGW	Opinions of The Judge Advocate General of the United States Army (typed)
LNTS	League of Nations Treaty Series

LRTWC	Law Reports of Trials of War Criminals
Malloy	Treaties, conventions, international acts, protocols, and agreements between the United States of America and other Powers, 1776-1937
M.L.J.	Malayan Law Journal
M.L. Rev.	Malayan Law Review
[1965] Measures to Repress	Respect of the Geneva Conventions: Measures taken to Repress Violations. Report submitted by the International Committee of the Red Cross to the XXth International Conference of the Red Cross, Vienna, 1965. Conf. D. 4 a/1
Miller	Treaties and Other International Acts of the United States of America
NWC	United States Naval War College, International Law Documents
Parry	Consolidated Treaty Series
Pictet, Commentary	Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War
RGDIP	Revue général de droit international public
RICR	Revue internationale de la Croix-Rouge
S.A.L.R.	South African Law Reports
Santa Clara Law.	Santa Clara Lawyer
Schindler & Toman	The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents (1973)
Stat.	United States Statutes at Large
TIAS	Treaties and Other International Act Series [United States]
TWC	Trials of War Criminals before the Nuernberg Military Tribunals
U.S.	Reports of the Supreme Court of the United States
U.S.C.	United States Code
USCMA	Reports of the United States Court of Military Appeals
UNTS	United Nations Treaty Series
UST	United States Treaties and other International Agreements (1950-)
WM. & Mary L. Rev.	William and Mary Law Review
W.W.R.	Western Weekly Reports [Canada]

DOCUMENT NO. 1

THE BIBLE
(B.C.E.)

SOURCE
The Bible (King James Version)

NOTE

In biblical days capture by the enemy usually meant death. This was the almost universal rule with regard to men and it was frequently the rule with regard to women and children. The extracts from the Bible given below are indicative of the general low value placed upon human life which prevailed throughout the world of that time period to the extent that history was being recorded.

EXTRACTS

NUM. 31:7-8

7 And they warred against the Midianites, as the LORD commanded Moses, and they slew all the males.

8 And they slew the kings of Midian, beside the rest of them that were slain; *namely*, Ēvī, and Rekem, and Zur, and Hur, and Reba, five kings of Midian; Bā'llāām also the son of Beor, they slew with the sword.

DEUT. 3:3 and 6

3 So the LORD our God delivered into our hands Og also, the king of Bashan, and all his people, and we smote him until none was left to him remaining.

6 And we utterly destroyed them, as we did unto Sihon, king of Heshbon, utterly destroying the men, women, and children of every city.

DEUT. 20:16-17

16 But of the cities of these people, which the LORD thy God doth give thee *for* an inheritance, thou shalt save alive nothing that breatheth,

17 But thou shalt utterly destroy them; *namely*, the Hittites, and the Amorites, the Cā'naanītes, and the Periz'zītes, the Hivites, and the Jebūsītes, as the LORD thy God hath commanded thee,

JOSH. 6:20-21

20 So the people shouted when *the priests* blew the trumpets; and it came to pass, when the people heard the sound of the trumpet, and the people shouted with a great shout, that the wall fell down flat, so that the people went up into the city, every man straight before him, and they took the city.

21 And they utterly destroyed all that *was* in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword.

1 SAM. 15:3

3 Now go and smite Am'alek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass.

But see

2 KINGS 6:21-23

21 And the king of Israel said unto Elisha, when he saw them, My father, shall I smite *them?*

22 And he answered, Thou shalt not smite *them.* Wouldest thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread and water before them,that they may eat and drink, and go to their master.

23 And he prepared great provision for them. And when they had eaten and drunk, he sent them away, and they went to their master. So the bands of Syria came no more into the land of Israel.

DOCUMENT NO. 2

THE QUR'AN (KORAN)
(610-632 A.D.)

SOURCE

The Holy Qur'an (Maulawi Sher'Ali trans.)

NOTE

The Qur'an, or Koran, is the record of the revelations received by Muhammad, the Holy Prophet of Islam, from Allah (God) during the period from 610 to 632 A.D., first at Mecca (610-622 A.D.) and then, after the flight from Mecca (the "Hijira" or "Hejira), at Medina (622-632 A.D.). It is the Holy Book of the Muslim religion. While in many respects it was as implacable as the Bible, it contained admonitions which served as a basis for humanitarian interpretations by Muslim scholars long before such an attitude is to be found in the works of Christian scholars. (See DOCUMENT NO. 3).

EXTRACTS

47:5. And when you meet in regular battle those who disbelieve, smite their necks; and, when you have overcome them, bind fast the fetters — then afterwards either release them as a favor or by taking ransom — until the war lays down its burdens. That is the ordinance. . . .

76:9. And they feed, for love of Him, the poor, the orphan, and the prisoner.

[A tradition quotes the Prophet Muhammad as saying:

Prisoners are your brethren. It is the grace of God that they are in your hands. Since they are at your mercy, treat them as you would treat yourself as regards food, clothing, and shelter. Do not demand of them a labour which exceeds their strength; help them rather in what they have to do.]

DOCUMENT NO. 3

DECREE OF THE THIRD LATERAN COUNCIL (1179)

SOURCE

5(2) Hefele, Histoire des Conciles de l'Eglise 1105 (DeClercq French trans., 1913)

NOTE

The statement is frequently made that during the Crusades the Catholic Church, acting through the agency of the Third Lateran Concilium, issued a ban against the practice of making slaves of prisoners of war of the Catholic faith. Actually, the pertinent decree, or capitula, of that Council, which met in Rome in March 1179 at the call of Pope Alexander III, was far less all-encompassing than is usually believed.

EXTRACT

Can. 24

It has unfortunately occurred that Christians have delivered to the Saracens arms, iron, and wood for the construction of vessels, that they have given assistance to the Saracens in the latters' wars against the Christians, and that they have taken service on the vessels of the Saracen pirates. All those who have so acted are excommunicated, their property shall be confiscated by the lay princes, and, if they are captured, they shall be reduced to slavery. The sentence of excommunication pronounced against them shall be published in all the ports. There shall also fall under the ban of excommunication all those who make prisoners of war of, or who rob, Christian sailors as well as those who pillage shipwrecked Christians instead of assisting them.

DOCUMENT NO. 4

TREATY OF PEACE BETWEEN SPAIN AND THE NETHERLANDS, SIGNED AT MUNSTER, IN WESTPHALIA, ON 30 JANUARY 1648

SOURCE
1 Parry 70

NOTE

This was the earliest of the series of treaties entered into at Osnabruck and Munster, in Westphalia, during 1648 which brought to an end the Thirty Years' War. (See also DOCUMENT NO. 5.)

EXTRACT

LXIII. All prisoners of war shall be delivered up by both sides, without the payment of any ransom, and without any distinction and without exception with respect to the prisoners who served outside of the Low Countries and under other standards and flags than those of the said Sovereign States.

DOCUMENT NO. 5

TREATY OF PEACE BETWEEN FRANCE AND HER ALLIES AND THE HOLY ROMAN EMPIRE AND ITS ALLIES, SIGNED AT MUNSTER, IN WESTPHALIA, ON 24 OCTOBER 1648

SOURCES
1 Parry 319
1 Israel 7

NOTE

This was the most important of the series of treaties entered into at Osnabruck and Munster, in Westphalia, during 1648, which brought to an end the Thirty Years' War and rewrote the map of Europe. (See also DOCUMENT NO. 4.)

EXTRACT

CX. Moreover, all prisoners on the one side and the other, without any distinction of the Gown or Sword, shall be released after the manner it has been convenanted, or shall be agreed between the Generals of the Armys, with His Imperial Majesty's Approbation.

DOCUMENT NO. 6

TREATY OF KUTSCHUK-KAINARDJI [KUCUK KAINARDJI], BEING A TREATY OF PEACE BETWEEN CATHERINE II, TSARINA OF RUSSIA, AND ABDUL-HAMID I, SULTAN OF THE OTTOMAN EMPIRE (21 July 1774)

SOURCES
2 Israel 913
45 Parry 349

NOTE

This treaty ended a war (one of many) between Russia and Turkey which had begun in 1768. The provision concerning prisoners of war who had changed their religion is typical of a number of such treaties entered into by the Ottoman Empire with Christian countries, especially Russia, over a period of years during the latter part of the eighteenth century and the early part of the nineteenth. (See, for example, DOCUMENT NO. 18.) The original treaty was signed in French and Italian versions only.

EXTRACT
Article XXV

All prisoners of war and slaves of both sexes, of whatever dignity and rank, who are now in the two Empires, except for those who, being Moslems, have voluntarily embraced the Christian Religion in the Russian Empire, and those, being Christians, who have voluntarily embraced the Moslem Religion in the Ottoman Empire, immediately after the ratification of this Treaty shall be liberated with no ransom or payment, with no pretexts advanced. Likewise, all other Christians who have fallen into slavery, Poles, Moldavians, Wallachians, Peloponesians, inhabitants of the islands, and Georgians, in whatever number they may be, shall be liberated without the least exception, with no ransom or payment.

DOCUMENT NO. 7

TREATY OF AMITY AND COMMERCE BETWEEN THE KING OF PRUSSIA AND THE UNITED STATES OF AMERICA
(Berlin, 10 September 1785)

SOURCES

8 Stat. 84
8 Bevans 78
49 Parry 331
2 Malloy 1477

NOTE

This treaty, one of the earliest to which the United States was a Party, was negotiated by Benjamin Franklin, Thomas Jefferson, and John Adams. (Its ratification by the United States was delayed "for want of a proper number of States in Congress.") It was most unusual for the era in which it was negotiated in that, although a treaty of amity and commerce, entered into when the Parties were friends and at peace with each other, it contained a lengthy and completely novel article which, in effect, constituted an agreement for the protection of prisoners of war should the two countries, Prussia and the United States, find themselves at war with each other during the effective period of the treaty. (For a 20th-century German comment on the provision given below, see DOCUMENT NO. 31.) Identical provisions were contained in Article XXIV of the Treaty of Berlin of 11 July 1799 between the same Parties (8 Stat. 162; 8 Bevans 88; 15BFSP 894; 55 Parry 15). Although this latter treaty expired on 22 June 1810, the Treaty of Washington of 1 May 1828 (8 Stat. 378; 8 Bevans 98; 15 BFSP 874; 78 Parry 279) revived, among others, Article XXIV thereof, "with the same force and virtue, as if they made part of the context of the present treaty"; and the 1828 Treaty remained in force between the United States and Germany, the successor State of Prussia, until it lapsed pursuant to the provisions of Article 289 of the 1919 Treaty of Versailles (sources at DOCUMENT NO. 44) as carried into effect for the United States by Article 2 of the 1921 Treaty of Berlin (42 Stat. 1939; 8 Bevans 145; 114 BFSP 828; 16 AJIL Supp. 10). Accordingly, during World War I General Pershing properly considered that the provisions set forth below were applicable to German prisoners of war captured by the United States armed forces (see DOCUMENT NO. 39).

EXTRACTS

ARTICLE XXIV

And to prevent the destruction of prisoners of war, by sending them into distant and inclement countries, or by crouding them into close and noxious places, the two contracting parties solemnly pledge themselves to each other, and to the world, that they will not adopt any such practice; that neither will send the prisoners whom they may take from the other into the East-Indies,

Document #7 cont.

or any other parts of Asia or Africa, but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomly and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are, with as many rations, and of the same articles and quality as they are allowed by them, either in kind or by commutation, to officers of equal rank in their own army; and all others shall be daily furnished by them with such ration as they allow to a common soldier in their own service; the value whereof shall be paid by the other party on a mutual adjustments of accounts for the subsistence of prisoners of at the close of the war; and the said accounts shall not be mingled with, of set off against any others, nor the balances due on them, be withheld as a satisfaction or reprisal for any other cause, real or pretended, whatever; that each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual officer or other prisoner, shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment. And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceeding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.

ARTICLE XXVII.

His Majesty the King of Prussia, and the United States of America, agree, that this treaty shall be in force during the term of ten years from the exchange of ratifications; and if the expiration of that term should happen during the course of a war between them, then the articles before provided for the regulation of their conduct during such a war, shall continue in force until the conclusion of the treaty which shall re-establish peace; and that this treaty shall be ratified on both sides, and the ratifications exchanged within one year from the day of its signature.

DOCUMENT NO. 8

DECREE OF 4 MAY 1792 OF THE FRENCH NATIONAL ASSEMBLY CONCERNING PRISONERS OF WAR

SOURCE
1 DeClercq 217

NOTE

This Decree was enacted by the French National Assembly on 4 May 1792, just two weeks after the Assembly had declared war on Austria and Prussia and when war with other European monarchies, deeply concerned lest the revolutionary developments in France overflow into their realms, could readily be forseen. The Decree typifies the attitude since then frequently adopted by revolutionary regimes in an effort to demonstrate their humanitarian motivation, and in this case, in the hope that its promulgation would convince enemy soldiers that their future lay with the French Revolution and would thus encourage them to desert and surrender. It was undoubtedly inspired by the writings of Montesquieu and Rousseau.

TEXT

The National Assembly,

Desiring, at the commencement of a war undertaken for liberty, to regulate, in accordance with justice and humanity, the treatment of enemy soldiers whom the fortunes of war place in the power of the French nation:

Considering that under the terms of the Declaration of Rights [of Man and of the Citizen of 26 August 1789], when society is forced to deprive an individual of his liberty, all harshness which is unnecessary to retain him in custody ought to be severely repressed by the law:

Recognizing that this principle is particularly applicable to prisoners of war who, not having come under the civil power of the nation voluntarily, remain under the protection of the natural law of man and of nations,

Decrees that there is an emergency.

The National Assembly, after having decreed an emergency, decrees as follows:

1. Prisoners of war are under the protection of the French nation.

2. All cruel acts, all violence, and all insults committed against a prisoner of war shall be punished as if committed against a French citizen.

3. All prisoners of war shall be transported to special places in the rear of the army for which purpose the commanding generals shall have designated specific areas.

4. They shall thereafter be kept in the interior of the kingdom, at a distance of at least twenty leagues from any frontier, and they shall be kept primarily in the county seats and closed towns.

5. There shall be provisionally allocated to them for their maintenance,

Document #8 cont.

from extraordinary war funds, the full peacetime pay and allowances received by corresponding grades of the French infantry.

6. Prisoners of war shall be permitted to give, in the presence of municipal officials, their parole not to leave the place of residence to which they have been assigned; and in such a case, the entire town shall be the limits of their confinement and they shall not be subject to the roll calls which may be fixed by specific regulation.

7. Those who, apart from their parole, furnish security, shall only be required to present themselves for one roll call each day, without the right, nevertheless, to go more than two leagues beyond the limits of the town.

8. All prisoners of war shall be required to be dressed in their uniforms and may not, under any circumstances, possess or carry arms.

9. Those who do not give the security and refuse the parole mentioned in article 7 shall be held in closed national installations.

10. Those who, having given their parole or furnished security, disregard the obligations which are imposed upon them by articles 7, 8 and 9, shall be brought before a police correctional tribunal and shall be sentenced to remain in prison for a period of time based upon the gravity of the circumstances and which may be indefinite if an attempt to escape is proven.

11. Prisoners of war shall enjoy, in addition, the benefits of the common law of France; they may engage in any profession upon complying with the conditions prescribed by law; they shall be brought before the ordinary courts in case of the commission of a crime, tried there for acts of mutiny, and receive there reparations for injuries or damages for which they have a complaint.

12. The executive power shall present, as soon as possible, a set of regulations on the places to which prisoners of war shall be transferred, on the method of their transfer, on the number who may be sent to the same place, on the manner in which they shall be watched over and guarded, on the roll calls which shall be required of those who enjoy the benefits of articles 7 and 8, on the policing of the buildings in which those who do not enjoy this privilege shall be held, on the correspondence of all prisoners of war addressed to foreign lands; and, in sum, with all of the methods of executing the present decree.

13. The present decree shall be effective immediately.

DOCUMENT NO. 9

DECREE OF 3 AUGUST 1792 OF THE FRENCH NATIONAL ASSEMBLY CONCERNING PRISONERS OF WAR CAPTURED IN COMBAT

SOURCE
1 DeClercq 219

NOTE

This is another of the several Decrees adopted by the French National Assembly in 1792, shortly after revolutionary France had gone to war with Austria and Prussia. (See DOCUMENT NO. 8 and DOCUMENT NO. 10) In true revolutionary spirit the legislation, which provided for reprisals for the maltreatment of French prisoners of war by the enemy, excluded common soldiers from being the object of these reprisals. One other major purpose of the legislation was to make clear the French insistence upon the recognition of the military status, and entitlement upon capture to all prisoner of war protections, of members of the various volunteer units which had just been brought into being. This was a comparatively new problem inasmuch as previously the military had more often than not been professionals and the question of entitlement to such status and protection had rarely arisen.

TEXT

The National Assembly,

Considering that officers and soldiers of the voluntary national guard and of the local national guards of the various communities are, like the officers and soldiers of the regular army, armed by virtue of the law for the defense of liberty; considering that they ought, as a consequence, when they are captured in combat, to be treated according to the rules established between nations concerning prisoners of war; and wishing, at the same time, to ensure the security of French citizens, to maintain equality of rights between communities, and not to deviate from the sacred laws of humanity.

Decrees that there is an emergency; and further decrees as follows:

1. Foreigners taken in combat shall be treated in accordance with the Decree of 4 May [1792]. In any case in which the customary law of war shall have been violated by the enemy Powers, every member of the foreign nobility, every officer, and every general, whatever may be his status and his title, who shall be taken prisoner in combat against the French nation, shall be treated in the same manner as their nations have treated French citizens, including the officers and soldiers of the voluntary battalions, of the local national guard, and of the regular army, captured in combat.

2. In all cases the common soldiers of the enemy forces shall be treated in accordance with the customary rules of war.

DOCUMENT NO. 10

DECREE OF 16 SEPTEMBER 1792 OF THE FRENCH NATIONAL ASSEMBLY CONCERNING THE EXCHANGE OF PRISONERS OF WAR

SOURCE
1 DeClercq 219

NOTE

Nowhere was the egalitarianism of the French Revolution better demonstrated than in this Decree which terminated, as far as revolutionary France was concerned, the practice common to prisoner-of-war exchange agreements of evaluating officers and noncommissioned officers as equal to a specified number of enlisted men. (See, for example, Article First of the 1813 Cartel between Great Britain and the United States, DOCUMENT NO. 14.) This Decree was reenacted on 25 May 1793 in a greatly enlarged form by the successor legislative body, the National Convention (DOCUMENT NO. 11).

TEXT

The National Assembly,

Considering the necessity of being able to exchange prisoners of war as promptly as possible, and to respond with the utmost alacrity on behalf of those of our brothers-in-arms who, in fighting for the nation, have fallen into the hands of the enemy;

Considering that the basis upon which the executive power or the generals of the army enter into treaties, conventions, or agreements ought to be founded upon the principles of liberty and equality;

Decrees as the principle for the exchange of prisoners of war:

1. There shall be no monetary table for exchange, according to different grades, except in terms relative to the corresponding grades in the enemy armies.

2. There shall be no table of exchange under which an officer or noncommissioned officer, of whatever grade he may be, is to be exchanged against a greater number of individuals of lower grade.

3. The common basis for the exchange of prisoners of war, which no modification may alter, shall be to exchange man for man, grade for grade.

DOCUMENT NO. 11

DECREE OF 25 MAY 1793 OF THE FRENCH NATIONAL CONVENTION CONCERNING A UNIFORM METHOD FOR THE EXCHANGE OF PRISONERS [OF WAR]

SOURCE
1 DeClercq 225

NOTE

As will easily be seen, this Decree of the French National Convention goes far beyond the subject matter referred to in its title. While it continues the egalitarianism of the Decree of 16 September 1792 (DOCUMENT NO. 10), enacted by its predecessor legislative body, the National Assembly, the present Decree makes it clear in several places that French implementation thereof will depend entirely upon reciprocity by the enemies of France; and even the common soldier can only expect to receive the basic benefits of this statute if his country provides them for French prisoners of war held by it. (The 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) eschews reciprocity as a requirement for compliance by either side. There is a growing body of evidence that this may well have been a mistake.)

EXTRACTS

1. There shall be no monetary table for the exchange of prisoners of war.

2. There shall be no table of exchange under which an officer or non-commissioned officer, of whatever grade he may be, is to be exchanged against a greater number of individuals of a lower grade.

3. The common basis for the exchange of prisoners of war, which no modification may alter without the express consent of the National Convention, shall be to exchange man for man, grade for grade.

4. No exchange shall be made except after a list has been prepared containing the names and grades of the prisoners to be exchanged.

5. Individuals who are simply attached to the army and who are not combatants shall not be considered to be prisoners of war. Accordingly, they shall be returned as soon as they have been claimed and have been sufficiently identified, it being understood that such disposition shall be subject to reciprocity between the belligerents.

6. The commanding generals of the armies of the Republic are authorized to treat, in accordance with these principles, with the commanding generals of the enemy armies.

8. Prisoners of war who have not been included in an exchange cartel because they exceed the number of prisoners of war held by the enemy may be returned on their parole not to perform any service until they have been exchanged; they shall, therefore, be the first to be included in the next cartel; and two lists of their names shall be prepared, one for the enemy commanding

general and the other for the French commanding general, in order that both sides will be in a position to ensure the execution of these provisions.

14. No enemy prisoner of war shall be taken into the armies of the Republic and its commanding generals shall require reciprocal action by the enemy commanding generals.

15. The Republic shall pay, as subsistence, to the enemy officers, noncommissioned officers, and soldiers made prisoners of war, the amount of pay and allowances in effect in time of peace, at the grades corresponding to theirs in the French army; and when they receive their bread ration, it shall be on the same basis as for troops of the Republic.

19. The commanding generals shall also take care to advise the Minister of War of the exact status of the French who are prisoners of war, and they shall take the necessary action to be informed, not only of the number of such prisoners of war, but also of their situation, of the manner in which they are provided with subsistence, and of the treatment which they receive in the foreign country, in order to be in a position to send them assistance and protection through the enemy commander, and to ensure that proper action is taken on their complaints when they are well-founded.

20. The intention of the Republic being that the French officers and soldiers who, by the fortunes of war, have fallen into the power of the enemy, shall enjoy, until the time of their exchange, the pay and allowances of their grades, the army commanders shall make this intention known to the enemy commanders, as well as the table of peacetime pay and allowances, adjusted for the different grades, in order that the French prisoners of war may be treated by the enemy as the enemy prisoners of war are treated by the Republic.

22. The French prisoners of war who, by virtue of article 8 of the present decree, are sent back on parole, shall receive their peacetime pay and allowances until the time when, having been returned to the service of the Republic through the medium of exchange, they are able to rejoin their units.

23. The enemy prisoners of war who are sick or wounded shall be treated in the military hospitals of the Republic, either as ambulatory or as bed patients, with the same care as French soldiers receive, and their pay and allowances shall be subject to the same deductions as are made under similar circumstances for officers and soldiers of the Republic; it being understood that this treatment, dictated by justice and humanity, shall be reciprocated by the enemy toward French prisoners of war.

DOCUMENT NO. 12

TREATY OF PEACE AND AMITY BETWEEN THE UNITED STATES OF AMERICA AND THE BASHAW, BEY, AND SUBJECTS OF TRIPOLI, IN BARBARY (4 June 1805)

SOURCES

8 Stat. 214
11 Bevans 1081
58 Parry 143
2 Malloy 1788
2 Miller 529

NOTE

This is the treaty which ended the war (1801-1805) between the United States and Tripoli, one of the "Barbary Coast pirate states." The 300 Americans referred to as being "in the possession" of the Bashaw (Pasha) of Tripoli were the officers and crew of the U.S.S. Philadelphia, captured when that ship went aground in Tripoli Harbor on 31 October 1803. Although the Barbary Coast states were not noted as having a particularly humanitarian attitude toward prisoners of war, most of the captured men had survived their 19 months of imprisonment.

EXTRACTS

ART. II. The bashaw of Tripoli shall deliver up to the American squadron, now off Tripoli, all the Americans in his possession; and all the subjects of the bashaw of Tripoli, now in the power of the United States of America, shall be delivered up to him; and as the number of Americans in possession of the bashaw of Tripoli, amounts to three hundred persons, more or less, and the number of Tripoline subjects in the power of the Americans, is about one hundred, more or less, the bashaw of Tripoli shall receive from the United States of America, the sum of sixty thousand dollars, as a payment for the difference between the prisoners herein mentioned.

ART. 16th. If in the fluctuation of human events, a war should break out between the two nations, the prisoners captured by either party shall not be made slaves, but shall be exchanged rank for rank. And if there should be a deficiency on either side, it shall be made up by the payment of five hundred Spanish dollars for each captain, three hundred dollars for each mate and supercargo, and one hundred Spanish dollars for each seaman so wanting. And it is agreed that prisoners shall be exchanged in twelve months from the time of their capture; and that the exchange may be effected by any private individual legally authorized by either of the parties.

DOCUMENT NO. 13

IMPERIAL DECREE OF 4 AUGUST 1811 CONCERNING PRISONERS OF WAR AND HOSTAGES (FRANCE)

SOURCES

Bulletin des lois, decret n° 7130, année 1811, fascicule 382, p. 95

Bulletin Official du Ministre de la Guerre N° 110-0.

Le droit des gens et les conventions internationales 263 (1955)

NOTE

Although Napoleon has been charged with the responsibility for the disappearance of the system of parole (and exchange) of prisoners of war, as well as a number of other retrogressive steps in the law of war, this decree indicates that he was giving it at least lip service as late as 1811.

TEXT

Article 1. Prisoners of war having the rank of officers, as well as hostages, shall have the right to repair, without restraint and without escort, to the place to which they have been assigned and to reside there without being confined, after, however, they have given their parole not to deviate from the route that has been designated for them nor to leave their place of residence.

Article 2. Any prisoner of war having the rank of officer, and any hostage, who, after having given his parole, violates it, shall, if he is recaptured, be considered and treated as a common soldier on the pay and rations reports and shall be confined in a citadel, fort, or castle.

Article 3. Prisoners of war having the rank of officer, and hostages, who do not enjoy the privilege accorded by Article 1 hereof shall be detained in depots and shall not travel except with a military guard. If they escape while en route, or from the depot, and they are recaptured, they shall be confined in a citadel, fort, or castle.

Article 4. Prisoners of war other than officers who escape either while en route to or from a depot, from a battalion, or from the private home in which they have been billeted, shall, in the event of their recapture, be confined in a citadel, fort, or castle.

DOCUMENT NO. 14

CARTEL FOR THE EXCHANGE OF PRISONERS OF WAR BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA (12 May 1813)

SOURCES
2 Miller 557
1 BFSP 1410
62 Parry 243

NOTE

This 1813 Cartel was negotiated to replace a prior (28 November 1812) provisional agreement of much more limited scope (it had dealt with naval prisoners only) which had been disapproved by President Madison. The Cartel was signed in Washington on 12 May 1813 and it provided that, if approved by the Secretary of State of the United States, it was to be "provisionally executed" until it was known whether the British authorities (mistakenly stated to be the Lords Commissioners of the Admiralty) approved. Secretary of State Monroe approved the Cartel on 14 May 1813 and its implementation was begun. Subsequently, the British Government found a number of technical objections present in the Cartel and submitted a new proposal. While there is no record of the approval of that proposal by the United States, and the Cartel here presented was never ratified by Great Britain, it appears probable that it was at least considered to provide a modus operandi during the balance of the War of 1812 (1812-1815) between the two countries. (The often unique orthography appears in the original)

EXTRACTS

The Provisional agreement for the exchange of naval prisoners of war, made and concluded at Halifax in the province of Nova Scotia on the 28th day of November 1812 between the Honourable Richard John Uniacke His Britannic Majestys attorney and advocate General for the province of Nova Scotia and William Miller Esquire Lieutenant in the Royal navy and agent for Prisoners of War at Halifax; and John Mitchell Esquire late counsel of the united states at St. Jago de Cuba, american agent for Prisoners of war at Halifax, having been transmitted to the Department of state of the United States for approval and John Mason Esquire Commissary General for Prisoners for the United States having been duely authorized to meet Thomas Barclay Esquire his Britanic Majestys agent for Prisoners of war and for carrying on an exchange of Prisoners for the purpose of considering and revising the said provisional agreement and the articles of the said agreement having been by them considered and discussed — it has been agreed by the said Thomas Barclay and John Mason subject to the ratification of both their governments that the said provisional agreement shall be so altered and revised as to stand expressed in the following words:

ARTICLE FIRST — The Prisoners taken at sea or on land on both sides shall be treated with humanity conformable to the usage and practise of the most civilized nations during war; and such prisoners shall without delay, and as speedily as circumstances will admit, be exchanged on the following terms and conditions. That is to say — An admiral or a General commanding in chief shall be exchanged for officers of equal rank or for sixty men each; a vice admiral or a Lieutenant General for officers of equal rank or for forty men each, a Rear Admiral or a Major General, for officers of equal rank, or for thirty men each; a Commodore with a broad pendant and a Captain under him or a Brigadier General for officers of equal rank or for twenty men each; a Captain of a line of Battle ship or a Colonel for officers of equal rank or for fifteen men each; a Captain of a frigate, or Lieutenant Colonel for officers of equal rank or for ten men each; Commanders of sloops of war, Bomb Catches, fire ships, and Packets or a Major for officers of equal rank, or for eight men each; Lieutenants or masters in the navy, or Captains in the army, for officers of equal rank, or for six men each; Masters-Mates, or Lieutenants in the army for officers of equal rank, or for four men each; Midshipmen, warrant officers, Masters of merchant vessels, and Captains of private armed vessels, or sub Lieutenants and Ensigns for officers of equal rank, or for three men each: Lieutenants and mates of private armed vessels Mates of merchant vessels and all petty officers of ships of war, or all non commissioned officers of the army, for officers of equal rank, or for two men each — seamen and private soldiers one for the other.

SECOND — All non combatants that is to say, surgeons and surgeons mates, Pursers, secretaries Chaplains and Schoolmasters, belonging to the army or men of war; surgeons and surgeons mates of merchant vessels, or Privateers; passengers, and all other men who are not engaged in the naval or Military service of the enemy, not being sea faring persons; all women and girls, and all Boys under twelve years of age; every person of the foregoing description, or of whatever description exempt from capture by the usage and practise of the most civilized nations when at war — if taken shall be immediately released without exchange and shall take their departure at their own charge, agreeably to passports to be granted them, or otherwise shall be put on board the next cartel which sails; persons found on board recaptured ships, whatever situation they may have held in the Capturing ship, shall not be considered as non combatants — non combatants are not to be imprisoned except for improper conduct, and if poor or unprovided with means to support themselves, the government of each nation will allow them a reasonable subsistence, having respect to their rank and situation in life.

THIRD — American prisoners taken and brought within any of the dominions of his Brittanick majesty shall be stationed for exchange at Halifax in Nova Scotia — Quebec, Bridgetown in Barbadoes, Kingstowm in Jamaica — Falmouth and Liverpool in England and at no other posts or places — and British prisoners taken and brought into the United States shall be stationed at Salem in Massachusetts — Schnecteday in the state of New York — Providence in Rhode Island — Wilmington in Deleware, Annapolis in

Maryland — Savannah in Georgia — New Orleans in Louisiana and at no other ports or places in the United States. — The Government of Great Brittain will receive and protect an agent to be appointed by the Government of the United States, to reside at or near each of the before mentioned places in the British Dominions for the purpose of inspecting the management and care which is taken of the american prisoners of war at each station: and the Government of the United States will in like manner receive and protect an agent, to be appointed by the British Government to reside at or near each of the stations before mentioned within the dominions of the United States for the like purpose of inspecting the mamagement and care taken of the British prisoners of war at each of the stations — and each Government shall be at liberty to appoint an agent to reside at or near any Depot established for prisoners by the other nation, for the purpose of taking care and inspecting the state and situation of such prisoners — and such agents shall be protected respectively in the same manner as the agents at the stations for exchange.

FOURTH Whenever a Prisoner is admitted to parole the form of such parole shall be as follows —

Whereas the agent appointed for the care and custody of prisoners of war at in has been pleased to grant leave to the undersigned Prisoner of war as described on the back hereof to reside in upon condition that give parole of honor not to withdraw from the bounds prescribed there without leave for that purpose from the said agent. That will behave decently and with due respect to the laws of this country and also that will not during continuance in either directly or indirectly carry on a correspondence with any of the enemies of or receive or write any letter or letters whatever, but through the hands of said agent, in order that they may be read and approved by him do hereby declare have given parole of honor accordingly, and that will keep it inviolably, dated at

Signature.	Quality	Ships or Corps	Men of War Privateer or Mercht in which taken

And the agent who shall take such parole shall grant a certificate to each prisoner so paroled, certifying the limits to which his parole extends, the hours and other rules, to be observed, and granting permission to such person to remain unmolested within such limits and every commissioned officer in the navy or army, when so paroled, if in health shall be paid by the agent that has granted such parole to him during the continuance thereof the sum of three shillings sterling per day each, for subsistence; and all other prisoners so paroled shall be paid each person at the rate of one shilling and six pence per day sterling, at the rate of four shillings and six pence sterling per

American milled dollar; which pay in case of actual sickness shall be doubled to each so long as the surgeon shall certify the continuance of such sickness; and each sick prisoner shall also be allowed the attendance of a nurse, in case the surgeon shall certify the person to be so ill as to require such help; all which subsistence and pay is to be paid in advance twice in every week; and prisoners who shall wilfully disobey the rules and regulations established for Prisoners on parole, may be sent to Prison. And all rules and regulations to be observed by prisoners on parole, are to be published and made known to each prisoner — and when any prisoner shall be allowed to depart at his own expense if he has not a sufficiency of money for that purpose he shall be allowed necessary money not to exceed the parole subsistence, to which he would have been entitled for one month, if he had remained.

FIFTH — And in case any prisoner be permitted to return to his own country on parole, on condition of not serving until duly exchanged such prisoner shall sign an engagement in the following form —

Whereas Agent for the care and custody of Prisoners of War at has granted me the undersigned prisoner, described on the back hereof, permission to return to upon condition that I give my parole of honor that I will not enter into any naval military or other service whatever against the or any of the dominions thereunto belonging; or against any powers at peace with untill I shall have been regularly exchanged, and that I will surrender myself, if required by the agent of the government at such place and at such time as may be appointed, in case my exchange, shall not be affected; and I will untill exchanged, give notice from time to time of my place of residence. Now in consideration of my enlargement I do hereby declare, that I have given my parole of honour accordingly and that I will keep it inviolably — given under my hand at this day in the year of our Lord.

and to the Prisoner so granted his enlargement on parole, shall be given a certificate and passport specifying the terms and conditions of his enlargement, and a description of his person, & notice of such parole agreement shall be sent to the agent for prisoners of war at the nearest station to the place where such parole shall be granted.

SIXTH — In case any prisoner of war shall become unmindfull of the honourable obligation he lies under, to the nation which shall have granted him his parole, and shall violate the same, he shall be liable to be dealt with according to the usages and customs observed in such cases, by the most civilized nations, when at war; and either nation shall have a right to demand from the other, the surrender and restoration of any prisoner of war who shall violate his parole, and every just & reasonable satisfaction shall be given to the nation damanding the same, to shew that if such prisoner be not returned, it is by reason of its not being in the power of the nation to which he originally belonged.

SEVENTH — No prisoner shall be struck with the hand, whip, stick, or any other weapon whatever, the complaints of the prisoners shall be attended to, and real grievances redressed; and if they behave disorderly, they may be closely confined, and Kept on two thirds allowance for a reasonable time not exceeding ten days. They are to be furnished by the government in whose possession they maybe, with a subsistence of sound and wholesome pro-

visions, consisting of, one pound of Beef, or twelve ounces of pork; one pound of wheaten bread, and a quarter of a pint of pease, or six ounces of rice, or a pound of potatoes, per day to each man; and of salt and vinegar in the proportion of two quarts of salt and four quarts of vinegar to every hundred days subsistence. Or the ration shall consist of such other meats and vegetables (not changeing the proportion of meat to the vegetables, and the quantity of bread salt and vinegar always remaining the same) as may from time to time be agreed on, at the several stations, by the respective agents of the two governments, as of equal nutriment with the ration first described — Both Governments shall be at liberty, by means of their respective agents to supply their prisoners with clothing, and such other small allowances, as may be deemed reasonable, and to inspect at all times the quality and quantity of subsistence provided for the prisoners of their nations respectively, as stipulated in this article.

EIGHTH — Every facility shall be given, as far as circumstances will permit, to the exchange of prisoners; and they shall be selected for exchange according to the scale hereby established on both sides, by the respective agents of the country to which they belong, without any interference whatever of the government in whose possession they may be — and if any prisoner is kept back, when his exchange shall be applied for, good and sufficient cause shall be assigned for such detention.

THIRTEENTH — Lists shall be exchanged by the agents on both sides, of the prisoners hitherto delivered and after such lists are adjusted and signed agreeably to the rule of exchange hereby established, the persons named therein shall be considered as liberated and free to serve again, as well as those heretofore exchanged, notwithstanding any parole or engagement they may have previously entered into; and in future prisoners embarked in a cartel — belonging to the nation sending such prisoners, shall not be credited to the nation so sending them until they are delivered at one of the stations of the nation to which such prisoners belong, and a receipt is obtained from the proper agent of such delivery — But where the Prisoners and Cartel both belong to the same nation the delivery shall take place and receipts be given at the port of embarkation; provided that the delivery shall not be considered compleat, untill the cartel is in the act of departing the port, and the nation delivering the prisoners, shall retain the custody of them by mantaining a sufficient guard on board the Cartel untill she is actually under way — when the receipt shall be duely executed and delivered, and when special exchanges are negotiated in discharge of special paroles, a certificate of such exchange must be forwarded to the station where the parole was granted.

FOURTEENTH — If either nation shall at any time have delivered more prisoners than it has received, it is optional with such nation to stop sending any more prisoners on credit, untill a return shall be made equal in number to the balance so in advance.

DOCUMENT NO. 15

TREATY OF PEACE AND AMITY BETWEEN HIS BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA (Ghent, 24 December 1814)

SOURCES
8 Stat. 218
12 Bevans 41
2 BFSP 357
63 Parry 422
1 Malloy 12
2 Miller 574

NOTE

This is the treaty of peace which brought to an end the so-called War of 1812 (1812-1815) between Great Britain and the United States. (Because of the nature of the communications of that era, the Battle of New Orleans was fought on 8 January 1815; and the U.S.S. Constitution fought two British warships on 20 January 1815 and was chased by three British warships on 11 March 1815. The treaty had been signed on 24 December 1814 and while Great Britain had ratified it on 31 December 1814, the first news of its signing did not arrive in the United States until 11 February 1815, and it was not ratified by the latter until 17 February 1815. By its terms hostilities were to cease only upon the exchange of ratifications.) Of particular interest is the provision requiring prisoners of war to discharge all local debts prior to repatriation.

EXTRACT

ARTICLE THE THIRD.

All prisoners of war taken on either side, as well by land as by sea, shall be restored as soon as practicable after the ratifications of this treaty, as hereinafter mentioned, on their paying the debts which they may have contracted during their captivity. The two contracting parties respectively engage to discharge, in specie, the advances which may have been made by the other for the sustenance and maintenance of such prisoners.

DOCUMENT NO. 16

TREATY OF PEACE AND AMITY CONCLUDED BETWEEN THE UNITED STATES OF AMERICA AND HIS HIGHNESS OMAR BASHAW, DEY OF ALGIERS (30 June 1815)

SOURCES

6 Stat. 224
5 Bevans 45
3 BFSP 45
65 Parry 33
1 Malloy 6
2 Miller 585

NOTE

Algiers, another of the "Barbary Coast pirate states," (see DOCUMENT NO. 12) had instituted hostilities against the United States in 1812. Probably because of its preoccupation with and involvement in the so-called War of 1812 (1812-1815) with Great Britain, no major action was taken by the United States against Algiers until the more important conflict had been concluded. A few weeks after the exchange of ratifications of the Treaty of Ghent (DOCUMENT NO. 15) ending that war, Congress authorized naval operations against Algiers. These operations were completely successful and this Treaty of Peace was prepared aboard an American warship off the coast of Algiers and was signed by the Dey on 30 June 1815. (According to one authority, a draft of the proposed treaty was prepared aboard ship and was sent ashore by small boat for review by the Dey. It returned three hours later with the draft signed and with the prisoners of war mentioned therein.) The difference between the provisions of this treaty and those of the 1805 Treaty between the United States and Tripoli (DOCUMENT NO. 12) with respect to the excess number of prisoners of war held by one side is worthy of note. (For technical reasons it became necessary for the Parties to enter into a new treaty, which they did on 22 December 1816 (8 Stat. 244; 5 Bevans 51; BFSP 841; 66 Parry 453; 2 Miller 617). Article 3 below had, of course, already been executed; and Article 17 was reproduced in identical form. For comparison purposes, and as a curiosity, a literal English translation of the Turkish version of Article 17 is given below. It appears in Miller.)

EXTRACTS

ART. 3. The Dey of Algiers shall cause to be immediately delivered up to the American squadron now off Algiers, all the American citizens now in his possession, amounting to ten, more or less; and all the subjects of the Dey of Algiers, now in possession of the United States, amounting to five hundred, more or less, shall be delivered up to him; the United States, according to the

usages of civilized nations, requiring no ransom for the excess of prisoners in their favor.

ART. 17. If, in the course of events, a war should break out between the two nations, the prisoners captured by either party shall not be made slaves; they shall not be forced to hard labor, or other confinement than such as may be necessary to secure their safe keeping, and shall be exchanged rank for rank; and it is agreed that prisoners shall be exchanged in twelve months after their capture; and the exchange may be effected by any private individual legally authorized by either of the parties.

[English translation of the Turkish version:

ARTICLE 17.

If, in case of war with the Americans, they are taken prisoners, the guards may not treat them with heavy blows and keep them as slaves. If Algerian prisoners should arrive in their country, they shall be exchanged; a delay of a year shall be given.]

DOCUMENT NO. 17

CONVENTION BETWEEN COLOMBIA AND SPAIN FOR THE REGULARIZATION OF THE WAR (Trujillo, 26 November 1820)

SOURCE
71 Parry 292

NOTE

On 25 November 1820 representatives of Simon Bolivar, Liberator and President of Colombia, and of General Pedro Morillo, who had earlier been the Spanish "Pacificator," signed a temporary armistice in the civil war in which they were then engaged. At Bolivar's suggestion that armistice contained a provision committing the parties to conclude a treaty regulating the conduct of the war. The Convention for the Regularization of the War, signed at Trujillo on the following day, resulted from that commitment. Bolivar and Morillo demonstrated a humanitarian concern quite atypical of their era and of Morillo himself. (He had been widely known for his terroristic excesses.)

EXTRACTS

Art. II. Any member of the armed forces and any individual attached to an army unit, captured on the field of battle, even before the date of the present convention, shall be regarded as a prisoner of war and shall be treated as such in accordance with his rank until he is exchanged.

Art. III. There shall also be considered as prisoners of war those who fall into the power of the enemy during a march, a reconnaissance, or an excursion from the places, garrisons, and fortified posts, even when they are taken by assault, and at sea, when taken by boarding.

Art. IV. The members of the armed forces and the individuals attached to an army unit, who have been captured while wounded or while sick in a hospital or elsewhere, shall not be considered to be prisoners of war, and they shall be free to return to their side as soon as they are able to do so. As humanity speaks strongly in favor of these unfortunates, who have sacrificed themselves for their country and their government, they shall be treated as prisoners of war, but with even more consideration, and they shall be furnished the same help and the same care that is given to the wounded and sick of the party which has made them prisoners of war.

Art. V. Prisoners of war shall be exchanged, class for class, and grade for grade, and there shall be exchanged for a member of the armed forces of superior grade the number of individuals of a lesser grade which is fixed by the custom of civilized nations.

Art. VI. There shall also be included in the exchange, and treated as prisoners of war, the members of the armed forces and the peasants who, be it separately or as a body, serve the commander of the armed force by making reconnaissances or by reconnoitering the enemy army.

Art. VII. The present war having arisen out of a difference of opinion, and the persons who have fought with the most passion for the two causes having between them close ties of consanguinity or others, and it being desired to avoid bloodshed to the maximum extent possible, it is agreed that members of the armed forces and representatives who, after having served one of the two governments, have abandoned it and have been captured while serving the other, shall not be punished by death. The same shall be true as to conspirators and malcontents on both sides.

Art. VIII. The exchange of prisoners [of war] shall be obligatory and shall be accomplished within the shortest time possible. Prisoners [of war] shall be retained on the territory of Columbia, whatever their grade or rank, and they shall not, for any reason or under any pretext, be taken out of the country and exposed to sufferings worse than death.

Art. IX. The military commanders shall take care that prisoners [of war] are maintained in the manner desired by the government to which they belong, considering that there shall be reciprocal reimbursement of the expenses incurred in this regard. The commanders shall have the right to appoint commissioners who shall repair to the prisoner-of-war depots, examine their state, and take care that the condition of the prisoners of war is improved and that their lot is rendered easier.

Art. X. Members of the armed forces who are presently prisoners [of war] shall enjoy the benefits of this treaty.

Art. XIII. The generals of armies, the commanders of divisions, and all other authorities shall be bound to the faithful and strict observance of the present treaty; and violations shall be punished in a rigorous manner and the two governments promise, under the guaranty of the loyalty and honor of their nations, to accomplish this with scrupulous exactitude.

DOCUMENT NO. 18

TREATY OF ADRIANOPLE, BEING A TREATY OF PEACE BETWEEN THE EMPEROR OF RUSSIA AND THE EMPEROR OF THE OTTOMANS

(14 September 1829)

SOURCES

2 Hertslet 813
16 BFSP 647
80 Parry 83

NOTE

This treaty, signed at Adrianople (now Edirne) on 14 September 1829, brought to an end another of the numerous wars between Russia and Turkey. Like other peace treaties of the Parties of this era (see DOCUMENT NO. 6), it contained a provision excepting from the requirement of liberation and return those prisoners of war who had, while in that category, elected to change their religion.

EXTRACTS

ART. XIV. All the Prisoners of War, of whatsoever nation, condition, and sex they may be, who are in the two Empires, must, immediately after the exchange of the Ratifications of the present Treaty of Peace, be delivered up and restored without the least ransom or payment. Exception is made in favour of the Christians who, of their own free will, have embraced the Mahometan religion, in the States of the Sublime Porte, and of the Mahometans, who in like manner, of their own free will, have embraced the Christian religion in the States of the Empire of Russia.

The same shall be observed with respect to the Russian subjects, who, after the signing of the present Treaty of Peace, may have, in any manner, fallen into captivity, and who are in the States of the Sublime Porte. The Imperial Court of Russia promises, on its part, to act in the same manner towards the subjects of the Sublime Porte.

No reimbursement of the sums which have been expended by the High Contracting Powers for the maintenance of the Prisoners of War, shall be required. Each of them shall provide all that is necessary for them during their journey to the frontier, where they will be exchanged by Commissioners appointed respectively.

DOCUMENT NO. 19

OPINION OF THE [BRITISH] KING'S ADVOCATE CONCERNING THE IMPROPER TREATMENT OF PRISONERS OF WAR
(London, 24 September 1832)

SOURCE

3 McNair, International Law Opinions 119

NOTE

For many years the King's Advocate, located at Doctors' Commons, was the adviser to the British Government on matters of international law. The opinion here presented was requested at a time when the usurper monarch of Portugal, Dom Miguel, was besieging Porto (Oporto) which was held by the forces of the constitutional king, Pedro I, who had the support of the British. The latter feared that the city would fall to the besiegers and that Dom Miguel would massacre the members of the constitutional forces who fell into his hands. (Actually, Porto did not fall and Dom Pedro succeeded in gaining his throne.) The British Government sought advice as to its right to intervene in an internal conflict in order to ensure the protection of the prospective prisoners of war.

TEXT

DOCTOR'S COMMONS
October 24th, 1832

My Lord,

I am honoured with Your Lordship's Commands signified in Mr. Backhouse's letter of the 13th instant transmitting to me, confidentially, a letter from Col. Evans, relative to the conduct which it is feared may be adopted, towards the Defenders of Oporto, in the event of the City being captured by the troops of Don Miguel, and Your Lordship is pleased to request that I would communicate any remarks that may occur to me upon the contents of this letter, and that I would state my opinion with regard to the right of the British Government to intervene at all in this matter.

In obedience to Your Lordship's commands I have the honour to report that cases may possibly occur in which treatment of Prisoners of War by a nation may be so barbarous and inhuman as to call upon other powers to make common cause against it, and to take such measures as may be necessary to compel it to abandon such practice, and to conform itself to the more lenient exercise of the rights of war, adopted by other States, and such I conceive to have been the principle acted upon in the cases of Turks and Algerines referred to by Col. Evans. But I apprehend that such interference can only be justified by the notorious existence of the fact, as in the instances just mentioned, and I am humbly of opinion that apprehension of what may possibly occur, in the event of the capture of Oporto, founded upon reports and rumours, which are the only grounds upon which the present application appears to rest, will not be a sufficient reason for His Majesty's Government

to interfere, by causing 'an Intimation to be given to Don Miguel, that England will not permit the ordinary Laws of war to be departed from', as suggested by Col. Evans or in any other manner.

I have the honour to be etc.

Viscount Palmerston HERBERT JENNER

DOCUMENT NO. 20

RECOMMENDATIONS AND PROCLAMATION OF GENERAL GUILLAUME H. DUFOUR DURING THE SWISS CIVIL WAR OF 1847, THE WAR OF THE SONDERBUND

(Berne, 4 and 5 November 1847)

SOURCE

DuFour, Campagne du Sonderbund 183 (1876)

NOTE

A festering dispute between the so-called "liberal" cantons of Switzerland and those which were strongly Catholic over the problem of freedom of religion culminated in the establishment by a number of Catholic cantons, in December 1845, of a separatist confederation, titled the Sonderbund. In July 1847, after it was certain that 12 of the 22 cantons were controlled by the liberals, the Swiss Diet met and declared the Sonderbund unlawful and ordered it dissolved. The cantons composing the Sonderbund decided to oppose this action with force and a civil war resulted. General Guillaume H. Dufour was elected commander-in-chief of the army of the central government (the first of four times that he was so elected) and in that capacity he issued the recommendations to his division commanders (4 November 1847) and the proclamation to his troops (5 November 1847) which appear below. Hostilities ended shortly thereafter with the complete defeat of the Sonderbund armed forces. Subsequently, General Dufour joined Henri Dunant in the work which resulted in the creation of the International Committee of the Red Cross and the trail-breaking 1864 Geneva Convention (DOCUMENT NO. 24).

EXTRACTS

Recommendations to the division commanders with respect to the conduct to adopt toward the inhabitants and soldiers of the Sonderbund (4 November 1847):

Disarm the prisoners of war, but do them no harm and do not insult them. On the contrary, treat them as well as possible so as to set them right. Allow them to return home if they promise, on their honor, to put aside their uniforms and not to take up arms again.

Proclamation to the troops (5 November 1847):

Soldiers! It is essential to come out of this struggle not only victorious, but also without shame. It must be possible to say of you: They fought valiantly when they had to do so, but they have shown themselves to be humane and generous.

I place under your protection the children, the women, the elderly, and the priests. Anyone who strikes a noncombattant dishonors and soils our flag. The prisoners of war, and above all the wounded, deserve your respect and your compassion, all the more because you have often been in the same camps with them.

DOCUMENT NO. 21

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

(Guadalupe Hidalgo, 2 February 1848)

SOURCES

9 Stat. 922
9 Bevans 791
37 BFSP 567
102 Parry 29

NOTE

This was the treaty which ended the war between Mexico and the United States (1846-1848). The provisions concerning the treatment of prisoners of war in any future conflict between the two countries was obviously modeled after the comparable provisions of the earlier Treaties of Amity and Commerce betweem Prussia and the United States (see DOCUMENT NO. 7).

EXTRACTS

ARTICLE IV

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the exchange of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following article, the government of the said United States will exact the release of such captives, and cause them to be restored to their country.

ARTICLE XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules; absolutely where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible: —

2. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant inclement or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships, or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have comfortable quarters; and the common soldier shall be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for its own troops. But if any officer shall break his parole by leaving the

district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall be dealt with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of the same articles, as are allowed, either in kind or by commutation, to officers of equal rank in its own army; and all others shall be daily furnished with such ration as is allowed to a common soldier in its own service; the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party, on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other; which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or taxes, and to distribute, whatever comforts may be sent to them by their friends; and shall be free to transmit his reports in open letters to the party by whom he is employed.

And it is declared that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided; and during which, its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

DOCUMENT NO. 22

THE "DIX-HILL CARTEL" FOR THE GENERAL EXCHANGE OF PRISONERS OF WAR ENTERED INTO BETWEEN THE UNION AND CONFEDERATE ARMIES
(22 July 1862)

SOURCE

War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies. Series II, Volume IV, at 266

NOTE

Because of this Cartel for a general exchange of prisoners of war, entered into by the two sides comparatively early in the American Civil War (1861-1865), it was assumed that prisoners of war would be held for only very short periods of time before being released on parole, thereafter to be administratively exchanged. Accordingly, no agreement was ever negotiated with respect to the treatment which prisoners of war were to receive while being held as such. Inasmuch as the Cartel was not fully complied with by either side (during the early part of the war the Union would have profited by full compliance and during the latter part of the war the Confederacy would have so profited), the poor treatment which prisoners of war received from both sides was the cause of bitter recriminations — and several post-war trials. (See DOCUMENT NO. 25.)

TEXT

HAXALL'S LANDING, ON JAMES RIVER, VA.,

July 22, 1862.

The undersigned having been commissioned by the authorities they respectively represent to make arrangements for a general exchange of prisoners of war have agreed to the following articles:

ARTICLE 1. It is hereby agreed and stipulated that all prisoners of war held by either party including those taken on private armed vessels known as privateers shall be discharged upon the conditions and terms following:

Prisoners to be exchanged man for man and officer for officer; privateers to be placed upon the footing of officers and men of the Navy.

Men and officers of lower grades may be exchanged for officers of a higher grade, and men and officers of different services may be exchanged according to the following scale of equivalents:

A general commanding in chief or an admiral shall be exchanged for officers of equal rank, or for sixty privates or common seamen.

A flag officer or major-general shall be exchanged for officers of equal rank, or for forty privates or common seamen.

A commodore carrying a broad pennant or a brigadier-general shall be exchanged for officers of equal rank, or twenty privates or common seamen.

A captain in the Navy or a colonel shall be exchanged for officers of equal rank, of for fifteen privates or common seamen.

A lieutenant-colonel or a commander in the Navy shall be exchanged for officers of equal rank, or for ten privates or common seamen.

A lieutenant-commander or a major shall be exchanged for officers of equal rank, or eight privates or common seamen.

A lieutenant or a master in the Navy or a captain in the Army or marines shall be exchanged for officers of equal rank, or six privates or common seamen.

Masters' mates in the Navy or lieutenants and ensigns in the Army shall be exchanged for officers of equal rank, or four privates or common seamen.

Midshipmen, warrant officers in the Navy, masters of merchant vessels and commanders of privateers shall be exchanged for officers of equal rank, or three privates or common seamen.

Second captains, lieutenants or mates of merchant vessels or privateers and all petty officers in the Navy and all non-commissioned officers in the Army or marines shall be severally exchanged for persons of equal rank, or for two privates or common seamen, and private soldiers or common seamen shall be exchanged for each other, man for man.

ART. 2. Local, State, civil and militia rank held by persons not in actual military service will not be recognized, the basis of exchange being the grade actually held in the naval and military service of the respective parties.

ART. 3. If citizens held by either party on charges of disloyalty or any alleged civil offense are exchanged it shall only be for citizens. Captured sutlers, teamsters and all civilians in the actual service of either party to be exchanged for persons in similar position.

ART. 4. All prisoners of war to be discharged on parole in ten days after their capture, and the prisoners now held and those hereafter taken to be transported to the points mutually agreed upon at the expense of the capturing party. The surplus prisoners not exchanged shall not be permitted to take up arms again, nor to serve as military police or constabulary force in any fort, garrison or field-work held by either of the respective parties, nor as guards of prisons, depots or stores, nor to discharge any duty usually performed by soldiers, until exchanged under the provisions of this cartel. The exchange is not to be considered complete until the officer or soldier exchanged for has been actually restored to the lines to which he belongs.

ART. 5. Each party upon the discharge of prisoners of the other party is authorized to discharge an equal number of their own officers or men from parole, furnishing at the same time to the other party a list of their prisoners discharged and of their own officers and men relieved from parole, thus enabling each party to relieve from parole such of their own officers and men as the party may choose. The lists thus mutually furnished will keep both parties advised of the true condition of the exchange of prisoners.

ART. 6. The stipulations and provisions above mentioned to be of binding obligation during the continuance of the war, it matters not which party may have the surplus of prisoners, the great principles involved being, first, an

equitable exchange of prisoners, man for man, officer for officer, or officers of higher grade exchanged for officers of lower grade or for privates, according to the scale of equivalents; second, that privateers and officers and men of different services may be exchanged according to the same scale of equivalents; third, that all prisoners, of whatever arm of service, are to be exchanged or paroled in ten days from the time of their capture, if it be practicable to transfer them to their own lines in that time; if not, as soon thereafter as practicable; fourth, that no officer, soldier or employee, in the service of either party, is to be considered as exchanged and absolved from his parole until his equivalent has actually reached the lines of his friends; fifth, that the parole forbids the performance of field, garrison, police, or guard, or constabulary duty.

JOHN A. DIX,
Major-General,
D. H. HILL,
Major-General, C. S. Army.

SUPPLEMENTARY ARTICLES.

ART. 7. All prisoners of war now held on either side and all prisoners hereafter taken shall be sent with all reasonable dispatch to A. M. Aiken's, below Dutch Gap, on the James River, Va., or to Vicksburg, on the Misisippi River, in the State of Mississippi, and there exchanged or paroled until such exchange can be effected, notice being previously given by each party of the number of prisoners it will send and the time when they will be delivered at those points respectively; and in case the vicissitudes of war shall change the military relations of the places designated in this article to the contending parties so as to render the same inconvenient for the delivery and exchange of prisoners, other places bearing as nearly as may be the present local relations of said places to the lines of said parties shall be by mutual agreement substituted. But nothing in this article contained shall prevent the commanders of two opposing armies from exchanging prisoners or releasing them on parole from other points mutually agreed on by said commanders.

ART. 8. For the purpose of carrying into effect the foregoing articles of agreement each party will appoint two agents, to be called agents for the exchange of prisoners of war, whose duty it shall be to communicate with each other by correspondence and otherwise, to prepare the lists of prisoners, to attend to the delivery of the prisoners at the places agreed on and to carry out promptly, effectually and in good faith all the details and provisions of the said articles of agreement.

ART. 9. And in case any misunderstanding shall arise in regard to any clause or stipulation in the foregoing articles it is mutually agreed that such misunderstanding shall not interrupt the release of prisoners on parole, as herein provided, but shall be made the subject of friendly explanations in order that the object of this agreement may neither be defeated nor postponed.

JOHN A. DIX,
Major-General,

D. H. HILL,
Major-General, C. S. Army

DOCUMENT NO. 23

INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD (THE "LIEBER CODE")
(24 April 1863)

SOURCES
NWC, 1903, at 115
Schindler & Toman 3

NOTE

These Instructions were prepared by Dr. Francis Lieber of Columbia University at the request of Maj. Gen. Henry W. Halleck, then General-in-Chief of the Union armies. They were revised by a Board of Officers headed by Maj. Gen. E. A. Hitchcock and were approved by President Abraham Lincoln. They were then published by the United States War Department as General Orders No. 100, 24 April 1863, thereby establishing operational rules to govern the activities of the Union armies during the American Civil War (1861–1865). While it will readily be seen that compared to presently existing law Lieber would not be considered overly humanitarian in his rules concerning prisoners of war, he was actually well in advance of his times as was demonstrated by: (1) the failure of both sides in the Civil War to give prisoners of war even the minimal treatment prescribed in the Instructions; (2) the fact that the 1874 Declaration of Brussels (DOCUMENT NO. 27), which included many of Lieber's provisions with respect to prisoners of war, was not ratified by the Powers and never entered into force; and (3) the fact that it was not until the 1899 Hague II Regulations (DOCUMENT NO. 28) were drafted and ratified that an international code with somewhat comparable provisions entered into force.

EXTRACTS

48.

Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American Army; and if a deserter from the enemy having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49.

A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its

efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoners of war.

50.

Moreover, citizens who accompany an army for whatever purpose such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe conduct granted by the captor's government, prisoners of war.

51.

If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the aproach of a hostile army, rise, under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

52.

No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit. If however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53.

The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54.

A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55.

If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56.

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57.

So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58.

The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States can not retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59.

A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60.

It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* cumber himself with prisoners.

61

Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62.

All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63

Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64.

If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65.

The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66.

Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67.

The law of nations allows every sovereign government to make war upon another soverign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

71.

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

72.

Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American Army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

73.

All officers, when captured, must surrender their side arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored can not wear them during captivity.

74.

A prisoner of war, being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor or to any oficer in command. The government alone releases captives, according to rules prescribed by itself.

75.

Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity, according to the demands of safety.

76.

Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77.

A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt to escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow prisoners or other persons.

78.

If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79.

Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80.

Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

81.

Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82.

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers — such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83.

Scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84.

Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85.

War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.

105.

Exchanges of prisoners take place — number for number — rank for rank — wounded for wounded — with added condition for added condition — such, for instance, as not to serve for a certain period.

106.

In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army in the field.

107.

A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank then belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the purpose of obtaining better treatment.

Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108.

The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessities.

Such arrangement, however, requires the sanction of the highest authority.

109.

The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it can not be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable as soon as either party has violated it.

110.

No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

119.

Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120.

The term "parole" designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121.

The pledge of the parole is always an individual, but not a private act.

122.

The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123.

Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124.

Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled person must be kept by the belligerents.

125.

When paroles are given and received there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126.

Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127.

No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128.

No paroling on the battlefield; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted or of any value.

129.

In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130.

The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131.

If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him, he is free of his parole.

132.

A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133.

No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

146.

Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

DOCUMENT NO. 24

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD
(22 August 1864)

SOURCES
22 Stat. 940
1 Bevans 7
55 BFSP 43
1 AJIL Supp. 90
129 Parry 361

NOTE

This was the first of the series of humanitarian conventions drafted in Geneva. It has been superseded by its counterparts of 1906 (DOCUMENT NO. 32), 1929 (DOCUMENT NO. 48), and 1949 (DOCUMENT NO. 106). It and its successors are the true "Red Cross" Conventions, although this term in sometimes improperly used to include the other humanitarian conventions which had their origin in Geneva.

EXTRACT

ART. VI. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

Commanders-in-Chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

Those who are recognized, after their wounds are healed, as incapable of serving, shall be sent back to their country.

The others may also be sent back, on condition of not again bearing arms during the continuance of the war.

Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

DOCUMENT NO. 25

UNITED STATES v. HENRY WIRZ
(Washington, 24 October 1865)

SOURCE

8 American State Trials 657
H.R. Executive Document No. 23, 40th Cong., 2nd Sess. (7 December 1867)

NOTE

This trial involved allegations of the maltreatment and murder of Union (Federal) prisoners of war by the accused, Captain Henry Wirz, formerly of the Confederate Army, who had been the commandant of the prisoner-of-war camp maintained by the Confederacy at Andersonville, Georgia, during the Civil War (1861-1865). The case was tried before a United States Military Commission sitting in Washington. Although, as usual, no opinion was written by the Military Commission, the charges and specifications, while employing a number of expressions which would now be considered obsolete, could otherwise have been used as the basis for charges perferred in many war crimes trials conducted after World War II (1939-1945). Although the word "traitorously" was used rather frequently in Charge 1 and its Specification, treason was not actually an issue and the Military Commission did not include the word in its findings. "Superior orders" was a defense.

EXTRACTS

CHARGES AND SPECIFICATIONS:

CHARGE 1.

Maliciously, willfully, and traitorously, and in aid of the then existing armed rebellion against the United States of America, on or before the first day of March, A. D. 1864, and on divers other days between that day and the tenth day of April, 1865, combining, confederating and conspiring together with John H. Winder, Richard B. Winder, Joseph White, W. S. Winder, R. R. Stevenson and others unknown, to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States and in the military prisons thereof, to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.

Specification.

In this, that he, the said Henry Wirz, did combine, confederate and conspire with them, the said John H. Winder, Richard B. Winder, Joseph White, W. S. Winder, R. R. Stevenson, and others whose names are unknown, citizens of the United States aforesaid, and who were then engaged

in armed rebellion against the United States, maliciously, traitorously, and in violation of the laws of war, to impair and injure the health and to destroy the lives — by subjecting to torture and great suffering, by confining in unhealthy and unwholesome quarters, by exposing to the inclemency of winter and to the dews and burning sun of summer, by compelling the use of impure water, and by furnishing insufficient and unwholesome food — of large numbers of Federal prisoners, towit, the number of thirty thousand, soldiers in the military service of the United States of America, held as prisoners of war at Andersonville, in the State of Georgia, within the lines of the so-called Confederate States, on or before the first day of March, A.D. 1864, and at divers times between that day and the tenth day of April, A. D. 1865, to the end that the armies of the United States might be weakened and impaired, and the insurgents engaged in armed rebellion against the United States might be aided and comforted: And he, the said Henry Wirz, an officer in the military service of the so-called Confederate States, being then and there commandant of a military prison at Andersonville, in the State of Georgia, located by authority of the so-called Confederate States for the confinement of prisoners of war, and as such commandant fully clothed with authority, and in duty bound to treat, care and provide for such prisoners held as aforesaid as were or might be placed in his custody, according to the law of war, did, in furtherance of such combination, confederation and conspiracy, and incited thereunto by them, the said John H. Winder, Richard B. Winder, Joseph White, W. S. Winder, R. R. Stevenson and others whose names are unknown, maliciously, wickedly, and traitorously confine a large number of such prisoners of war, soldiers in the military service of the United States, to the amount of thirty thousand men, in unhealthy and unwholesome quarters, in a close and small area of ground, wholly inadequate to their wants and destructive to their health, which he well knew and intended; and while there so confined, during the time aforesaid, did, in furtherance of his evil design, and in aid of the said conspiracy, willfully and maliciously neglect to furnish tents, barracks or other shelter sufficient for their protection from the inclemency of winter and the dews and burning sun of summer; and with such evil intent did take and cause to be taken from them their clothing, blankets, camp equipage and other property of which they were possessed at the time of being placed in his custody; and with like malice and evil intent, did refuse to furnish or cause to be furnished, food either of a quality or quantity sufficient to preserve health and sustain life; and did refuse and neglect to furnish wood sufficient for cooking in summer, and to keep the said prisoners warm in winter, and did compel the said prisoners to subsist upon unwholesome food, and that in limited quantities entirely inadequate to sustain health, which he well knew; and did compel the said prisoners to use unwholesome water, reeking with the filth and garbage of the prison and prison guard, and the offal and drainage of the cook-house of said prison, whereby the prisoners became greatly reduced in their bodily strength, and emaciated and injured in their bodily health, their minds impaired, and their intellects broken; and many of them towit, the number of ten thousand,

whose names are unknown, sickened and died by reason thereof, which he, the said Henry Wirz, then and there well knew and intended; and so knowing and evilly intending, did refuse and neglect to provide proper lodgings, food, or nourishment for the sick, and necessary medicine and medical attendance for the restoration of their health, and did knowingly, willfully and maliciously, in furtherance of his evil designs, permit them to languish and die from want of care and proper treatment; and the said Henry Wirz, still pursuing his evil purposes, did permit to remain in the said prison, among the emaciated sick and languishing living, the bodies of the dead, until they became corrupt and loathsome, and filled the air with fetid and noxious exhalations, and thereby greatly increased the unwholesomeness of the prison, insomuch that great numbers of said prisoners, towit, the number of one thousand, whose names are unknown, sickened and died by reason thereof. And the said Henry Wirz, still pursuing his wicked and cruel purpose, wholly disregarding the usages of civilized warfare, did, at the time and place aforesaid, maliciously and willfully subject the prisoners aforesaid to cruel, unusual, and infamous punishment upon slight, trivial and fictitious pretenses, by fastening large balls of iron to their feet, and binding large numbers of the prisoners aforesaid closely together, with large chains around their necks and feet so that they walked with the greatest difficulty; and, being so confined, were subjected to the burning rays of the sun often without food or drink for hours and even days, from which said cruel treatment large numbers, towit, the number of one hundred, whose names are unknown, sickened, fainted, and died: And he, the said Wirz, did further cruelly treat and injure said prisoners by maliciously confining them within an instrument of torture called "the stocks,"thus depriving them of the use of their limbs, and forcing them to lie, sit and stand for many hours without the power of changing position, and being without food or drink, in consequence of which many, towit, the number of thirty, whose names are unknown, sickened and died. And he, the said Wirz, still wickedly pursuing his evil purpose, did establish and cause to be designated within the prison inclosure containing said prisoners a "dead line," being a line around the inner face of the stockade, or wall inclosing said prison, and about twenty feet distant from and within said stockade; and having so established said dead line, which was in many places an imaginary line, and in many other places marked by insecure and shifting strips of boards nailed upon the top of small and insecure stakes or posts, he, the said Wirz, instructed the prison guard stationed around the top of said stockade to fire upon and kill any of the prisoners aforesaid who might touch, fall upon, pass over, or under, or across the said "dead line." Pursuant to which said orders and instructions, maliciously and needlessly given by said Wirz, the said prison guard did fire upon and kill a large number of said prisoners, towit, the number of about three hundred. And the said Wirz, still pursuing his evil purpose, did keep and use ferocious and bloodthirsty beasts, dangerous to human life, called bloodhounds, to hunt down prisoners of war aforesaid who made their escape from his custody, and did, then and there,

willfully and maliciously, incite and encourage the said beasts to seize, tear, mangle and maim the bodies and limbs of said fugitive prisoners of war who, during the time aforesaid, made their escape and were recaptured, and were by the said beasts then and there cruelly and inhumanly injured, insomuch that many of said prisoners, towit, the number of about fifty died: And the said Wirz, still pursuing his wicked purpose, and still aiding in carrying out said conspiracy, did use and cause to be used, for the pretended purpose of vaccination, impure and poisonous vaccine matter, which said impure and poisonous matter was then and there, by the direction and order of said Wirz, maliciously, cruelly, and wickedly deposited in the arms of many of said prisoners, by reason of which large numbers of the, towit, one hundred, lost the use of their arms, and many of them, towit, about the number of two hundred, were so injured that they soon thereafter died: All of which he, the said Henry Wirz, well knew and maliciously intended, and in aid of the then existing rebellion against the United States, with the view to assist in weakening and impairing the armies of the United States, and in furtherance of the said conspiracy, and with the full knowledge, consent and connivance of his co-conspirators aforesaid, he, the said Wirz, then and there did.

CHARGE 2.

Murder, in violation of the laws and customs of war.

Specification 1.

In this, that the said Henry Wirz, an officer in the military service of the so-called Confederate States of America, at Andersonville, in the State of Georgia, on or about the eighth day of July, A.D. 1864, then and there being commandant of a prison there located by the authority of the said so-called Confederate States for the confinement of prisoners of war taken and held as such from the armies of the United States of America, while acting as said commandant, feloniously, willfully and of his malice aforethought, did make an assault, and he, the said Henry Wirz, a certain pistol called a revolver then and there loaded and charged with gunpowder and bullets, which said pistol the said Henry Wirz in his hand then and there held, to, against, and upon a soldier belonging to the army of the United States, in his, the said Henry Wirz's custody as a prisoner of war, whose name is unknown, then and there feloniously, and of his malice aforethought, did shoot and discharge, inflicting upon the body of the soldier aforesaid a mortal wound with the pistol aforesaid, in consequence of which said mortal wound, murderously inflicted by the said Henry Wirz, the said soldier thereafter, towit, on the ninth day of July, A.D. 1864, died.

Specification 2.

In this, that the said Henry Wirz an officer in the military service of the so-called Confederate States of America, at Andersonville, in the State of Georgia, on or about the twentieth day of September, A.D. 1864, then and there being commandant of a prison there located by the authority of the said so-called Confederate States for the confinement of prisoners of war taken and held as such from the armies of the United States of America, while

acting as said commandant, feloniously, willfully, and of his malice aforethought, did jump upon, stamp, kick, bruise and otherwise injure with the heels of his boots, a soldier belonging to the army of the United States in his, the said Henry Wirz's custody as a prisoner of war, whose name is unknown, of which said stamping, kicking and bruising, maliciously done and inflicted by the said Wirz, he, the said soldier, soon thereafter, towit, on the twentieth day of September, A.D. 1864, died.

Specification 5.

In this, that the said Henry Wirz, an officer in the military service of the so-called Confederate States of America, at Andersonville, in the State of Georgia, on or about the twentieth day of August, A.D. 1864, then and there being commandant of a prison there located by the authority of the said so-called Confederate States for the confinement of prisoners of war taken and held as such from the armies of the United States ofAmerica, while acting as said commandant, feloniously, and of his malice aforethought, did confine and bind within an instrument of torture called "the stocks," a soldier belonging to the army of the United States, in his, the said Henry Wirz's, custody as a prisoner of war, whose name is unknown, in consequence of which said cruel treatment, maliciously and murderously inflicted as aforesaid, he, the said soldier, soon thereafter, towit, on the thirtieth day of August, A. D. 1864, died.

October 18.

THE PRISONER'S STATEMENT.

The Judge-Advocate. According to my promise to the court I have endeavored to go over this case in a thorough way, but to give the prisoner the benefit of a mind in no way colored against him, I selected Mr. Hays, one of the official reporters, to draw up the argument for the defense, and he will now read to the court the prisoner's statement drawn up by Mr. Hays on suggestions made by Captain Wirz and now submitted with the approval of the prisoner. It will now be read.

Captain Wirz. In this closing scene of a trial which must have wearied the patience of this honorable commission, and which has all but exhausted the little vitality left me, I appear to put on record my answer to the charges on which I am arraigned, and to protest and vindicate my innocence. I know how hard it is for one, helpless and unfriended as I am, to contend against the prejudices produced by popular clamor and long-continued misrepresentation, but I have great faith in the power of truth, and I have much confidence in the intelligence and impartiality of the officers who are my judges. I am here to answer for all my official and personal acts at Andersonville, and if I can convince this court that they have been void of offense before God and man, I trust that I shall not be held responsible for the official or personal misdeeds of others. That is all I ask. By my own acts let me judged, and if they have been such as to warrant my conviction on any one of the charges or specifications preferred against me, let me be visited with punishment commensurate with the offense. I do not ask mercy, but I demand justice; and I humbly pray that the God of justice will enlighten the

minds and quicken the perceptions of those whose solemn duty it is to discriminate between the truth and falsehood of all that has been testified to in the case. I will leave to my counsel the presentation and argument of such points of law as they may deem of importance, and will myself endeavor to analyze the evidence, group together the main facts, and explain away all that may seem to weigh so heavily against me. In doing so I will strive to be simple and concise, and let me beg the court to believe that I will be, above all things, frank and truthful.

There are three distinct parts in which the prosecution and defense are necessarily comprised. These are: First. Had he, as charged, maliciously, willfully and traitorously combined, confederated and conspired with John H. Winder and others to injure the health and destroy the lives of soldiers in the military service of the United States? Second. And was he the person who was officially responsible for the privations and sufferings of the Federal prisoners at Andersonville? And, third, Had he committed the crime of murder, or perpetrated all or any of the atrocities laid to his charge?

As to the first, he said he was not conscious of a particle of testimony going to substantiate the charge of conspiracy. Of the one hundred and sixty witnesses who have testified, no one ever heard a syllable, or saw an act indicative of his knowledge of the existence of such a hellish plot; nor was there the least scrap of paper found in his office, or a word in the archives of the Confederacy to show that such a conspiracy existed. Even if all the specifications which are grouped under the charge of conspiracy were literally true, there is not a shadow of evidence that the suffering was the result of a conspiracy. The Government itself did not believe in the existence of the conspiracy, from the fact that the names of Robert E. Lee, James A. Seddon, Lucius Northrop and Dr. Moore, who were indicted with the accused when he was first arraigned, had been stricken out. If the charge was true now, it was true then; and if there was guilt anywhere, it certainly lay more deep and damning on the souls of those who held high positions than on him who was a mere subaltern officer. He believed that what the Judge-Advocate principally relied upon as proof of the conspiracy, was the expression attributed to him (Wirz) that "he was of more service to the Confederate Government than any regiment in the front," connected with the equally wicked and significant expressions attributed to General Winder, General Cobb and Captain W. S. Winder. As to the remark attributed to himself, he would refer to that in another part of the defence. General Winder has gone to the great judgment seat. Howell Cobb was not allowed to come here and have an opportunity of contradicting the testimony referring to him. The Judge-Advocate thus virtually admitted what it was expected to prove by him. As to W. S. Winder, he was under the jurisdiction of the United States Government. Surely he could not be held to answer for their rash and impudent expressions. Furthermore, if he as a subaltern officer, simply obeyed the legal orders of his superiors in the discharge of his official duties, he could not be held responsible for the motive that dictated such orders. And

if he overstepped them and violated the laws of war, and outraged humanity, he should be tried and punished according to the measure of his offense.

From his position at Andersonville, he should not be held responsible for the crowded condition of the stockade, the unwholesome food, etc., for the following reasons, among others, viz: he was not responsible for the selection of the location, as it was located by W. S. Winder in 1863, while he was yet in Europe; that he did not assume command until March, 1864; that Colonel Persons, one of the principal witnesses for the prosecution, testified that the stockade was sufficiently large and properly located for the accomodation of ten thousand prisoners; that Colonel Persons' testimony fully exonerated him (Wirz) from complicity in the selection of the location, overcrowding the stockade, or failure to provide proper shelter for the prisoners; that Dr. Bates exonerated him from all blame on account of the condition of things in the hospital, and that his testimony was corroborated by Dr. Roy, and that Colonel D. T. Chandler, in his report to Richond, never once attached blame to Wirz for the condition of things in the hospital, and that his testimony was corroborated by Dr. Roy and that Colonel D. T. Chandler, in his report to Richmond, never once attached blame to Wirz for the condition of affairs at Andersonville.

As to the third charge, that of murder, he hoped to be able to show the court that he was not guilty, and that he was not the monster he had been depicted; but that on the contrary, he did what little lay in his power to diminish or alleviate the miseries of the prisoners. The specifications accused him of no less than thirteen distinct crimes of the grade of murder; yet in no instance were the name, date, regiment or circumstances stated in the specifications, and in the whole mass of the testimony, there were but two cases of this character that could be fixed with any definiteness; and in these two cases he was prepared to make his defense. The two referred to were the actual, real case of "Chickamauga," and the mythical case described by the name of "William Stewart," who, it is alleged, was shot at the gate near the guard-house.

With regard to Chickamauga, he would make the following correct statement: On the evening referred to, an officer went to his (Wirz's) headquarters, and said there was a man in the dead line jawing the guard and creating a great deal of excitement. He rode to the stockade, dismounted, and went inside and asked Chickamauga in a rough way, "What in the hell he was doing there?" Chickamauga replied that "he wanted to be killed." He (Wirz) replied that "If that was all he wanted, he would soon have it." He then drew his revolver to menace Chickamauga, and the latter became frightened and went outside the dead-line. Wirz then ordered the guard to fire upon the cripple if he again approached the dead-line. He never supposed that Chickamauga's friends would allow him again to go near the forbidden line. Wirz then went out of the stockade, and was on his way to his quarters when he heard the report of a musket, and going back and mounting the sentry–box, he found that Chickamauga had been shot. He was shot for a violation of a rule of prison discipline; a rule absolutely necessary at

Andersonville, and one not unusual, for it was enforced in nearly all the military prisons in the South; besides, the rules were printed and posted in conspicuous places.

With regard to the other alleged case of shooting, it differed from that of Chickamauga in that the alleged victim, "William Stewart," had the good fortune never to have been at the Andersonville stockade. The man could not be found on the books of the prison, the hospital record, or the death register. As this testimony came from a man named Gray, who had prevaricated overmuch, his statement was not entitled to the least credence.

So as to the evidence of Alcok, who testified to having been robbed, and to Wirz ordering men to be bayoneted on the occasion of their removal for exchange. The testimony of Colonel Fanning shows that he had nothing to do with the employment of the dogs.

The allegation that furloughs were granted to soldiers for shooting prisoners was pronounced an absurd camp rumor. He denies that the prisoners were ever deprived of rations as a punishment.

On only one occasion was the whole camp deprived of rations, and that was on the 4th of July, when there was a difficulty with the raiders, and the quartermaster could not distribute the rations. He denies the exercise of personal violence toward the prisoners. His physical condition was such that he could not have knocked a man down, and he quotes from the testimony of Father Whalen, Dr. Roy and others who had opportunities of observation, to show that such a thing never occurred as his beating or shooting a prisoner.

He quoted from Colonel Chandler's report to show that when the prisoners were inquired of as to their treatment, they never once mentioned his (Wirz's) name. He acknowledges that two of the prisoners were whipped, viz: Bardo, for disguising himself as a negro (but not by Wirz's order, as appears by Bardo's own acknowledgement), and the negro Hawkins, for offering a gross insult to a white lady. He denies having used the expression that he was doing more for the Confederacy than any regiment at the front. The remark made was that he had a larger command than any general in the field, and this was tortured into the remark first above mentioned. The remark at the graveyard that "the Yankees were getting the land they came for," was actually made, but not by him (Wirz), but by another officer who was present.

And here I will close with one or two final remarks. The court will observe that in this statement I have studiously avoided any deviation from the strict, legitimate path of my defense. I have not said a word to bring discredit upon any officer of the late Confederate or of the Federal Government. I have not attempted to complicate the case with any allusions as to where the responsibility rested for non-exchange of prisoners of war.

Closely connected as that question is with the general subject, it has nothing to do with the subject of my guilt or innocence. If I were rash or imprudent enough to touch that question it might be imputed to me as an acknowledgment of the weakness of my case. I want all the sympathy, good feeling and confidence of this court too much to say or do anything that might give offense. It is composed of brave, honorable and enlightened officers, who

have the ability, I am sure, to distinguish the real from the fictitious in this case, the honesty to rise above popular clamor and public misrepresentations, and who have names and reputations to transmit to history, and to leave unimpaired to their descendants. I cannot believe that they will either darken their intellect or prostitute their independence for the sake of crushing out the last faint embers of a life that is just ebbing out. I cannot believe that they will consent to let the present and future generations say of them that they stepped down from their high positions, at the bidding of power, or at the more reckless dictate of ignorant, widespread prejudice, to consign to a felon's doom a poor subaltern officer, who, in a difficult post, sought to do his duty and did it. The statement, which I now close, will probably survive me and you alike. It will stand as a complete answer to all the mass of misrepresentation heaped upon me. May God so direct and enlighten you in your deliberations that your reputation for impartiality and justice may be upheld, my character vindicated, and the few days of my natural life spared to my helpless family.

THE JUDGE ADVOCATE'S ARGUMENT.

October 20.

Colonel Chipman. May it please the Court: Deeply sensible of the importance and solemnity with which you have clothed this trial, and quickened, as I know you are, to a high sense of duty by the obligation you have taken to "well and truly try and determine, according to the evidence, the matter now before you between the United States of America and the prisoner to be tried, and to duly administer justice according to your conscience, the best of your understanding, and the custom of war," no word of mine is needed to increase the impressiveness of this occasion.

In many of its aspects and bearings this trial presents features more startling, more extraordinary, and more momentous than are found in the whole annals of jurisprudence from the record this long black catalogue of crimes, these tortures unparalleled, these murders by starvation, implacable as could have been perpetrated had the spirit of darkness controlled them, there are yet many, very many, phases of Andersonville prison life that I must leave unnoticed.

Has there been any defense made to these horrors? Is there any palliation for their perpetrators? Lives there a witness who has denied or can deny them? The counsel for the prisoner had unlimited control of the strong arm of the government; he has had days and weeks for preparation; he has, as all must admit, labored sedulously and untiringly for his client, constituting himself at the same time counsel for his co-conspirators, yet, with all his efforts, so earnestly put forth, he has utterly, signally failed. The special acts of cruelty committed by the prisoner at the bar he has sought to explain; with what success I leave to you to judge. The general management and discipline, and his responsibility for the same while at Andersonville, he has sought to deny by showing the presence at that place of a superior officer, General Winder, who, he alleges, had chief control. All this is swept away by the fact

that before General Winder's arrival the fearful rigors of that prison began; they continued during his stay, from June till October, and they subsided only in proportion as the number of prisoners became less, after General Winder's departure. And notwithstanding his earnest appeal, made to you in his final statement, begging that he, a poor subaltern, acting only in obedience to his superior, should not bear the odium and punishment deserved, with whatever force these cries of a desperate man, in a desperate and terrible strait may come to you, there is no law, no sympathy, no code of morals, that can warrant you in refusing to let him have all justice, because the lesser and not the greater criminal is on trial.

THE VERDICT AND SENTENCE.

October 24.

Today the COURT announced its decision as follows:

It finds the accused, Henry Wirz, of Charge I, "Guilty," viz.: that he did combine, confederate and conspire with John H. Winder, Richard B. Winder, W. S. Winder, R. Stevenson, and others, names unknown, engaged in armed rebellion against the United States, against the laws of war, to impair and injure the health, and to destroy the lives of large numbers of Federal prisoners, to-wit: 45,000 at Andersonville.

Of Specification first to Charge II, "Guilty.
Of Specification second to Charge II, "Guilty."
Of Specification third to Charge II, "Guilty."
Of Specification four to Charge II, "Not Guilty."
Of Specification five to Charge II, "Guilty."
Of Specification six to Charge II, "Guilty."
Of Specification seven to Charge II, "Guilty."
Of Specification eight and nine to Charge II, "Guilty."
Of Specification ten to Charge II, "Not Guilty."
Of Specification eleven to Charge II, "Guilty."
Of Specification twelve to Charge II, "Guilty."
Of Specification thirteen to Charge II, "Not Guilty."

And the Commission does therefore sentence him, the said Henry Wirz, "to be hanged by the neck till he be dead, at such time and place as the President of the United States may direct, two-thirds of the court concurring therein."

"November 3, 1865.

"The proceedings, findings, and sentence of the court in the within case are approved, and it is ordered that the sentence be carried into execution by the officer commanding the Department of Washington on Friday, the 10th day of November, 1865, between the hours of 6 o'clock a. m., and 12 o'clock noon.

Andrew Johnson, President."

THE EXECUTION.

Washington, D. C., Nov. 11, 1865.

I have the honor to report that the sentence and orders of the President in the case of Henry Wirz have been duly executed (between the hours of 10 and 11 a. m.), yesterday, November 10, and his body has been interred by the side of Atzerodt in the Arsenal grounds.

To the Adjutant General of the Army.

C. C. Augur,
Major General Commanding
Department of Washington.

DOCUMENT NO. 26

ADDITIONAL ARTICLES RELATING TO THE CONDITION OF THE WOUNDED OF ARMIES IN THE FIELD
(20 October 1868)

SOURCES

22 Stat. 946
73 BFSP 1111
1 AJIL Supp. 192
138 Parry 189

NOTE

These articles were drafted, in part, with the objective of extending protections contained in the 1864 Geneva Convention (DOCUMENT NO. 24) to naval forces. There appears to be some uncertainty as to whether they ever actually entered into force. However, they did at least provide guidelines for several major conflicts, including the Spanish-American War (1898). The 1899 Hague III Convention (DOCUMENT NO. 29) was probably the first effective treaty to extend protection to the sick, wounded, and shipwrecked at sea.

EXTRACTS

ART. V. In addition to Article VI. of the Convention, it is stipulated that, with the reservation of officers whose detention might be important to the fate of arms and within the limits fixed by the second paragraph of that article, the wounded fallen into the hands of the enemy shall be sent back to their country, after they are cured, or sooner if possible, on condition, neverthelesss, of not again bearing arms during the continuance of the war.

[*Articles concerning the Marine.*]

ART. VI. The boats which, at their own risk and peril, during and after an engagement pick up the shipwrecked or wounded, or which having picked them up, convey them on board a neutral or hospital ship, shall enjoy, until the accomplishment of their mission, the character of neutrality, as far as the circumstances of the engagement and the position of the ships engaged will permit.

The appreciation of these circumstances is entrusted to the humanity of all the combatants. The wrecked and wounded thus picked and saved must not serve again during the continuance of the war.

ART. XI. Wounded or sick sailors and soldiers, when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.

Their return to their own country is subject to the provisions of Article VI. of the Convention, and of the additional Article V.

DOCUMENT NO. 27

DECLARATION OF BRUSSELS
(27 August 1874)

SOURCES
1 AJIL Supp. 96
65 BFSP 1059

NOTE

The international (European) community having successfully negotiated the 1864 Geneva Red Cross Convention (DOCUMENT NO. 24) and the 1868 Declaration of St. Petersburg (prohibiting the use of explosive or fulminating projectiles weighing less than 400 grams), the Tsar of Russia convened a Diplomatic Conference at Brussels in July 1874 with the considerably broader objective of deliberating on the draft of "an international agreement respecting the laws and customs of war." Although the Declaration which resulted from the deliberations of that conference, many of the provisions of which bear a striking resemblance to Lieber's Code (DOCUMENT NO. 23), never became effective for lack of ratifications, it is the obvious progenitor of the 1899 Hague II Regulations (DOCUMENT NO. 28) and of the 1907 Hague IV Regulations (DOCUMENT NO. 33).

EXTRACTS

IX. The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions:

1. That they have at their head a person responsible for his subordinates;
2. That they wear some settled distinctive badge recognizable at a distance;
3. That they carry arms openly; and
4. That, in their operations, they conform to the laws and customs of war.

In those countries where the militia forms the whole or part of the army, they shall be included under the denomination of "army."

X. The population of a non-occupied territory, who, on the approach of the enemy, of their own accord take up arms to resist the invading troops, without having had time to organize themselves in conformity with Article IX, shall be considered as belligerents, if they respect the laws and customs of war.

XI. The armed forces of the belligerents may be composed of combatants and non-combatants. In the event of being captured by the enemy, both one and the other shall enjoy the rights of prisoners of war.

XXI. If a spy who rejoins the army to which he belongs is subsequently captured by the enemy, he is to be treated as a prisoner of war, and incurs no responsibility for his previous acts.

XXII. Military men (les militaires) who have penetrated within the zone of operations of the enemy's army, with the intention of collecting information, are not considered as spies if it has been possible to recognize their military character.

In like manner military men (and also non-military persons carrying out their mission openly) charged with the transmission of despatches either to their own army or to that of the enemy, shall not be considered as spies if captured by the enemy.

To this class belong, also, if captured, individuals sent in balloons to carry despatches, and generally to keep up communications between the different parts of an army, or of a territory.

XXIII. Prisoners of war are lawful and disarmed enemies. They are in the power of the enemy's Government, but not of the individuals or of the corps who made them prisoners.

They should be treated with humanity.

Every act of insubordination authorizes the necessary measures of severity to be taken with regard to them.

All their personal effects except their arms are considered to be their own property.

XXIV. Prisoners of war are liable to internment in a town, fortress, camp, or in any locality whatever, under an obligation not to go beyond certain fixed limits; but they may not be placed in confinement (enfermés) unless absolutely necessary as a measure of security.

XXV. Prisoners of war may be employed on certain public works which have no immediate connection with the operations in the theater of war, provided the employment be not excessive, nor humilitating to their military rank, if they belong to the army, or to their official or social position, if they do not belong to it.

They may also, subject to such regulations as may be drawn up by the military authorities, undertake private work.

The pay they receive will go towards ameliorating their position or will be placed to their credit at the time of their release. In this case the cost of their maintenance may be deducted from their pay.

XXVI. Prisoners of war cannot be compelled in any way to take any part whatever in carrying on the operations of the war.

XXVII. The Government, in whose power are the prisoners of war undertakes to provide for their maintenance.

The conditions of such maintenance may be settled by a mutual understanding between the belligerents.

In default of such an understanding, and as a general principal, prisoners of war shall be treated, as regards food and clothing, on the same footing as the troops of the Government who made them prisoners.

XXVIII. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are.

Arms may be used, after summoning, against a prisoner attempting to escape. If retaken, he is subject to summary punishment (peines disciplinaires) or to a stricter surveillance.

If, after having escaped, he is again made prisoner, he is not liable to any punishment for his previous escape.

XXIX. Every prisoner is bound to declare, if interrogated on the point, his

true name and rank, and in the case of his infringing this rule he will incur a restriction of the advantages granted to the prisoners of the class to which he belongs.

XXX. The exchange of prisoners of war is regulated by mutual agreement between belligerents.

XXXI. Prisoners of war may be released on parole if the laws of their country allow it, and in such a case are bound on their personal honour to fulfil scrupulously, as regards their own Government, as well as that which made them prisoners, the engagements they have undertaken.

In the same case their own Government should neither demand nor accept from them any service contrary to their parole.

XXXII. A prisoner of war cannot be forced to accept release on parole, nor is the enemy's Government obliged to comply with the request of a prisoner claiming to be released on parole.

XXXIII. Every prisoner of war liberated on parole, and retaken carrying arms against the Government to which he had pledged his honour, may be deprived of the rights accorded to prisoners of war, and may be brought before the tribunals.

XXXIV. Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, "vivandiers," contractors, etc., may also be made prisoners of war.

These persons should, however, be furnished with a permit issued by a competent authority, as well as with a certificate of identity.

XXXV. The duties of belligerents, with regard to the treatment of sick and wounded, are regulated by the Convention of Geneva of the 22d August, 1864, subject to the modifications which may be introduced into that convention.

LIII. The neutral State receiving in its territory troops belonging to the belligerent armies will intern them, so far as it may be possible away from the theater of war.

They may be kept in camps, or even confined in fortresses or in places appropriated to this purpose.

It will decide whether the officers may be released on giving their parole not to quit the neutral territory without authority.

LIV. In default of a special agreement, the neutral State which receives the belligerent troops will furnish the interned with provisions, clothing, and such aid as humanity demands.

The expenses incurred by the internment will be made good at the conclusion of peace.

LV. The neutral State may authorize the transport across its territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the *personnel* or *material* of war.

In this case the neutral State is bound to take the measures necessary for the safety and control of the operation.

LVI. The Convention of Geneva is applicable to the sick and wounded interned on neutral territory.

DOCUMENT NO. 28

1899 HAGUE CONVENTION II WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND (With Annexed Regulations) (29 July 1899)

SOURCES

32 Stat. 1803
1 Bevans 247
91 BFSP 988
1 AJIL Supp. 129

NOTE

On 21 August 1898 the Foreign Minister of Russia surprised the members of the diplomatic corps in St. Petersburg by handing each of them an Imperial Rescript proposing an international conference to consider ways for ending the armament competition. While the conference which met at The Hague on 18 May 1899 as a result of this proposal failed completely to accomplish the major purpose which had been specified by Tsar Nicholas II in convening it, it did succeed in drafting several conventions, including the present one, a revision of the 1874 Declaration of Brussels (DOCUMENT NO. 27), which were acceptable to and were ratified by most of the governments of the then world community. All of the conventions drafted by this conference were signed on 29 July 1899.

EXTRACTS

PREAMBLE:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience;

CONVENTION:

ARTICLE I.

The High Contracting Parties 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.

REGULATIONS:

REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND.

SECTION I. — ON BELLIGERENTS.

CHAPTER I. — *On the Qualifications of Belligerents.*

ARTICLE I.

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 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 II.

The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article I, shall be regarded a belligerent, if they respect the laws and customs of war.

ARTICLE III.

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

CHAPTER II. — *On Prisoners of War.*

ARTICLE IV.

Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers remain their property.

ARTICLE V.

Prisoners of war may be interned in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety.

ARTICLE VI.

The State may utilize the labor of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations.

Prisoners may be authorized to work for the Public Service, for private persons, or on their own account.

Work done for the State shall be paid according to the tariffs in force for soldiers of the national army employed on similar tasks.

When the work is for other branches of the Public Service or for private persons, the conditions shall be settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

ARTICLE VII.

The Government into whose hands prisoners of war have fallen is bound to maintain them.

Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them.

ARTICLE VIII.

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen.

Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping are again taken prisoners, are not liable to any punishment for the previous flight.

ARTICLE IX.

Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.

ARTICLE X.

Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and, in such a case, they are bound, on their personnal honour, scrupulously to fulfill, both as regards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases, their own Government shall not require of nor accept from them any service incompatible with the parole given.

ARTICLE XI.

A prisoner of war can not be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole.

ARTICLE XII.

Any prisoner of war, who is liberated on parole and recaptured, bearing arms against the Government to whom he had pledged his honor, or against the allies of that Government, forfeits his right to be treated as a prisoner of war, and can be brought before the Courts.

ARTICLE XIII.

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.

ARTICLE XIV.

A Bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and, when necessary, in the neutral countries on whose territory belligerents have been received. This Bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital and deaths.

It is the duty of the Information Bureau to receive and collect all objects of personal use, valuables, letters, &c., found on the battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested.

ARTICLE XV.

Relief Societies for prisoners of war, which are regularly constituted in accordance with the law of the country with the object of serving as the intermediary for charity, shall receive from the belligerents for themselves and their duly accredited agents every facility, within the bounds of military requirements and Administrative Regulations, for the effective accomplishment of their humane task. Delegates of these Societies may be admitted to the places of internment for the distribution of relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all their Regulations for order and police.

ARTICLE XVI.

The Information Bureau shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels destined for the prisoners of war or dispatched by them, shall be free of all postal duties both in the countries of origin and destination, as well as in those they pass through.

Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payment for carriage by the Government railways.

ARTICLE XVII.

Officers taken prisoners may receive, if necessary, the full pay allowed them in this position by their country's regulations, the amount to be repaid by their Government.

ARTICLE XVIII.

Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities.

ARTICLE XIX.

The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the National Army.

The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

ARTICLE XX.

After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible.

CHAPTER III. — *On the Sick and Wounded.*

ARTICLE XXI.

The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of the 22nd August, 1864, subject to any modifications which may be introduced into it.

DOCUMENT NO. 29

1899 HAGUE CONVENTION III FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION OF AUGUST 22, 1864

(29 July 1899)

SOURCES

32 Stat. 1827
1 Bevans 263
91 BFSP 1002
1 AJIL Supp. 159

NOTE

In 1868 "Additional Articles" (DOCUMENT NO. 26) to the 1864 Geneva Red Cross Convention (DOCUMENT NO. 24) had been drafted, adapting to maritime warfare the provisions of the 1864 Convention applicable to the wounded and sick of armies in the field. These "Additional Articles" probably never entered into force. The 1899 Conference, meeting shortly after the end of the Spanish-American War (1898), which had been primarily a naval conflict, was more successful in obtaining acceptance of its adaptation of the 1864 Convention, with appropriate modifications and additions, to maritime warfare. Like all of the 1899 agreements, it was signed on 29 July 1899.

EXTRACTS

ARTICLE VII.

The religious, medical, or hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave when the Commander-in-Chief considers it possible.

The belligerents must guarantee to the staff that has fallen into their hands the enjoyment of their salaries intact.

ARTICLE VIII.

Sailors and soldiers who are taken on board when sick or wounded, to whatever nation they belong, shall be protected and looked after by the captors.

ARTICLE IX.

The shipwrecked, wounded, or sick of one of the belligerents who fall into the hands of the other, are prisoners of war. The captor must decide, according to circumstances, if it is best to keep them or send them to a port of his own country, to a neutral port, or even to a hostile port. In the last case, prisoners thus repatriated cannot serve as long as the war lasts.

DOCUMENT NO. 30

TREATY OF VEREENIGING (TREATY OF PEACE BETWEEN THE ORANGE FREE STATE AND THE SOUTH AFRICAN REPUBLIC WITH GREAT BRITAIN, 31 MAY 1902)

SOURCES
95 BFSP 160
2 Israel 1145

NOTE

This treaty, which brought to an end the so-called Boer War (1899-1902), was negotiated at Vereeniging in South Africa but was actually signed at Pretoria. By the provision quoted below the British reserved the right to try those individuals who had violated the law of war during the course of the conflict. This, of course, would have included any cases of maltreatment of prisoners of war. (It is only appropriate to note that the treatment of prisoners of war by the Boer authorities themselves was exemplary. Winston Churchill, the most famous of those prisoners of war, implicitly admits this in his book dealing with that war.)

EXTRACT

4. No proceedings, civil or criminal, will be taken against any of the burghers surrendering or so returning for any acts in connection with the prosecution of the war. The benefit of this clause will not extend to certain acts, contrary to usages of war, which have been notified by the Commander-in-Chief to the Boer Generals, and which shall be tried by court-martial immediately after the close of hostilities.

DOCUMENT NO. 31

THE "USAGES OF WAR ON LAND" (KRIEGSBRAUCH IM LANDKRIEGE) (c. 1902)

SOURCES

Morgan, The German War Book 51 (1915)
Bernhardi, Britain as Germany's Vassal 240 (Becker trans., 1914)

NOTE

Shortly after the 1899 Hague Conference which had drafted the 1899 Hague Convention II (DOCUMENT NO. 28), and probably in 1902, a "War Book," really a military manual on the law of war on land and bearing the official name *Kriegsbrauch im Landkriege,* was issued by the German General Staff. It was generally similar in form to the manuals on the law of war on land issued by many armies. (See, for example, DOCUMENT NO. 138 and DOCUMENT NO. 141.) It received little publicity at the time despite the fact that it had been issued under the imprimatur of the German General Staff. A French scholar promptly pointed out that if this volume represented German military legal doctrine, as it apparently did, then in many respects that doctrine was in conflict with the 1899 Hague Convention II and its Annexed Regulations. (Carpentier, *Les lois de la guerre continentale* [1904 and 1916].) J. H. Morgan, an English lawyer, was one of the leaders in publicizing the contents of the War Book. His book, which is one of the rare sources for the complete German War Book in English, contains a discussion of that book, followed by the translation thereof. (It is interesting to note the War Book's laudatory comment concerning the prisoner-of-war provision of the 1785 Prussian-United States treaty [DOCUMENT NO. 7].)

EXTRACTS

2. *Capture of Enemy Combatants*

If individual members or parties of the army fall into the power of the enemy's forces, either through their being disarmed and defenceless, or through their being obliged to cease from hostilities in consequence of a formal capitulation, they are then in the position of "prisoners of war," and thereby in some measure exchange an active for a passive position.

According to the older doctrine of international law all persons belonging to the hostile State, whether combatants or non-combatants, who happen to fall into the hands of their opponent, are in the position of prisoners of war. He could deal with them according to his pleasure, ill-treat them, kill them, lead them away into bondage, or sell them into slavery. History knows but few exceptions to this rule, these being the result of particular treaties. In the Middle Ages the Church tried to intervene as mediator in order to ameliorate the lot of the prisoners, but without success. Only the prospect of ransom, and chivalrous ideas in the case of individuals, availed to give any greater

protection. It is to be borne in mind that the prisoners belonged to him who had captured them, a conception which began to disappear after the Thirty Years War. The treatment of prisoners of war was mostly harsh and inhuman; still, in the seventeenth century, it was usual to secure their lot by a treaty on the outbreak of a war.

The credit of having opened the way to another conception of war captivity belongs to Frederick the Great and Franklin, inasmuch as they inserted in the famous Treaty of Friendship, concluded in 1785 between Prussia and North America, entirely new regulations as to the treatment of prisoners of war.

The complete change in the conception of war introduced in recent times has in consequence changed all earlier ideas as to the position and treatment of prisoners of war. Starting from the principle that only States and not private persons are in the position of enemies in time of war, and that an enemy who is disarmed and taken prisoner is no longer an object of attack, the doctrine of war captivity is entirely altered and the position of prisoners has become assimilated to that of the wounded and the sick.

The present position of international law and the law of war on the subject of prisoners of war is based on the fundamental conception that they are the captives not of private individuals, that is to say of Commanders, Soldiers, or Detachments of Troops, but that they are the captives of the State. But the State regards them as persons who have simply done their duty and obeyed the commands of their superiors, and in consequence views their captivity not as penal but merely as precautionary.

It therefore follows that the object of war captivity is simply to prevent the captives from taking any further part in the war, and that the State can,in fact, do everything which appears necessary for securing the captives, but nothing beyond that. The captives have therefore to submit to all those restrictions and inconveniences which the purpose of securing them necessitates; they can collectively be involved in a common suffering if some individuals among them have provoked sterner treatment; but, on the other hand, they are protected against unjustifiable severities, ill-treatment, and unworthy handling; they do, indeed, lose their freedom, but not their rights; war captivity is, in other words, no longer an act of grace on the part of the victor but a right of the defenceless.

According to the notions of the laws of war to-day the following persons are to be treated as prisoners of war:

1. The Sovereign, together with those members of his family who were capable of bearing arms, the chief of the enemy's State, generally speaking, and the Ministers who conduct its policy even though they are not among the individuals belonging to the active army.
2. All persons belonging to the armed forces.
3. All Diplomatists and Civil Servants attached to the army.
4. All civilians staying with the army, with the approval of its Commanders, such as transport, sulters, contractors, newspaper correspondents, and the like.

5. All persons actively concerned with the war such as Higher Officials, Diplomatists, Couriers, and the like, as also all those persons whose freedom can be a danger to the army of the other State, for example, Journalists of hostile opinions, prominent and influential leaders of Parties, Clergy who excite the people, and such like.
6. The mass of the population of a province or a district if they rise in defence of their country.

The points of view regarding the treanment of prisoners of war may be summarized in the following rules:

Prisoners of war are subject to the laws of the State which has captured them.

The relation of the prisoners of war to their own former superiors ceases during their captivity; a captured officer's servant steps into the position of a private servant. Captured officers are never the superiors of soldiers of the State which has captured them; on the contrary, they are under the orders of such of the latter as are entrusted with their custody.

The prisoners of war have, in the places in which they are quartered, to submit to such restrictions of their liberty as are necessary for their safe keeping. They have strictly to comply with the obligation imposed upon them, not to move beyond a certain indicated boundary.

These measures for their safe keeping are not to be exceeded; in particular, penal confinement, fetters, and unnecessary restrictions of freedom are only to be resorted to if particular reasons exist to justify or necessitate them.

The concentration camps in which prisoners of war are quartered must be as healthy, clean, and decent as possible; they should not be prisons or convict establishments.

It is true that the French captives were transported by the Russians to Siberia as malefactors in the years 1812 and 1813. This was a measure which was not illegal according to the older practice of war, but it is no longer in accordance with the legal conscience of today. Similarly the methods which were adopted during the Civil War in North America in a prison in the Southern States, against prisoners of war of the Union Forces, whereby the men were kept without air and nourishment and thus badly treated, were also against the practice of the law of war.

Freedom of movement within these concentration camps or within the whole locality may be permitted if there are no special reasons against it. But obviously prisoners of war are subject to the existing, or to the appointed rules of the establishment or garrison.

Prisoners of war can be put to moderate work proportionate to their position in life; work is a safeguard against excesses. Also on grounds of health this is desirable. But these tasks should not be prejudicial to health nor in any way dishonourable or such as contribute directly or indirectly to the military operations against the Fatherland of the captives. Work for the State is, according to The Hague Regulations, to be paid at the rates payable to members of the army of the State itself.

Should the work be done on account of other public authorities or of private

persons, then the conditions will be fixed by agreement with the military authorities. The wages of the prisoners of war must be expended in the improvement of their condition, and anything that remains should be paid over to them after deducting the cost of their maintanance when they are set free. Voluntary work in order to earn extra wages is to be allowed, if there are no particular reasons against it. Insurrection, insubordination, misuse of the freedom granted, will of course justify severer confinement in each case, also punishment, and so will crimes and misdemeanours.

Attempts at escape on the part of individuals who have not pledged their word of honour might be regarded as the expression of a natural impulse for liberty, and not as a crime. They are therefore to be punished by restrictions of the privileges granted and a sharper supervision but not with death. But the latter punishment will follow of course in the case of plots to escape, if only because of the danger of them. In case of a breach of a man's parole the punishment of death may reasonably be incurred. In some circumstances, if necessity and the behavior of the prisoners compel it, one is justified in taking measures the effect of which is to involve the innocent with the guilty.

The food of the prisoners must be sufficient and suitable to their rank, yet they will have to be content with the customary food of the country; luxuries which the prisoners wish to get at their own expense are to be permitted if reasons of discipline do not forbid.

Correspondence with one's own home is to be permitted, likewise visits and intercourse, but these of course must be watched.

The prisoners of war remain in possession of their private property with the exception of arms, horses, and documents of a military purport. If for definite reasons any objects are taken away from them, then these must be kept in suitable places and restored to them at the end of their captivity.

Article 14 of The Hague Regulations prescribes that on the outbreak of hostilities there shall be established in each of the belligerent States and in a given case in neutral States, which have received into their territory any of the combatants, an information bureau for prisoners of war. Its duty will be to answer all inquiries concerning such prisoners and to receive the necessary particulars from the services concerned in order to be able to keep a personal entry for every prisoner. The information bureau must always be kept well posted about everything which concerns a prisoner of war. Also this information bureau must collect and assign to the legitimate persons all personal objects, valuables, letters, and the like, which are found on the field of battle or have been left behind by dead prisoners of war in hospitals or field-hospitals. The information bureau enjoys freedom from postage, as do generally all postal dispatches sent to or by prisoners of war. Charitable gifts for prisoners of war must be free of customs duty and also of freight charges on the public railways.

The prisoners of war have, in the event of their being wounded or sick, a claim to medical assistance and case as understood by the Geneva Convention, so far as is possible, to spiritual ministrations also.

These rules may be shortly summarized as follows:

Prisoners of war are subject to the laws of the country in which they find themselves, particularly the rules in force in the army of the local State; they are to be treated like one's own soldiers, neither worse nor better.

The following considerations hold good as regard the imposition of a death penalty in the case of prisoners; they can be put to death:

1. In case they commit offences or are guilty of practices which are punishable by death by civil or military laws.
2. In case of insubordination, attempts at escape, etc., deadly weapons can be employed.
3. In case of overwhelming necessity, as reprisals, either against similar measures, or against other irregularities on the part of the management of the enemy's army.
4. In case of overwhelming necessity, when other means of precaution do not exist and the existence of the prisoners becomes a danger to one's own existence.

As regards the admissibility of reprisals, it is to be remarked that these are objected to by numerous teachers of international law on grounds of humanity. To make this a matter of principle, and apply it to every case exhibits, however, "a misconception due to intelligible but exaggerated and unjustifiable feelings of humanity, of the significance, the seriousness and the right of war. It must not be overlooked that here also the necessity of war, and the safety of the State are the first consideration, and not regard for the unconditional freedom of prisoners from molestation."

That prisoners should only be killed in the event of extreme necessity, and that only the duty of self-preservation and the security of one's own State can justify a proceeding of this kind is to-day universally admitted. But that these considerations have not always been decisive is proved by the shooting of 2,000 Arabs at Jaffa in 1799 by Napoleon; of the prisoners in the rising of La Vendée; in the Carlist War; in Mexico, and in the American War of Secession, where it was generally a case of deliverance from burdensome supervision and the difficulties of maintenance; whereas peoples of a higher morality such as the Boers in our own days, finding themselves in a similar position, have preferred to let their prisoners go. For the rest, calamities such as might lead to the shooting of prisoners are scarcely likely to happen under the excellent conditions of transport in our own time and the correspondingly small difficulty of feeding them — in a European campaign.

The captivity of war comes to an end:

1. By force of circumstances which *de facto* determine it, for example, successful escape, cessation of the war, or death.
2. By becoming the subject of the enemy's state.
3. By release, whether conditional or unconditional, unilateral or reciprocal.
4. By Exchange.

As to 1. With the cessation of the war every reason for the captivity ceases, provided there exist no special grounds for another view. It is on that account

that care should be taken to discharge prisoners immediately. There remain only prisoners sentenced to punishment or awaiting trial, *i.e.*, until the expiation of their sentence or the end of their trials as the case may be.

As to 2. This pre-supposes the readiness of the State to accept the prisoner as a subject.

As to 3. A man released under certain conditions has to fulfil them without question. If he does not do this, and again falls into the hands of his enemy, then he must expect to be dealt with by military law, and indeed according to circumstances with the punishment of death. A conditional release cannot be imposed on the captive; still less is there any obligation upon the state to discharge a prisoner on conditions — for example, on his parole. The release depends entirely on the discretion of the State, as does also the determination of its limits and the persons to whom it shall apply.

The release of whole detachments on their parole is not usual. It is rather to be regarded as an arrangement with each particular individual.

Arrangements of this kind, every one of which is as a rule made a conditional discharge, must be very precisely formulated and the wording of them most carefully scrutinized. In particular it must be precisely expressed whether the person released is only bound no longer to fight directly with arms against the State which releases him, in the present war, whether he is justified in rendering services to his own country in other positions or in the colonies, etc., or whether all and every kind of service is forbidden him.

The question whether the parole given by an officer or a soldier is recognized as binding or not by his own State depends on whether the legislation or even the military instructions permit or forbid the giving of one's parole. In the first case his own State must not command him to do services the performance of which he has pledged himself not to undertake. But personally the man released on parole is under all circumstances bound to observe it. He destroys his honour if he breaks his word, and is liable to punishment if recaptured, even though he has been hindered by his own State from keeping it. According to The Hague Regulations a Government can demand no services which are in conflict with a man's parole.

As to 4. The exchange of prisoners in a single case can take place between two belligerents without its being necessary in every case to make circumstantial agreements. As regards the scope of the exchange and the forms in which it is to be completed the Commanding Officers on both sides alone decide. Usually the exchange is man for man, in which case the different categories of military persons are taken into account and certain ratios established as to what constitutes equivalents.

Transport of Prisoners. — Since no Army makes prisoners in order to let them escape again afterwards, measures must be taken for their transport in order to prevent attempts at escape. If one recalls that in the year 1870-71, no fewer than 11,160 officers and 333,885 men were brought from France to Germany, and as a result many thousands often had to be guarded by a proportionately small company, one must admit that in such a position only the most zealous energy and ruthless employment of all the means at one's

disposal can avail, and although it is opposed to military sentiment to use weapons against the defenceless, none the less in such a case one has no other choice. The captive who seeks to free himself by flight does so at his peril and can complain of no violence which the custody of prisoners directs in order to prevent behaviour of that kind. Apart from these apparently harsh measures against attempt at escape, the transport authorities must do everything they can to alleviate the lot of the sick and wounded prisoners, in particular they are to protect them against insults and ill-treatment from an excited mob.

DOCUMENT NO. 32

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED OF THE ARMIES IN THE FIELD
(6 July 1906)

SOURCES

35 Stat. 1885
1 Bevans 516
99 BFSP 968
1 AJIL Supp. 201

NOTE

This was the second of the series of humanitarian conventions drafted in Geneva and known as the "Red Cross" Conventions. It superseded the 1864 Convention (DOCUMENT NO. 24) and was itself superseded by the 1929 Convention (DOCUMENT NO. 48) and then by the 1949 Convention (DOCUMENT NO. 106).

EXTRACTS

ARTICLE 1.

Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and care for, without distinction of nationality, by the belligerent in whose power they are.

A belligerent, however, when compelled to leave his wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and material of his sanitary service to assist in caring for them.

ART. 2.

Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners become applicable to them.

The belligerents remain free, however, to mutually agree upon such clauses, by way of exception or favor, in relation to the wounded or sick as they may deem proper. They shall especially have authority to agree:

1. To mutually return the sick and wounded left on the field of battle after an engagement.

2. To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners.

3. To send the sick and wounded of the enemy to a neutral state, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities.

ART. 9.

The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

These provisions apply to sanitary formations and establishments in the case provided for in section 2 of article 8.

ART. 10.

The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.

Each state shall make known to the other, either in time of peace or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

ART. 11.

A recognized society of a neutral state can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.

ART. 12.

Persons described in articles 9, 10, and 11 will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power.

When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with militaty necessity. They will carry with them such effects, instruments, arms, and horses as are their private property.

ART. 28.

In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

They will communicate to each other through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the ratification of the present convention.

DOCUMENT NO. 33

1907 HAGUE CONVENTION IV WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND (WITH ANNEXED REGULATIONS) (18 October 1907)

SOURCES
36 Stat. 2277
1 Bevans 631
100 BFSP 338
2 AJIL Supp. 90

NOTE

The First (1899) Hague Conference had been called by the Tsar of Russia (DOCUMENT NO. 28). It was expected that a second conference would be convened shortly thereafter but this did not occur and then the Tsar found himself involved in the Russo-Japanese War (1904-1905). At the urging of the Interparliamentary Union, in 1904 the United States began sounding out the Parties to the 1899 Conventions concerning the possibility of and the desire for a second conference. However, before any affirmative action had been taken with respect to the favorable responses received, the Russo-Japanese War ended, the Tsar was permitted to resume the position of initiator, and he proposed a new conference to meet at The Hague in June 1907. When it adjourned on 18 October 1907, it had drafted 13 separate conventions and a declaration. Among the conventions was the 1907 Hague Convention IV with its Annexed Regulations setting forth the laws and customs of war on land. These were a not very radical revision of their predecessor, the 1899 Hague Convention II with its Annexed Regulations (DOCUMENT NO. 28). They represented the applicable law of war on land in both of the World Wars of the first half of the 20th century.

EXTRACTS

PREAMBLE:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

CONVENTION:

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 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.

REGULATIONS:

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 the time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

ARTICLE 3.

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

CHAPTER II. — *Prisoners of War.*

ARTICLE 4.

Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE 5.

Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they cannot be confined except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

ARTICLE 6.

The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

ARTICLE 7.

The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

ARTICLE 8.

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

ARTICLE 9.

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

ARTICLE 10.

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

ARTICLE 11.

A prisoner of war can not be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

ARTICLE 12.

Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the Courts.

ARTICLE 13.

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

ARTICLE 14.

An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, &c., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

ARTICLE 15.

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

ARTICLE 16.

Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

ARTICLE 17.

Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

ARTICLE 18.

Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever Church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

ARTICLE 19.

The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

ARTICLE 20.

After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

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.

DOCUMENT NO. 34

1907 HAGUE CONVENTION V RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS AND PERSONS IN CASE OF WAR ON LAND

18 October 1907

SOURCES

36 Stat. 2310
1 Bevans 654
100 BFSP 359
2 AJIL Supp. 117

NOTE

This was the first international convention to deal generally with the subject of neutrality. Although it was not ratified by several of the major Powers, including Great Britain, the provisions quoted below were apparently not among those found objectionable as they have been applied in two World Wars and there appears little doubt that, at the very least, they now represent customary international law. During both World Wars Switzerland and, to a lesser extent, Sweden had frequent occasion to apply many of the provisions of this Convention relating to prisoners of war.

EXTRACTS

ARTICLE 11.

A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as fas as possible, at a distance from the theatre of war.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

ARTICLE 12.

In the absence of a special Convention to the contrary, the neutral Power shall supply the interned with food, clothing, and relief required by humanity.

At the conclusion of peace the expenses caused by the internment shall be made good.

ARTICLE 13.

A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

ARTICLE 14.

A neutral Power may authorize the passage into its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel or war material. In such a case the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose.

The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to ensure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

ARTICLE 15.

The Geneva Convention applies to sick and wounded interned in neutral territory.

DOCUMENT NO. 35

1907 HAGUE CONVENTION X FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION [OF 6 JULY 1906]
(18 October 1907)

SOURCES
36 Stat. 2371
1 Bevans 694
100 BFSP 415
2 AJIL Supp. 153

NOTE

The first attempt, made in 1868, to adapt to maritime warfare the rules applicable to the wounded and sick of armies in the field had probably been unsuccessful (DOCUMENT NO. 26). The second attempt, the 1899 Hague Convention III (DOCUMENT NO. 29), had received wide acceptance. So, too, did the present convention. No attempt was made to update this convention in 1929, when its land warfare counterpart was redrafted (DOCUMENT NO. 48), so it remained in effect until superseded by the 1949 Geneva Second Convention (DOCUMENT NO. 107).

EXTRACTS

ARTICLE 10.

The religious, medical, and hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the Commander-in-chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.

ARTICLE 11.

Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.

ARTICLE 12.

Any war-ship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital-ships, hospital-ships belonging to relief societies or to private individuals, merchant-ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.

ARTICLE 13.

If sick, wounded, or shipwrecked persons are taken on board a neutral war-ship, every possible precaution must be taken that they do not again take part in the operations of the war.

ARTICLE 14.

The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerents are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts.

ARTICLE 15.

The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded persons belong.

ARTICLE 16.

After every engagement, the two belligerents, so fas as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.

ARTICLE 17.

Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospital and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.

ARTICLE 21.

The Signatory Powers likewise undertake to enact or to propose to their Legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorized use of the distinctive marks mentioned in Article 5 by vessels not protected by the present Convention.

DOCUMENT NO. 36

1907 HAGUE CONVENTION XI RELATIVE TO CERTAIN RESTRICTIONS WITH REGARD TO THE EXERCISE OF THE RIGHT OF CAPTURE IN NAVAL WAR
(18 October 1907)

SOURCES
36 Stat. 2396
1 Bevans 711
100 BFSP 422
2 AJIL Supp. 167

NOTE

Even though it does not specifically so provide, and probably was not so intended, this convention actually had the effect of codifying a rule of customary international law under which members of the civilian crews of captured enemy merchant vessels, if enemy nationals, were detained by their captors but were denied prisoner-of-war status and protections. It was only as a result of the provisions of Article 4A(5) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) that the right of these individuals to prisoner-of-war status, as a minimum, was established.

EXTRACTS

ARTICLE 5.

When an enemy merchant-ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The same rule in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.

ARTICLE 6.

The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.

ARTICLE 7.

The names of the persons retaining their liberty under the conditions laid down in Article 5, paragraph 2, and in Article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said person.

ARTICLE 8.

The provisions of the three preceding Articles do not apply to ships taking part in the hostilities.

DOCUMENT NO. 37

AGREEMENT BETWEEN GREAT BRITAIN AND GERMANY CONCERNING COMBATANT AND CIVILIAN PRISONERS OF WAR
(The Hague, 2 July 1917)

SOURCES

111 BFSP 257

Parl. Papers, "Misc., No. 12 (1917)"

NOTE

During World War I (1914-1918) the provisions of the 1907 Hague IV Regulations (DOCUMENT NO. 33) with respect to prisoners of war repeatedly proved inadequate to answer the many problems which arose in that area. Accordingly, the various Parties to that conflict found it necessary and appropriate to enter into a great number of bilateral and multilateral agreements containing *ad hoc* solutions to those problems. (This was a phenomenon which was not repeated during World War II (1939-1945) despite the many obvious inadequacies of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49).) The present agreement is one of them. Two other representative agreements, containing typical solutions to the great majority of the prisoner-of-war problems which arose during World War I are included herein. One of them (DOCUMENT NO. 40) supplements the present agreement and the other is between Germany and the United States (DOCUMENT NO. 42). Other representative agreements, to be found in French only, were entered into by Germany, Austria-Hungary, Rumania, Russia, and Turkey at Copenhagen in November 1917 (Archives of the Ministry of Foreign Affairs, Copenhagen, Denmark) and by France and Germany in April 1918 (111 BFSP 713). The rather anomalous term "civilian prisoners of war" was used in a number of these agreements, including the present one, because of the necessity to provide a *modus operandi* for dealing with civilian internees who, at the time, were not the subjects of any humanitarian convention. This problem is now dealt with in the 1949 Civilians (Fourth) Convention (75 UNTS 287; 6 UST 3516; 157 BFSP 355; 50 AJIL Supp. 724).

EXTRACTS

The British and German Governments, with respect to combatant and civilian prisoners of war, have agreed as follows: —

I. — *Resumption of Repatriation under the existing Agreements.*

Paragraph 1. — Repatriation of combatant and civilian prisoners of war under the existing Agreements shall be resumed as soon as practicable, and to that end the Netherlands Government has been requested by both parties to arrange for and carry through such repatriation in a manner agreeable to the British and German Governments.

II. — *Repatriation or Internment in Neutral Countries of Sick and Wounded Combatant Prisoners of War.*

Paragraph 2. *Repatriation of Tuberculous Prisoners.* — All tuberculous prisoners interned in Switzerland who are practically cured shall be repatriated after examination, as prescribed by paragraph 8.

Paragraph 3. *New Schedules of Disabilities.* — New and more lenient schedules of disabilities shall be drawn up for guidance in choosing combatant prisoners of war —

(a.) For repatriation direct or from a neutral country.

(b.) For internment in a neutral country.

Pending the settlement of these new schedules, the schedules lately agreed upon between the French, German, and Swiss military authorities shall be operative for the purpose aforesaid.

Paragraph 4. *Barbed-wire Disease.* — Prisoners of war who have been at least eighteen months in captivity, and who are suffering from "barbed-wire disease," shall for the future be recognised as suitable for internment in Switzerland or other neutral country. If after being interned there for three months a considerable improvement in health is not observable, the disease will be treated as serious and the prisoner entitled to be considered for repatriation, as provided in paragraph 8 hereof.

Paragraph 5. *"Complementary Internment" according to the New Schedules of Disabilities.* — (A.) With consent of the Swiss Government, there shall be effectuated, in August and September of this year, a complementary internment in Switzerland of prisoners who were in captivity prior to the 1st November, 1916.

The examination for this purpose shall be conducted by two Commissions, each composed of three Swiss doctors and three doctors of the captor State. In case the Commission is equally divided in opinion, the Senior Swiss medical officer shall have the casting vote. The Commissions shall meet on the 1st August of this year, and shall base their decisions in each case presented to them upon the new schedules of disabilities above referred to.

The classes of prisoners whose cases are to be decided upon by these Commissions are: —

(a.) Prisoners of war, who have already been selected as fit for internment in a neutral country by the travelling medical Commission, but whose cases have been adjourned for future considerations.

(b.) Prisoners of whom it has become known that they have been ill for some time, but have, for unknown reasons, not been recognised as being fit for internment.

(c.) Prisoners who, by mistake or inadvertence, have not had their cases brought before the travelling Commission, or who have been unable to appear before it.

(B.) None of these prisoners shall be finally rejected by the Commission above mentioned at the first examination. All those not selected for repatriation or internment shall be transferred to an observation camp, and

their cases shall be considered again by the Commission after an interval of four weeks. When the decision of the Commission is unfavourable to the prisoner, the reasons shall be explicitly given.

(C.) All prisoners who have been designated by the complementary examination as being fit for internment shall be transferred to Switzerland as soon as practicable.

Paragraph 6. *Repatriation of Interned Prisoners of War.* — In order to gain room for the complementary internment, the British prisoners interned by the German Government and the German prisoners interned by the British Government, who need a long time for their complete recovery, shall be repatriated from Switzerland in August and September next, according to the Agreement for the reciprocal exchange of the severely wounded and seriously ill. The decision is a matter for the Swiss doctors, and shall be binding on both sides, unless the nationals of one side designated for repatriation shall exceed by 20 per cent or more the nationals of the other. In that case, the method of examination shall be as at present (see paragraph 8).

Paragraph 7. *Further Examination according to the New Schedules.* —

(A.) As soon as possible after the examination mentioned in paragraph 5 has been concluded, Commissions, composed of two medical officers of a neutral State and three medical officers of the captor State, shall proceed to examine the prisoners who have been recommended for internment by the camp medical officers of the captor State after having made a thorough examination according to the new schedule of disabilities for internment.

(B.) The same procedure shall be adopted in subsequent examinations of invalid prisoners of war for internment in a neutral country. These examinations will take place at intervals of three or four months, as hitherto has been customary.

(C.) Prisoners of war passed for internment shall be interned as soon as practicable.

Paragraph 8. *Examination for Repatriation from a Neutral Country.* — The examination of invalids for repatriation from a neutral country shall be made in accordance with the new schedule of disabilities for repatriation, and shall in other respects continue to be conducted on the present system, namely, by a Commission composed of two medical officers of the captor State and a representative of the Legation of the same State in the country of internment.

Paragraph 9. *Direct Repatriation of Prisoners of War.* — The selection of prisoners of war for direct repatriation shall be made in accordance with the new schedule of disabilities for repatriation, but in other respects the procedure shall remain as heretofore.

Paragraph 10. *Non-employment of Repatriated Prisoners of War.* — Prisoners repatriated in pursuance of this chapter shall not be employed on any front of military operations or on lines of communication or within occupied territory.

III. — *Internment in a Neutral Country of Officers and Non-commissioned Officers who have been in Captivity for not less than 18 months.*

Paragraph 11. — All officers and non-commissioned officers, irrespective of rank or number, and whether under punishment or not, so soon as they have been in captivity at least eighteen months, shall, so far as they do not express the desire to remain, be interned in Switzerland or other neutral country, subject always to the possibility of accommodation being found for them, which both Governments will use their best efforts to secure. The order of transfer to the neutral country shall be that of priority of capture irrespective of nationality. As far as German officers and non-commissioned officers are concerned, the agreement contained in this paragraph applies to those only who are now or may hereafter be in Great Britain and France.

IV. — *Internment of Invalid Civilians in the Netherlands.*

Paragraph 12. — 1,600 of the German civilians now interned in Great Britain, and 400 of the British civilians now interned in Germany, shall be interned in the Netherlands. They shall be chosen by the medical authorities of the captor State in accordance with the new schedule of disabilities for the internment of sick and wounded combatants referred to in Chapter II of this Agreement. If on either side the civilians who are found to be qualified under that schedule do not reach the requisite number, the deficiency shall be made up by adding those who, in the opinion of the medical authorities of the captor State, are the next most in need of relief from captivity on medical grounds.

V. — *Allocation of Accommodation for Combatant and Civilian Prisoners of War to be Interned in the Netherlands.*

Paragraph 13. — Under the supposition that the Netherlands Government, as they have offered, will receive for internment in the Netherlands 16,000 German and British prisoners of war (combatant or interned civilians), this accommodation shall be allotted as follows: —

(a.) To sick and wounded combatants to be interned under Chapter II of this Agreement, 7,500 places.

(b.) To officers and non-commissioned officers to be interned under Chapter III of this Agreement, 6,500 places.

(c.) To invalid civilians to be interned under Chapter IV of this Agreement, 2,000 places.

Both Governments hereby undertake to return promptly to the Netherlands any of these persons who may escape therefrom and come within their power.

VI. — *Repatriation of Medical Personnel still retained.*

Paragraph 14. — All members of the German medical personnel who are still in British hands [in Great Britain or France], and all members of the British medical personnel who are still in German hands, shall be released and repatriated, as soon as may be, in the transport for exchanges of prisoners of war.

If further evidence that a prisoner belongs to the medical personnel is required by the captor State, this shall be given by his name being included in a list which will be complied by the Home Government and sent to the captor State through the usual diplomatic channel. If the captor State has reasons for refusing to recognise the right to repatriation of any person mentioned in the lists the captor State shall explicitly set forth these reasons.

Paragraph 15. — The British Government will permit the German medical personnel originally belonging to the German garrison of Tsingtau, and now in the United States of America, to return to Germany by sea if they are permitted by the Government of the United States to leave that country for Germany.

VII. — *Punishments for Attempts to Escape by Combatant Prisoners of War.*

Paragraph 16. — *(a.)* The punishment for a simple attempt to escape on the part of a combatant prisoner of war, even if repeated, shall not exceed military confinement for a period of fourteen days.

The punishment for such an attempt to escape combined with other punishable actions consequent upon or incidental to such attempt in respect of property, whether in relation to the appropriation or possession thereof, or injury thereto, shall not exceed military confinement for a period of two months.

(b.) All combatant prisoners of war who have been in confinement in respect of attempts to escape, whether simple or combined with other offences as defined above for longer periods than above mentioned, shall at once be released.

(c.) All reprisals taken on British combatant prisoners of war in German hands for the offence of attempting to escape, whether simple or combined with other offences as defined in sub-paragraph *(a)*, shall be at once cancelled.

Paragraph 17. — The Agreement contained in the preceding paragraph shall become operative at the latest on the 1st August, 1917.

VIII. — *Remission of Punishment Inflicted on Combatant and Civilian Prisoners of War.*

Paragraph 18. — The execution of all punishments inflicted on combatant and civilian prisoners of war on account of offences and crimes which have been committed between the date of capture and the 1st August next will be remitted until the conclusion of peace.

Paragraph 19. — Any prisoner who benefits under this Agreement will be exempt from any special restrictions other than those which are applicable to all prisoners of war and will be equally eligible with them for all benefits they may enjoy, including repatriation and internment in a neutral country.

IX. — *Reprisals against Combatant and Civilian Prisoners of War.*

Paragraph 20. — Reprisals against combatant and civilian prisoners of war may only be carried out after at least four week's notice of intention so to do has been given.

The time limit begins with the date on which the Swiss Legation in London has been notified of the intended reprisals against German prisoners in British hands or the Netherlands Legation in Berlin of those against British prisoners in German hands.

In cases which seem suitable an attempt will be made to eliminate the reasons for reprisals by arranging a personal discussion at The Hague before threatening the reprisals.

X. — *Speedy Delivery of Parcels.*

Paragraph 21. — Both military administrations will use every endeavour to secure the speedy delivery of all parcels addressed to prisoners of war, both combatant and civilian, and to avoid all unnecessary censorship.

XI. — *Notification of Capture.*

Paragraph 22. — Both military administrations will immediately repeat instructions to all concerned to the following effect: —

(a.) All captures are to be notified by the captor State to the other State with the least possible delay.

(b.) Every prisoner captured is to be allowed to communicate at once with his family and is to be provided with the means of doing so, and the dispatch of his communications is to be facilitated.

(c.) As soon as practicable after capture every prisoner is to be enabled to inform his family of an address at which his family can communicate with him.

Annex 3.

The Hague, July 2, 1917.

Youthful Prisoners. — General Friedrich declares that subject to reciprocity, those British subjects who are youthful and who are captives in German hands, shall be separated from the rest of the prisoners of war and put in a separate block in one camp by themselves. They shall be kept away from all unfavourable influences to which they might be subjected by being brought in contact with adult prisoners of war. Their further education and instruction shall also be provided for.

Annex 4.

The Hague, July 2, 1917.

More Speedy Trial of Combatant Prisoners of War. — The British delegates having intimated that information has reached His Majesty's Government from time to time that the trial of prisoners of war in German camps has frequently only taken place after long delay and that the prisoners in the meantime been kept in custody, General Freidrich informed the delegates that such occurrences were not in any way in order, and he stated that so soon as he returned to Berlin he would expressly instruct the different commands to take such steps as would prevent the occurrence of similar delays in the future.

Annex 5.

The Hague, June 28, 1917.

Punishments of Prisoners of War, Remission of Punishments. — (1.) The British delegates desire to represent to the German delegates the desirability of an Agreement being concluded between them on lines approximately as closely as possible to that arranged between the French and German Governments whereby all sentences inflicted for offences committed prior to the 1st September, 1916, were remitted until the conclusion of hostilities. An Agreement on precisely similar lines is, however, owing to the limitations of disciplinary powers allowable under the British military code, impracticable.

The British delegates therefore suggest that every combatant prisoner of war held by either State, of whatever rank, shall, on a date to be agreed upon between the British and German Governments, be released from any form of imprisonment, detention, punishment, or restrictions which may have been inflicted upon him for any crime or offence whatever committed during his internment and prior to the date agreed upon, and that the remainder of his punishment shall be remitted from that date. Any prisoner who benefits under this Agreement will be exempt from any special restrictions other than those which are applicable to all prisoners of war, and will be equally eligible with them for all benefits they may enjoy, including repatriation and internment in Switzerland.

It has been a satisfaction to the British delegates to observe the favourable reception accorded by the German delegates to this proposal at the meeting of the 26th June. The British delegates were moved to make their proposal largely by reason of the number of heavy sentences hitherto inflicted on many British prisoners in Germany far beyond any imposed for similar purposes in England, and the delegates express the hope that they are now things of the past.

(2.) The British delegates assume that all ideas which the German delegates may have had that prisoners of war, whether combatant or civilian, who attempt to escape, are subjected to additional penalties by reason of their falling into the hands of the civil power, has been removed by the explanation given on the subject at the meeting of the 26th June.

The Hague, June 30, 1917.

The German delegates have heard with interest the declaration of the British delegates of the 28th June, from which it appears desirable that an understanding should be arrived at on the subject of the remission of the punishments of British and German prisoners of war. They entirely agree with the view of the British delegates, and have willingly complied as far as possible in this direction with their proposals. By the understanding thus reached the point seems to be settled in a satisfactory manner.

A far as concerns the punishment of German prisoners of war who have endeavoured to escape, the German delegates have no hesitation, after the explanation given by the British delegates at the sitting of the 26th June, in confirming that the supposition expressed at the end of the declaration of the 28th June is correct.

Annex 6.

The Hague, July 2, 1917.

Parcels. — Various questions were raised relating to the delay which had taken place in the delivery of parcels, especially to prisoners in the labour camps throughout Germany and in the occupied districts. This delay appears to be largely attributable to excessive censorship, some parcels before reaching their destination having been censored as often as three times.

General Friedrich explained that the delays in the delivery of parcels at the camps in Germany and the strict censorship which is being exercised on parcels was due to the discovery in many cases of articles of sabotage, which had been enclosed in parcels addressed to prisoners of war in Germany.

General Friedrich further stated that the wishes of the British delegates had already been met to a certain extent, and the British delegates having stated that they saw great objection to such practices and strongly deprecated them, General Friedrich suggested that the British Government should publish in the British and especially in the neutral press a statement that the including of articles of sabotage in the parcels addressed to combatant and civilian prisoners of war is deprecated and disapproved by the Government as being contrary to the interests of the whole body of prisoners of war, General Friedrich stating that he would simultaneously publish a corresponding declaration on behalf of the German Government.

By these means it would be possible to give full satisfaction to the wishes of the British delegates.

In order to give a guarantee for a corresponding action, General Friedrich proposes that both Governments communicate to each other the text of their publications. As soon as General Friedrich approves the British text, he will communicate to the British Government the text he proposes to publish for their approval. As soon as the two Governments have arrived at an agreement on the text of both announcements, as far as possible by telegram, the declaration shall be published by both sides on the same date agreed upon by telegram.

General Friedrich then stated that he had given instructions before leaving Germany that parcels for prisoners in working camps were to be censored only at those camps, save in exceptional instances where no possibility of local censorship existed, in which cases the parcels would be censored at the parent camp before being sent on to their destination as far as possible undamaged. He added that as the result of his conversation with the British delegates this would be the practice in the future. General Friedrich also stated that these parcels were now delivered in the working camps in occupied districts as freely as in the camps in Germany, and that in these camps the same privileges of correspondence would be permitted to the prisoners as in other camps. Special cases of excessive censorship, which would lead to the deterioration of the goods, would be enquired into and avoided as much as possible in future.

DOCUMENT NO. 38

TREATY OF PEACE OF BREST-LITOVSK BETWEEN GERMANY, AUSTRIA-HUNGARY, BULGARIA, AND TURKEY ON THE ONE HAND, AND RUSSIA ON THE OTHER: TOGETHER WITH A GERMAN-RUSSIAN AGREEMENT SUPPLEMENTARY TO THE PEACE TREATY

(3 March 1918)

SOURCES

For. Rel., 1918, Russia, I, at 442
1 Soviet Documents on For. Rel., 1917-1924, at 50

NOTE

This treaty ended World War I (1914-1918) hostilities between the new Soviet Russian Government and the Central Powers. (It was annulled by the Soviet Government on 13 November 1918, two days after the signing of the Armistice between Germany and the Allied Powers on 11 November 1918 [DOCUMENT NO. 41].) The subject of the repatriation of prisoners of war was regulated by a "German-Russian Agreement Supplemental to the Peace Treaty," negotiated and signed at the same time as the Peace Treaty and in accordance with Article 12 of that Treaty. It is interesting to note that in this agreement, negotiated early in its existence, the Soviet Union gave prisoners of war the option of refusing repatriation.

EXTRACTS

TREATY OF PEACE:

ARTICLE 8

The prisoners of war of both parties will be allowed to return home. The regulation of questions in connection with the above will be the subject of special treaties mentioned in Article 12.

ARTICLE 12

The reestablishment of public and private legal relations, the exchange of war and civil prisoners, the question of amnesty as well as the question regarding merchant ships which have been seized by one or the other side, will be provided for in separate treaties with Russia, which form an important part of the present peace treaty, and as far as it is possible come into force simultaneously with the latter.

SUPPLEMENTARY GERMAN-RUSSIAN AGREEMENT:

ARTICLE 17

The exchange of prisoners of war provided for in Article 8 of the peace treaty is governed by the following regulations:

1. The prisoners of war of both parties shall be set at liberty to return home, in so far as they do not desire, with the consent of the state which took them prisoners, to remain within its boundaries, or leave for another country.

The exchange of prisoners of war unfit for military service, which has already begun, will be continued with the greatest possible speed.

The exchange of other prisoners of war will take place as speedily as possible at established intervals of time to be exactly determined upon by means of a mutual agreement.

Russia will admit and assist, as far as possible, on its territory German commissions, which will be charged with the care for German prisoners of war.

2. In liberating prisoners of war, there shall be restored to them their private property which was taken away from them by the authorities of the state which took them prisoners, and also that part of their earnings which has not yet been paid or credited them; this obligation does not apply to written documents of military contents.

3. Each of the contracting parties will refund such expenses for the maintenance of its citizens who have been taken prisoners, incurred by the opposite party, in so far as these expenses have not been compensated for by the work of the prisoners of war in state or private establishments.

The payment will be made in the currency of the state which made the prisoners, in separate instalments for each 50,000 persons, to be paid each time within one week of departure.

4. Immediately upon ratification of the peace treaty a commission shall be convoked at a place yet to be determined upon consisting of four representatives of each of the parties, for the purpose of defining the intervals of time provided for in part 3 of paragraph 1, and also other details of the exchange, especially the method and procedure of repatriation, and in order to supervise the putting into effect of the agreements arrived at.

Furthermore, the commission will establish the expenses in connection with prisoners of war, provided for in paragraph 3, liable to a refund by both parties. If in the course of two months after the commencement of its work the commission does not arrive at an agreement in regard to these expenses, the latter shall be definitely established after calling in a neutral chairman by a majority of votes; the parties will apply to the President of the Swiss Federal Council to nominate the chairman of the commission.

DOCUMENT NO. 39

GENERAL ORDERS NO. 106, GENERAL HEADQUARTERS AMERICAN EXPEDITIONARY FORCES, FRANCE
(1 July 1918)

SOURCE

16 United States Army in the World War, 1917-1919, at 367

NOTE

The contrast between the chivalrous spirit which motivated the belligerents generally in their treatment of prisoners of war during World War I (1914-1918) (see, for example, DOCUMENT NO. 37 and DOCUMENT NO. 42) and the maltreatment received by so many of them during World War II (1939-1945) (see, for example, DOCUMENT NO. 85 and DOCUMENT NO. 101) and in Korea (1950-1953) (see, for example, DOCUMENT NO. 131 and DOCUMENT 134) is probably nowhere so clearly demonstrated as in this order issued by General Pershing's headquarters during World War I.

EXTRACTS

I. PRISONERS OF WAR

1. Places of confinement for prisoners of war will be established from time to time as may be necessary, and shall be known as Prisoners of War Enclosures — the abbreviation of which shall be P. W. E.

2. Prisoners of war will be under the control of the P. M. G. (Department) for the purpose of maintenance and discipline from the time that they are delivered to the Division P. W. E. by the combatant troops. Such Division and Central P. W. E.'s will be established as become necessary. Prisoners of war will be forwarded from Division P. W. E. to the Central P. W. E. as promptly as the exigencies of the service permit. The necessary officers and guards for Division P. W. E. will be provided by division commanders when required.

3. The general staffs of divisions, corps or army or their authorized representatives shall at all times have access to prisoners for the purpose of examination. With this exception no person except the escort on duty will be allowed to enter any part of P. W. E. or to converse with prisoners.

4. Prisoners who may be required by the General Staff for the purpose of a special examination will be sent to headquarters at their request. If retained at headquarters a receipt will be given to the officer commanding the company or P. W. E. and the prisoners returned as soon as practicable.

5. The importance of speedy evacuation of prisoners of war must be born in mind, especially in the forward areas. Prisoners will be disarmed immediately upon capture and sent to Brigade Headquarters, where they will be searched, and all concealed weapons which may have escaped observation of their captors taken from them. They will then be sent to the Division P. W. E. or collecting point, where a thorough search will be conducted.

6. The responsibility for the examination of prisoners rests entirely with the Second Section of the General Staff, and as promptly as possible after capture they will be searched and examined by an Intelligence officer. Officers will be responsible that nothing except arms are removed from prisoners until they have been so examined and searched. All maps, papers of a military character, field glasses, compasses, etc., will be taken from them under the supervision of a member or representative of the Second Section, General Staff.

7. Prisoners of war will be forwarded from Division P. W. E. to Central P. W. E. under an escort furnished by the P. M. G.

II. PRISONERS OF WAR INFORMATION BUREAU.

There is hereby established in the Central Records Office, A. G. D., A. E. F., the Prisoners of War Information Bureau prescribed by Article 14 of The Hague Convention, which is charged with the following duties:

1. To receive all reports and maintain all records concerning enemy prisoners of war.

2. To collect and keep up to date full information respecting captures, internments, transfers, releases, exchanges, escapes, admission into hospital, deaths and such other information as may be necessary to make an individual return for each prisoner of war. This individual record will show the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding and death, as well as any observations of a special character.

3. To reply to all inquiries about prisoners of war; and all such inquiries, by whomsoever received, will be forwarded to the Prisoners of War Information Bureau. Replies will be confined to the presence and condition of health of the prisoners to the exclusion of all other information.

4. To receive and keep all personal effects and money taken from prisoners of war, and all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners released or exchanged, or who have escaped or died.

5. To censor prisoners of war correspondence, and to report periodically the information disclosed therein. All correspondence and parcels addressed to or sent by prisoners of war will be forwarded through this bureau.

6. To receive and safely keep the wills of prisoners of war in compliance with Article 19 of the Hague Convention.

7. To prepare and maintain records of pay and allocations for prisoners of war.

8. An officer of the Quartermaster Corps will be attached to this bureau. This officer will be responsible for the safekeeping of the personal effects, money and other valuables received by the Prisoners of War Information Bureau, and for the allocations allowed to prisoners of war.

III. REPORTS AND RETURNS

1. Field Reports, Enemy Prisoners of War. Commanding officers of all organizations capturing prisoners will make a report as soon as practicable to division headquarters of all prisoners captured, giving name, number, rank, organization and disposition made thereof. These reports will be consolidated at division headquarters on form "Field Report of Enemy Prisoners of War" and forwarded in accordance with instructions thereon.

2. Prisoners of War Initial Information Blank. Upon the arrival of an enemy prisoner of war at Central P. W. E., or at base hospital, immediately after capture, this blank will be completed and distributed in accordance with instructions thereon.

3. Weekly Report of Casualties and Changes, Prisoners of War. This report will be rendered weekly by commanding officers of Central P. W. E. and labor companies, such information being given as required by instructions thereon. Enemy prisoners of war at base hospitals will be reported on "Daily Reports of Casualties and Changes for Patients in Hospitals," Form A. G. O., S. D., No. 22, headed "Enemy Prisoners of War," and in same manner as on "Weekly Medical Report (Serious Cases)."

4. Roster. A monthly roster will be prepared in duplicate of all prisoners of war in Central P. W. E. and labor companies. This roster will show the names, ranks and numbers of the prisoners, the days of labor performed by each and other such data as may be required to compute pay and allocations. One copy will be forwarded to the Q. M. Prisoners of War Information Bureau.

5. Burial Report. This report will be on form required by Par. 7, subparagraph f, G. O. No. 30, c.s., these headquarters, and marked "Enemy Prisoners of War." In the field commanding officers of burial parties will give all information possible on burial report to determine the identity of enemy dead, and forward identification tags and all personal effects except clothing to Prisoners of War Information Bureau.

6. Report to Violent Deaths and Injuries. In the case of the death of a prisoner of war other than through natural causes a report will be sent immediately to the C. R. O., A. G. D., A. E. F., through official channels, of all facts connected with such death. A duplicate of this report will be sent to the Prisoners of War Information Bureau.

7. Return of Personal Effects. All personal effects taken from prisoners of war will be listed, packed and forwarded with list by registered mail through the nearest Quartermaster to the Prisoners of War Information Bureau, C. R. O., A. G. D., A. E. F., plainly labelled with name of prisoner and marked "Personal Effects of Prisoner of War." Immediately upon the death of a prisoner of war all personal effects on person thereof will be listed and disposed of as required above.

IV. REGIME OF PRISONERS OF WAR.

1. The law of nature and of nations will be sacredly heeded in the treatment of prisoners of war. They will be accorded every consideration dictated by the principles of humanity. The behavior of a generous and chivalrous people toward enemy prisoners of war will be punctiliously observed. There will be no departure from this fixed rule of conduct unless the enemy by the mistreatment of American prisoners in his hands makes it necessary.

2. In strict compliance with The Hague Convention, prisoners of war will be retrained within fixed limits, but they will not be confined except as an indispensable measure of safety, and then only while the circumstances which necessitate the measure continue to exist; they will not be kept or employed within range of their own fire; they will be treated as regards food, lodging and clothing on the same footing as the troops of the American Army; their personal belongings, including medals and identity discs, and excepting arms, horses and military papers, will remain their property, and the acceptance of gifts from prisoners, as well as the appropriation of articles which have belonged to the enemy's dead, are strictly prohibited; they may receive presents and relief in kind and dispatch and receive correspondence, subject only to necessary and proper surveillance and censorship; they shall enjoy liberty in the exercise of their religion, and they will be permitted to execute wills, which will be preserved for transmission to the proper parties in interest.

3. By the Treaty of Berlin, 1799, still in force, the United States of America and the King of Prussia solemnly pledge themselves to the world and to each other "That the prisoners of war whom they may take from the other shall be placed in wholesome situations;" that they shall not be confined; that the officers shall have comfortable quarters, and the men be disposed in cantonments or barracks as roomy and good as provided for their own troops, and that they shall be allowed the same rations. "And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the preceding articles; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be sacredly observed as the most acknowledged articles in the law of nature and nations."

The obligations of this treaty will be scrupulously observed unless and until substantially violated by Germany, in which case further orders will be published from these headquarters.

V. DISCIPLINE.

1. Prisoners of war are subject to discipline under the laws, regulations and orders in force in the Army of the United States. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

2. The maintenance of discipline among prisoners of war is a function of the Provost Marshal General. No collective punishment will be imposed for the misdemeanor or escape of an individual. Punishments will be such only as

could lawfully be inflicted upon our own troops. A monthly report of all punishments imposed will be made by Central Enclosure and labor company commanders to the Provost Marshal General.

3. If it becomes necessary to try a prisoner of war by a military tribunal the accused will be afforded proper opportunity of preparing his defense and shall be allowed free communication with his witnesses. In cases of grave offenses, the prisoner of war may be represented by counsel of his own selection whenever military exigencies and the necessities of discipline will permit it.

4. A prisoner of war shall not be sentenced to death except for an offense for which an American solider may be capitally punished. The sentence of death shall not be pronounced by any court other than a general court-martial or military commission appointed by the C. in C. Punishments other than death may be awarded by provost courts appointed by the Provost Marshal General, and their sentences may be carried into effect when approved by him. The commanding officer of a prisoners of war company or of a P. W. E. may, for a minor offense, summarily impose a punishment not to exceed one month's confinement.

VI. WORK.

1. Prisoners of war, not officers, will be required to labor for the public service. The labor exacted shall not be excessive, but the welfare of the prisoners themselves, as well as the interest of the United States, requires the constant employment of the largest number of prisoner laborers possible.

2. Prisoner of war labor companies will be formed at Central P. W. E. They will work under the direction of the department of the army to which assigned for labor.

3. Prisoner of war companies will be commanded by an officer appointed by these headquarters, who will be responsible for the discipline and administration of the company. The necessary non-commissioned officers and men for the proper administration of the company will be assigned by the Provost Marshal General, who will likewise furnish the necessary guards and escort.

4. An allocation of pay will be allowed to prisoners of war for each day's labor (other than that necessary for their comfort or for the upkeep of the places of internment), which will be paid by the Q.M. Prisoner of War Information Bureau in tokens or scrip provided by the Q. M. Department under regulations to be issued from these headquarters.

VII. CONTACT WITH PRISONERS OF WAR.

1. Provision will be made to allow regularly constituted relief societies and their accredited agents to carry on and effectively accomplish their welfare work among the prisoners of war within the bounds imposed by military necessities and administrative regulations.

2. Permission will be granted to members of a neutral legation or embassy to visit prisoners of war. In such visits free intercourse will be allowed between the visitors and the prisoners out of hearing of any member of the company staff.

DOCUMENT NO.40

AGREEMENT BETWEEN THE BRITISH AND GERMAN GOVERNMENTS CONCERNING COMBATANT PRISONERS OF WAR AND CIVILIANS

(The Hague, 14 July 1918)

SOURCES

111 BFSP 279

Parl. Papers, "Misc., No. 20 (1918)"

NOTE

Despite the length and breadth of the special bilateral agreement concerning prisoners of war entered into during World War I (1914-1918) by Great Britain and Germany on 2 July 1917 (DOCUMENT NO. 37), just a year later they found it both necessary and appropriate to enter into a new and supplementary agreement on the the same subject and in even greater length. These two agreements between Great Britain and Germany and the similar, but even more complete, agreement between Germany and the United States (DOCUMENT NO. 42) clearly demonstrate that no matter how detailed an international convention on the subject may be, it is axiomatic that new problems, not covered by the convention, will always arise. The draftsmen of the 1949 Geveva Prisoner-of-War Convention (DOCUMENT NO. 108) conceded this when they included, in Article 6 of that Convention, a provision authorizing the Parties to enter into special agreements which do not adversly affect the prisoners of war.

EXTRACTS

1. — REPATRIATION AND INTERNMENT IN NEUTRAL COUNTRIES OF COMBATANTS AND CIVILIANS.

1. *Extension of Existing Agreements.*

ART. I. — Warrant officers and non-commissioned officers, as well as men, who have been prisoners of war for more than eighteen months on the date on which this Agreement comes into force, shall be repatriated head for head, and rank for rank, with the exception of the prisoners specified in Article 8.

For the purpose of this exchange no distinction shall be made between the different ranks of the warrant officers and non-commissioned officers.

From the date on which this Agreement comes into force, paragraph 11 of The Hague Agreement of the 2nd July, 1917, shall only apply to officers.

II. — All combatant prisoners of war who are interned in the Netherlands and in Switzerland in accordance with existing agreements on the date on which this Agreement comes into force shall, with the co-operation of the Netherlands and Swiss Governments, be repatriated without regard to the surplus. Subject to the consent of the Netherlands Government, the same shall apply to all other members of the forces of the two countries who are

interned in the Netherlands on the date on which this Agreement comes into force.

III. — The civilian subjects of each of the two parties, including all officers and other ratings of the mercantile marine, who are in any territory which is in the power of the other party on the date on which this Agreement comes into force, shall, regardless of age and sex, be repatriated if they so desire. The British Government shall, however, have the right to retain a number not exceeding seventy, and the German Government a number not exceeding forty, including in each case those retained by virtue of previous Agreements.

IV. — The surplus of valid German civilians to be repatriated under the provisions of Article III shall be met by the surplus of British combatants to be repatriated from neutral countries in pursuance of Article II. The number of these British combatants shall be taken as 4,820, composed as follows: —

(a.) 320 officers and 2,200 warrant and non-commissioned officers interned in Holland under The Hague Agreement of the 2nd July, 1917.

(b.) 2,300 combatants of all ranks, including those interned in Holland by order of the Netherlands Government.

If these numbers are not reached, the deficiency shall be made up by the repatriation from Germany of an equal number of valid British combatant prisoners of war, who shall be of corresponding ranks, in so far as concerns sub-paragraph *(a)* above.

Should the number of valid British civilians who are repatriated in pursuance of Article III amount to less than 6,000, the deficiency shall be made up by the repatriation of an equal number of valid British combatant prisoners of war.

It is further provided that if the number of valid German civilians who are repatriated in pursuance of Article III exceeds 20,000, one valid British combatant prisoner of war shall be repatriated for every three German civilians above that number.

The selection of the combatant prisoners of war referred to in the three preceding paragraphs shall be made according to priority of capture.

For the purpose of this article a valid ("diensttauglich") combatant or a valid ("wehrfähig") civilian shall be deemed to be one who is not eligible for repatriation under any previous Agreement.

V. — Civilians, including officers and other ratings of the mercantile marine, interned in the Netherlands in accordance with The Hague Agreement of the 2nd July, 1917, shall be repatriated as soon as possible with the co-operation of the Netherlands Government.

VI. — Members of the German forces in tropical regions who have been captured, or who may be captured, by the British forces, shall, failing their repatriation under the provisions of this or any other Agreement, be transferred to Great Britain as soon as opportunity offers.

VII. — The provisions of paragraph 11 of The Hague Agreement of the 2nd July, 1917, shall be extended so as to include German officers in British oversea Dominions and Protectorates and occupied territories.

VIII. — The petty officers and men of submarines who have been in captivity for more than eighteen months on the date on which this Agreement comes into force shall be interned in the Netherlands.

IX. — The transport of the persons referred to in Articles I to VIII shall be carried out as provided in Annexes I and II to this Agreement. The necessary measures shall be taken as soon as this Agreement comes into force.

X. — Combatant prisoners of war who, on the date on which this Agreement comes into force, have not fulfilled the conditions set forth in Article I thereof, shall be exchanged as soon as possible after becoming qualified.

XI.— The foregoing provisions shall be brought to the notice of those whom they concern by repeated insertions in the press and by notices in the camps.

XII. — Representatives of the protecting Powers are empowered to supervise the execution of the provisions of Articles I to XI.

XIII. — Lists of those civilians who wish to leave the territory of the State where they are residing shall be furnished without delay to their Government.

XIV. — The provisions of Articles I and VIII of this Agreement and of paragraph 11 of The Hague Agreement of the 2nd July, 1917, shall lapse on the 1st August, 1919. The termination shall not affect those persons who are eligible for repatriation or internment in neutral countries on the date when the provisions lapse.

2. *Further Provisions with regard to Wounded and Sick Combatant Prisoners of War.*

XV. — Visits to camps by Travelling Medical Commissions shall be resumed. Each such Commission shall be composed of two neutral doctors and one doctor of the captor State. The function of these Commissions shall be to ascertain the combatant prisoners of war who are eligible for repatriation or internment in a neutral country on grounds of their physical condition, and their decisions shall be made in accordance with the schedules of disabilities agreed between the two Governments.

Travelling Commissions shall visit the camps in the United Kingdom and Germany once every three months.

Paragraphs 7 and 9 of The Hague Agreement of the 2nd July, 1917, are hereby cancelled.

XVI. — The following prisoners of war shall be brought before the Travelling Commissions, whether they are in camps or in working parties: —

1. Those recommended by Camp Medical Officers in lists drawn up by them;

2. Those whose names are proposed by the Government of their country of origin to the Government of the captor State;

3. Those recommended by Help Committees of camps. (See Article 51.)

For the purpose mentioned in paragraph 1, sub-paragraph 3, the Help Committees of camps shall be authorised to prepare once a month a list of prisoners of war who are in, or attached to, their camp and to deliver this list

to the Commandants.

The lists prepared by the Camp Medical Officers and by the Help Committees shall be kept by the Commandants; the lists of prisoners of war proposed by their country of origin shall be handed over to the Travelling Commissions.

In the working parties, the representative (see Article LI) shall transmit to the Help Committee of the main camp lists of the prisoners of war in his party, who should, in his opinion, be brought before a Commission. These lists shall be sent every month to the Commandant of the main camp, who will attach them to the lists drawn up in that camp. The prisoners of war named in the former lists shall be brought before a Travelling Commission equally with those in the latter lists.

XVII. — The Travelling Commissions on their arrival at any camp and before beginning their examinations shall inspect the lists in the possession of the Commandant and shall compare them with those in their own possession.

Should any prisoner of war whose name appears on one of the lists have been transferred before the arrival of the Commission to another camp, the Commission shall be informed of the fact. The Commission shall transmit the names of any such prisoners to a central authority designated by the captor State. This authority shall arrange for the examination of all such prisoners in every case by one of the Travelling Commissions.

XVIII. — Prisoners of war who are within an area of operations or on lines of communication, and whose names appear on the lists furnished by the Goverment of their own country or by Help Committees or representatives, but not on that of the Camp Medical Officer, shall be examined by the Camp Medical Officer. If the Camp Medical Officer finds them eligible for repatriation or internment, they shall be brought before a Travelling Commission. For the purpose of the examination these prisoners, as well as those who are recommended by the Camp Medical Officer, shall be assembled at a place accessible to a Travelling Commission.

XIX. — Any prisoner of war suffering from any injury or sickness, however caused, which falls within the schedule of disabilities, shall be repatriated or interned in a neutral country, provided that a self-inflicted injury shall not confer any right under this clause.

XX. — When prisoners of war are recognised as suffering from curable tuberculosis or malaria, or when there is good ground for suspecting tuberculosis, they shall be interned in Switzerland.

Prisoners of war recognised as suffering from incurable tuberculosis shall be repatriated forthwith.

The medical authorities concerned shall take a lenient view of cases of nervous debility ("psychasthenia") which come under examination.

XXI. — The adverse decisions of the Travelling Commission shall be communicated to the prisoners' Government, with a statement in each case of the reasons for rejection and the source of the recommendation for repatriation or internment.

XXII. — Prisoners of war whose cases are recognised by the medical authorities of the captor State as urgent on account of the serious nature of their injuries or sickness shall be repatriated or interned at once without waiting for the visit of the Travelling Commissions.

XXII. — Prisoners of war considered suitable by the Travelling Commissions for repatriation or internment shall be examined by a Commission of Control, whose decision shall be final. The Commissions of Control shall be composed of three neutral medical officers and three medical officers of the captor State. If opinions are qually divided the senior neutral medical officer shall have the casting vote.

The adverse decisions of the Commissions of Control shall be communicated as provided in Article XXI.

Prisoners of war passed for repatriation or internment by the Commissions of Control shall be repatriated or sent to a neutral country as quickly as possible.

XXIV. — Prisoners of war transferred from either country to a neutral country for internment shall be repatriated, with the co-operation of the neutral Government, if they are found to fulfil the conditions prescribed in the schedule of disabilities for repatriation.

The decision shall rest with the medical authorities of the neutral country in which the prisoners are interned, whose Government shall be requested to conduct examinations once in every three months.

Paragraph 8 of The Hague Agreement of the 2nd July, 1917, is hereby cancelled.

3. Principles common to 1 and 2.

XXV. — If a combatant prisoner of war who is awaiting trial for any offence is eligible for repatriation or internment in a neutral country, he may be detained until the end of the trial, and, subject to the limit provided in paragraph 2, until the end of the sentence, if any.

If a combatant prisoner of war, who has been awarded or is undergoing any sentence which has not yet been completed, is eligible for repatriation or internment in a neutral country, he may be detained for a period not exceeding two months after the date on which he would otherwise have been repatriated or interned.

In every case in which the sentence has not been completed the prisoner's Government shall be informed by the captor Government of the nature of the offence, the sentence, and the length of the sentence unexpired.

The provisions of this article shall not affect cases in which a neutral country declines to receive a prisoner of war convicted of a grave offence.

Civilians awaiting trial or under sentence may be detained until the expiration of their sentences.

XXVI. — The employment of combatant prisoners of war and civilians repatriated under this Agreement shall be limited as follows: —

Combatant prisoners of war shall not be employed in military service on any front of operations or on the lines of communication or within occupied or

other foreign territory. Naval prisoners of war shall be precluded from any employment afloat or ashore in which they might be actively engaged with the enemy.

Civilians shall not be employed in any naval or military service, nor in the mercantile marine, including coasting vessels. They shall not be called on to undertake any compulsory national service.

XXVII. — Combatant prisoners of war who are repatriated or transferred to a neutral country, and civilians who are repatriated, shall be allowed to take with them their personal property, subject to the following restrictions: —

(a.) All regulations governing export must be obeyed;

(b.) Written or printed matter can only be allowed if circumstances permit of its being censored. This does not apply to certificates of birth, baptism, marriage, and military service, or any other official documents affecting the owner's personal status;

(c.) The total weight of the luggage taken by the prisoners with them must not exceed 100 lb. (British) or 90 lb. (German), exclusive of hand luggage. Prisoners travelling in the same party shall be permitted to adjust amongst themselves cases of overweight and underweight.

A receipt shall be given for articles retained, and care shall be taken for the safety of such articles.

The limit of 100 lb. weight shall not apply in the case of persons brought from overseas, but they shall be allowed to bring as much luggage as can reasonably be transported.

II. — Treatment of Combatant and Civilian Prisoners of War.

1. General Dispositions.

XXVIII. — The treatment of prisoners of war shall follow the principles laid down in international Agreements. In particular they are to be protected from acts of violence and personal insults and from public curiosity, and are to be treated humanely. They may not be compelled to do any work which is directly connected with the operations of war.

XXIX. — Forcible means of any kind to compel prisoners of war to give information about their army or their country are strictly forbidden. Prisoners of war, who refuse to give information may neither be threatened nor insulted nor subjected to any other treatment which puts them in a less favourable position than other prisoners.

XXX. — Money in the possession of prisoners of war may be taken from them only by the orders of an officer, and only then when it is possible to make a proper record. Bank-notes and silver money of the prisoners' country of origin may not be changed without their consent. Money taken from a prisoner shall be credited to him. A receipt for it shall be handed to him. Objects of value, such as rings, watches, cigar and cigarette cases, as well as badges of rank and decorations, may not be taken from prisoners.

The confiscation of personal papers belonging to prisoners of war is strictly forbidden. The captor State may take copies of such papers.

XXXI. — Both Governments shall give instructions to the military authorities to take severe measures against any breach of the provisions of Articles XXIX and XXX.

XXXII. — The duration of the daily work of prisoners of war shall not exceed that of the civilian workers of the district, and shall not, as a rule, exceed ten hours. The time occupied in going to and from work shall be included in this period if the distance is more than 1 kilom. from the place at which the prisoner of war is located.

An interval of one hour shall be allowed for the mid-day meal. This hour shall be excluded in calculating the hours of work.

Prisoners of war who work shall be allowed one day of rest per week. Whenever possible this shall be Sunday.

In the case of any accident happening to a prisoner of war when at work, a certificate stating the nature of the accident shall be given to the man by the authorities of the captor State on his liberation.

XXXIII. — Prisoners of war shall not be employed in mines and quarries if they are unfitted for such work on account of their physical condition or on account of the nature of their previous occupation. Before prisoners of war are employed in mines or quarries they shall be medically examined, and they shall further be medically examined once in every month during the continuance of such employment. Any prisoner of war, in whose case the examining medical officer considers it necessary, shall be removed to some other employment, which shall not be more severe.

Prisoners of war who work in mines or quarries shall be placed on the same footing as regards duration of work as free workmen employed in the same class of work; and they shall be equally entitled to any increase in rations which is allowed to the free workmen.

2. Protection after Capture.

XXXIV. — On first capture prisoners of war shall be brought back as soon as possible to a collecting camp, which must be at least 30 kilom. from the firing line. Both Governments shall give instructions to the military authorities to take severe measures against any breach of the provisions of this article.

3. Prisoners Retained in an Area of Operations.

XXXV.— Only those prisoners of war who are physically fit for labour may be retained in an area of operations, or on lines of communication. Exception shall be made in the case of prisoners, who, as a result of wounds or sickness, cannot be transported to hospitals outside the area of operations.

All other prisoners shall be removed from the area of operations as soon as possible.

XXXVI. — Prisoners of war in an area of operations or on lines of communication shall be treated in the same way as prisoners in home territory. Special care shall be taken in the case of the former to ensure the

strict execution of the provisions of this Agreement relating to food and clothing.

XXXVII. — All prisoners of war who are retained in an area of operations or on lines of communication shall be permitted to send letters and postcards under the same conditions as prisoners elsewhere, and to receive letters, postcards, remittances, and parcels. They shall be allowed to communicate to their families, within one month of their capture, an exact address to which their letters, &c., can be regularly and speedily sent. Prisoners shall be allowed to communicate to their families without delay any change of this address. They shall be provided with the necessary writing materials.

XXXVIII. — Prisoners of war retained in an area of operations or on lines of communication may only be employed at a distance of at least 30 kilom. from the firing line.

XXXIX. — Each Government shall give its favourable consideration to any request by the other Government for permission for representatives of the protecting Legation to inspect a camp in an area of operations or on lines of communication.

4. Notification of Capture.

XL. — The name, rank and regiment of every prisoner of war shall be notified within one month of his capture to the competent authorities of the captor State, whence it shall be transmitted as soon as possible to the Government of his country of origin.

Every prisoner shall be enabled to send to his family within one week after his capture a postcard containing information of his capture and of the state of his health. He shall be provided with the necessary writing materials. These cards shall be forwarded as rapidly as possible, and shall not be delayed.

Paragraph 22 of The Hague Agreement of the 2nd July, 1917, is hereby cancelled.

XLI. — Facilities shall be given to every prisoner of war, within three days after his arrival in a prisoners' camp, to communicate to his family by means of a printed card the address at which they can send him letters, postcards, remittances, and parcels. These postcards shall be despatched without any delay, and shall not be reckoned in the number of letters or postcards a prisoner is authorised to write.

The provisions of this article shall also apply whenever a prisoner of war is transferred from one camp to another.

5. Equipment and Organisation of Camps.

Officers' Camps.

XLII. — The equipment and organisation of officers' camps shall not fall below the minimum conditions set forth in Annex III to this Agreement.

In British Oversea Dominions and Protectorates and occupied territories the provisions of Annex III with regard to accommodation and sanitary arrangements shall apply in so far as they are suited to the local and climatic conditions. The accommodation and sanitary arrangements shall, however, in no case be less favourable than the provisions of Annex III. In tropical

places barracks of corrugated iron may only be used if they are sufficiently protected against sun and rain by wood or other suitable material.

These minimum conditions shall be fulfilled not more than two months after this Agreement comes into force, save in so far as new construction or structural alterations may be required, for which an additional six weeks shall be allowed.

XLIII. — The senior officer prisoner of war in any camp is authorised to inform the protecting Legation whether these minimum conditions have been complied with. This information may be given on any date after that on which the conditions mentioned in the preceding article should have been fulfilled.

This information shall be transmitted to the Commandant of the camp, who shall forward it through the usual channel to the Legation. The Commandant may add to it any observations he thinks fit.

Should the Commandant disagree with the statements of the senior officer prisoner of war the Government of the captor State shall invite the protecting Legation to send one of its members to the camp forthwith. The report of this delegate shall be transmitted to the Government of the captor State and to the prisoners' Government.

Camps for Ranks other than officers.

XLIV. — The equipment and organisation of main camps for ranks other than officers shall not fall below the minimum conditions set forth in Annex IV to this Agreement.

In the British Oversea Dominions and Protectorates and occupied territories the provisions of Annex IV with regard to the accommodation and sanitary arrangements shall apply in so far as they are suited to the local and climatic conditions. The accommodation and sanitary arrangements shall, however, in no case be less favourable than the provisions of Annex IV. In tropical places barracks of corrugated iron may only be used if they are sufficiently protected against sun and rain by wood or other suitable material.

These minimum conditions shall be fulfilled not more than three months from the date on which this Agreement comes into force, save in so far as new construction or structural alterations may be required, for which an additional six weeks shall be allowed.

The same conditions shall apply to working parties as far as the local circumstances permit.

Nothing in the above shall preclude the accommodation of ranks other than officers under canvas at suitable times of the year and under conditions which are in medical opinion not injurious to health.

6. Food.

XLV. — The daily rations of prisoners of war shall be sufficient in quantity and quality, especially as regards meat and vegetables, regard being had to the restrictions imposed on the consumption of food by the civil population of the country.

Officers shall be assisted as far as possible to manage their own messing.

XLVI. — Combatant prisoners of war shall receive as far as possible the same allowance of the rationed articles of food as the civil population. The

daily caloric values of their diets shall in no case fall below the following minima: —

2,000 calories for non-workers;

2,500 calories for ordinary workers;

2,850 calories for heavy workers.

The daily ration of bread shall in no case be less than 250 grammes, and in the case of ordinary workers there shall be a daily addition to this ration of 100 grammes of bread or other cereals, and in the case of heavy workers a daily addition of 150 grammes of bread or other cereals.

XLVII. — In camps for prisoners of war canteens shall as far as possible be maintained, in which prisoners can obtain at reasonable prices such articles of daily use as are available.

7. Punishments.

XLVIII. — Paragraph 16 of The Hague Agreement of the 2nd July, 1917, is hereby cancelled, and the following is substituted therefor: —

The duration of the punishment for a single attempt to escape on the part of a prisoner of war, even if repeated, shall not exceed military confinment for a period of fourteen days, and, if made in concert with other prisoners, a period of twenty-eight days.

The duration of the punishment for such an attempt to escape combined with other punishable actions consequent upon or incidental to such attempt in respect of property, whether in relation to the appropriation or possession thereof, or injury thereto, shall not exceed military confinement for a period of two months.

The foregoing provisions shall apply to attempts to escape from arrest of any kind, or from prison, in the same manner as they apply to attempts to escape from ordinary camps.

Prisoners of war recaptured after an attempt to escape shall not be subjected to any unnecessary harshness. Any insult or injury to such prisoners shall be severely punished. They shall be protected from violence of every kind. In particular, officers recaptured after an attempt to escape shall be treated in a manner suitable to their rank.

XLIX. — Collective punishments or deprivations of privilege on account of the misconduct of individuals are forbidden.

L. — Punishments which are undergone in camp cells shall be carried out under the conditions provided in Annexes V and VI to this Agreement.

8. Help Committees.

LI. — In every main camp and in every working camp numbering more than 100 prisoners of war of the same nationality there shall be established a Help Committee freely chosen by the prisoners from among themselves. The membership of the committee shall require the approval of the Commandant.

In like manner every working party numbering from 10 to 100 men of the same nationality shall choose a representative. So far as circumstances permit, representatives of working parties numbering less than ten men of the same nationality shall also be recognised. This representative shall be the channel of communication between prisoners attached to the working party

and the Help Committee of the main camp.

LII. — Help Committee and representatives shall receive and distribute the consignments in bulk of bread, other victuals, clothing, books, &c., and also single parcels, the proper recipient of which cannot be ascertained.

Representatives are authorised to correspond freely with Help Committees, and Help Committees with the societies or individuals by whom parcels are despatched, provided that this correspondence relates solely to consignments of goods, whether these be received in bulk or as individual parcels.

The Help Committee of each main camp is authorised to correspond with the Help Committees of the working camps and with the representatives of the working parties attached thereto with respect to the drawing up and transmission of the lists provided for in Articles 16 and 18. Letters written for this purpose shall be in addition to the number of letters authorised by existing regulations.

Help Committee shall draw up, under the supervision of the Commandants, lists of men who have had no news of their families for at least three months. These lists shall contain the names of the prisoners, the addresses of the families and brief communications and requests for news limited to a length of twenty words in telegraphic style. These lists shall be sent to the Red Cross Committee of the captor State or to the International Red Cross Committee at Geneva. These Committees shall obtain and forward the answers of the families in question as rapidly as possible.

LIII. — Medicines, medical appliances and stimulants for medical purposes, despatched in bulk from an authorised source to the Help Committees of camps, shall be admitted. The distribution of these articles to the prisoners in the main camps and in the dependent working camps shall be carried out by the Help Committee of each camp under the supervision of the camp medical officer.

9. Relations with Protecting Powers.

LIV. — Prisoners of war may address written requests or complaints regarding treatment or conditions in camps, or on subjects of purely personal interest to the writer, to the protecting Legation, or may make them verbally to the visiting members of that Legation.

Such communications, if in writing, shall be handed to the Help Committee of the camp, or, in the case of a working party, to the representative for transmission to the Help Committee of the main camp. The Help Committee may suppress such communications if it considers them to be useless or without foundation. Otherwise, the Help Committee shall forward them to the Commandant, who shall transmit them without delay to the protecting Legation through the usual channel.

The military authorities may not withhold complaints of this kind unless they contain statements which are intentionally false or are written in insulting language. An order to suppress such a document may only be given by the War Office, or, in the case of prisoners of war overseas, by the chief

local military authority. When such an order has been given, the writer and the protecting Legation shall be informed of the fact and of the reasons for it. The military authorities shall add such observations on the prisoner's requests and complaints as will enable the Legation to appreciate the merits of the case.

For the time being, communications addressed to the protecting Legation shall not be reckoned in the number of letters that a prisoner is allowed to write.

In no case shall written communications addressed to the Commandant and intended for him alone be counted in the number of authorised letters and postcards.

10. Parcels and Postal Service.

LV. — Parcels addressed to individual prisoners of war shall be delivered to them as quickly as possible. Commandants of camps and working parties are forbidden to withhold them. The contents shall be examined with all care to prevent injury, in the presence of the addressees or of their representative. Preserved foods shall not be opened until they are needed for consumption, and shall not be delivered to the owner in a manner which unfits them for consumption.

The contents shall be handed over to the addressees, either on arrival or, if the addressees so prefer, as they are required.

Every recipient of a parcel shall have the right to despatch to the sender a postcard specially printed, so as to contain only an acknowledgment of the receipt and a statement of the contents. This postcard shall be additional to the number of letters he is authorised to write.

The despatch to prisoners of books and pamphlets shall be authorised, subject to censorship. Books may be bound.

Parcels may be sent in the ships for the transport of prisoners of war between Great Britain and the Netherlands.

LVI. — Parcels addressed to individuals may be packed together in bulk, provided the packages are of such a kind as to be conveniently carried by sea and rail.

Unaddressed parcels may likewise be packed in bulk and the packages addressed to the Help Committees of main camps. These Help Committees shall distribute the parcels to the Help Committees and representatives in working parties attached to their camp. Such packages shall be clearly marked as follows: —

"For distribution to prisoners of war who have no parcels."

LVII. — Care shall be taken to accelerate the correspondence of prisoners of war as far as possible.

11. Publication of Agreements in the Camps.

LVIII. — The provisions of Article XXVIII-LVII, and of Annexes III-VI, as well as of any future agreements between the two Governments concerning the treatment of prisoners of war, shall be posted up in a conspicuous place in all the camps and working parties in the prisoners' own language.

12. Application to Civilian Prisoners of War.

LIX. — The provisions of Article XLIV and Annex IV, and of Articles XLV-LVIII, shall apply to civilian prisoners of war in the same manner as to combatant prisoners of war, with such modifications as circumstances may require, provided always that any such modifications shall not be less favourable to the prisoners than the original provisions.

DOCUMENT NO. 41

CONDITIONS OF AN ARMISTICE BETWEEN THE ALLIED AND ASSOCIATED POWERS AND GERMANY
(Compiègne, 11 November 1918)

SOURCES

2 Bevans 9
13 AJIL Supp. 97
Parl. Papers, "Misc., No. 25 (1918)"
3 Malloy 3307

NOTE

This is the armistice agreement which brought about a cessation of the hostilities of World War I (1914-1918). The war itself was brought to an end by the Treaty of Versailles of 28 June 1919 (DOCUMENT NO. 44). Like many of its counterparts which have followed the complete victory of one side and the complete defeat of the other and a dictated armistice agreement (see, for example, DOCUMENT NO. 50 and DOCUMENT NO. 64), the provisions in this agreement for the repatriation of the members of the armed forces of the victor nations who were being held as prisoners of war by the defeated side were not matched by a similar requirement for the repatriation of the members of the armed forces of the vanquished nation who were being held as prisoners of war by the victors; that had to await the peace treaty. This situation was not improved by the provisions of Article 75(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) and the excesses in this respect which followed each termination of hostilities in World War II (1939-1945) (see, for example, (DOCUMENT NO. 115) led to the drafting and adoption of Article 118 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). However, even the unambiguous provisions of that article have not proven successful in accomplishing their purpose. (See DOCUMENT NO. 167.)

EXTRACTS

X. The immediate repatriation, without reciprocity, according to detailed conditions which shall be fixed, of all allied and United States prisoners of war, including those under trial and condemned. The allied powers and the United States of America shall be able to dispose of these prisoners as they think fit. This condition annuls all other conventions regarding prisoners of war, including that of July, 1918, now being ratified. However, the return of German prisoners of war interned in Holland and Switzerland shall continue as heretofore. The return of German prisoners of war shall be settled at the conclusion of the peace preliminaries.

XI. Sick and wounded who can not be removed from territory evacuated by the German forces shall be cared for by German personnel, who shall be left on the spot with the material required.

DOCUMENT NO. 42

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND GERMANY CONCERNING PRISONERS OF WAR, SANITARY PERSONNEL, AND CIVILIANS
(Berne, 11 November 1918)

SOURCES

For. Rel., 1918, Supp. 2, at 103
13 AJIL Supp. 1

NOTE

During the course of World War I (1914-1918) practically all of the belligerents found it necessary to supplement the provisions of the 1907 Hague IV Regulations (DOCUMENT NO. 33) relating to prisoners of war through the medium of special bilateral and multilateral agreement (see, for example, DOCUMENT NO. 37 and DOCUMENT NO. 40). However, an examination of those instruments will quickly reveal that each was somewhat of a hodge-podge negotiated in order to take care of a number of specific, unrelated problems which had arisen and which required solutions. While the agreement between the United States and Germany appearing below seems at first glance to fall into the same category, opening, as it does, with 22 articles dealing with various problems of repatriation and internment in a neutral country, actually, Articles 23-184 of the agreement and the seven annexes probably constitute the single most complete general agreement governing the treatment of prisoners of war ever drafted, including the 1929 and 1949 Geneva Prisoner-of-War Conventions (DOCUMENT NO. 49 and DOCUMENT NO. 108, respectively). Because it was signed on 11 November 1918, the date upon which the armistice ending World War I hostilities was also signed (DOCUMENT NO. 41), this agreement never entered into effect.

TEXT

A. PRISONERS OF WAR

I. Internment in a Neutral Country or Repatriation of Prisoners of War

1. VALID PRISONERS OF WAR

ARTICLE 1. Valid prisoners of war who have been in captivity for one year, except as otherwise specifically provided in articles 2, 3 and 16 shall be repatriated on the basis of head for head and rank for rank.

On the same basis prisoners of war who have been interned in a neutral country because of invalidism and have been declared cured and valid by a neutral medical commission, shall be repatriated when they shall have been in captivity and interned in a neutral country, both combined, for a period of one year.

In the execution of this article the following shall be deemed to be of equal rank:

(a) all general, flag, field and commanding officers;

(b) all other officers;

(c) all non-commissioned and petty officers;

(d) all other enlisted or enrolled persons.

ART. 2. The personnel of the German war vessels who were interned in the United States or its possessions prior to April 6, 1917, who are now held as prisoners of war, and who have no claim because of invalidism to repatriation, shall be exchanged, as soon as possible after this agreement goes into force for an equal number of American prisoners of war, whether the latter have been in confinement for a year or not, on a basis of head for head and rank for rank. In the execution of this article the following shall be deemed to be of equal rank:

(a) all officers;

(b) all non-commissioned officers, petty officers and men.

ART. 3. Prisoners of war who have completed their fortieth (40th) year of age and who, although eligible for repatriation on the basis of rank for rank and head for head as established in article 1, cannot be repatriated because of the inequality in the numbers of such prisoners of war held by the two parties, shall be interned in a neutral country. They may be repatriated as soon as conditions as to equality in the number of prisoners of war held by the two parties shall render possible an exchange on the basis of article 1.

2. INVALID PRISONERS OF WAR

ART. 4. Prisoners of war shall be directly repatriated without regard to rank or number if they suffer from infirmities or diseases of the kinds specified in Annex 1, Sections 1*(a)*, 2*(a)*, and 3.

ART. 5. Prisoners of war shall be interned in a neutral country without regard to rank or number if they suffer from infirmities or diseases of the kinds specified in Annex 1, Sections 1*(b)*, 2*(b)* and 3.

ART. 6. Prisoners of war who do not suffer from the disabilities or diseases of the kind specified in Annex 1 may be repatriated or interned in a neutral country when their condition of health in other respects appears to the Travelling Commissions or Commission of Control to render this necessary.

ART. 7. The cause of the infirmity or disease shall not be taken into consideration in determining the eligibility for repatriation or internment of prisoners of war on the ground of invalidism except when self-inflicted injuries are involved.

ART. 8. For the purpose of determining what prisoners of war are entitled to repatriation or to internment according to articles 4, 5 and 6, on account of invalidism, the prison camps are to be visited by medical commissions (Travelling Commissions).

Each Travelling Commission shall consist of one neutral physician and one physician of the Captor State. In the case of a difference of opinion the decision shall rest with the neutral physician. The Travelling Commissions may be composed exclusively of physicians of the Captor State, provided the

State of Origin requests it through the Protecting Power.

At the request of the Protecting Power Travelling Commissions shall be allowed to make recommendations in regard to the medical care of the prisoners and the hygienic conditions of the camps.

One of the Travelling Commissions, the number of which is to be in proportion to the number of prisoners held by each State, shall visit each camp every two months.

ART. 9. There shall be brought before the Travelling Commissions all prisoners of war who have been proposed for repatriation or internment in a neutral country:

(a) by the camp physician in a list prepared by him;
(b) by the State of Origin to the Government of the Captor State;
(c) by the Camp Help Committee;
(d) by the head of a hospital not under the authority of a Camp Commandant or by any other person in independent charge of prisoners.

In order to carry out the provisions mentioned in paragraph 1, sub-section (*c*), the Camp Help Committee shall be allowed to prepare each month a list of prisoners of war in or belonging to the camp, which list is to be handed to the Camp Commandant.

All prisoners of war in confinment within or without the camp shall receive consideration by all authorities concerned in the proposals for examination. The Camp Commandant shall keep a current list of all prisoners of war in confinement which shall be copied monthly by the Camp Help Committee. Copies of the lists which have been prepared by the camp physicians and by the Camp Help Committees shall be kept in the custody of the Camp Commandants.

The lists of prisoners of war named by the State of Origin shall be handed to the Travelling Commissions.

ART. 10. The representative of the Camp Help Committee with each working detachment shall transmit every month to the Commandant and to the Camp Help Committee of his own camp duplicate lists showing the names of all men from the camp in his working detachment and also showing in regard to each man named thereon:

(a) whether in the representative's opinion, he should be examined by the Travelling Commission;
(b) whether the man himself desires to be examined; or
(c) whether he neither needs to be nor desires to be examined.

These lists are to be submitted with the greatest possible despatch.

ART. 11. The Travelling Commissions, on their arrival in each camp and before beginning examinations, shall inspect the lists in the custody of the Camp Commandant and compare them with the lists in their own possession.

Should a prisoner of war whose name appears on one of the lists have been transferred to another prison camp before the arrival of the Travelling Commission, or should a prisoner of war be in confinement outside of the camp and request of the proper authorities of his parent camp or of his Camp

Help Committee an examination by a Travelling Commission, the Commission shall be so informed. The Commission shall transmit the names of any such prisoners to a central authority designated by the Captor State, which authority shall arrange in every case for the examination of all such prisoners of war by one of the Travelling Commissions.

ART. 12. When visits are to be made by Travelling Commissions to prisoners of war in zones barred for military reasons, arrangements therefor compatible with military necessities shall immediately be made by the competent military authorities. If for military reasons such visits are impossible for a period of thirty (30) days, the prisoners of war shall, for the purpose of presentation to the Travelling Commission, be brought to a locality accessible to the commission.

ART. 13. The adverse decisions of the Travelling Commissions shall be communicated to the State of Origin, together with the reasons therefor, and the name of the agency which proposed the prisoner of war for repatriation or internment.

ART. 14. In cases which have been recognized as urgent by the medical officers of the Captor State because of the serious nature of the infirmity or disease of the prisoner of war, the repatriation or internment in a neutral country shall take place at once without waiting for a visit from the Travelling Commission.

ART. 15. Prisoners of war who have been found by the Travelling Commission to be eligible for repatriation or for internment shall be examined by a Commission of Control whose decision shall be final. The Commission of Control shall consist of three physicians of a neutral country and three physicians of the Captor State. In case of a tie vote, the vote of the senior neutral physician shall be decisive.

The provisions of Article 13 shall apply to the adverse decisions of the Commission of Control.

Prisoners of war who have been recognized by the Commission of Control as entitled to repatriation or internment shall be repatriated or interned in a neutral country with the least possible delay.

3. GENERAL PROVISIONS

ART. 16. Valid submarine personnel who have been in captivity for a period of not less than twelve (12) months and who might otherwise be entitled to repatriation under this agreement shall in lieu of repatriation be interned in a neutral country until the conclusion of peace, anything in this agreement to the contrary notwithstanding. Invalid submarine personnel shall be repatriated or interned as provided in this agreement for other invalid prisoners of war.

ART. 17. The order of priority for internment in a neutral country and for repatriation shall be determined in accordance with the principles stated in article 175.

ART. 18. Prisoners of war eligible for internment in a neutral country or for repatriation, under articles 1 to 7 inclusive, and 16, may renounce their rights thereto, in which case a written declaration of the fact must be made.

In doubtful cases either of the two Governments may request confirmation of the renunciation through a representative of the Protecting Power, or, in the case of prisoners of war interned in a neutral country, through the government of the latter country.

ART. 19. Prisoners of war interned in a neutral country shall not be repatriated unless they become eligible for repatriation:

(a) Under the provisions of Annex 1; or

(b) Under the provisions of articles 1, 3 or 6.

Before their repatriation their names shall be reported by the competent auhorities of the neutral country to the Government of the Captor State.

The decision relating to the repatriation of prisoners of war from a neutral country under this article shall be made by neutral examining commissions. The neutral Government is to be requested to arrange examinations accordingly every three months or oftener if necessary in special cases.

ART. 20. If prisoners of war eligible for internment in a neutral country or repatriation are awaiting trial, they may be detained until the completion of the trial, and, with the limitation provided in the following paragraph, until the expiration of the sentence if any.

If prisoners of war eligible for internment in a neutral country or repatriation have not yet begun or have not completely served a sentence imposed upon them, they may be detained until they have completed their punishment, but not longer than two months from the day on which they would otherwise have been interned or repatriated.

This provision does not apply to prisoners of war who are to be transported over seas and the unexpired portion of whose sentences does not exceed two months. In such cases the prisoners of war shall not be detained, but they shall be sent on the next available transport.

When a prisoner of war is detained under either of the above provisions, the Government of the State of Origin shall be advised by the Government of the Captor State of the reason for detention and, in case of punishment, of the length of the sentence and of the unexpired portion thereof.

The provisions of this article do not apply to those cases in which a neutral Government refuses to receive for internment a prisoner of war who has been sentenced on account of a grave offense.

ART. 21. Prisoners of war who have been repatriated under the terms of this agreement shall be excluded from service in units normally used in combat against the enemy on water or land or in the air in the forces of the Contracting Parties or of any of their allies or co-belligerents.

Cases of infringement of the provisions in the above paragraph brought to the attention of the State of Origin by the corresponding Protecting Power shall be investigated by the former and proper redress made therefor without delay.

ART. 22. Prisoners of war who are to be interned in a neutral country or repatriated may take their personal belongings with them, including moneys in their possession, or held for them or due them on any account, subject to the following limitations:

(a) All export regulations must be complied with. Nevertheless a prisoner of war may, except as provided in subsection *(c)*, take with him clothing and personal effects which he possessed at the time of capture or which were sent him from abroad for his personal use while a prisoner. He may also take with him the articles in the third paragraph of Article 28.

(b) Prisoners of war may take with them written or printed matter only in case circumstances permit examination by the censor. This restriction is not applicable to birth, baptismal, or marriage certificates, or to commissions and other personal official papers.

(c) The total weight of the baggage which may be taken shall not exceed fifty kilograms, exclusive of hand baggage. An equalization of weights over and under the authorized limit shall be permitted among different persons of the same party. This limit of fifty kilograms is not to apply to persons going overseas; on the contrary, such persons may take as much baggage with them as can be transported without difficulty.

A certificate shall be furnished for articles retained, and care shall be taken to insure their safe-keeping.

II. Treatment of Prisoners of War

1. GENERAL PROVISIONS

ART. 23. The treatment of prisoners of war shall follow the principles laid down in international agreements. In particular they are to be protected from acts of violence, ill-treatment, cruelties, personal insults and from public curiosity, and are to be treated humanely. Instructions to this effect shall be given to the authorities entrusted with the care of prisoners of war.

Officer prisoners of war shall be treated with the courtesy and consideration which their rank and grade require.

ART. 24. Prisoners of war shall not be quartered nor worked with nor treated as criminals except as punishment for crime of which they have been convicted by due process of law.

ART. 25. Compulsory measures of any kind to make prisoners of war give information about their army, navy or State, or about those of their co-belligerents, are strictly forbidden. Prisoners of war who decline to give information shall neither be threatened nor insulted, nor exposed to any other treatment which will put them in a position less favorable than other prisoners of war.

ART. 26. In general, prisoners of war shall be allowed to talk with one another.

ART. 27. Prisoners of war shall be permitted to retain the clothing necessary for their personal use provided that no objections exist on hygienic grounds.

ART. 28. Prisoners of war shall not be deprived of their money except on command of an officer, and then only when conditions permit a proper receipt to be given. Their paper and silver money may not be changed without their consent, and if changed it shall be only at the fixed rate of one mark for one franc or six marks for one dollar.

Money taken from a prisoner of war must be credited to him and a receipt given therefor.

Objects of value, such as rings, watches, cigar and cigarette cases, etc., as well as insignia of rank and decorations may not be taken from prisoners of war.

The confiscation of personal papers belonging to prisoners of war is strictly forbidden. The Captor State may make a copy of such papers, in which case the papers must be given back within two weeks at the latest.

ART. 29. Dogs shall not be used as guards in the interior of prison camps nor in guarding working or exercise detachments, unless they are in leash or are securely muzzled. Unmuzzled dogs shall under no circumstances be used in tracking down escaped prisoners of war.

ART. 30. Prisoners of war shall accord to the members of the armed forces of the Captor State its prescribed military courtesies. Regulations in the language of the State of Origin prescribing such courtesies shall be kept posted in a conspicuous place, accessible to the prisoners of war, and no prisoner of war shall be punished for failing to accord any military courtesy not specified in the regulations so posted.

ART. 31. All female personnel serving with the armed forces of either of the Contracting Parties, shall, if captured, be given every possible protection against harsh treatment, insult or any manifestation of disrespect in any way related to their sex. They shall be suitably and decently quartered, and provided with lavatories, bathing facilities, and other similar necessities quite separate from those provided for males.

2. PROTECTION AFTER CAPTURE

ART. 32. Prisoners of war shall be sent back as soon as possible after capture to collecting camps, which shall be at least 30 kilometers from the front line of the Captor State. In no case shall prisoners of war be kept nearer to the front line than 30 kilometers, unless on account of wounds or sickness they would incur greater danger by being moved than by remaining.

Seriously wounded prisoners of war shall be given competent medical care without delay and as soon as circumstances permit, shall be removed to a hospital.

ART. 33. In so far as practicable prisoners of war shall be grouped in camps, working detachments, and quarters with prisoners of war of the same State of Origin; and prisoners of war other than officers shall, whenever possible, be assigned to a camp containing at least 100 men from their own State of Origin.

Every prisoner of war not an officer shall be assigned to a prisoner of war camp having a Camp Help Committee composed of prisoners of war of his own State of Origin and he shall be informed of this assignment.

ART. 34. Special camps for non-commissioned officers shall not be established.

3. NOTIFICATION OF CAPTURE

ART. 35. The name, individual number, rank or rating and military or naval

organization of every prisoner of war shall be notified within one month of capture to the competent authorities of the Captor State and be transmitted as soon as possible to the State of Origin.

ART. 36. The Contracting Parties will do all in their power to insure that news in regard to the location of prisoners of war or missing belligerents shall be telegraphed to the State of Origin through the intermediary of the designed at Relief Societies.

The following are the designated Relief Societies:

(a) For the United States of America: American Red Cross, Berne, Switzerland

(b) For Germany: The Frankfort Red Cross, Committee for German Prisoners of War, Telegraphic Address: Gefangenenhilfe-Frankfurtmain.

ART. 37. Prisoners of war may send to their families within one week after capture a printed post card containing the news of their capture and information regarding their state of health.

Prisoners of war may within three days after assignment to a prison camp communicate to their families by means of a printed post card the address at which letters, post cards, remittances and parcels may be sent them. This provision shall also apply to all cases where prisoners of war are transferred from one prison camp to another.

The communications mentioned in the two preceding paragraphs, for which the necessary writing material is to be furnished to prisoners of war by the Captor State, shall be forwarded as quickly as possible and without delay; they shall not be counted in the authorized maximum of letters and post cards.

In the case of American prisoners of war these communications shall be addressed in care of the American Red Cross, Berne, Switzerland.

4. EQUIPMENT AND ORGANIZATION OF CAMPS

ART. 38. Quarters provided for troops of the Captor State shall form in hygienic as well as other respects the standard for the housing of prisoners of war in prisoner of war camps. The points mentioned in Annex 2 in regard to camps for officers and in Annex 3 in regard to camps for prisoners other than officers represent minimum requirements below which equipment and organization in the camps shall not fall. To whatever extent local conditions allow, the minimum requirements prescribed for main camps for prisoners other than officers shall be applicable to working detachments; and in all instances irrespective of local or other conditions the minimum requirements as to clothing, equipment and blankets, as stipulated in Annex 3, shall at least be met.

Prisoners of war shall be protected against the inclemencies of the weather to the same extent as members of the armed forces of the Captor State.

ART. 39. The minimum requirements must be fulfilled within three months at most after this agreement goes into force, unless new buildings or changes in buildings are necessary. In such cases a further delay of six weeks is permissible.

ART. 40. In camps for officers, the senior officer prisoner of war, and in camps for prisoners of war other than officers, the senior in rank on the Camp Help Committee, shall have the right to inform the diplomatic representative of the Protecting Power as to whether the minimum requirements have actually been complied with. This information may be given at any time after the expiration of the period for which provision is made in Article 39.

The reports shall be handed to the Camp Commandant and shall be forwarded by the latter through official channels to the diplomatic representative of the Protecting Power, together with such comments as appear appropriate and necessary.

If the Camp Commandant considers the report unfounded, the Government of the Captor State shall request the diplomatic representative of the Protecting Power to send a delegate to the camp immediately. The report of such delegate is to be communicated to the Governments of the Captor State and of the State of Origin.

5. WORK

ART. 41. The Captor State may utilize the labor of prisoners of war, officer prisoners of war excepted, according to their grade and rating, aptitude and physical ability.

ART. 42. Prisoners of war shall neither be required to perform, nor by menaces, threats or force coerced into volunteering to perform, any work directly related to the operations of the war.

Neither Contracting Party shall utilize prisoners of war of the other for work in mines, marshes, munition factories, or for dangerous work in quarries.

ART. 43. Prisoners of war may be employed only at a distance of at least thirty kilometers from the front line of the Captor State.

ART. 44. Prisoners of war subject to compulsory work under the provisions of this agreement may be required to work for the public service of the Captor State, or for private persons or private corporate interests, or they may be authorized to work on their own account.

All work performed by prisoners of war shall be under the supervision of the Captor State. The Captor State shall retain full obligation and responsibility for the proper care, maintenance, pay and treatment of all prisoners of war who may be hired out to work for private persons or private corporate interests.

ART. 45. Prisoners of war shall not be worked longer hours than the civil population engaged in similar work in the same locality and except in cases of emergency the working day shall not be longer than ten hours, including whatever time is consumed in passing to and from work.

An interval of one hour, which will not be counted as working time, shall be allowed for the mid-day meal. Adequate time and opportunity for attending to calls of nature shall be given.

ART. 46. Prisoners of war who work shall be allowed one full day's rest of 24 hours in each seven days; this rest day shall be the calendar Sunday whenever practicable. When, however, emergency conditions require work on Sunday,

the day of rest shall be accorded as soon as practicable thereafter and in no event shall the interval between successive rest days be longer than nine days nor shall there be more than one such nine-day interval in each 30 days.

ART. 47. When prisoners of war, from the nature of their work, are exposed to dangers or sickness, special preventive measures shall be taken.

ART. 48. Prisoners of war shall be classified by the attending medical officer according to their ability to work without injury to their health in the following categories:

(a) heavy work,
(b) light work,
(c) no physical work,
(d) sick — no work.

Classified lists, certified by the medical officer, shall be kept by the camp authorities. Where circumstances require, as for instance transfer from one camp to another, prisoners of war shall be accompanied by a certificate showing their classification for work.

ART. 49. The following prisoners of war are exempted from all forms of compulsory work:

(a) Aviation cadets, officer candidates, field clerks, and other appointed officers of the American army and navy;
(b) "Offizier-Stellvertreter" and "Beamtenstellvertreter" and "Faehnriche" of the German army and the German navy, "Deckoffiziere," "Vice-Deckoffiziere," and "Hilfs-Deckoffiziere" of the German navy.

ART. 50. American non-commissioned officers and naval petty officers and German Unteroffiziere and Offiziersanwaerter, except those mentioned in Article 49, are exempted from compulsory work, except:

(a) For the supervision of prisoners of war of their own armed forces while at work.
(b) For checking and distributing mail matter and packages.
(c) For clerical work.
(d) For work which is absolutely necessary for the maintenance of the camp or the prisoners of war (e.g. work in gardens or kitchens) as far as this work is compatible with the dignity of their rank and is entirely within the enclosure of the camp.

In no case, however, shall non-commissioned officers be used for menial or dirty work, such as the loading and transport of coal, or the cleaning of streets or latrines.

ART. 51. Prisoners of war shall receive no compensation for work done for their own benefit or in connection with the maintenance or administration of their camp, their quarters or their work shop. Other work for the Captor State shall be paid for at a daily rate of not less than 50 Pfennigs or 12½ Cents nor more than 2 Marks or 50 Cents.

Prisoners of war shall be paid for work done in industrial occupations for private persons or firms at the same rate as industrial workers in the same locality for the same sort of work. Of the wages earned in this manner 25 to 50

Cents or 1 Mark to 2 Marks per day shall be credited to the prisoner of war concerned. The remainder shall be retained by the Captor State. Prisoners of war engaged in agricultural labor shall receive a daily wage of 50 Pfennigs or 12½ Cents which shall be credited to them without any deduction.

No deductions for maintenance shall be made from the net portion of their earnings but the full amount shall be credited to the prisoners of war and placed at their disposal for the purchase in accordance with camp regulations of articles needed by them.

The net balance remaining to the credit of prisoners of war shall be paid them upon their internment in a neutral country or upon their repatriation; in case of death of a prisoner of war this balance shall be paid to the diplomatic representative of the Protecting Power for the benefit of the legal heirs of the deceased.

6. RATIONS

ART. 52. It is the obligation of the Captor State to provide prisoners of war under its charge with such quantity and quality of wholesome food, especially of meat and vegetables, as is necessary to maintain unimpaired their normal physical health and working capacity. In general the ration served to prisoners of war shall be equal in amount, quality and nutritive value to that served to the armed forces of the Captor State when in barracks or in cantonments.

The food value of their daily ration shall not fall below a minimum of

2,000 calories for non-workers,
2,500 calories for ordinary workers,
2,850 calories for heavy workers.

The daily ration of bread shall in no case be less than 250 grams, and in the case of ordinary workers this ration shall be increased by the addition of 100 grams; and in the case of heavy workers by the addition of 150 grams of bread or other cereals; furthermore each prisoner of war's daily food ration shall contain amounts of fresh vegetables, fresh meat, and animal fat not less than those furnished to the guards at the same camp or place of detention.

All food furnished shall be sound and wholesome and shall have been handled in a proper manner.

An abundant supply of safely potable water, amounting to at least 3 litres per man per day shall be provided for drinking purposes for all prisoners of war.

ART. 53. Officer prisoners of war shall be permitted and, as far as possible, encouraged to manage their own messes; and at their request the rations furnished by the Captor State shall be delivered to them uncooked.

Prisoners of war shall be permitted to utilize the food contents of their parcels in common as additional ration. The necessary facilities for this shall be arranged with the Camp Commandant by a committee chosen by the officers in officer camps, and by the Camp Help Committee in camps for prisoners of war other than officers.

ART. 54. Menus specifying the weight of each article provided per man per day shall be posted daily and shall at all times be accessible to the delegate of

the Protecting Power.

ART. 55. Prisoners of war shall be allowed at all times to obtain hot water at a reasonable price, not to exceed 5 centimes or 5 pfennigs for 2 litres.

ART. 56. Camp Help Committees shall be given a hearing in cases of complaints made by prisoners of war about their food.

ART. 57. In camps where there are prisoners of war of different States of Origin, the Camp Commandant shall, as far as possible, permit the cooking for the prisoners of war to be done by cooks of their State of Origin.

The camp cooks shall be permitted to prepare the food according to the taste of the prisoners of war.

ART. 58. When necessary for the preparation of the contents of packages, special kitchen facilities and fuel shall be furnished prisoners of war by the Captor State. Members of the Camp Help Committee shall be permitted to enter the kitchens.

ART. 59. In all camps for prisoners of war canteens shall be maintained in which prisoners may buy at reasonable prices currently obtainable food and articles of daily use. Camp Help Committees shall co-operate in the management of the canteens. Price lists of articles for sale, in the language of the prisoners of war, shall be kept posted in a conspicuous place. The profits made may be used only for the benefit of the prisoners of war.

ART. 60. All officers, non-commissioned officers and men not employed on work outside the camp enclosure shall be permitted to take weekly walks of not less than two hours under military supervision outside the camp enclosure. If the prisoners of war so desire and local conditions permit, these walks shall be taken to a point at least four kilometers distant from the camp.

For this purpose, officer prisoners of war shall give their paroles not to make or prepare an attempt to escape during the walks, nor to do anything during this time which may be directed against the Captor State, its allies or co-belligerents. Such paroles shall be binding only for the duration of the walk for which given and on such conditions military supervision will be limited to conducting the walks.

8. INTELLECTUAL OCCUPATION AND DIVINE SERVICES

ART. 61. Prisoners of war shall be given as much opportunity as possible for intellectual occupation and development. For this purpose it is agreed as follows:

(a) In every main camp and as far as possible in every working detachment a reading and workroom sufficiently lighted and heated shall be provided and put at the disposal of the prisoners of war.

(b) Properly qualified prisoners of way may give educational courses and lectures which shall be so arranged as not to interfere with the work of the prisoners of war.

(c) The formation of camp libraries is to be encouraged in every way. Prisoners of war may have such newspapers of the Captor State or of its co-belligerents as the former may choose. Prisoners of war in working detachments shall be given every opportunity to make use of the libraries of the main camps. The exchange of books between the various

camps shall be accomplished through the military authorities. The use of text books, dictionaries and bound books shall be permitted.

(d) Prisoners of war charged with giving educational courses or lectures and the management of libraries are to be exempt from work in the camps and are to be transferred to another camp only in cases of urgent necessity.

(e) As far as possible, prisoners of war shall be permitted to complete the courses they are attending.

(f) Prisoners of war shall be given opportunities to arrange and give musical and theatrical performances and similar entertainments.

ART. 62. Prisoners of war shall enjoy complete liberty in the exercise of whatever religion they may profess.

Chaplains pending repatriation under Article 140, shall be allowed to perform their religious and professional duties among the prisoners of war. Similar opportunities shall be given to prisoners of war who are ministers of religion and they shall be exempted from such work as will interfere with their religious duties.

9. MEDICAL TREATMENT

ART. 63. Prisoners of war shall be given the same medical and dental care and treatment and diet as are provided by the Captor State for sick of like grades in its own armed forces.

In case of a shortage of military doctors, competent civilian doctors shall be provided.

The services of such prisoners of war as are dentists and are not repatriated as members of the Sanitary Personnel, shall be utilized.

In no case shall any charge be made against a prisoner of war for medical or dental treatment, or supplies or anesthetics.

ART. 64. Prisoners of war shall be protected against sickness to the same extent as the nationals of the Captor State; and especially against those diseases that are conveyed by infection through the respiratory and the alimentary tracts, by transmission through the agency of insects, by contact and by poisons, etc.

ART. 65. Artificial limbs, sticks, crutches, false teeth and all other surgical and medical appliances necessary for the well-being of prisoners of war shall be furnished by the Captor State, reimbursement therefor to be made by the State of Origin. Such further appliances as may be furnished to prisoners of war by the representative of the Protecting Power shall not be withheld by the Captor State.

ART. 66. If the Captor State is unable to furnish any of the medicines or medical supplies necessary for the treatment of the sick or wounded prisoners of war it shall notify the Protecting Power, and shall allow such medical supplies to be furnished and shall expedite their transportation and delivery to the Camp Help Committees at the camps for which they were requested.

The same applies to articles of specified kinds whose delivery has been recommended by the Travelling Commissions, or by a delegate of the Protecting Power. The distribution of these articles among the prisoners of

war in any main camp and in the working detachments belonging thereto shall be made through the Camp Help Committee of the camp and under the direction of the camp doctor.

ART. 67. In every prisoner of war camp a sick call shall be held daily at a specified hour in the presence of a medical officer at which prisoners of war may attend and receive medical attention from him.

ART. 68. Prisoners of war other than officers shall be detailed as orderly assistants to the medical officers of the camps in the proportion of not less than one for every one hundred prisoners of war in the camp, but there shall not be less than two such orderlies in any camp. Such orderlies shall perform no other duties.

ART. 69. In hospitals, correspondence and parcels shall be delivered without delay, but the use of the contents of the latter shall be under the control of the medical officer in charge.

10. PUNISHMENT OF PRISONERS OF WAR

ART. 70. Prisoners of war shall be subject to the laws, regulations, and orders in force in the armed forces of the Captor State, except as otherwise expressly provided in this Agreement.

ART. 71. All proceedings against prisoners of war whether before military or civil tribunals shall be accelerated as much as the ends of justice demand and the nature of the case permits.

ART. 72. No punishments other than those provided by the laws of the Captor State for the personnel of its own armed forces shall be inflicted upon prisoners of war by the military authorities, or military tribunals.

ART. 73. For refusal to work and other infractions of discipline suitable and adequate punishment may be inflicted upon guilty prisoners of war by the camp authorities or by the military tribunals, as the case may be. In no case, however, shall the punishment inflicted be more severe in nature or degree than the punishment legally assignable to a member of the armed forces of the Captor State for the same or a like offense.

ART. 74. Punishments which may be inflicted by a Camp Commandant or under military authority other than the tribunals established pursuant to law shall be limited to the following:

(a) For Officers: Deprivation of privileges; retention of pay; reprimand; confinement to room.

(b) For non-commissioned officers, petty officers, and men: Deprivation of privileges; retention of working pay; assignment to fatigue, and extra duties in addition to routine work by roster; confinement in a cell.

The pay of officers and the working pay of non-commissioned officers and men so retained as a measure of disciplinary punishment shall be credited to their respective accounts and shall be paid to them upon their release from the status of prisoner of war. Under all circumstances the necessary money to pay their mess bills shall be allowed to officer prisoners of war.

ART. 75. Physical violence or maltreatment, either mental or physical, shall neither be inflicted as a disciplinary punishment nor permitted to a

subordinate as extra-legal measures of punishment or suppression of prisoners of war. The right is expressly reserved to the authorities of the Captor State, however, to take such measures as may be indispensable for the suppression of riot or concerted or group insubordination or mutiny on the part of prisoners of war, such measures to be always within the bounds of humanity.

Prisoners of war shall not be subjected to extreme heat or cold.

Marching with full equipment and other aggravations of punishments are forbidden.

ART. 76. Immediately after charges calling for a trial before a court are preferred against a prisoner, the Captor State shall notify the Protecting Power thereof. This notification shall be at least three weeks before the day set for the trial and shall contain:

(a) The full name and rank of the prisoner of war.

(b) The location of the prisoner of war or his place of detention.

(c) A short statement of the criminal act charged, accompanied by a statement of its legal consequences.

(d) The name of the tribunal before which he will be tried with exact information regarding the place and date of trial, including the street and number of the premises where the trial is to take place.

The notification provided for in the preceding paragraph may be omitted in cases before inferior courts provided the authorized limit of punishment for the offense with which the prisoner of war is charged does not exceed confinement for a period of three months.

ART. 77. In the cases mentioned in Article 76 as requiring formal notification to the Protecting Power, the accused prisoner of war shall have the right, unless prohibited by law, to be represented by legal counsel able to speak his own language; of which right he shall be definitely informed by the Captor State reasonably in advance of trial. The Protecting Power shall have the right to appoint counsel for the accused. In such cases and in all other cases where counsel is required by law or appears essential, the Captor State shall furnish the Protecting Power a list of the persons who may act as counsel, and shall notify the latter that counsel will be selected therefrom unless the Protecting Power shall have chosen counsel two weeks after receipt of this list.

In all cases where formal notification is not required the accused shall be assisted in defence by counsel whenever reasonable and compatible with law; otherwise he shall be assisted by an interpreter.

The right of the accused freely to consult with his counsel shall not be denied nor unreasonably abridged.

The representative of the Protecting Power shall have the right to send a representative to attend the public sessions of the trial even though it shall not have designated a counsel to represent the accused as aforesaid.

ART. 78. The accused shall not be compelled to be a witness against himself, but he may, if he wishes, present to the tribunal arguments, either oral or

written, in support of his cause.

With a view to shortening the time of confinement awaiting trial, the judicial proceedings shall be expedited. The period of confinement awaiting trial may be considered in whole or in part in imposing sentence.

ART. 79. Any sentences unexpired at the time this agreement goes into effect in excess of the limitations therein imposed shall be at once remitted.

ART. 80. A prisoner of war shall have the same right of appeal to higher authority, judicial or executive, as that possessed by members of the armed forces of the Captor State in similar cases.

ART. 81. In cases in which the death sentence is imposed by a military tribunal upon a prisoner of war, a statement showing in detail the character and circumstances of the offense shall be promptly communicated to the Protecting Power for transmission to the State of Origin of the prisoner of war concerned, and the execution of the sentence shall be delayed for a period of at least three months counting from the date of this communication. Such sentences may be pronounced only by tribunals of the same kind and following the same procedure as in corresponding cases for members of the armed forces of the Captor State. The accused shall have the specific right to be represented in the trial by counsel to the same extent as members of the armed forces of the Captor State.

The delay in the execution of the sentence provided in paragraph one of this Article is not applicable in those cases in which the death sentence is imposed for the offense of murder or attempted murder committed in the zone of operations.

ART. 82. The length of sentence to confinement in a cell or confinement in a room which may be imposed by a Camp Commandant or under military authority other than the tribunals established pursuant to law, shall not exceed thirty (30) days for any single offense.

If the total of several such consecutive sentences exceeds thirty (30) days, an interval of one week, during which no punishment shall be inflicted, shall follow each thirty (30) days confinement in a cell.

ART. 83. The duration of the punishment for a simple attempt to escape on the part of prisoners of war, even if repeated, shall not exceed military confinement for a period of fourteen days, and if made in concert with other prisoners, a period of twenty-eight days.

The duration of the punishment for such an attempt to escape, combined with other punishments for acts consequent upon, or incident to such attempt, in respect of property, whether in relation to the appropriation or possession thereof, or injury thereto, shall not exceed military confinement for a period of two months.

The foregoing provisions shall apply to attempts to escape from detention of any description in the same manner as they apply to attempts to escape from ordinary camps.

Prisoners of war recaptured after an attempt to escape shall not be subjected to any unnecessary harshness. Any insult or injury to such prisoners of war shall be severely punished. They shall be protected from

violence of every kind. Officer prisoners of war recaptured after an attempt to escape shall continue to be treated in a manner suitable to their grade.

ART. 84. Collective punishments or deprivations of privileges on account of the misconduct of individuals are forbidden. Those collective punishments are especially forbidden through which prisoners of war lose their right to receive their mail and to send the allowed number of letters and postcards. In the case of individuals such a prohibition may be imposed as a punishment but shall not exceed two weeks. The prisoner of war has in this case the right to notify his family of this stoppage of correspondence before it goes into effect.

ART. 85. Punishments which are served in the prisoner of war camps and military prisons shall be carried out under the conditions provided in Annexes 4 and 5 of this agreement; otherwise, in the absence of specific provisions, prisoners of war undergoing punishment shall be treated as other prisoners of war.

Prisoners of war undergoing confinement in places removed from the camps, shall be permitted to receive four parcels a month and to use the food contents of these parcels, except upon the days when they are placed on bread and water diet. Adequate cooking facilities and fuel shall be provided for them.

ART. 86. At their request prisoners of war in close confinement shall be permitted to attend the daily sick call as provided for in Article 67, and they shall receive such medical attention and treatment as, in the opinion of the attending medical officer, they may require, including removal to hospital when necessary.

ART. 87. The provisions of this agreement shall not apply to prisoners of war who through acts of individual misconduct against the law of the land have passed from the control of the military to that of the civil authorities.

11. DEATHS AND ACCIDENTS

ART. 88. Officially stamped or otherwise authenticated certificates of deaths occurring among prisoners of war shall be executed without delay and transmitted to the diplomatic representative of the Protecting Power.

The representative of the Protecting Power shall be notified as quickly as possible of deaths by violence, and shall be informed as to the particulars.

ART. 89. The property of deceased prisoners of war, including identification tags, pay-books and other personal papers, shall be despatched by the Government of the Captor State to the State of Origin.

ART. 90. The Contracting Parties shall provide and maintain proper burial places for prisoners of war of the other party who are killed or die while in captivity. Available information regarding the identity of the deceased shall be marked in a clear manner on the grave, and the location of graves shall be reported without delay to the State of Origin.

Deceased prisoners of war shall be accorded the same honors at burial as are accorded to persons of the same rank or rating in the armed forces of the Captor State.

ART. 91. Each Government shall take measures that information regarding the death or whereabouts of missing nationals of the other party be gathered

and forwarded as rapidly as possible to the State of Origin.

ART. 92. A statement shall be immediately prepared concerning all accidents to prisoners of war, to which a brief medical report must be appended. In such cases the prisoner of war shall be furnished a certificate by the Camp Commandant, stating the nature of the injury. The certificate shall be deposited with the papers of the prisoner of war and shall be handed him on his discharge or, in case of internment in a neutral country, shall be transmitted for safe keeping to the government of this neutral country and be given him on his repatriation.

12. EXCHANGE OF POWERS OF ATTORNEY AND WILLS

ART. 93. Prisoners of war shall be permitted to execute and have attested, in accordance with special regulations to be issued on the subject by the Captor State, powers of attorney and wills, which may be written in their own handwriting or sent them from their States of Origin, or drawn up for them in the camp by third parties. The camp authorities shall be responsible for forwarding such papers as quickly as possible to the diplomatic representative of the Protecting Power.

13. HELP COMMITTEES

ART. 94. A Camp Help Committee freely chosen by the prisoners of war shall be formed in each camp, including quarantine and distributing camps. This choice is subject to the approval of the Camp Commandant.

Camp Help Committees shall consist of at least:

1 member in camps of from 1 to 50 men.
2 members in camps of from 51 to 100 men.
3 members in camps of from 101 to 500 men.
5 members in camps of from 501 to 1,000 men.

In camps of more than 1,000 men there shall be one representative for every additional 500 men. In computing the membership of Camp Help Committees, the prisoners assigned or attached to a camp shall be counted even though they be absent from camp. Similarly in every working detachment representatives in the same ratio as provided above shall be chosen to be the correspondent or correspondents of the Camp Help Committee of the camp to which the working detachment is assigned.

In each hospital having ten or more prisoners of war of the same State of Origin representatives may be chosen in the proportion prescribed above for working detachments. Their duties and privileges shall be the same as those prescribed in this agreement for the representatives of working detachments.

ART. 95. Camp Help Committees and representatives besides exercising the functions enumerated elsewhere in this agreement, shall co-operate with the camp authorities in all matters relating to prisoners of war, such as foundation of libraries and provision of educational facilities; organization of amusements; registration of complaints lodged by prisoners of war; receipt, registration and distribution of gifts and of relief to prisoners of war wherever located; co-operation with the authorized relief societies and with the Protecting Power; distribution of contents of parcels of deceased

prisoners of war and management of postal operations.

ART. 96. Camp Help Committees shall be allowed each week to copy the current lists of prisoners of war undergoing medical treatment and to transmit the same to the designated relief societies.

ART. 97. Camp Help Committees may correspond in matters relating to their duties freely and directly with their representatives, with the diplomatic representative of the Protecting Power, with the designated relief societies and with absent prisoners of war belonging to their Camp who have no representative.

The correspondence of the Camp Help Committee referred to in the preceding paragraph shall be subject to censorship by the camp authorities. Communications which contain requests or complaints and which are addressed to the diplomatic representative of the Protecting Power, shall be handed over to the Camp Commandant who shall immediately transmit them through official channels. Such communications may be withheld only when they contain wilfully false statements or are written in improper language. The decision to withhold them rests exclusively with the Ministry of War; in the case of German prisoners of war in Europe, with the Headquarters of the American Expeditionary Forces. In case a letter is withheld, the writer and the diplomatic representative of the Protecting Power must be informed of the fact and the reasons.

The competent military authorities in forwarding these communications will endorse thereon their remarks in order that the representative of the Protecting Power can upon their receipt form an opinion as to the statements contained therein.

Copies or abstracts of letters sent by the Camp Help Committees shall be kept by them and shown upon request to the representative of the Protecting Power and to the prisoners of war of their State of Origin.

ART. 98. Camp Help Committees shall draw up under the supervision of Camp Commandants lists of prisoners of war who have had no news of their families for at least three months. These lists shall contain the names of the prioners of war, the addresses of the families and brief communications or enquiries limited to 20 words in telegraphic style. These lists shall be sent to the Red Cross Societies of the respective States of Origin mentioned in Article 36 which shall attend to forwarding the answers of the families as quickly as possible.

ART. 99. Camp Help Committees, composed of prisoners of war of either of the Contracting Parties may render, from supplies at their disposal, assistance to prisoners of war of the other States of Origin within the same camp. Reciprocally, prisoners of war of the two Contracting Parties may receive similar assistance from the Committees composed of the prisoners of war of other States of Origin.

ART. 100. Members of Camp Help Committees and their representatives in working detachments shall not be required to perform any work which interferes with their duties as such. They shall not be transferred from one camp to another except for urgent reasons; and then only after they shall have

been given opportunity to arrange their affairs in a business-like manner and to transfer to their successors the property and accounts in their care.

ART. 101. Suitable offices and store rooms shall be provided for the use of Camp Help Committees. These store rooms shall be fitted with two locks, the keys of one to be kept by the Camp Help Committee, those of the other by the Camp Commandant.

ART. 102. Packing boxes or materials used in transporting supplies to prisoners of war which are not the property of individual prisoners of war shall become the property of the Camp Help Committee for use in repacking or other purposes; until then they remain in the custody of the Camp Authorities.

14. CORRESPONDENCE AND PARCELS

ART. 103. Special attention shall be given to the rapid forwarding of the correspondence of prisoners of war, especially over-seas correspondence. Camp Commandants and commanders of working detachments shall be instructed accordingly.

The incoming mail for prisoners of war shall be distributed without delay. The despatch of accepted letters and postcards shall not be delayed longer than ten days. Exceptions shall be permitted only as provided for by Article 84.

ART. 104. Letters, postcards, parcels, money and valuables sent to prisoners of war, and letters and postcards sent by prisoners of war, shall not be subject to charges for postage, delivery, duties, storage or to any other charges, either in the country of mailing or destination.

Similarly, articles sent to prisoners of war as gifts or as relief shipments, either in bulk or in collective consignments, shall be free from all custom duties, freight charges and other dues or charges.

ART. 105. Prisoners of war shall be permitted to send two letters and four postcards each month. Letters of officers shall not exceed six pages, and letters of those of other ranks or ratings shall not exceed four pages.

The letters and postcards shall be legibly written in black ink or in soft black lead pencil and, except with the permission of the Commandant, must be in English, French or German. Letters and postcards must be addressed specifically to a person, firm or corporation, by name, and not to a mere post office or accommodation address.

ART. 106. Correspondence of prisoners of war must not contain information regarding the political or military situation, or other information detrimental to the safety of the Captor State. Enclosures may be permitted provided they accord with the sense of this Article, it being recognized, however, that such enclosures may result in a delay in the despatch of the letter.

Correspondence of prisoners of war which violates the provisions of this agreement shall be returned to the writer, unless required as evidence in judicial or disciplinary proceedings, and shall be counted in the authorized maximum of letters and postcards.

ART. 107. Prisoners of war may receive and answer enquiries from

recognized relief societies and information bureaus in regard to the location of missing members of the armed forces; the answers are not to be counted in the authorized maximum of letters and postcards.

ART. 108. Prisoners of war shall be allowed to receive an unlimited number of parcels; those sent by mail shall not weigh more than seven kilograms each. Commandants of Camps and working detachments are forbidden to withhold parcels, except in the cases specifically provided for in this agreement.

ART. 109. The sending of books and pamphlets, as well as bulk shipments of writing paper and blank books, shall be allowed subject to examination. Books may be bound.

ART. 110. Parcels addressed to individuals may be despatched in collective consignments when packed in such a manner as to be transported by ship and by rail without difficulty.

Individual parcels without specified recipients may also be despatched in collective consignments addressed to the Camp Help Committees of the main camps. These Committees may distribute the parcels to their representatives or other Camp Help Committees. Such parcels must be clearly marked as follows:

"For distribution to prisoners of war who receive no parcels."

If an addressee be deceased, the contents of his parcels shall be distributed among the prisoners of war by the Camp Help Committee.

ART. 111. The parcels shall be handed out immediately or, if preferred by the prisoners of war, only when asked for.

The parcels shall be handled so as to prevent injury and shall be examined only once, and then in the presence of the addressee or of some one designated by him. The containers of perishable foodstuffs shall be kept intact until the contents are needed for consumption.

ART. 112. Every recipient of a parcel shall be permitted to despatch to the sender a printed postcard containing only an acknowledgement of the receipt an an intemized statement of the contents and of the condition thereof at the time of the receipt. In case printed forms for this purpose are not at hand, the rceipt may be written but must not contain other information than the printed forms. This postcard shall not be counted in the authorized maximum of letters and postcards.

The printed postcards or printed lists, enclosed in parcels or bulk shipments stating the contents, shall always be delivered to the addressee. They shall be checked against the contents in the presence of the addressee or his representative.

ART. 113. The packings tin containers and boxes shall remain the property of the prisoners of war but they shall be stored by the camp authorities until required for use.

ART. 114. Camp Help Committees shall be allowed to make lists of all parcels sent to the working detachments that are attached to their main

camp, and lists of the contents of each parcel; these lists shall accompany the parcels.

ART. 115. Camp Help Committees shall be permitted to make claims for loss of parcels or of their contents, or for damage thereto, for all prisoners of war in their camps or attached thereto.

ART. 116. Prisoners of war shall be permitted to transmit to their dependents funds in their possession at the time of capture, or paid to them by the Captor State.

Domestic money orders, when permitted shall be subject to the ordinary fees.

ART. 117. All foreign postal traffic under this arrangement shall, with the consent of the Swiss Government, be through its postal sevice.

15. COMMUNICATION WITH THE PROTECTING POWER

ART. 118. Prisoners of war may at all times communicate in writing to the diplomatic representative of the Protecting Power requests or complaints concerning treatment or conditions in their camp, or matters of purely personal interest; or may present such statements verbally to a delegate of the Protecting Power.

In main camps such written communications shall be presented to the Camp Help Committees, and in working detachments to the representatives of the detachment, to be transmitted to the Camp Help Committee of the main camp. The Camp Help Committee, after having made notations on the communication if such are necessary, shall forward it to the Camp Commandant, who shall in turn transmit it without delay through official channels to the representative of the Protecting Power.

Further action shall be in accordance with the provisions of Article 97, paragraphs 2 and 3.

ART. 119. The communications addressed to the diplomatic representative of the Protecting Power shall not be counted in the authorized maximum of letters and postcards. In no case shall written communications addressed by prisoners of war to the Camp Commandant and intended only for him be counted in the authorized maximum of letters and postcards.

ART. 120. Prisoners of war may be punished on account of complaints sent by them to the Protecting Power only when they contain intentionally insulting statements or intentionally false accusations. Punishment may be inflicted only by sentence of a court or with the approval of the Ministry of War; in the case of German prisoners held in Europe with the approval of the Commander-in-Chief of the American Expeditionary Forces.

16. VISITS OF INSPECTION BY DELEGATES OF THE PROTECTING POWER

ART. 121. The diplomatic representative of the Protecting Power shall present for approval by the Captor State a list of the delegates for whom are desired permits to inspect prisoners of war and the places where they are confined.

Each accepted delegate shall be given a permit authorizing him to inspect the prisoners of war and their places of confinement subject to the conditions attached thereto. These permits may be cancelled or recalled at any time.

ART. 122. The following regulations shall apply to the visits mentioned in Article 121:

(a) The authorized delegate of the Protecting Power may visit all places where prisoners of war of the State whose interests he is protecting are kept. When such visits are to be made in zones barred for military reasons, arrangements therefor compatible with military necessities shall be made immediately by the competent military authorities. If for military reasons such visits are impossible for a period of thirty (30) days, the prisoners of war shall be permanently removed to territory accessible to the delegate.

(b) The visits of the delegate of the Protecting Power may be without notice and without restriction except as follows:

Camps under quarantine and contagious wards of hospitals may be visited only with the consent of the medical officer in charge.

Penitentiaries and prisons may be visited only with the consent of competent superior authority.

Permission to visit shops or other places where members of working detachments are employed may only be refused by competent superior authority when such visit would in his opinion be incompatible with the safety of the State or with rules established for the preservation of trade secrets. The foregoing shall in no way curtail the right of the delegate of the Protecting Power to visit the working detachment camp and to interview its members. When the above restriction makes it necessary, prisoners of war shall be brought for the purpose of the interview to a place accessible to the delegate.

(c) On arrival a delegate must first present his permit to the proper authorities for verification.

(d) An officer, or, if none is available, some other military escort shall be detailed by the Commandant to accompany the delegate on his tour of inspection. Upon the wish of the delegate the ranking prisoner of war may also be detailed to accompany him.

(e) The delegate shall have the right at all times to speak to prisoners of war, except those who are awaiting trial, without witnesses and outside the hearing of any third party. Nevertheless, interviews with prisoners of war who are confined pending trial or under sentence may be permitted, with the consent of the proper authorities, when in conformity with the rules and regulations for the visits of third parties to such persons. Such consent shall always be given if compatible with the object or purpose for which the prisoner of war is detained and with local prison regulations. In this event, interviews may take place in the presence of witnesses.

(f) The delegate shall, at no time, without the full knowledge and permission of the Commandant, give to or receive from a prisoner of war written matter of any kind, or any oral messages; nor shall he converse with prisoners of war on any subject not relating to personal matters affecting them.

(g) Before leaving the camp, the delegate may informally present to the camp authorities, for discussion and possible rectification, complaints made by prisoners of war and such suggestions as he may consider advisable regarding changes or improvements.

A prisoner of war shall not be punished on account of a complaint made by him to the visiting delegate except when such complaint is shown to contain intentionally false or insulting statements or accusations; in which case punishment may be inflicted only in the manner prescribed in Article 120 and after the delegate of the Protecting Power has been heard in the matter.

ART. 123. The diplomatic representative of the Protecting Power shall be freely permitted to make complaints directly to the central authority of the Captor State about the management and conditions of the prison camps, the treatment of the prisoners of war and about the camp personnel, etc. The Captor State shall immediately make an investigation of all such complaints. The diplomatic representative of the Protecting Power shall be permitted to adduce evidence by witnesses or otherwise. Should it appear essential for a full investigation of the case, an officer of the central authority of the Captor State shall visit the camp, who shall, upon the request of the competent diplomatic representative be accompanied by a delegate of the latter.

The result of every such investigation and a statement of the action taken thereon, shall in each case be communicated to the diplomatic representative of the Protecting Power. If the result of the investigation be unfavorable, remedial action shall be taken immediately.

None of the military personnel of a prison camp, including interpreters, removed from their positions on account of their attitude towards prisoners of war, shall thereafter be employed in connection with prisoners of war.

17. RATES OF PAY OF OFFICERS AND CERTAIN OTHER PRISONERS OF WAR

ART. 124. Officer prisoners of war, officials and certain other prisoners of war classed as officers shall receive from the Captor State while in its custody pay on the basis of the following articles.

ART. 125. Officers and others entitled to pay will for the purpose of pay be divided into three classes.

Class I comprises:

(a) Captains and higher grades of the American army and marine corps; lieutenants senior grade and officers of higher grades of the American navy, line or staff corps.

(b) Officers of the grade of captain and higher grades of the German army and marine infantry. Officers of the rank of "Kapitän-Leutnant" and higher ranks of all officer corps of the German navy.

Class II comprises:

(a) First and second lieutenants of the American army; officers, line or staff corps, of the grade of lieutenant (junior grade), ensign, chief warrant officer and warrant officer, whatever their corps or branch, of the American navy, and officers of the American marine corps of the corresponding grades.

(b) Subaltern officers of the German army and all officer corps of the German navy (including "Feldwebelleutnants" in the army and navy as well as "Deckoffizierleutnants, Deckoffizier-Ingenieure" and "Hilfs-Offiziere" holding the rank of subaltern officers in the German navy).

Class III comprises:

(a) Aviation cadets, officer candidates, field clerks, and other appointed officers of the American army and navy;

(b) "Offizier-Stellvertreter" and "Beamten-Stellvertreter" of the German army and the German navy, "Fähnriche zur See", "Deckoffiziere", "Vize-Deckoffiziere" and "Hilfs-Deckoffiziere" of the German navy.

ART. 126. The monthly pay shall be, on the basis of 1 Dollar=4.20 Marks; for class I, 95.25 Dollars or 400 Marks; for class II, 83.35 Dollars or 350 Marks; for class III, 65.50 Dollars of 275 Marks.

ART. 127. Officials of the army or navy prisoners of war of either side shall receive during their captivity the same pay as the military persons whose rank they hold.

ART. 128. The rates of the pay herein stipulated shall apply to all prisoners of war entitled to pay, whether they are on the active, retired, or reserve lists, who at the time of capture were on active duty in the military or naval service of their respective States of Origin.

ART. 129. Prisoners of war entitled to pay under the provisions of Articles 124 to 128 inclusive shall be paid on or about the first of each month for the preceding month or fraction thereof. Pay will accrue from the day of their capture.

When a duplication of pay occurs, due to this agreement and to the differences in method of payment of the two Contracting Parties, the attention of the recipients shall be called to the fact that they will have to refund to their State of Origin upon internment in a neutral country or upon repatriation any such amount.

ART. 130. A prisoner of war who becomes entitled to an increase in pay by promotion will be paid at the increased rate from the date named by the State of Origin through diplomatic channels as the date on which the promotion took effect.

ART. 131. The obligation of the Captor State to pay prisoners of war as provided shall cease upon their internment in a neutral country or upon repatriation.

ART. 132. All payments made by the Captor State to prisoners of war according to the above provisions shall ultimately be reimbursed to the Captor State by the State of Origin.

18. TRANSFERS TO OTHER PRISON CAMPS

ART. 133. Prisoners of war upon being transferred from one place to another shall be permitted to take with them their personal effects, letters and parcels.

ART. 134. Upon their own request made through official channels or upon

the request of their State of Origin, fathers, sons and brothers who are simultaneously prisoners of war shall be united in the same main camp or working detachment unless sanitary reasons or strict requirements of discipline forbid.

The transportation of prisoners of war who are to be united will be furnished by the Captor State without charge.

As long as the reunion shall not have taken place or when it is not feasible, the prisoners of war may communicate by letter or postcard with each other; these letters and postcards shall be counted in the authorized maximum.

ART. 135. Officer prisoners of war shall not be transferred from one camp to another except upon urgent necessity and, if transferred, notice of such transfer shall be communicated as speedily as possible to the Protecting Power.

Officer prisoners of war may, however, be transferred at their own request, in which case, unless it falls within the provisions of Article 134, expenses incident to the transfer shall be borne by the officer transferred; otherwise the aforesaid expenses shall be borne by the Captor State.

19. RECOGNITION OF RANK

ART. 136. The promotion of prisoners of war to the grade of officer or to higher ranks or grades shall be recognized by the Captor State upon notification of such promotion by the diplomatic representative of the Protecting Power, provided that the promotion was recommended at a date prior to capture or becomes effective in due course of seniority according to the laws and regulations of the State of Origin.

ART. 137. In case of doubt as to the military grade of a prisoner of war and as to his right to the corresponding privileges and pay, an official statement of these matters to the Captor State by the diplomatic representative of the Protecting Power shall be conclusive.

20. RELIEF SOCIETIES

ART. 138. Each party to this agreement shall be free to designate to the other party relief societies, and these societies shall be given all facilities for the performance of their humane tasks within the bounds imposed by military necessities and administrative regulations.

21. WAR CORRESPONDENTS, ETC.

ART. 139. Individuals who follow an army without belonging directly to it, such as war correspondents, reporters and purveyors, shall be treated as prisoners of war when captured by the enemy and when detention seems expedient, provided they are in possession of a certificate from the commander of the army which they accompany. In this case they are entitled to the same treatment as subaltern officers with the exception of pay.

B. SANITARY PERSONNEL

I. REPATRIATION OF SANITARY PERSONNEL

ART. 140. All sanitary personnel and chaplains mentioned in Articles 9, 10 and 11 of the Geneva Convention of July 6th, 1906, and in the Hague Convention No. X, of October 18th, 1907, relative to the application to naval warfare of the principles laid down in the Geneva Convention, including the

sanitary personnel of the interned crews of ships of war, shall be repatriated as soon as their services are no longer necessary for the proper care of the captured sick and wounded of their own State of Origin.

None of the sanitary personnel of the Contracting Parties who fall into the power of the armed forces of the other either on the continent of Europe or in European waters, shall be removed from Europe or transferred to another State which is at war with the other Contracting Party.

ART. 141. The term "Sanitary Personnel" shall be held to comprise the following:

(a) To be recognized immediately.

1. Army and navy chaplains, medical officers, sanitary administration officers, doctors of non-commissioned rank (hospital inspectors, apothecaries, etc.), both male and female doctors, nurses and assistants, who are clearly recognizable by their special uniforms or otherwise.

2. Every other wearer of the brassard described in Article 20 of the Geneva Convention of July 6th, 1906, who can show his or her right to wear this brassard by an officially stamped certificate issued by the commanding officer of the organization and signed in his own hand by the bearer. These certificates may not be taken away either at the time of capture or later.

3. Persons incontestably identified as members of the sanitary personnel by the evidence of third parties.

(b) To be recognized upon presentation of further evidence.

Others the identification of whom shall be accomplished, subject to examination by the Captor State, by a subsequent certification issued by the Ministry of War or Navy of the State of Origin; or in the case of American sanitary personnel, by the Commander-in-Chief of the expeditionary force.

ART. 142. In the case of sanitary personnel belonging to organizations the records and archives of which have been destroyed or are in the hands of the enemy, it shall suffice that the State of Origin attest the probability of their character; such attestation shall be accepted as sufficient evidence.

ART. 143. The State of Origin shall transmit to the Captor State by diplomatic channels the names of the sanitary personnel whose repatriation is desired, and the certificate required by Article 141, *(b)*. The return to their homes of the sanitary personnel specified in Article 141, *(a)*, shall not be conditioned on their inclusion in these lists.

If the Captor State believes it has grounds for declining repatriation of any person on these lists, the reasons must be stated in full.

ART. 144. The release of sanitary personnel held awaiting trial or serving sentence is subject to the provisions of Article 20.

ART. 145. The taking home of personal effects by released sanitary personnel shall be governed by Article 22; and private property, including instruments and weapons, which they brought with them into captivity, shall be excepted from any prohibitions of export.

ART. 146. The persons repatriated in accordance with the stipulations in

Articles 140 to 144 inclusive shall be employed only on medical or religious duty.

II. TREATMENT OF SANITARY PERSONNEL

ART. 147. The appropriate stipulations of Articles 23 to 40 inclusive, 52 to 123 inclusive and 133 to 137 inclusive, apply to the treatment of the sanitary personnel in the power of the Captor State.

When captured they shall be allowed to retain, or to deposit against receipt, such instruments, implements, drugs and other belongings as can be proved to be their personal property.

Utilization of sanitary personnel on work other than sanitary or medical duty is prohibited.

ART. 148. Sanitary personnel of either of the Contracting Parties while in the hands of the other, shall be paid by the latter at the same rates as are paid by the German Government to members of its armed forces of similar ranks and ratings. The corresponding ranks and ratings of the sanitary personnel of the two Contracting Parties are shown in Annex 6.[1]

[1]Not printed.

When such sanitary personnel would receive a lower rate of pay according to the preceding paragraph than prisoners of war of the same rank, they shall be paid at the rate authorized for the latter.

The provisions of Articles 128 to 131 inclusive for the payment of prisoners of war shall govern payments to sanitary personnel. Upon identification as such, they shall receive back pay due them.

ART. 149. The sanitary personnel of the armed forces of the two Contracting Parties captured while serving with the armed forces of an ally or co-belligerent shall be embraced in this agreement as though taken while serving with their own armed forces.

ART. 150. The provisions of Articles 140 to 147 inclusive and 149 shall apply to all members of the designated relief societies mentioned in Article 138 captured by either of the Contracting Parties.

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D. GENERAL PROVISIONS

ART. 173. For the purpose of this agreement, including its seven annexes, the terms prisoners of war, civil prisoner, officer, non-commissioned officer, invalid, valid, repatriation and State of Origin, shall have the meanings defined in Annex 7, except when otherwise specified in the text.

ART. 174. The transportation of prisoners of war, civil prisoners and sanitary personnel, who are entitled to repatriation or internment on the basis of this Agreement, shall be arranged with the co-operation of one or more neutral States.

The details for carrying out the transportation by land or sea, including the selection of land and sea routes, shall be determined by a mixed commission (a transportation commission). Any neutral State, through or in which the transportation takes place, shall be represented by one member, and each Contracting Party by two members.

A transportation commission, constituted as above specified, shall convene immediately after the ratification of this Agreement or at an earlier date, to be agreed upon by both Contracting Parties, at The Hague, subject to the consent of the Government of the Netherlands, whose consent both Contracting Parties shall endeavor to obtain.

If necessary the membership of this commission may be increased by representatives of other neutral States affected, or additional similar commissions may be created in other neutral countries concerned, according to circumstances. The chairman of each transportation commission shall be the representative of the neutral State in whose territory the commission meets.

The Commission shall arrange that the Governments concerned be promptly informed of all decisions and measures that affect them. The commission may receive from the Governments concerned all information of importance to them.

The Contracting Parties shall carry out as far as the facilities at their command permit and as rapidly as possible the arrangements for transportation agreed upon by these commissions. The Contracting Parties guarantee to all trains and ships, while engaged on any journey or voyage having the purpose of carrying out the repatriation or internment herein provided for, immunity from any hostile action on their own parts; and they will seek to obtain similar guarantees from their Allies and co-belligerents. When a return trip is involved as a necessary part of the complete transaction as arranged for by the Commission, like immunity shall extend to such return trip.

ART. 175. The following principles shall govern the order in which persons eligible for internment in a neutral country or for repatriation shall be dispatched:

(a) Invalid prisoners of war, invalid civil prisoners and sanitary personnel, shall have precedence over all other persons who are to be transported, and shall be assigned to the next possible shipment after their eligibility for internment in a neutral country or for repatriation has been established.

(b) Other persons entitled to transportation shall be sent in the following order:

1. Males under 17 years of age and all females;
2. Prisoners of war;
3. Civilian males over 17 years of age; those over 45 years in preference to those between 17 and 45 years.

Precedence in their respective classes among persons named under the above classes shall be decided according to length of captivity, and when their captivity is of equal duration, according to seniority of age, priority being given to the oldest and children going with their parents or guardians.

(c) If because of uncontrollable circumstances, the order of priority contemplated in the preceding paragraphs cannot be followed, the repatriation of the person whose departure may have been delayed

shall take place within a maximum period of two months.

(d) Persons selected for transportation over seas shall be embarked as soon as possible after the arrival of the transport in the port of embarkation and in such manner as to utilize fully all available space. The proper authorities of the United States co-operating with the representative of the Protecting Power shall decide questions of priority regarding the transport of Germans.

(e) As far as possible, families shall be sent on the same transport.

ART. 176. The expenses of transporting prisoners of war and civil prisoners who are to be repatriated or interned in a neutral country in accordance with this agreement shall be met as follows:

(a) The State of Origin shall bear the expenses of transportation overseas on their own or neutral ships;

(b) The expenses of transportation overland in the territory of the Captor State and in that of its co-belligerents shall be borne by the Captor State; in the territory of the State of Origin, in that of its co-belligerents and in that of neutral states, by the State of Origin of the prisoners.

ART. 177. The enumeration in this agreement of certain rights which shall be accorded and privileges which shall not be denied to prisoners of war, sanitary personnel and civil prisoners, shall not be held or construed to preclude additional or greater rights or privileges wherever local conditions may permit.

ART. 178. In the interests of German prisoners of war in the hands of the American forces in France, the Protecting Power shall have the right to appoint special delegates who shall have the same privileges and duties, and shall be under the same restrictions as are provided in this agreement for the delegates of the Protecting Powers in the United States and Germany. He shall also be advised of all information regarding the prisoners of war with whose interests he is charged, which under the terms of this agreement is communicated to the representative of the Protecting Power in Washington.

ART. 179. The Contracting Parties shall instruct all authorities concerned to take the severest measures to prevent all violations of the provisions of this agreement.

ART. 180. Each Contracting Party agrees to notify the other through the representative of its Protecting Power of errors or omissions by the other in the application of the provisions of this Agreement. Upon the receipt of such notification the party notified shall immediately conduct any inquiry into the causes of the complaint and as soon as possible make known to the Protecting Power the results thereof, together with the remedial steps taken.

ART. 181. Differences of opinion between the two Contracting Parties as to the interpretation of this Agreement or of any articles thereof shall be referred to a joint commission, which shall consist of a chairman, to be designated by the president of the Swiss Confederation, and of one representative of each of the Contracting Parties. The decision of this commission shall be final.

ART. 182. No measure of retaliation or reprisal shall be taken by either of the Contracting Parties against the prisoners of war of the other without giving previous notification of at least forty days of such intent. This notification shall contain a definite statement of the reasons for the measure of reprisal or retaliation proposed and shall be transmitted simultaneously to the diplomatic representative of the Protecting Power and to the Government of the Swiss Confederation. The forty days shall be counted from the date upon which notification is received by the Swiss Government.

The period specified in the preceding paragraph may be lengthened by a definite period at the option of the State threatening the reprisal, when the representative of the Protecting Power states that the time allowed will not suffice for a full investigation of the causes assigned.

ART. 183. Speeches or verbal orders by the commandant of a prison camp or one of his subordinates, if delivered in a language other than that of the prisoners addressed, shall be translated by an interpreter. Written orders shall at all times be translated into the language of the State of Origin of the prisoners and shall be kept posted in a conspicuous place as long as they are in force.

ART. 184. The text of this Agreement, together with its annexes, shall, as soon as it comes into force, be posted and kept permanently posted in English and German, in all camps and working detachments in a public place. The highest ranking officers in officers' camps, and the Camp Help Committees and their representatives shall be supplied with a sufficient number of copies of this Agreement to give all those concerned an opportunity to make themselves acquainted with its contents.

E. APPROVAL OF THE AGREEMENT

ART. 185. This Agreement and its seven annexes shall be approved by both Contracting Parties and notification of such approval in writing shall be transmitted immediately thereafter to the Swiss Federal Government.

The Agreement shall go into effect seven days after the receipt by the Swiss Federal Government of both notifications of approval.

The Contracting Parties agree to take the necessary steps to obtain the co-operation of the neutral Governments concerned in any measures necessary for the bringing of this Agreement into operation and for its due execution.

ANNEX 1

CONDITIONS FOR THE REPATRIATION AND INTERNMENT OF PRISONERS OF WAR UPON THE BASIS OF HEALTH

1. GUIDING PRINCIPLES FOR REPATRIATION AND INTERNMENT

(a) Guiding principles for repatriation

There shall be repatriated:

1. Sick and wounded who, according to medical opinion, cannot be expected to recover within a year, because their condition requires treatment and their mental or physical ability appears to have undergone marked deterioration.

2. Incurably sick and wounded whose mental or physical ability appears to have undergone marked deterioration.

3. Cured sick and wounded whose mental or physical ability appears to have undergone marked deterioration.

(b) Guiding principles for internment

There shall be interned:

1. Sick and wounded whose recovery within a period of one year, while expected, would appear more sure and rapid if they were given the benefits afforded by the resources of a neutral country than if their captivity were prolonged.

2. Prisoners of war whose mental or physical health, according to medical opinion, is seriously menaced by their remaining in captivity, whereas internment in a neutral country would probably relieve them of this risk.

(c) Guiding principles for the repatriation of those interned in a neutral country

There shall be repatriated:

1. Those whose state of health is or is becoming such that they fall within the categories of those eligible for repatriation on the basis of invalidism.

2. The recovered whose mental or physical ability appears to have undergone a marked deterioration.

2. SPECIAL RULES FOR REPATRIATION AND INTERNMENT

(a) Special rules for repatriation

There shall be repatriated:

1. All prisoners of war who as a result of organic lesions are afflicted with any of the following defects: Loss of limb, paralysis, changes in joints, or similar injury which causes a defect at least as great as the loss of a foot or a hand.

2. All wounded or injured prisoners of war whose condition is such as to make them invalids whose recovery, according to medical opinion, cannot be expected within one year.

3. All sick whose condition is such that their recovery, according to medical opinion, cannot be expected within one year.

To this category belong particularly:

(a) Progressive tuberculosis of any organ, which, according to medical opinion, cannot be cured, or at least markedly bettered, by treatment in a neutral country.

(b) Non-tuberculous affections of the respiratory organs of a presumably incurable nature such as, especially, high grade emphysema with or without bronchitis, bronchiectasis, severe asthma, gas poisoning, etc.

(c) Serious chronic affections of the organs of circulation (for example, valvular diseases with tendency to disturbances of compensation, relatively serious diseases of the myocardium, pericardium or vessels, particularly inoperable aneurysms of the large vessels, etc.).

(d) Severe chronic affections of the digestive organs.

(e) Severe chronic affections of the genito-urinary organs (for example, all cases of proved chronic nephritis with complete symptomatology, and particularly those already showing cardiac and vascular changes; also chronic pyelitis and cystitis, etc.).

(f) Severe chronic diseases of the central and peripheral nervous system (for example, severe neurasthenia and hysteria, all cases of undoubted epilepsy and of exophthalmic goitre).

(g) Blindness of both eyes, or of one eye if the vision of the other eye is impaired and cannot be corrected to normal by glasses. Diminution of visual acuity so that it cannot be brought up by correcting glasses to 20/40 in at least one eye. Other ocular affections falling in this category are glaucoma, iritis, choroiditis, etc.

(h) Total bilateral deafness or total unilateral deafness, provided that the incompletely deaf ear does not hear ordinary conversation at a distance of one meter.

(i) All clearly established cases of mental disease.

(k) Grave chronic poisoning by metals or other causes (lead or mercurial poisoning, morphinism, cocainism, alcoholism, poisoning by gas, etc.).

(l) Severe chronic affections of the organs of locomotion (arthritis deformans, gout, rheumatism with clinically demonstrable organic changes).

(m) All malignant neoplasms, if they are not removable by relatively slight operations which do not endanger life.

(n) All cases of malaria with demonstrable organic alterations (considerable chronic enlargements of the liver or spleen, cachexia, etc.).

(o) Grave chronic skin diseases, of such a nature that they do not constitute a medical indication for internment in a neutral country.

(b) Special rules for internment

Prisoners of war shall be interned if they suffer from any of the following affections:

1. All forms of tuberculosis of any organs, which, according to existing medical knowledge, can be cured or at least markedly improved by methods available in a neutral country (altitude, treatment in sanatoria, etc.).

2. All forms of diseases of the respiratory, circulatory, digestive or genito-urinary organs, of the nerves, the organs of sense, the locomotor apparatus and the skin, which need treatment and which do not belong to the categories prescribed for repatriation and are not acute diseases properly so-called, showing a tendency to ready recovery. The affections here discussed are those which offer better chances of recovery by the application of measures available in a neutral country than if the patients were to be treated in captivity.

Nervous troubles caused directly by the events of the war or by captivity, such as psychasthenia of prisoners (barbed wire disease) and similar cases shall be especially considered.

All cases of this kind which are definitely determined and which, in view of their gravity or their constitutional character, are not entitled to direct repatriation, shall be interned.

Cases of psychasthenia of prisoners (barbed wire disease) which are not cured after three months in a neutral country or which, after that length of time, are not manifestly on the way to definite cure, shall be repatriated.

3. All cases of wounds or injuries and of their consequences, which offer a better chance of cure in a neutral country than in captivity, and which are not on the one hand eligible for repatriation nor on the other insignificant.

4. All cases of duly proved malaria without clinically demonstrable organic alterations (chronic enlargement of liver or spleen, or cachexia, etc.) for which a stay in a neutral country offers particularly favorable prospects of a complete cure.

5. All cases of poisoning (particularly by gas, metals, alkaloids) for which the prospects of cure are especially favorable in a neutral country.

There shall be excluded from internment:

1. All cases of duly proved mental disease.

2. All organic or functional nervous diseases, reputed incurable. (These two categories belong to those which give a right to direct repatriation.)

3. Severe chronic alcoholism.

4. All contagious diseases in the period in which they are transmissible (acute infectious diseases, primary and secondary syphilis, trachoma, leprosy, etc.). Persons infested with vermin must be freed therefrom before internment.

3. GENERAL REMARKS

The conditions set forth above should in general be interpreted and applied in a spirit as broad as possible.

This broad interpretation ought to be applied particularly to neuropathic or psychopathic states caused or determined by war experiences or by captivity itself (psychasthenia of prisoners of war) as well as to cases of tuberculosis in all stages.

There will be many cases brought before the travelling commissions and commissions of control which do not conform to the examples given under heading 2. The examples are given as typical only. An analogous list of surgical alterations has not been made, because, except for certain cases which by their very nature are incontestable (amputations), it is difficult to make a list of particular types. Experience has shown that the setting forth of such cases is in practice inconvenient.

All cases which do not correspond exactly to the examples cited are to be judged in accordance with the spirit of the guiding principles given above.

ANNEX 2.

MINIMUM CONDITIONS FOR THE EQUIPMENT AND ORGANIZATION OF OFFICERS' CAMPS

1. HOUSING

The location and equipment of officers' camps must meet all requirements for proper hygiene and cleanliness. Camps shall not be situated in unhealthful

locations. The wire fences shall not be electrified. The buildings shall be suitable for the occupancy of officers, and the rooms shall be sufficiently ventilated and free from draughts. The minimum floor space per head shall be as follows:

(a) Sleeping rooms

Single bed rooms for general and flag officers, 12 square metres.

Single bed rooms for field and commanding officers, 10 square metres.

Rooms with more than one bed for field and commanding officers, 8 square metres.

Rooms for all army captains and subaltern officers, 6 square metres.

(b) Dining rooms, work rooms, and recreation rooms combined

In camps up to 100 officers, 1 square metre.

In camps of from 101 to 300 officers, 0.75 square metre.

In camps of more than 300 officers, 0.50 square metre.

Working rooms and recreation rooms may be used as dining rooms. In such cases they shall be open from reveille to tattoo.

In so far as barracks are used either for sleeping or dining or as work and recreation rooms, they shall as a rule have double walls and wooden floors, but where this is not possible, they shall be otherwise sufficiently protected against cold and damp.

The minimum height for all rooms above mentioned shall be 2.50 metres to the eaves.

(c) Protection against fire

Every reasonable precaution, in accordance with current engineering practice in the Captor State, shall be taken against the possibility of injury to prisoners of war because of fire. Fire orders providing for the safe and orderly disposition of prisoners of war in case of fire shall be posted in all prison barracks and camps in the language of the prisoners of war, and the latter as well as the guards shall be fully informed of such orders. These orders shall specifically provide for the temporary release under guard of prisoners of war confined in cells or special disciplinary inclosures.

2. PATHS

Paths habitually in use within the camp shall be kept in serviceable condition even in bad weather.

3. BEDS AND BEDDING

Each officer shall be provided with a single bed with springs, mattress, pillow, two warm covers of adequate dimensions and two sheets. General and flag officers and field and commanding officers shall be provided with a pillow in addition. The beds shall be raised at least twenty centimeters from the floor. Beds shall not be superimposed.

Bed linen shall be changed at least once a month.

4. FURNITURE

Each officer shall have at his disposal in his bedroom a cupboard or other place in which he can keep his personal belongings (clothing, etc.).

Each officer prisoner of war shall have one chair and adequate table space. General and flag officers shall each have two chairs.

5. LIGHTING AND HEATING

All rooms shall be adequately lighted, and the light for every general or flag officer must have a minimum of 16 candle power, and for every field of commanding officer a minimum of 10 candle power, in rooms for two officers of other grades 16 candle power. Where it is not possible to supply electric light, other means of supplying an equal amount of light shall be provided. All rooms shall be heated sufficiently for the purpose for which they are used.

6. GROUNDS FOR GAMES AND EXERCISES

A space for exercise of sufficient size to permit of games being played shall be provided in each camp. In camps having up to 200 prisoners of war a minimum of 30 square metres per man; in camps of over 200 men 25 square meters per man, shall be provided. Paths may be, but gardens shall not be counted in computing this area. Exercise grounds if outside the camp may be used on condition that officers give their paroles as in the case of walks.

7. WASHING AND SANITARY ARRANGEMENTS

(a) Bathing and washing arrangements

Every officer shall be enabled to take at least one hot bath or hot shower bath a week, and unless other and adequate arrangements are made for bathing there shall be at least one shower bath for every forty officers. In every camp there must be at least two shower baths available. The shower baths shall be available for officers daily for three hours in the morning and three hours in the afternoon.

Ordinarily, every officer shall have at his disposal a wash basin and jug, and a water pitcher and glass. Where stationary washstands with running water are provided there shall be at least one bowl for every ten officers.

(b) Sanitary conveniences

All latrines and urinals shall comply with the requirements of proper sanitation and shall be lighted at night.

There shall be at least one latrine seat for every 30 officers. In no event shall there be less than three in any camp. They shall be separated one from another and shut off from view.

There shall be at least one urinal for every 20 officers.

The latrines for use at night shall be outside the sleeping rooms, and if not in the same building, access thereto shall be protected against bad weather.

Latrines and urinals for the use of officers shall be separate from those used by enlisted men.

8. MEDICAL TREATMENT

(a) Infirmaries

An infirmary shall be established in every camp for officer prisoners of war, which shall contain at least three beds for every one hundred officers in camp. The rules as regards floor space and height shall comply with the conditions prescribed for the sleeping rooms. Separate bathing arrangements, latrines and urinals shall be provided for sick officers.

(b) Hospitals

Officers in hospitals shall be allowed during the day time to be in the open

air as far as this is in accordance with the treatment prescribed for them by the medical officer.

Officers who are seriously ill may, with the consent of the medical officer, be visited by comrades who are in the same hospital or in a neighboring camp. The visiting officers must give their paroles under the same conditions as are prescribed for walks.

9. ORDERLIES

Every general or flag officer shall be entitled to one orderly. Field and commanding officers shall be entitled to one orderly for every four officers. Army captains and subalterns are entitled to one orderly for every seven officers.

Men employed as orderlies should be willing to perform this duty, should be physically fit in every way for the work, and should work only for the officer prisoners.

Orderlies shall be quartered and otherwise treated as well as other prisoners of war of like grades.

The rations and other rights of the orderlies shall not be curtailed on account of any gratuities or gifts in kind which they may receive from the officers.

Orderlies shall if possible be of the same State of Origin as the officers to whom they are assigned.

10. ROLL CALL

A commissioned officer of the Captor State shall be present at all roll calls and there shall not be more than three roll calls per day. When there are adequate reasons the number of roll calls may be increased temporarily. In such case the Secretary of War or his representative must be notified.

11. PHYSICAL EXERCISES

Compulsory physical exercises and drills are forbidden.

ANNEX 3

MINIMUM CONDITIONS FOR THE EQUIPMENT AND ORGANIZATION OF CAMPS FOR PRISONERS OF WAR OTHER THAN OFFICERS

1. HOUSING

Prisoners of war shall be housed in buildings or barracks which must fulfill all requirements of hygiene and be fully protected from inclement weather. Barracks shall, if possible, have wooden floors. If that is not practicable, the floor shall be so constructed that it can be kept hard, dry and clean.

Camps shall not be established in unhealthful locations. Wire fencing shall not be electrified.

(a) Dormitories

The floor space of dormitories shall be on the scale of 3 square meters per head. If beds are placed one above the other, the floor space may be reduced to 2 square meters per head. Rooms shall be sufficiently large to provide each occupant with an air space of 7.5 cubic meters.

(b) Living and dining rooms

In all camps containing at least 100 prisoners of war there shall be dining rooms provided with a sufficient quantity of tables and benches. The floor

space shall be on the scale of 0.5 square metres per head. The dining rooms may be used by the prisoners of war for purposes of recreation between meals. In that case they must remain open from reveille until tattoo.

(c) Protection against fire

Every reasonable precaution, in accordance with current engineering practice in the Captor State, shall be taken against the possibility of injury to prisoners of war because of fire. Fire orders providing for the safe and orderly disposition of prisoners of war in case of fire shall be posted in all prison barracks, camps or working camps in the language of the prisoners of war; and the latter as well as the guards shall be fully informed of such orders. These orders shall specifically provide for the temporary release under guard of prisoners of war confined in cells or special disciplinary inclosures.

2. PATHS

Paths habitually in use within the camp shall be kept in serviceable condition even in bad weather.

3. BEDS AND BEDDING

The beds shall be either iron or wooden frames. The bedding shall consist of a soft mattress at least 5 centimeters thick throughout and of two warm covers of adequate dimensions to be supplied by the Captor State. The bed frames shall be raised at least 20 centimeters above the floor. They shall be separated by a space 50 centimeters broad or a dividing wall 40 centimeters high. The contents of the mattress if of straw, paper, seaweed or similar material shall be renewed sufficiently often to insure cleanliness and adequate thickness. The contents must not consist of unclean material. Prisoners of war shall be allowed to keep their own blankets in addition to those provided by the camps.

4. LIGHTING AND HEATING

Lighting shall be sufficient to enable prisoners of war to read and write from dusk until tattoo in the rooms at their disposal for the purpose.

All rooms must be sufficiently heated for the purpose for which they are used.

5. GROUNDS FOR GAMES AND EXERCISES

A space for exercise of sufficient size to permit of outdoor games being played shall be provided in each camp. It shall be sufficient to provide ten square meters for every non-worker. In main and working camps containing more than 100 prisoners of war a special exercise ground shall be provided which the prisoners of war themselves shall prepare. The area shall be on a basis of 250 square meters for 100 prisoners of war and 75 square meters for every additional 100 prisoners of war. Paths may be, but gardens shall not be counted in computing this area.

6. WASHING AND SANITARY ARRANGEMENTS

(a) Bathing and washing arrangements

Adequate facilities for washing must be provided and in the absence of other adequate arrangements there shall be a tap to every 30 men and a shower bath for every 50 men. Suitable provision for washing shall, however,

always be made when necessitated by the nature of the work prisoners of war are called upon to perform.

Bathing facilities shall permit of at least one hot bath or hot shower per week of at least five minutes duration. Facilities for washing clothes shall be available at least once a week.

Prisoners of war shall receive an allowance of soap which shall in no case be less than 150 grams per head per month. Prisoners employed on heavy work shall receive an extra allowance.

(b) Sanitary conveniences

Latrines and urinals must conform to the requirements of health and cleanliness and, if in barracks, must be separated from the living rooms.

There must be at least one latrine seat and one meter of urinal trough for every 40 men.

The latrines for use at night shall be outside the sleeping rooms, and, if not in the same buildings, access thereto shall be protected against bad weather.

Latrines shall be lighted at night.

7. CLOTHING AND EQUIPMENT

(a) Clothing

Clothing, underclothing and footwear shall be furnished by the Captor State, the quality of which shall equal that of the same articles furnished for similar purposes to its own armed forces. Furthermore the prisoners of war shall be allowed to receive wearing apparel and other objects of daily use from the designated relief societies. No such consignment shall relieve the Captor State of the obligation of providing clothing, etc. The Captor State shall provide for regular renewal and repair.

Regulation uniforms furnished by the State of Origin or the relief societies shall not be cut for the purpose of applying stripes or other distinctive marks.

Every prisoner of war shall be provided with the following articles: 1 cap, 1 pair cloth trousers, 1 cloth coat or tunic, 1 overcoat, 2 shirts, 2 pairs of drawers, 2 pairs of socks or stockings, 2 pairs of boots or shoes of which one pair may be house shoes or wooden slippers, 1 towel per week.

In addition, each worker shall be provided with a suit of drill overalls whenever the nature of the work requires it.

(b) Equipment

Each prisoner of war shall be given a mess kit and utensils, including a knife, fork and a spoon, a drinking cup and a barrack bag or other suitable container for his personal belongings.

8. MEDICAL TREATMENT

(a) Infirmaries

In every camp containing more than 30 prisoners of war there shall be an infirmary. The number of beds shall be three for every hundred prisoners and for every bed there shall be an air space of at least 10 cubic metres. The beds shall each have springs, a mattress, a pillow and sheets.

Special bath and sanitary conveniences shall be provided for the sick.

(b) Hospitals

Prisoners of war under treatment in hospitals shall be given opportunity

for being in the open air daily, so far as this is in accordance with the treatment prescribed for them by the medical officers.

Men who are seriously ill may be visited, so far as practicable and subject to the consent of the medical officer, by comrades who are located in the same hospital or in a neighboring camp.

9. PHYSICAL EXERCISES

Compulsory drills and physical exercises shall not last more than one hour per day.

ANNEX 4

REGULATIONS FOR CARRYING OUT THE PUNISHMENT OF OFFICER PRISONERS OF WAR IN PRISON CAMPS AND MILITARY PRISONS

1. HOUSING

Rooms shall be sanitary, sufficiently large, light, dry, well ventilated by at least one window leading to the open air, and warmed during cold weather; they must be artificially lighted from dusk to 9 P.M. Places of confinement may be secured by locks.

2. FURNITURE

The furniture of the rooms shall consist of a bed with mattress, sufficient blankets and sheets, one table, one chair, a wash-basin, a water pitcher and glass.

3. DIET

Officer prisoners of war under punishment shall receive from the Officers' mess the same diet as those who are not under punishment. They shall not be permitted to buy alcoholic beverages or eatables. They shall be allowed to smoke.

4. EXERCISE

Officer prisoners of war under punishment may take exercise in the open air for 2 hours a day, but must not have communication with their fellows.

5. OCCUPATION

Officer prisoners of war under punishment shall be allowed to read and write and to receive newspapers. If two or more officers are confined in the same room they shall be allowed to talk together. They shall be permitted to play games, but not to gamble.

6. CORRESPONDENCE

Officer prisoners of war under punishment shall be allowed to receive and send the authorized maximum of letters and post cards. However parcels and money addressed to them shall not be delivered until their punishment has expired.

The food contents of parcels shall be handed over to the Officers' mess of the camp. If any officer prisoner does not receive his food from the Officers' mess, he shall receive the food contents of parcels intended for him, together with facilities and fuel for cooking such food.

7. SANITARY CONVENIENCES

Officer prisoners of war under punishment shall have every reasonable facility for keeping themselves in a state of personal cleanliness. The rooms in which they are confined shall be properly cleaned. Latrines shall be kept clean

and odorless. Night stools in the rooms are forbidden, but adequate opportunities for attending to the calls of nature shall be given.

8. ORDERLIES

Orderlies shall be provided for necessary cooking, policing, etc.

9. CLOTHING

Officer prisoners of war under punishment shall be allowed such of their clothing as they may reasonably request.

ANNEX 5

REGULATIONS FOR THE CARRYING OUT OF PUNISHMENTS OF PRISONERS OF WAR OTHER THAN OFFICERS IN PRISON CAMPS AND MILITARY PRISONS

1. HOUSING

Rooms shall be sanitary, sufficiently light, dry, well ventilated and warmed in cold weather. The cubic contents shall at least be 2½x2½x1½ meters per head. There need be no artificial lighting.

2. FURNITURE AND CLOTHING

Each room shall be provided with a wooden bed board without a mattress. The bed board shall not be taken from the room. A mattress shall be allowed one night in every four. In the room there shall be a water pitcher and a drinking glass. If washing facilities are not afforded outside of the room, each prisoner of war under punishment shall be furnished a wash basin. They shall be allowed at all times a sufficient number of blankets. They may retain their uniforms and overcoats.

3. DIET

As a punishment, prisoners of war may be put on a bread and water diet. While on bread and water diet they shall receive not less than 500 grams of bread each day and as much drinking water as they wish. Such diet shall not be continued for more than 3 days at a time; nor more than 6 days out of 12 consecutive days; nor more than 12 days in 28; nor more than a total of 80 days in one year. On all other days they shall receive the same full ration as their comrades, including their share of the food supplies received from the designated relief societies. Unless such additional food supplies are turned into the mess for all prisoners together, prisoners of war under punishment shall be granted facilities and fuel for cooking such food on all days on which they are entitled to full ration.

Prisoners of war under punishment who are required to work shall not be put on restricted diet but shall each day receive the same food as their comrades.

Alcoholic beverages and smoking are forbidden.

4. OUTDOOR EXERCISE

Prisoners of war under punishment shall be allowed two hours exercise in the open air every day without having communication with their comrades.

5. EMPLOYMENT

Prisoners of war under punishment may be employed on work during the day. Reading and writing shall be permitted.

6. CORRESPONDENCE

Prisoners of war under punishment shall be allowed to receive and to send the authorized maximum of letters and postcards. However, parcels and money which may be addressed to them shall not be delivered until their punishment has expired. Food stuffs contained in parcels shall be handed over to the prisoner of war mess.

7. SANITATION

Prisoners of war under punishment shall have sufficient facilities for keeping themselves in a state of personal cleanliness. Their rooms shall be properly cleaned. Latrines shall be kept clean and odorless. Night stools in the rooms are forbidden; but sufficient opportunity shall be afforded to attend to calls of nature during the night.

ANNEX 6

CORRESPONDING TITLES AND RANKS OF THE SANITARY PERSONNEL OF THE GERMAN AND AMERICAN LAND AND NAVAL FORCES

[This annex consists of a table.]

ANNEX 7

DEFINITIONS

1. PRISONERS OF WAR

The term "prisoners of war" shall comprise those officers, officials, non-commissioned officers and enlisted or enrolled persons, male or female, of all branches and corps of the army, navy, and marine corps whether on the active, retired or reserve lists, who are captured while in the active service of the armed forces of their State of Origin. Sanitary personnel are excluded.

2. CIVIL PRISONERS

The term "civil prisoners" shall comprise all citizens or subjects of either Contacting Party held in confinement by the other for any reason except the violation of the penal laws in force in the territories of the Captor State or any of its subdivisions; inclusive of the officers and members of crews of merchant ships, and exclusive of persons coming within the definition of "prisoners of war," or Article 139 or 140.

3. OFFICERS

The term "officer" shall comprise the officers of all corps of the armed forces, military or naval, of the two Contracting Parties and shall include commissioned, warranted and appointed officers of the United States, "Hilfsoffiziere" of the German navy and officials with the rank of officer in the German army or navy.

4. NON-COMMISSIONED OFFICERS

The terms "non-commissioned officer" shall include in the American army corporals, and in the German army or navy "Offiziersstellvertreter" and "Beamtenstellvertreter," "Deckoffiziere," "Vizedeckoffiziere" and "Hilfsdeckoffiziere."

5. STATE OF ORIGIN

The term "State of Origin" shall be held to mean:

(a) with reference to military or naval personnel, the State in whose

armed forces they are commissioned, warranted, appointed, enlisted or enrolled;

(b) with reference to non-military persons, the State with whose armed forces they are exclusively connected.

6. INVALID AND VALID PRISONERS OF WAR

The term "invalid prisoners of war" shall comprise those who are eligible for internment in a neutral country or repatriation under the terms of this Agreement because of physical or mental unsoundness. All other prisoners of war shall be deemed "valid."

7. REPATRIATION

The term "repatriation" shall, when applied to prisoners of war and sanitary personnel, mean the return to American or German military control; as applied to civilians it is defined in Article 163.

DOCUMENT NO. 43

REPORT OF THE COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE [FIRST WORLD] WAR AND ON ENFORCEMENT OF PENALTIES
(29 March 1919)

SOURCE
14 AJIL 95

NOTE

The Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties was created by the Preliminary Peace Conference which met at Versailles in 1919 and which ultimately drafted the Treaty of Peace between the Allied and Associated Powers and Germany which legally terminated World War I (1914-1918). That Treaty, known as the Treaty of Versailles (DOCUMENT NO. 44), contained a number of provisions for the trial of persons accused of having committed war crimes, including the maltreatment of prisoners of war, as recommended in this Report.

EXTRACTS

The Preliminary Peace Conference at the plenary session on the 25th January, 1919 (Minute No. 2), decided to create, for the purpose of inquiring into the responsibilities relating to the war, a commission composed of fifteen members, two to be named by each of the Great Powers (United States of America, British Empire, France, Italy and Japan) and five elected from among the Powers with special interests.

The Commission was charged to inquire into and report upon the following points:

1. The responsibility of the authors of the war.
2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.
5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.

CHAPTER II

VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR

On the second point submitted by the Conference, *the facts as to breaches of*

the laws and customs of war committed by the forces of the German Empire and their allies on land, on sea, and in the air, during the present war, the Commission has considered a large number of documents. The Report of the British Commission drawn up by Lord Bryce, the labors of the French Commission presided over by M. Payelle, the numerous publications of the Belgian Government, the Memorandum submitted by the Belgian Delegation, the Memorandum of the Greek Delegation, the documents lodged by the Italian Government, the formal denunciation by the Greeks at the Conference of the crimes committed against Greek populations by the Bulgars, Turks and Greeks, the Memorandum of the Serbian Delegation, the Report of the Inter-Allied Commission on the violations of the Hague Conventions and of international law in general, committed between 1915 and 1918 by the Bulgars in occupied Serbia, the summary of the Polish Delegation, together with the Roumanian and Armenian Memoranda, supply abundant evidence of outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and of the laws of humanity.

In spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage. Additions are daily and continually being made. It is impossible to imagine a list of cases so diverse and so painful. Violations of the rights of combatants, of the rights of civilians, and of the rights of both, are multiplied in this list of the most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out to the end. Not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance. Murders and massacres, tortures, shields formed of living human beings, collective penalties, the arrest and execution of hostages, the requisitioning of services for military purposes, the arbitrary destruction of public and private property, the aerial bombardment of open towns without there being any regular siege, the destruction of merchant ships without previous visit and without any precautions for the safety of passengers and crew, the massacre of prisoners, attacks on hospital ships, the poisoning of springs and of wells, outrages and profanations without regard for religion or the honor of individuals, the issue of counterfeit money reported by the Polish Government, the methodical and deliberate destruction of industries with no other object than to promote German economic supremacy after the war, constitute the most striking list of crimes that has ever been drawn up to the eternal shame of those who committed them. The facts are established. They are numerous and so vouched for that they admit of no doubt and cry for justice. The Commission, impressed by their number and gravity, thinks there are good grounds for the constitution of a special commission, to collect and classify all outstanding information for the purpose of preparing a complete list of the charges under the following heads:

The following is the list arrived at:

* * *

(28) Directions to give no quarter.
(29) Ill-treatment of wounded and prisoners of war.
(30) Employment of prisoners of war on unauthorized works.

* * *

The Commission desires to draw attention to the fact that the offences enumerated and the particulars given in Annex I are not regarded as complete and exhaustive; to these such additions can from time to time be made as may seem necessary.

CONCLUSIONS

1. The war was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity.

2. A commission should be created for the purpose of collecting and classifying systematically all the information already had or to be obtained, in order to prepare as complete a list of facts as possible concerning the violations of the laws and customs of war committed by the forces of the German Empire and its Allies, on land, on sea and in the air, in the course of the present war.

CHAPTER III

PERSONAL RESPONSIBILITY

The third point submitted by the Conference is thus stated:

> *The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.*

For the purpose of dealing with this point, it is not necessary to wait for proof attaching guilt to particular individuals. It is quite clear from the information now before the Commission that there are grave charges which must be brought and investigated by a court against a number of persons.

In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

We have later on in our Report proposed the establishment of a high tribunal composed of judges drawn from many nations, and included the possibility of the trial before that tribunal of a former head of a state with the consent of that state itself secured by articles in the Treaty of Peace. If the

immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.

In view of the grave charges which may be preferred against — to take one case — the ex-Kaiser — the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished. Moreover, the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.

There is little doubt that the ex-Kaiser and others in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air.

We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.

CONCLUSION

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.

CHAPTER IV

CONSTITUTION AND PROCEDURE OF AN APPROPRIATE TRIBUNAL

The fourth point submitted to the Commission is stated as follows:

> *The constitution and procedure of a tribunal appropriate for the trial of these offences* (crimes relating to the war).

On this question the Commission is of opinion that, having regard to the multiplicity of crimes committed by those Powers which a short time before had on two occasions at The Hague protested their reverence for right and their respect for the principles of humanity, the public conscience insists upon a sanction which will put clearly in the light that it is not permitted cynically to profess a disdain for the most sacred laws and the most formal undertakings.

Two classes of culpable acts present themselves:

(a) Acts which provoked the world war and accompanied its inception.

(b) Violations of the laws and customs of war and the laws of humanity.

* * *

(b) Violations of the Laws and Customs of War and of the Laws of Humanity

Every belligerent has, according to international law, the power and

authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases. These courts would be able to try the incriminated persons according to their own procedure, and much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal.

There remain, however, a number of charges:

(a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labor in mines where prisoners of more than one nationality were forced to work;

(b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct of operations against several of the Allied armies;

(c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators);

(d) Against such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the high tribunal hereafter referred to.

For the trial of outrages falling under these four categories the Commission is of opinion that a high tribunal is essential and should be established according to the following plan:

(1) It shall be composed of three persons appointed by each of the following governments: The United States of America, the British Empire, France, Italy and Japan, and one person appointed by each of the following governments: Belgium, Greece, Poland, Portugal, Roumania, Serbia and Czecho-Slovakia. The members shall be selected by each country from among the members of their national courts or tribunals, civil or military, and now in existence or erected as indicated above.

(2) The tribunal shall have power to appoint experts to assist it in the trial of any particular case or class of cases.

(3) The law to be applied by the tribunal shall be "the principles of the

law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."

(4) When the accused is found by the tribunal to be guilty, the tribunal shall have the power to sentence him to such punishment or punishments as may be imposed for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person.

(5) The tribunal shall determine its own procedure. It shall have power to sit in divisions of not less than five members and to request any national court to assume jurisdiction for the purpose of inquiry or for trial judgment.

(6) The duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it shall be imposed upon a Prosecuting Commission of five members, of whom one shall be appointed by the Governments of the United States of America, the British Empire, France, Italy and Japan, and for the assistance of which any other government may delegate a representative.

(7) Applications by any Allied or Associated Government for the trial before the tribunal of any offender who has not been delivered up or who is at the disposition of some other Allied or Associated Government shall be addressed to the Prosecuting Commission, and a national court shall not proceed with the trial of any person who is selected for trial before the tribunal, but shall permit such person to be dealt with as directed by the Prosecuting Commission.

(8) No person shall be liable to be tried by a national court for an offence in respect of which charges have been preferred before the tribunal, but no trial or sentence by a court of an enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States.

CONCLUSIONS

The Commission has consequently the honor to recommend:

1. *That a high tribunal be constituted as above set out.*
2. *That is shall be provided by the treaty of peace:*

(a) *That the enemy governments shall, notwithstanding that peace may have been declared, recognize the jurisdiction of the national tribunals and the high tribunal, that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree, and that the governments of such persons shall undertake to surrender them to be tried.*

(b) *That the enemy governments shall undertake to deliver up and give in such manner as may be determined thereby:*

(i) *The names of all persons in command or charge of or in any way exercising authority in or over all civilian internment camps, prisoner-of-war camps, branch camps, working camps and*

"commandoes" and other places where prisoners were confined in any of their dominions or in territory at any time occupied by them, with respect to which such information is required, and all orders and instructions or copies of orders or instructions and reports in their possession or under their control relating to the administration and discipline of all such places in respect of which the supply of such documents as aforesaid shall be demanded;

(ii) All orders, instructions, copies of orders and instructions, General Staff plans of campaign, proceedings in naval or military courts and courts of inquiry, reports and other documents in their possession or under their control which relate to acts or operations, whether in their dominions or in territory at any time occupied by them, which shall be alleged to have been done or carried out in breach of the laws and customs of war and the laws of humanity;

(iii) Such information as will indicate the persons who committed or were responsible for such acts or operations;

(iv) All logs, charts, reports and other documents relating to operations by submarines;

(v) All orders issued to submarines, with details or scope of operations by these vessels;

(vi) Such reports and other documents as may be demanded relating to operations alleged to have been conducted by enemy ships and their crews during the war contrary to the laws and customs of war and the laws of humanity.

3. That each Allied and Associated Government adopt such legislation as may be necessary to support the jurisdiction of the international court, and to assure the carrying out of its sentences.

4. That the five states represented on the Prosecuting Commission shall jointly approach neutral governments with a view to obtaining the surrender for trial of persons within their territories who are charged by such states with violations of the laws and customs of war and the laws of humanity.

DOCUMENT NO. 44

TREATY OF PEACE BETWEEN THE ALLIED AND ASSOCIATED POWERS, OF THE ONE PART, AND GERMANY, OF THE OTHER PART
(Versailles, 28 June 1919)

SOURCES

2 Bevans 43
112 BFSP 1
13 AJIL Supp. 151

NOTE

This is the treaty which officially ended World War I (1914-1918) and which is believed by some to have laid the basis for World War II (1939-1945). With respect to the provisions of the treaty concerning the repatriation of prisoners of war, it must be borne in mind that all of the members of the armed forces of the Allied and Associated Powers who had been held as prisoners of war by Germany during the hostilities had long since been repatriated in accordance with the provisions of the 1918 Armistice Agreement (DOCUMENT NO. 41) and that some of these provisions of the treaty, although stated in a bilateral manner, actually were concerned solely with the problem of the many German prisoners of war who were still being held by some of the Allied and Associated Powers in June 1919. There was no improvement in the applicable law contained in Article 75(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) and the problem of lengthy delay in the repatriation of the members of the armed forces of the vanquished nation who were prisoners of war continued to arise (see, for example, DOCUMENT NO. 50 and DOCUMENT NO. 64). It was finally resolved by the adoption of Article 118 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). However, even that article failed of implementation by India after the 1971 armed conflict between India and Pakistan. (See DOCUMENT NO. 167). It should be noted that Article 220(2) of the Treaty of Versailles included the principle of "voluntary" repatriation. It should also be noted that Articles 228-230, among others, of the Treaty implemented the recommendations of the Commission on the Responsibility of the Authors of the [First World] War and on Enforcement of Penalties (DOCUMENT NO. 43). Despite the cited articles, the German Government of the day, bowing to public pressure, refused to deliver the accused to the Allied and Associated Powers for trial. It was then agreed that they would be tried by a German court, the Supreme Court of Leipzig. After a number of cases, including several which involved maltreatment of prisoners of war, had been so tried, it became evident that the program was failing to accomplish its purpose and it was discontinued.

EXTRACTS

ARTICLE 214.

The repatriation of prisoners of war and interned civilians shall take place as soon as possible after the coming into force of the present Treaty and shall be carried out with the greatest rapidity.

ARTICLE 215

The repatriation of German prisoners of war and interned civilians shall, in accordance with Article 214, be carried out by a Commission composed of representatives of the Allied and Associated Powers on the one part and of German Government on the other part.

For each of the Allied and Associated Powers a Sub-Commission, composed exclusively of Representatives of the interested Power and of Delegates of the German Government, shall regulate the details of carrying into effect the repatriation of the prisoners of war.

ARTICLE 216.

From the time of their delivery into the hands of the German authorities the prisoners of war and interned civilians are to be returned without delay to their homes by the said authorities.

Those amongst them who before the war were habitually resident in territory occupied by the troops of the Allied and Associated Powers are likewise to be sent to their homes, subject to the consent and control of the military authorities of the Allied and Associated armies of occupation.

ARTICLE 217.

The whole cost of repatriation from the moment of starting shall be borne by the German Government who shall also provide the land and sea transport and staff considered necessary by the Commission referred to in Article 215.

ARTICLE 218.

Prisoners of war and interned civilians awaiting disposal or undergoing sentence for offences against discipline shall be repatriated irrespective of the completion of their sentence or of the proceedings pending against them.

This stipulation shall not apply to prisoners of war and interned civilians punished for offences committed subsequent to May 1, 1919.

During the period pending their repatriation all prisoners of war and interned civilians shall remain subject to the existing regulations, more especially as regards work and discipline.

ARTICLE 219.

Prisoners of war and interned civilians who are awaiting disposal or undergoing sentence for offences other than those against discipline may be detained.

ARTICLE 220.

The German Government undertakes to admit to its territory without distinction all persons liable to repatriation.

Prisoners of war or other German nationals who do not desire to be repatriated may be excluded from repatriation; but the Allied and Associated Governments reserve to themselves the right either to repatriate or to take

them to a neutral country or to allow them to reside in their own territories.

The German Government undertakes not to institute any exceptional proceedings against these persons or their families nor to take any repressive or vexatious measures of any kind whatsoever against them on this account.

ARTICLE 221.

The Allied and Associated Governments reserve the right to make the repatriation of German prisoners of war or German nationals in their hands conditional upon the immediate notification and release by the German Government of any prisoners of war who are nationals of the Allied and Associated Powers and may still be in Germany.

ARTICLE 222.

Germany undertakes:

(1) To give every facility to Commissions to enquire into the cases of those who cannot be traced; to furnish such Commissions with all necessary means of transport; to allow them access to camps, prisons, hospitals and all other places; and to place at their disposal all documents, whether public or private, which would facilitate their enquiries;

(2) To impose penalties upon any German officials or private persons who have concealed the presence of any nationals of any of the Allied and Associated Powers or have neglected to reveal the presence of any such after it had come to their knowledge.

ARTICLE 224.

The High Contracting Parties waive reciprocally all repayment of sums due for the maintenance of prisoners of war in their respective territories.

ARTICLE 228.

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

ARTICLE 229.

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

ARTICLE 230.

The German Government undertakes to furnish all documents and

information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.

DOCUMENT NO. 45

TREATY OF PEACE BETWEEN RUSSIA AND ESTHONIA
(Tartu, 2 February 1920)

SOURCE
11 LNTS 51

NOTE

This is one example of the large number of treaties entered into by the new Russian Soviet Government with its European neighbors, and others, in the aftermath of World War I (1914-1918) and the Russian Revolution (1917). It will be noted that one characteristic of these treaties was that prisoners of war were given the alternatives of being repatriated, of remaining in the country in which held if that constry consented, of going to a third country (see, for example, DOCUMENT NO. 38) or were to be allowed to go "where they themselves desire it" (see, for example, DOCUMENT NO. 46). Note also the amnesty provision contained in Article 10.

EXTRACTS

ARTICLE 9.

The prisoners of war of both countries shall be released as soon as possible. The formalities for the exchange of prisoners are set out in the Annex to this Article.

Note 1. The term "prisoners of war" shall apply to individuals who were captured and did not take service in the armies of the State which captured them.

Note 2. Prisoners of war who were captured by irregular forces and did not take service in the ranks of such forces shall be repatriated in the ordinary course.

ANNEX TO ARTICLE 9.

(1) Prisoners of war of both contracting Parties shall be repatriated, unless they prefer to remain in the country in which they are (with the consent of the Government of that country), or to go to some other country.

(2) The periods within which the exchange of prisoners of war shall be carried out shall be settled by the two Governments after the ratification of the Peace Treaty.

(3) Prisoners of war shall, at the time of their release, have restored to them everything of which they were deprived by acts of the authorities of the Government which captured them, and shall also receive the full amount of the pay due to them, or any part of such pay withheld from them.

(4) Each of the contracting Parties shall undertake to refund the costs of the maintenance of its citizens who were made prisoners, as far as these expenses have not been covered by the work of the prisoners in State or private enterprises. The payment shall be carried out in the currency of the State which maintained the prisoners.

Note. The costs of maintenance to be refunded shall comprise the value of the prisoners' food, the supplies made to him in kind, and his pay.

(5) Prisoners shall be conducted to the frontier in detachments, at the expense of the Government which captured them; the return of these prisoners shall be carried out according to the lists drawn up, which shall show the Christian name, patronymic and family name of the prisoner, the date of his capture, the unit in which he was serving before capture, and, if he has been sentenced to imprisonment for any act regarded as criminal, the precise nature of such crime and the date on which it was committed.

(6) Immediately after the ratification of the Peace Treaty, a Committee, consisting of four representatives of each of the contracting Parties, shall be formed for the exchange of prisoners of war. This Committee shall superintend the carrying-out of the clauses of the present Annex, organise the repatriation of prisoners, and also determine the amount of their maintenance costs by reference to the accounts submitted at the time of the release of the prisoners by the party concerned.

ARTICLE 10.

The contracting Parties shall remit to prisoners of war and interned civilians, on their return to their own country, all punishments to which they may have been condemned for criminal acts committed for the benefit of the opposite party, and all disciplinary punishment of every kind.

The amnesty shall not extend to persons who have committed a crime of the kind mentioned above, or a breach of discipline, after the signature of the Peace Treaty.

Prisoners of war and interned civilians, sentenced by a criminal court for any crime not covered by the amnesty, before the ratification of the present Treaty, or after it but before the expiration of one year from the date of the ratification, shall not be repatriated until their punishment has been carried out.

Those prisoners or interned civilians who have been prosecuted for criminal acts not covered by the amnesty, but upon whom no sentence has been passed within one year from the date of the ratification of the present Peace Treaty, shall be handed over to the authorities of their own country at the expiration of this period, together with all documents relating to the proceedings brought against them.

DOCUMENT NO. 46

AGREEMENT BETWEEN GERMANY AND THE RUSSIAN SOCIALIST FEDERAL SOVIET REPUBLIC WITH REGARD TO THE MUTUAL REPATRIATION OF PRISONERS OF WAR AND INTERNED CIVILIANS
(Berlin, 19 April 1920)

SOURCES
2 LNTS 66
113 BFSP 1068

NOTE

This is another example of the attempt made by the new Russian Soviet Government to sort out with its European neighbors, and others, some of the problems arising out of the World War I (1914-1918) and the Russian Revolution (1917). (See also DOCUMENT NO. 38.) Here, the prisoners of war who were to be released were to be repatriated only "where they themselves desire it." Moreover, as in many of these treaties (see, for example, DOCUMENT NO. 45), there was an amnesty, a guarantee against the punishment of the repatriated prisoners of war by their own State, even if they had fought against it. For whatever such a provision is worth, it was unwisely omitted from the 1945 Yalta Agreement (DOCUMENT NO. 65), with devastating results.

EXTRACTS

ARTICLE 1.

Prisoners of war and interned civilians of both sides are to be repatriated in all cases where they themselves desire it. The repatriation shall begin without delay, and shall be carried out with the utmost despatch.

Both parties undertake to proceed rapidly with the repatriation by all the means at their disposal, and to make the necessary arrangements therefore.

The exchange shall be carried out convoy for convoy. Each of the two contracting parties undertakes, as soon as the other party gives notice of the despatch of a convoy, to make all preparations to repatriate a convoy from its own side.

ARTICLE 2.

Each of the two parties undertakes the following:

(1) All prisoners of war and interned civilians of the other party who are in their hands, and also such nationals of the other party as may have been granted furlough or released from military or civil detention, shall be granted adequate subsistence or facilities for earning the same till they are handed over to their own country or its representatives.

(2) That it will forthwith officially notify any persons who are entitled to repatriation under the terms of Article I of this agreement.

ARTICLE 3.

"Russian Prisoners of War" within the meaning of this Agreement shall be held to include all Russians or former Russian subjects who have come into

German hands, whether fighting for the former Russian Empire or for the Russian Soviet Republic, or against the Russian Soviet Republic.

ARTICLE 4.

"German Prisoners of War" within the meaning of this Agreement shall be held to include all Germans or former subjects of the German Reich who have come into Russian hands fighting for the German Reich or against the Russian Soviet Republic.

NOTE TO ARTICLES 3 AND 4.

Hostages on both sides shall be regarded as Prisoners of War within the meaning of this Agreement, and immediately repatriated.

ARTICLE 5.

Repatriation shall not be delayed by the fact that the individual entitled to it has accepted employment or has to fulfil some other legal engagement in the territory of the other contracting party. Compensation for engagements of this nature cannot be provided by either side.

ARTICLE 6.

No one shall be detained for the purpose of enquiry into or by reason of having been sentenced for any infraction of discipline or any political crimes and offences, in particular espionage. On the other hand persons presumably entitled to repatriation may be detained for trial and punishment for ordinary crimes until they have undergone all punishment to which they may be liable or until some further agreement shall have been entered into by the contracting parties.

ARTICLE 7.

Each of the two contracting parties guarantees indemnity from punishment to those repatriated persons who may have taken action against the constitution of their state either by political agitation or by arms.

ARTICLE 8.

Until the carrying out of this Agreement each of the two parties shall be entitled to maintain in the territory of the other a welfare-centre for the purpose of preparing for repatriation and granting material assistance to those of its nationals who are returning. The extent of the duties of such welfare-centre shall be regulated by special agreements.

ARTICLE 9.

Both parties entrust the conduct of negotiations with such states as may be concerned in the passage of convoys to the International Red Cross at Geneva, which body shall also be responsible for the management and safety of the convoys during their passage through the territory of such states. Each of the contracting parties shall conclude a special agreement with the International Red Cross with regard to the expenses arising out of these proceedings.

ARTICLE 10.

The calculation of all expenses arising from the carrying out of this Agreement and the settlement of all questions concerning the property of persons repatriated, the estates of those deceased, the exchange of lists of such persons, the notification of their place of burial and similar matters, shall be settled by a special agreement.

DOCUMENT NO. 47

RULES OF AERIAL WARFARE DRAFTED BY AN INTERNATIONAL COMMISSION OF JURISTS ESTABLISHED BY THE 1922 WASHINGTON DIPLOMATIC CONFERENCE ON THE LIMITATION OF ARMAMENT

(The Hague, 19 February 1923)

SOURCES

17 AJIL Supp. 245
32 AJIL Supp. 1
Greenspan, The Modern Law of Land Warfare 650 (1959)

NOTE

Although the Diplomatic Conference which convened in Washington in 1922 had as its objective an agreement limiting armaments, during the course of its discussions it decided to create an International Commission of Jurists to study two subjects dealing not with limitations of armaments, but with the conduct of war: the use of radio telegraphy; and air warefare. The Commission, meeting at The Hague from November 1922 to February 1923, drafted a set of rules in each area. Neither set was ever included in any effective international document; but each has unquestionably had its impact on the evolution of its particular facet of the law of war. Much remains in the area of custom; but provisions of conventional law may be found in Article 4A(4) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) and in Article 42 of the 1977 Protocol I (DOCUMENT NO. 175).

EXTRACTS

ARTICLE 20

When an aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be attacked in the course of their descent.

ARTICLE 36

When an enemy military aircraft falls into the hands of a belligerent, the members of the crew and the passengers, if any, may be made prisoners of war.

The same rule applies to the members of the crew and the passengers, if any, of an enemy public non-military aircraft, except that in the case of public non-military aircraft devoted exclusively to the transport of passengers, the passengers will be entitled to be released unless they are in the service of the enemy, or are enemy nationals fit for military service.

If an enemy private aircraft falls into the hands of a belligerent, members of the crew who are enemy nationals or who are neutral nationals in the service of the enemy, may be made prisoners of war. Neutral members of the crew, who are not in the service of the enemy, are entitled to be released if they sign a written undertaking not to serve in any enemy aircraft while hostilities last.

Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

Release may in any case be delayed if the military interests of the belligerent so require.

The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy.

ARTICLE 38

Where under the provisions of Articles 36 and 37 it is provided that members of the crew or passengers may be made prisoners of war, it is to be understood that, if they are not members of the armed forces, they shall be entitled to treatment not less favorable than that accorded to prisoners of war.

ARTICLE 43

The personnel of a disabled belligerent military aircraft rescued outside neutral waters and brought into the jurisdiction of a neutral state by a neutral military aircraft and there landed shall be interned.

ARTICLE 61

The term "military" throughout these rules is to be read as referring to all branches of the forces, *i.e.* the land forces, the naval forces and the air forces.

ARTICLE 62

Except so far as special rules are here laid down and except also so far as the provisions of Chapter VII of these rules or international conventions indicate that maritime law and procedure are applicable, aircraft personnel engaged in hostilities come under the laws of war and neutrality applicable to land troops in virtue of the custom and practice of international law and of the various declarations and conventions to which the states concerned are parties.

DOCUMENT NO. 48

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK OF ARMIES IN THE FIELD
(27 July 1929)

SOURCES

118 LNTS 303
47 Stat. 2074
2 Bevans 965
130 BFSP 265
27 AJIL Supp. 43
NWC, 1950-1951, at 40

NOTE

This is the third of the series of four "Red Cross" conventions which have been widely accepted by the international community. It was preceded by the Convention of 1864 (DOCUMENT NO. 24) and that of 1906 (DOCUMENT NO. 32); and it has now been completely supplanted by the 1949 Convention of the same name (DOCUMENT NO. 106).

EXTRACTS

ARTICLE 1.

Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances; they shall be treated with humanity and cared for medically, without distinction of nationality, by the belligerent in whose power they may be.

Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment.

ARTICLE 2.

Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of international law concerning prisoners of war shall be applicable to them.

Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations.

ARTICLE 9.

The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.

Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of identity, shall enjoy the same treatment as the permanent medical personnel if they are taken prisoners while carrying out these functions.

ARTICLE 10.

The personnel of Voluntary Aid Societies, duly recognised and authorised by their Government, who may be employed on the same duties as those of the personnel mentioned in the first paragraph of article 9, are placed on the same footing as the personnel contemplated in that paragraph, provided that the personnel of such societies are subject to military law and regulations.

Each High Contracting Party shall notify to the other, either in time of peace or at the commencement of or during the course of hostilities, but in every case before actually employing them, the names of the societies which it has authorised, under its responsibility, to render assistance to the regular medical service of its armed forces.

ARTICLE 11.

A recognised society of a neutral country can only afford the assistance of its medical personnel and formations to a belligerent with the previous consent of its own Government and the authorisation of the belligerent concerned.

The belligerent who accepts such assistance is bound to notify the enemy thereof before making any use of it.

ARTICLE 12.

The persons designated in articles 9, 10 and 11 may not be retained after they have fallen into the hands of the enemy.

In the absence of an agreement to the contrary, they shall be sent back to the belligerent to which they belong as soon as a route for their return shall be open and military considerations permit.

Pending their return they shall continue to carry out their duties under the direction of the enemy; they shall preferably be engaged in the care of the wounded and sick of the belligerent to which they belong.

On their departure, they shall take with them the effects, instruments, arms and means of transport belonging to them.

ARTICLE 13.

Belligerents shall secure to the personnel mentioned in articles 9, 10 and 11, while in their hands, the same food, the same lodging, the same allowances and the same pay as are granted to the corresponding personnel of their own armed forces.

At the outbreak of hostilities the belligerents will notify one another of the grades of their respective medical personnel.

DOCUMENT NO. 49

1929 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR
(27 July 1929)

SOURCES
118 LNTS 343
47 Stat. 2021
2 Bevans 932
130 BFSP 239
27 AJIL Supp. 59
NWC, 1950-1951, at 49

NOTE

While the 1874 Declaration of Brussels (DOCUMENT NO. 27), the 1899 Hague II Regulations (DOCUMENT NO. 28), and the 1907 Hague IV Regulations (DOCUMENT NO. 33) had all dealt with the subject of prisoners of war at some length, this was the first mutilateral convention drafted in peacetime which was concerned exclusively with prisoners of war. Unfortunately, when put to the test in World War II (1939-1945), it failed to provide solutions to many of the problems which had surfaced during World War I (1914-1918) and which had been the subject of specific provisions in the many bilateral and miultilateral agreements entered into by the belligerents during the course of those hostilities. (For examples of such agreements, see DOCUMENT NO. 37 and DOCUMENT NO. 42.) It has now been completely replaced by the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108).

TEXT

TITLE I. GENERAL PROVISIONS

ARTICLE 1

The present Convention shall apply, without prejudice to the stipulations of Title VII:

1) To all persons mentioned in Articles 1, 2 and 3 of the Regulations annexed to the Hague Convention respecting the laws and customs of war on land, of October 18, 1907, and captured by the enemy.

2) To all persons belonging to the armed forces of belligerent parties, captured by the enemy in the course of military operations at sea or in the air, except for such derogations as might be rendered inevitable by the conditions of capture. However, such derogations shall not infringe upon the fundamental principles of the present Convention; they shall cease from the moment when the persons captured have rejoined a prisoners-of-war camp.

ARTICLE 2

Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them.

They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity.

Measures of reprisal against them are prohibited.

ARTICLE 3

Prisoners of war have the right to have their person and their honor respected. Women shall be treated with all the regard due to their sex.

Prisoners retain their full status.

ARTICLE 4

The Power detaining prisoners of war is bound to provide for their maintenance.

Difference in treatment among prisoners is lawful only when it is based on the military rank, state of physical or mental health, professional qualifications or sex of those who profit thereby.

TITLE II. CAPTURE

ARTICLE 5

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, or else his regimental number.

If he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever.

If, because of his physical or mental condition, a prisoner is unable to identify himself, he shall be turned over to the medical corps.

ARTICLE 6

All effects and objects of personal use — except arms, horses, military equipment and military papers — shall remain in the possession of prisoners of war, as well as metal helmets and gas masks.

Money in the possession of prisoners may not be taken away from them except by order of an officer and after the amount is determined. A receipt shall be given. Money thus taken away shall be entered to the account of each prisoner.

Identification documents, insignia of rank, decorations and objects of value may not be taken from prisoners.

TITLE III. CAPTIVITY

SECTION I. EVACUATION OF PRISONERS OF WAR

ARTICLE 7

Prisoners of war shall be evacuated within the shortest possible period after their capture, to depots located in a region far enough from the zone of combat for them to be out of danger.

Only prisoners who, because of wounds or sickness, would run greater risks by being evacuated than by remaining where they are may be temporarily kept in a dangerous zone.

Prisoners shall not be needlessly exposed to danger while awaiting their evacuation from the combat zone.

Evacuation of prisoners on foot may normally be effected only by stages of 20 kilometers a day, unless the necessity of reaching water and food depots requires longer stages.

ARTICLE 8

Belligerents are bound mutually to notify each other of their capture of prisoners within the shortest period possible, through the intermediary of the information bureaus, such as are organized according to Article 77. They are likewise bound to inform each other of the official addresses to which the correspondence of their families may be sent to prisoners of war.

As soon as possible, every prisoner must be able to correspond with his family himself, under the conditions provided in Articles 36 *et seq.*

As regards prisoners captured at sea, the provisions of the present article shall be observed as soon as possible after arrival at port.

SECTION II. PRISONERS-OF-WAR CAMPS

ARTICLE 9

Prisoners of war may be interned in a town, fortress, or other place, and bound not to go beyond certain fixed limits. They may also be interned in enclosed camps; they may not be confined or imprisoned except as an indispensable measure of safety or sanitation, and only while the circumstances which necessitate the measure continue to exist.

Prisoners captured in unhealthful regions or where the climate is injurious for persons coming from temperate regions, shall be transported, as soon as possible, to a more favorable climate.

Belligerents shall, so far as possible, avoid assembling in a single camp prisoners of different races or nationalities.

No prisoner may, at any time, be sent into a region where he might be exposed to the fire of the combat zone, nor used to give protection from bombardment to certain points or certain regions by his presence.

CHAPTER I. *Installation of Camps*

ARTICLE 10

Prisoners of war shall be lodged in buildings or in barracks affording all possible guarantees of hygiene and healthfulness.

The quarters must be fully protected from dampness, sufficiently heated and lighted. All precautions must be taken against danger of fire.

With regard to dormitories — the total surface, minimum cubic amount of air, arrangement and material of bedding — the conditions shall be the same as for the troops at base camps of the detaining Power.

CHAPTER 2. *Food and Clothing of Prisoners of War*

ARTICLE 11

The food ration of prisoners of war shall be equal in quantity and quality to that of troops at base camps.

Furthermore, prisoners shall receive facilities for preparing, themselves, additional food which they might have.

A sufficiency of potable water shall be furnished them. The use of tobacco shall be permitted. Prisoners may be employed in the kitchens.

All collective disciplinary measures affecting the food are prohibited.

ARTICLE 12

Clothing, linen and footwear shall be furnished prisoners of war by the detaining Power. Replacement and repairing of these effects must be assured regularly. In addition, laborers must receive work clothes wherever the nature of the work requires it.

Canteens shall be installed in all camps where prisoners may obtain, at the local market price, food products and ordinary objects.

Profits made by the canteens for camp administrations shall be used for the benefit of prisoners.

CHAPTER 3. *Sanitary Service in Camps*

ARTICLE 13

Belligerents shall be bound to take all sanitary measures necessary to assure the cleanliness and healthfulness of camps and to prevent epidemics.

Prisoners of war shall have at their disposal, day and night, installations conforming to sanitary rules and constantly maintained in a state of cleanliness.

Furthermore, and without prejudice to baths and showers with which the camp shall be as well provided as possible, prisoners shall be furnished a sufficient quantity of water for the care of their own bodily cleanliness.

It shall be possible for them to take physical exercise and enjoy the open air.

ARTICLE 14

Every camp shall have an infirmary, where prisoners of war shall receive every kind of attention they need. If necessary, isolated quarters shall be reserved for the sick affected with contagious diseases.

Expenses of treatment, including therein those of temporary prosthetic equipment, shall be borne by the detaining Power.

Upon request, belligerents shall be bound to deliver to every prisoner treated an official statement showing the nature and duration of his illness as well as the attention received.

It shall be lawful for belligerents reciprocally to authorize, by means of private arrangements, the retention in the camps of physicians and attendants to care for prisoners of their own country.

Prisoners affected with a serious illness or whose condition necessitates an important surgical operation, must be admitted, at the expense of the detaining Power, to any military or civil medical unit qualified to treat them.

ARTICLE 15

Medical inspections of prisoners of war shall be arranged at least once a month. Their purpose shall be the supervision of the general state of health and cleanliness, and the detection of contagious diseases, particularly tuberculosis and venereal diseases.

CHAPTER 4. *Intellectual and Moral Needs of Prisoners of War*

ARTICLE 16

Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of their faith, on the sole

condition that they comply with the measures of order and police issued by the military authorities.

Ministers of a religion, prisoners of war, whatever their religious denomination, shall be allowed to minister fully to members of the same religion.

ARTICLE 17

So are as possible, belligerents shall encourage intellectual diversions and sports organized by prisoners of war.

CHAPTER 5. *Internal Discipline of Camps*

ARTICLE 18

Every camp of prisoners of war shall be placed under the command of a responsible officer.

Besides the external marks of respect provided by the regulations in force in their armies with regard to their nationals, prisoners of war must salute all officers of the detaining Power.

Officers who are prisoners of war are bound to salute only officers of a higher or equal rank of that Power.

ARTICLE 19

The wearing of insignia of rank and of decorations shall be permitted.

ARTICLE 20

Regulations, orders, notices and proclamations of every kind must be communicated to prisoners of war in a language which they understand. The same principle shall be applied in examinations.

CHAPTER 6. *Special Provisions Regarding Officers and Persons of Equivalent Status*

ARTICLE 21

Upon the beginning of hostilities, belligerents shall be bound to communicate to one another the titles and ranks in use in their respective armies, with a view to assuring equality of treatment between corresponding ranks of officers and persons of equivalent status.

Officers and persons of equivalent status who are prisoners of war shall be treated with the regard due their rank and age.

ARTICLE 22

In order to assure service in officers' camps, soldiers of the same army who are prisoners of war and, wherever possible, who speak the same language, shall be assigned thereto, in sufficient numbers, considering the rank of the officers and persons of equivalent status.

The latter shall secure their food and clothing from the pay which shall be granted them by the detaining Power. Administration of the mess-fund by the officers themselves must be facilitated in every way.

CHAPTER 7. *Financial Resources of Prisoners of War*

ARTICLE 23

Subject to private arrangements between belligerent Powers, and particularly those provided in Article 24, officers and persons of equivalent status who are prisoners of war shall receive from the detaining Power the

same pay as officers of corresponding rank in the armies of that Power, on the condition, however, that this pay does not exceed that to which they are entitled in the armies of the country which they have served. This pay shall be granted them in full, once a month if possible, and without being liable to any deduction for expenses incumbent on the detaining Power, even when they are in favor of the prisoners.

An agreement between the belligerents shall fix the rate of exchange applicable to this payment; in the absence of such an agreement, the rate adopted shall be that in force at the opening of hostilities.

All payments made to prisoners of war as pay must be reimbursed at the end of hostilities, by the Power which they have served.

ARTICLE 24

Upon the outbreak of hostilities, the belligerents shall, by common agreement, fix the maximum amount of ready money which prisoners of war of various ranks and classes shall be allowed to keep in their possession. Any surplus taken or withheld from a prisoner shall be entered to his account, the same as any deposit of money effected by him, and may not be converted into another currency without his consent.

Pay to the credit of their accounts shall be given to prisoners of war at the end of their captivity.

During their imprisonment, facilities shall be granted them for the transfer of these amounts, in whole or in part, to banks or private persons in their country of origin.

CHAPTER 8. *Transfer of Prisoners of War*

ARTICLE 25

Unless the conduct of military operations so requires, sick and wounded prisoners of war shall not be transferred as long as their recovery might be endangered by the trip.

ARTICLE 26

In case of transfer, prisoners of war shall be officially notified of their new destination in advance; they shall be allowed to take with them their personal effects, their correspondence and packages which have arrived for them.

All due measures shall be taken that correspondence and packages addressed to their former camp may be forwarded to them without delay.

Money deposited to the account of transferred prisoners shall be transmitted to the competent authority of their new place of residence.

The expenses occasioned by the transfer shall be charged to the detaining Power.

SECTION III. LABOR OF PRISONERS OF WAR

CHAPTER 1. *Generalities*

ARTICLE 27

Belligerents may utilize the labor of able prisoners of war, according to their rank and aptitude, officers and persons of equivalent status excepted.

However, if officers or persons of equivalent status request suitable work, it shall be secured for them so far as is possible.

Noncommissioned officers who are prisoners of war shall only be required

to do supervisory work, unless they expressly request a remunerative occupation.

Belligerents shall be bound, during the whole period of captivity, to allow to prisoners of war who are victims of accidents in connection with their work their enjoyment of the benefit of the provisions applicable to laborers of the same class according to the legislation of the detaining Power. With regard to prisoners of war to whom these legal provisions might not be applied by reason of the legislation of that Power, the latter undertakes to recommend to its legislative body all proper measures equitably to indemnify the victims.

CHAPTER 2. *Organization of the Labor*

ARTICLE 28

The detaining Power shall assume entire responsibility for the maintenance, care, treatment and payment of wages of prisoners of war working for the account of private persons.

ARTICLE 29

No prisoner of war may be employed at labors for which he is physically unfit.

ARTICLE 30

The length of the day's work of prisoners of war, including therein the trip going and returning, shall not be excessive and must not, in any case, exceed that allowed for the civil workers in the region employed at the same work. Every prisoner shall be allowed a rest of twenty-four consecutive hours every week, preferably on Sunday.

CHAPTER 3. *Prohibited Labor*

ARTICLE 31

Labor furnished by prisoners of war shall have no direct relation with war operations. It is especially prohibited to use prisoners for manufacturing and transporting arms or munitions of any kind, or for transporting material intended for combatant units.

In case of violation of the provisions of the preceding paragraph, prisoners, after executing or beginning to execute the order, shall be free to have their protests presented through the mediation of the agents whose functions are set forth in Articles 43 and 44, or, in the absence of an agent, through the mediation of representatives of the protecting Power.

ARTICLE 32

It is forbidden to use prisoners of war at unhealthful or dangerous work.

Any aggravation of the conditions of labor by disciplinary measures is forbidden.

CHAPTER 4. *Labor Detachments*

ARTICLE 33

The system of labor detachments must be similar to that of prisoners-of-war camps, particularly with regard to sanitary conditions, food, attention in case of accident or sickness, correspondence and the receipt of packages.

Every labor detachment shall be dependent on a prisoners' camp. The commander of this camp shall be responsible for the observation, in the labor detachment, of the provisions of the present Convention.

CHAPTER 5. *Wages*

ARTICLE 34

Prisoners of war shall not receive wages for work connected with the administration, management and maintenance of the camps.

Prisoners utilized for other work shall be entitled to wages to be fixed by agreements between the belligerents.

These agreements shall also specify the part which the camp administration may retain, the amount which shall belong to the prisoner of war and the manner in which that amount shall be put at his disposal during the period of his captivity.

While awaiting the conclusion of the said agreements, payment for labor of prisoners shall be settled according to the rules given below:

a) Work done for the State shall be paid for in accordance with the rates in force for soliders of the national army doing the same work, or, if none exists, according to a rate in harmony with the work performed.

b) When the work is done for the account of other public administrations or for private persons, conditions shall be regulated by agreement with the military authority.

The pay remaining to the credit of the prisoners shall be delivered to him at the end of his captivity. In case of death, it shall be forwarded through the diplomatic channel to the heirs of the deceased.

SECTION IV. EXTERNAL RELATIONS OF PRISONERS OF WAR

ARTICLE 35

Upon the outbreak of hostilities, belligerents shall publish the measures provided for the execution of the provisions of this section.

ARTICLE 36

Each of the belligerents shall periodically determine the number of letters and postal cards per month which prisoners of war of the various classes shall be allowed to send, and shall inform the other belligerent of this number. These letters and cards shall be transmitted by post by the shortest route. They may not be delayed or retained for disciplinary reasons.

Within a period of not more than one week after his arrival at the camp, and likewise in case of sickness, every prisoner shall be enabled to write his family a postal card informing it of his capture and of the state of his health. The said postal cards shall be forwarded as rapidly as possible and may not be delayed in any manner.

As a general rule, correspondence of prisoners shall be written in their native language. Belligerents may allow correspondence in other languages.

ARTICLE 37

Prisoners of war shall be allowed individually to receive parcels by mail, containing foods and other articles intended to supply them with food or clothing. Packages shall be delivered to the addressees and a receipt given.

ARTICLE 38

Letters and consignments of money or valuables, as well as parcels by post intended for prisoners of war or dispatched by them, either directly, or by the mediation of the information bureaus provided for in Article 77, shall be

exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners shall be likewise exempt from all import and other duties, as well as of payments for carriage by the State railways.

Prisoners may, in cases of acknowledged urgency, be allowed to send telegrams, paying the usual charges.

ARTICLE 39

Prisoners of war shall be allowed to receive shipments of books individually, which may be subject to censorship.

Representatives of the protecting Powers and duly recognized and authorized aid societies may send books and collections of books to the libraries of prisoners' camps. The transmission of these shipments to libraries may not be delayed under the pretext of censorship difficulties.

ARTICLE 40

Censorship of correspondence must be effected within the shortest possible time. Furthermore, inspection of parcels post must be effected under proper conditions to guarantee the preservation of the products which they may contain and, if possible, in the presence of the addressee or an agent duly recognized by him.

Prohibitions of correspondence promulgated by the belligerents for military or political reasons, must be transient in character and as short as possible.

ARTICLE 41

Belligerents shall assure all facilities for the transmission of instruments, papers or documents intended for prisoners of war or signed by them particularly of powers of attorney and wills.

They shall take the necessary measures to assure, in case of necessity, the authentication of signatures made by prisoners.

SECTION V. PRISONERS' RELATIONS WITH THE AUTHORITIES

CHAPTER 1. *Complaints of Prisoners of War because of the Conditions of Captivity*

ARTICLE 42

Prisoners of war shall have the right to inform the military authorities in whose power they are of their requests with regard to the conditions of captivity to which they are subjected.

They shall also have the right to address themselves to representatives of the protecting Powers to indicate to them the points on which they have complaints to formulate with regard to the conditions of captivity.

These requests and complaints must be transmitted immediately.

Even if they are recognized to be unfounded, they may not occasion any punishment.

CHAPTER 2. *Representatives of Prisoners of War*

ARTICLE 43

In every place where there are prisoners of war, they shall be allowed to

appoint agents entrusted with representing them directly with military authorities and protecting Powers.

This appointment shall be subject to the approval of the military authority.

The agents shall be entrusted with the reception and distribution of collective shipments. Likewise, in case the prisoners should decide to organize a mutual assistance system among themselves, this organization would be in the sphere of the agents. Further, they may lend their offices to prisoners to facilitate their relations with the aid societies mentioned in Article 78.

In camps of officers and persons of equivalent status, the senior officer prisoner of the highest rank shall be recognized as intermediary between the camp authorities and the officers and persons of equivalent status who are prisoners. For this purpose, he shall have the power to appoint a prisoner officer to assist him as an interpreter during the conferences with the camp authorities.

ARTICLE 44

When the agents are employed as laborers, their activity as representatives of prisoners of war must be counted in the compulsory period of labor.

All facilities shall be accorded the agents for their intercourse with the military authorities and with the protecting Power. This intercourse shall not be limited.

No representative of the prisoners may be transferred without the necessary time being allowed him to inform his successors about affairs under consideration.

CHAPTER 3. *Penalties Applicable to Prisoners of War*

1. GENERAL PROVISIONS

ARTICLE 45

Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining Power.

An act of insubordination shall justify the adoption towards them of the measures provided by such laws, regulations and orders.

The provisions of the present chapter, however, are reserved.

ARTICLE 46

Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power.

Rank being identical, officers, noncommissioned officers or soldiers who are prisoners of war undergoing a disciplinary punishment, shall not be subject to less favorable treatment than that provided in the armies of the detaining Power with regard to the same punishment.

Any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty, is forbidden.

Collective punishment for individual acts is also forbidden.

ARTICLE 47

Acts constituting an offense against discipline, and particularly attempted escape, shall be verified immediately; for all prisoners of war, commissioned

or not, preventive arrest shall be reduced to the absolute minimum.

Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit; preventive imprisonment shall be limited as much as possible

In all cases, the duration of preventive imprisonment shall be deducted from the disciplinary or judicial punishment inflicted, provided that this deduction is allowed for national soldiers.

ARTICLE 48

Prisoners of war may not be treated differently from other prisoners after having suffered the judicial or disciplinary punishment which has been imposed on them.

However, prisoners punished as a result of attempted escape may be subjected to special surveillance, which, however, may not entail the suppression of guarantees granted prisoners by the present Convention.

ARTICLE 49

No prisoner of war may be deprived of his rank by the detaining Power.

Prisoners given disciplinary punishment may not be deprived of the prerogatives attached to their rank. In particular, officers and persons of equivalent status who suffer punishment involving deprivation of liberty shall not be placed in the same quarters as non-commissioned officers or privates being punished.

ARTICLE 50

Escaped prisoners of war who are retaken before being able to rejoin their own army or to leave the territory occupied by the army which captured them shall be liable only to disciplinary punishment.

Prisoners who, after having succeeded in rejoining their army or in leaving the territory occupied by the army which captured them, may again be taken prisoners, shall not be liable to any punishment on account of their previous flight.

ARTICLE 51

Attempted escape, even if it is a repetition of the offense, shall not be considered as an aggravating circumstance in case the prisoner of war should be given over to the courts on account of crimes or offenses against persons or property committed in the course of that attempt.

After an attempted or accomplished escape, the comrades of the person escaping who assisted in the escape, may incur only disciplinary punishment on this account.

ARTICLE 52

Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war should be punished by disciplinary or judicial measures.

This shall be the case especially when it is a question of deciding on acts in connection with escape or attempted escape.

A prisoner may not be punished more than once because of the same act or the same count.

ARTICLE 53

No prisoner of war on whom a disciplinary punishment has been imposed, who might be eligible for repatriation, may be kept back because he has not undergone the punishment.

Prisoners to be repatriated who might be threatened with a penal prosecution may be excluded from repatriation until the end of the proceedings and, if necessary, until the completion of the punishment; those who might already be imprisoned by reason of a sentence may be detained until the end of their imprisonment.

Belligerents shall communicate to each other the lists of those who may not be repatriated for the reasons given in the preceding paragraph.

2. DISCIPLINARY PUNISHMENTS

ARTICLE 54

Arrest is the most severe disciplinary punishment which may be imposed on a prisoner of war.

The duration of a single punishment may not exceed thirty days.

This maximum of thirty days may not, further, be exceeded in the case of several acts for which the prisoner has to undergo discipline at the time when it is ordered for him, whether or not these acts are connected.

When, during or after the end of a period of arrest, a prisoner shall have a new disciplinary punishment imposed upon him, a space of at least three days shall separate each of the periods of arrest, if one of them is ten days or more.

ARTICLE 55

Subject to the provisions given in the last paragraph of Article 11, food restrictions allowed in the armies of the detaining Power are applicable, as an increase in punishment, to prisoners of war given disciplinary punishment.

However, these restrictions may be ordered only if the state of health of the prisoners punished permits it.

ARTICLE 56

In no case may prisoners of war be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) there to undergo disciplinary punishment.

The quarters in which they undergo disciplinary punishment shall conform to sanitary requirements.

Prisoners punished shall be enabled to keep themselves in a state of cleanliness.

These prisoners shall every day be allowed to exercise or to stay in the open air at least two hours.

ARTICLE 57

Prisoners of war given disciplinary punishment shall be allowed to read and write, as well as to send and receive letters.

On the other hand, packages and money sent may be not delivered to the addressees until the expiration of the punishment. If the packages not distributed contain perishable products, these shall be turned over to the camp infirmary or kitchen.

ARTICLE 58

Prisoners of war given disciplinary punishment shall be allowed, on their request, to be present at the daily medical inspection. They shall receive the care considered necessary by the doctors and, if necessary, shall be removed to the camp infirmary or to hospitals.

ARTICLE 59

Excepting the competence of courts and higher military authorities, disciplinary punishment may be ordered only by an officer provided with disciplinary powers in his capacity as commander of a camp or detachment, or by the responsible officer replacing him.

3. JUDICIAL SUITS

ARTICLE 60

At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial.

This advice shall contain the following information:

a) Civil state and rank of prisoner;

b) Place of sojourn or imprisonment;

c) Specification of the count or counts of the indictment, giving the legal provisions applicable.

If it is not possible to mention in that advice the court which will pass upon the matter, the date of opening the trial and the place where it will take place, this information must be furnished to the representative of the protecting Power later, as soon as possible, and at all events, at least three weeks before the opening of the trial.

ARTICLE 61

No prisoner of war may be sentenced without having had an opportunity to defend himself.

No prisoner may be obliged to admit himself guilty of the act of which he is accused.

ARTICLE 62

The prisoner of war shall be entitled to assistance by a qualified counsel of his choice, and, if necessary, to have recourse to the services of a competent interpreter. He shall be advised of his right by the detaining Power, in due time before the trial.

In default of a choice by the prisoner, the protecting Power may obtain a counsel for him. The detaining Power shall deliver to the protecting Power, on its request, a list of persons qualified to present the defense.

Representatives of the protecting Power shall be entitled to attend the trial of the case.

The only exception to this rule is the case where the trial of the case must be secret in the interest of the safety of the State. The detaining Power should so advise the protecting Power.

ARTICLE 63

Sentence may be pronounced against a prisoner of war only by the same

courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.

ARTICLE 64

Every prisoner of war shall have the right of appeal against any sentence rendered with regard to him, in the same way as individuals belonging to the armed forces of the detaining Power.

ARTICLE 65

Sentences pronounced against prisoners of war shall be communicated to the protecting Power immediately.

ARTICLE 66

If the death penalty is pronounced against a prisoner of war, a communication setting forth in detail the nature and circumstances of the offense shall be sent as soon as possible to the representative of the protecting Power, for transmission to the Power in whose armies the prisoner served.

The sentence shall not be executed before the expiration of a period of at least three months after this communication.

ARTICLE 67

No prisoner of war may be deprived of the benefit of the provisions of Article 42 of the present Convention as a result of a sentence or otherwise.

TITLE IV. TERMINATION OF CAPTIVITY

SECTION I. DIRECT REPATRIATION AND HOSPITALIZATION IN A NEUTRAL COUNTRY

ARTICLE 68

Belligerents are bound to send back to their own country, regardless of rank or number, seriously sick and seriously injured prisoners of war, after having brought them to a condition where they can be transported.

Agreements between belligerents shall accordingly settle as soon as possible the cases of invalidity or of sickness, entailing direct repatriation, as well as the cases entailing possible hospitalization in a neutral country. While awaiting the conclusion of these agreements, belligerents may have reference to the model agreement annexed, for documentary purposes, to the present Convention.

ARTICLE 69

Upon the outbreak of hostilities, belligerents shall come to an agreement to name mixed medical commissions. These commissions shall be composed of three members, two of them belonging to a neutral country and one appointed by the detaining Power; one of the physicians of the neutral country shall preside. These mixed medical commissions shall proceed to the examination of sick or wounded prisoners and shall make all due decisions regarding them.

Decisions of these commissions shall be by majority and carried out with the least possible delay.

ARTICLE 70

Besides those who are designated by the camp physician, the following prisoners of war shall be inspected by the mixed medical Commission mentioned in Article 69, with a view to their direct repatriation or their

hospitalization in a neutral country:

a) Prisoners who make such a request directly of the camp physician;

b) Prisoners who are presented by the agents provided for in Article 43, acting on their own initiative or at the request of the prisoners themselves;

c) Prisoners who have been proposed by the Power in whose armies they have served or by an aid society duly recognized and authorized by that Power.

ARTICLE 71

Prisoners of war who are victims of accidents in connection with work, except those voluntarily injured, shall enjoy the benefit of the same provisions, as far as repatriation or possible hospitalization in a neutral country are concerned.

ARTICLE 72

Throughout the duration of hostilities and for humane considerations, belligerents may conclude agreements with a view to the direct repatriation or hospitalization in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

ARTICLE 73

The expenses of repatriation or of transportation to a neutral country of prisoners of war shall be borne, from the frontiers of the detaining Power, by the Power in whose armies the prisoners have served.

ARTICLE 74

No repatriated person may be utilized in active military service.

ARTICLE 75

When belligerents conclude a convention of armistice, they must, in principle, have appear therein stipulations regarding the repatriation of prisoners of war. If it has not been possible to insert stipulations in this regard in such convention, belligerents shall nevertheless come to an agreement in this regard as soon as possible. In any case, repatriation of prisoners shall be effected with the least possible delay after the conclusion of peace.

Prisoners of war against whom a penal prosecution might be pending for a crime or an offense of municipal law may, however, be detained until the end of the proceedings and, if necessary, until the expiration of the punishment. The same shall be true of those sentenced for a crime or offense of municipal law.

On agreement between the belligerents, commissions may be established for the purpose of searching for dispersed prisoners and assuring their repatriation.

TITLE V. DEATH OF PRISONERS OF WAR

ARTICLE 76

Wills of prisoners of war shall be received and drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates.

Belligerents shall see that prisoners of war dying in captivity are honorably

buried and that the graves bear all due information, are respected and properly maintained.

TITLE VI. BUREAUS OF RELIEF AND INFORMATION CONCERNING PRISONERS OF WAR

ARTICLE 77

Upon the outbreak of hostilities, each of the belligerent Powers, as well as the neutral Powers which have received belligerents, shall institute an official information bureau for prisoners of war who are within their territory.

Within the shortest possible period, each of the belligerent Powers shall inform its information bureau of every capture of prisoners effected by its armies, giving it all the information regarding identity which it has, allowing it quickly to advise the families concerned, and informing it of the official addresses to which families may write to prisoners.

The information bureau shall immediately forward all this information to the interested Powers, through the intervention, on one hand, of the protecting Powers and, on the other, of the central agency provided for in Article 79.

The information bureau, being charged with replying to all inquiries about prisoners of war, shall receive from the various services concerned full information respecting internments, and transfers, release on parole, repatriations, escapes, stays in hospitals, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war.

The bureau shall state in this return, in so far as is possible and subject to the provisions of Article 5: the regimental number, given names and surname, date and place of birth, rank and unit of the interested party, the given name of the father and the name of the mother, the address of the person to be advised in case of accident, wounds, date and place of capture, internment, wounding and death, as well as any other important information.

Weekly lists containing all new information likely to facilitate the identification of each prisoner shall be transmitted to the interested Powers.

At the conclusion of peace the individual return of the prisoner of war shall be delivered to the Power which he served.

The information bureau shall further be bound to receive all objects of personal use, valuables, letters, pay vouchers, identification marks, etc., which are left by prisoners of war who have been repatriated, released on parole, escaped or died, and to transmit them to the countries interested.

ARTICLE 78

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort, shall receive from the belligerents, for themselves and their duly accredited agents, every facility for the efficient performance of their humane task within the bounds imposed by military necessities. Agents of these societies may be admitted to the camps for the purpose of distributing relief, as also to the halting places of repatriated

prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

ARTICLE 79

A central information agency for prisoners of war shall be created in a neutral country. The International Committee of the Red Cross shall propose the organization of such an agency to the interested Powers, if it considers it necessary.

The function of that agency shall be to centralize all information respecting prisoners, which it may obtain through official or private channels; it shall transmit it as quickly as possible to the country of origin of the prisoners or to the Power which they have served.

These provisions must not be interpreted as restricting the humanitarian activity of the International Committee of the Red Cross.

ARTICLE 80

Information bureaus shall enjoy the privilege of free postage on postal matter, as well as all exemptions provided in Article 38.

TITLE VII. APPLICATION OF THE CONVENTION TO CERTAIN CLASSES OF CIVILIANS

ARTICLE 81

Individuals who follow armed forces without directly belonging thereto, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, shall be entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the armed forces which they were accompanying.

TITLE VII. EXECUTION OF THE CONVENTION

SECTION I. GENERAL PROVISIONS

ARTICLE 82

The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances.

In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall nevertheless remain in force as between the belligerents who are parties thereto.

ARTICLE 83

The High Contracting Parties reserve the right to conclude special conventions on all questions relative to prisoners of war, on which it seems to them expedient to have particular regulations.

Prisoners of war shall receive the benefit of these agreements until the completion of repatriation, except in the case of express stipulations to the contrary contained in the above-mentioned agreements or in later agreements, or also except in the case of more favorable measures taken by one or the other of the belligerent Powers respecting the prisoners which they hold.

In order to assure the reciprocal application of the stipulations of the present Convention, and to facilitate the conclusion of the special conventions provided for above, belligerents may, upon the commencement of hostilities, authorize meetings of representatives of the respective authorities charged with the administration of prisoners of war.

ARTICLE 84

The text of the present Convention and of the special conventions provided for in the foregoing article, shall be posted, wherever possible in the native language of the prisoners of war, in places where it may be consulted by all the prisoners.

The text of these conventions shall be communicated to prisoners who find it impossible to get the information from the posted text, upon their request.

ARTICLE 85

The High Contracting Parties shall communicate to one another through the Swiss Federal Council, the official translations of the present Convention, as well as of the laws and regulations which they may come to adopt to assure the application of the present Convention.

SECTION II. ORGANIZATION OF CONTROL

ARTICLE 86

The High Contracting Parties recognize that the regular application of the present Convention will find a guaranty in the possibility of collaboration of the protecting Powers charged with safeguarding the interests of belligerents; in this respect, the protecting Powers may, besides their diplomatic personnel, appoint delegates from among their own nationals or from among the nationals of other neutral Powers. These delegates must be subject to the approval of the belligerent near which they exercise their mission.

Representatives of the protecting Power or its accepted delegates shall be permitted to go to any place, without exception, where prisoners of war are interned. They shall have access to all places occupied by prisoners and may interview them, as a general rule without witnesses, personally or through interpreters.

Belligerents shall so far as possible facilitate the task of representatives or accepted delegates of the protecting Power. The military authorities shall be informed of their visit.

Belligerents may come to an agreement to allow persons of the same nationality as the prisoners to be permitted to take part in inspection trips.

ARTICLE 87

In case of disagreement between the belligerents as to the application of the provisions of the present Convention, the protecting Powers must, in so far as possible, lend their good offices for the purpose of settling the difference.

For this purpose, each of the protecting Powers may, in particular, suggest to the interested belligerents a meeting of representatives thereof, possibly upon a neutral territory suitably chosen. Belligerents shall be bound to accede to proposals in this sense which are made to them. The protecting Power may, if occasion arises, submit for the approval of the Powers

concerned a person belonging to a neutral Power or a person delegated by the International Committee of the Red Cross, who shall be summoned to take part in this meeting.

ARTICLE 88

The foregoing provisions are not an obstacle to the humanitarian activity which the International Committee of the Red Cross may use for the protection of prisoners of war, with the consent of the interested belligerents.

SECTION III. FINAL PROVISIONS

ARTICLE 89

In the relations between powers bound by the Hague Convention respecting the Laws and Customs of War on Land, whether it is a question of that of July 29, 1899, or that of October 18, 1907, and who participate in the present Convention, this latter shall complete Chapter II of the Regulations annexed to the said Hague Conventions.

ARTICLE 90

The present Convention, which will bear this day's date, may be signed up to February 1, 1930, on behalf of all the countries represented at the Conference which opened at Geneva July 1, 1929.

ARTICLE 91

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at Berne.

A record of the deposit of each instrument of ratification shall be prepared, a duly certified copy of which shall be forwarded by the Swiss Federal Council to the Governments of all the countries on whose behalf the Convention has been signed or notification of adherence made.

ARTICLE 92

The present Convention shall become effective six months after the deposit of at least two instruments of ratification.

Subsequently, it shall become effective for each High Contracting Party six months after the deposit of its instrument of ratification.

ARTICLE 93

From the date on which it becomes effective, the present Convention shall be open for adherences given on behalf of any country in whose name this Convention was not signed.

ARTICLE 94

Adherences shall be given by written notification addressed to the Swiss Federal Council and shall take effect six months after the date of their receipt.

The Swiss Federal Council shall communicate adherences to the Governments of all the countries on whose behalf the Convention was signed or notification of adherence made.

ARTICLE 95

A state of war shall give immediate effect to ratifications deposited and to adherences notified by belligerent Powers prior to or after the outbreak of hostilities. The communications of ratifications or adherences received from

Powers at war shall be made by the Swiss Federal Council by the most rapid method.

ARTICLE 96

Each of the High Contracting Parties shall have the right to denounce the present Convention. The denunciation shall not take effect until one year after notification has been made in writing to the Swiss Federal Council. The latter shall communicate such notification to the Governments of all the High Contracting Parties.

The denunciation shall have effect only with respect to the High Contracting Party which gave notification thereof.

Moreover, such denunciation shall not take effect during a war in which the denouncing Power is involved. In this case, the present Convention shall continue in effect, beyond the period of one year, until the conclusion of peace, and, in any event, until the processes of repatriation are completed.

ARTICLE 97

A duly certified copy of the present Convention shall be deposited in the archives of the League of Nations by the Swiss Federal Council. Likewise, ratifications, adherences, and denunciations of which the Swiss Federal Council shall be notified, shall be communicated by it to the League of Nations.

ANNEX TO THE CONVENTION OF JULY 27, 1929 RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

MODEL AGREEMENT CONCERNING DIRECT REPATRIATION AND HOSPITALIZATION IN A NEUTRAL COUNTRY OF PRISONERS OF WAR FOR REASONS OF HEALTH

1. Governing Principles for Direct Repatriation and Hospitalization in a Neutral Country

A. DIRECT REPATRIATION

There shall be repatriated directly:

1. Sick and wounded who, according to medical opinion, are not likely to recover in one year, their condition requiring treatment and their mental or physical fitness appearing to have suffered considerable diminution;

2. Incurable sick and wounded whose mental or physical fitness appears to have suffered considerable diminution;

3. Cured sick and wounded whose mental or physical fitness appears to have suffered considerable diminution.

B. HOSPITALIZATION IN A NEUTRAL COUNTRY

There shall be placed in hospitals:

1. Sick and wounded whose cure within a period of one year is to be expected, such cure appearing more certain and more rapid if the sick and wounded are given the benefit of the resources offered by the neutral country than if their captivity properly so-called is prolonged;

2. Prisoners of war whose mental or physical health appears, according to medical opinion, to be seriously menaced by continuance in captivity, while hospitalization in a neutral country would probably remove this danger.

C. REPATRIATION OF THOSE HOSPITALIZED IN A NEUTRAL COUNTRY

There shall be repatriated the prisoners of war hospitalized in a neutral country who belong to the following categories:

1. Those whose state of health appears to be or to be becoming such that they fall within the categories of persons eligible to repatriation for reasons of health;

2. The recovered whose mental or physical fitness seems to have suffered a considerable diminution.

II. Special Principles for Direct Repatriation or Hospitalization in a Neutral Country

A. REPATRIATION

There shall be repatriated:

1. All prisoners of war who, as the result of organic injuries, have the following impairments, actual or functional: loss of a member, paralysis, articular or other defects, provided that the loss is at least a foot or a hand, or is equivalent to the loss of a foot or a hand;

2. All wounded or injured prisoners of war whose condition is such that it renders them invalids whose cure, within a period of one year, can not be anticipated from a medical standpoint;

3. All the sick whose condition is such that it renders them invalids whose cure, within a period of one year, can not be anticipated from a medical standpoint;

The following, in particular, belong to this category:

a) Progressive tuberculosis of any organs which, according to medical opinion, can no longer be cured or at least considerably improved by a course of treatment in a neutral country.

b) Nontubercular affections of the respiratory organs presumed incurable (such as, above all, strongly developed pulmonary emphysema, with or without bronchitis, bronchiectasis, serious asthma, gas poisoning, etc.);

c) Serious chronic affections of the organs of circulation (for example: valvular affections with tendencies to disorders of compensation, relatively serious affections of the myocardium, pericardium of the vessels, especially inoperable aneurisms of the large vessels, etc.);

d) Serious chronic affections of the digestive organs;

e) Serious chronic affections of the urinary and sexual organs (particularly, for example: all cases of confirmed chronic nephritis with complete semiology, and most especially when cardiac and vascular impairments already exist; likewise, pyelites and chronic cystitis, etc.);

f) Serious chronic diseases of the central and peripheral nervous system (such as, particularly, serious neurasthenia and hysteria, all unquestionable cases of epilepsy, serious cases of Basedow's disease, etc.);

g) Blindness in both eyes, or in one eye when the vision of the other remains below 1 in spite of the use of corrective glasses; reduction in acuteness of vision in case it is impossible to restore it by correction to the acuteness of ½ for one eye at least; other ocular affections coming in the present class (glaucoma, iritis, choroiditis, etc.);

h) Total deafness in both ears, as well as total deafness in one ear in case the partially deaf ear does not discern the ordinary spoken voice at a distance of one meter;

i) All unquestionable cases of mental affections;

k) All serious cases of chronic poisoning by metals or other causes (lead poisoning, mercury poisoning, morphinism, cocainism, alcoholism, gas poisoning, etc.);

l) Chronic affections of the organs of locomotion (arthritis deformans, gout, rheumatism with impairments clinically discoverable), provided they are serious;

m) All malignant growths, if they are not amenable to relatively minor operations without endangering the life of the patient;

n) All cases of malaria with noticeable organic changes (important chronic increases in size of the liver, of the spleen, cachexia, etc.);

o) Serious chronic cutaneous affections, in so far as their nature does not constitute a medical indication for hospitalization in a neutral country;

p) Serious avitaminoses (beri-beri, pellagra, chronic scurvy).

B. HOSPITALIZATION

Prisoners of war must be hospitalized if they have the following affections:

1. All forms of tuberculosis of any organs whatever if, according to present medical knowledge, they may be cured, or at least considerably improved by methods applicable in a neutral country (altitude, treatment in sanatoria, etc.);

2. All forms — necessitating treatment — of affections of the respiratory, circulatory, digestive, genito-urinary, and nervous organs, of organs of the senses, of the locomotor and cutaneous apparatus provided, however, that the forms of these affections do not belong to the categories requiring direct repatriation, or are not acute diseases properly so-called susceptible to a complete cure. The affections contemplated in this paragraph are those which offer really better chances of cure for the patient by the application of means of treatment available in a neutral country than if he were treated in captivity.

Nervous troubles, the efficient or determinant causes of which are the events of the war or even of the captivity itself, such as the psychasthenia of prisoners of war and other analogous cases, should be given special consideration.

All duly verified cases of this kind should be hospitalized, provided that the seriousness or constitutional character thereof does not make them cases for direct repatriation.

Cases of psychasthenia of prisoners of war which are not cured after three months of hospitalization in a neutral country or which, after this period has expired, are not obviously on the road to final recovery, should be repatriated.

3. All cases of wounds or lesions and their consequences which offer better chances of cure in a neutral country than in captivity, provided that these

cases are not either eligible for direct repatriation or else are insignificant;

4. All cases of malaria, duly verified and not presenting organic changes clinically discoverable (chronic enlargement of the liver, of the spleen, cachexia, etc.), if the stay in a netural country offers particularly favorable prospects of final cure;

5. All cases of poisoning (particularly by gases, metals, alkaloids) for which the prospects of cure in a neutral country are especially favorable.

There shall be excluded from hospitalization:

1. All duly verified cases of mental affections;

2. All organic or functional nervous affections reputed to be incurable; (These two categories belong to those giving a right to direct repatriation.)

3. Serious chronic alcoholism;

4. All contagious affections during the period in which they are transmissible (acute infectious diseases, primary and secondary syphilis, trachoma, leprosy, etc.).

III. General Observations

The conditions given above should, generally speaking, be interpreted and applied in as broad a spirit as possible.

This breadth of interpretation should be especially applied to neuropathic or psychopathic conditions caused or brought to a head by the events of the war or even of the captivity itself (psychasthenia of prisoners of war), and also to cases of tuberculosis in all degrees.

It is needless to state that camp physicians and the mixed medical commissions may find themselves confronted with a great number of cases not mentioned among the examples given under Section II, or cases not fitting in with these examples. The examples mentioned above are given only as typical examples; an analogous list of examples of surgical alterations has not been drawn up because, with the exception of cases incontestable by their very nature (amputations), it is difficult to make a list of particular types; experience has shown that a recital of these particular cases was not without disadvantages in practice.

All cases of not fitting exactly into the examples cited shall be decided by invoking the spirit of the above governing principles.

DOCUMENT NO. 50

ARMISTICE AGREEMENT BETWEEN THE CHIEF OF THE GERMAN HIGH COMMAND AND FRENCH PLENIPOTENTIARIES (Forest of Compiegne, 22 June 1940)

SOURCES

9 Documents on German Foreign Policy, 1918-1945, at 671
144 BFSP 402
34 AJIL Supp. 173
2 Documents on American Foreign Relations, July 1939-June 1940, at 247

NOTE

This is the armistice agreement which ended France's official participation in the hostilities of World War II (1939-1945). On Hitler's instructions it was signed in the same place and in the same railroad car in which the 1918 Armistice Agreement ending World War I (1914-1918) (DOCUMENT NO. 41) had been signed. Once again, like the agreement just mentioned, and like most other armistice agreements where there is a victor and a vanquished, the repatriation of prisoners of war was strictly unilateral, German prisoners of war held by the French to be repatriated immediately, but French prisoners of war held by the Germans to remain such until the conclusion of peace.

EXTRACTS

10. The French Government undertakes not to engage in any hostile actions with any part of the armed forces left to it, or in any other way, against the German Reich.

The French Government will also prevent members of the French armed forces from leaving the country and arms and war material of any kind, ships, aircraft, etc., from being moved to England or to any other foreign country.

The French Government will forbid French nationals to fight against the German Reich in the service of states with which Germany is still at war. French nationals who act contrary to this prohibition will be treated by German troops as francs-tireurs [*Freischärler*].

19. All German prisoners of war and civilian prisoners in French custody, including detained or convicted persons who have been arrested and sentenced for acts committed in the interests of the German Reich are to be handed over immediately to the German troops.

The French Government is obligated to hand over on demand all Germans in France, in the French possessions, colonies, protectorates, and mandated territories who are named by the German Government.

The French Government undertakes to prevent German prisoners of war or civilian prisoners from being removed from France to French possessions

or abroad. Correct lists are to be supplied of prisoners already removed from France as well as of sick and wounded German prisoners of war unfit for travel, with particulars of their whereabouts. The German High Command will take over the care of German sick and wounded prisoners of war.

20. Members of the French armed forces who are prisoners of war in German hands shall remain prisoners of war until the conclusion of peace.

DOCUMENT NO. 51

REGULATIONS PERTAINING TO PRISONERS OF WAR: TRANSLATION OF A COLLECTION OF ORDERS ISSUED BY THE SUPREME COMMAND OF THE WEHRMACHT

SOURCE

National Archives of the United States

NOTE

This is a collection of orders of the Supreme Command of the German Army [OKW] issued during World War II (1939-1945) as the need arose and which, at one time or another and not necessarily in the sequence in which they were issued, came into the possession of the United States Army and were translated by its Office of The Provost Marshal General in order to ascertain whether the German Army was being officially instructed in accordance with the law of war. The translations were made and disseminated in numbered groups, first as "Collected Communications" and then as "Compilations." Each of the "Collected Communications" had its own paragraphing so it is necessary to identify specific portions thereof by both the number of the "Collected Communication" and of the paragraph. Apparently, at No. 11 (11 March 1942), the name was changed to "Compilations" and the paragraphing became continuous. Accordingly, from that point on, reference to a paragraph number alone is adequate for identification. The series of orders here reproduced is of particular interest because each one was issued to meet a specific and actual problem with respect to prisoners of war which had arisen in connection with the German handling of enemy prisoners of war.

EXTRACTS

Collected Communications No. 1 (16 June 1941):

1. *Prisoners of war of alien nationalities in enemy armies.*
   Frequently recurring doubts in determining the nationality of alien prisoners of war are now definitely resolved in the sense that the *uniform* is the determining outward factor in establishing the fact of the prisoner's belonging to the respective armed forces. Accordingly, Polish prisoners of war captured in *French* uniforms will be considered *Frenchmen*, while Poles captured in *Polish* uniforms will be considered *Poles*.

Collected Communications No. 2 (7 July 1941):

7. *Cost of counsel for defense in criminal cases.*
   In accordance with art. 62 of the Geneva [Prisoner-of-War] Convention, the cost of legal defense in criminal cases against prisoners of war is to be borne by the Protecting Power if the latter has appointed counsel. However, in case the defendant has appointed his own counsel, he is to bear alone the cost of defense.

Collected Communications No. 4 (1 September 1941):

13. The decree of the OKW . . . permitting the confiscation, under certain circumstances, of regular German currency is also to be applied where prisoners of war are found in the *illegal* possession of currency other than German.

Collected Communications No. 5 (10 October 1941):

9. *Re: Continuous rest periods for prisoners of war.*

The principle that prisoners of war are entitled to the same continuous rest period (Sunday rest) as German workers is being circumvented by some contractors by the device of employing a very small percentage of German workers along with the prisoners of war on Sundays. Such German workers are called for Sunday work only at long intervals, while the prisoners of war are compelled to work every Sunday.

Apart from the fact that the above [OKW] order specifically provides for a continuous rest period for prisoners of war, such practices of the contractor cannot be condoned because they lead to continuous difficulties with the Protecting Power and also tend to exhaust the working capacity of the prisoners [of war].

The above order is to be understood in the sense that prisoners of war are entitled to the same continuous period of rest as German workers in the *regular course of work*. Any arbitrary interpretation of the order by the contractor is to be prevented.

10. *Correspondence between prisoners of war.*

In accordance with the censor's regulations, prisoners of war related by blood, such as fathers, brothers, or sons, may be permitted to correspond with each other.

There is no objection to increasing the regular mail allotment of prisoners of war having relatives of the above stated degree in other prisoner of war camps by one letter and one card — incoming and outgoing — per month, as long as the regular mail control is not affected thereby.

Collected Communications No. 6 (11 November 1941):

3. *Re: Marriages by proxy, etc., of French prisoners of war.*

According to French law, declarations of French prisoners of war concerning proxy marriages, acknowledgments of paternity of an illegitimate child, and powers-of-attorney of all kinds must be made in the presence of two French officers or noncommissioned officers, or in the presence of one French noncommissioned officer and two witnesses of French nationality.

5. *Re: Enemy medical corps personnel.*

In case enemy medical officers or medical corps personnel attempt to evade the obligations imposed by the [Geneva Wounded-and Sick] Convention of 1929, Art. 12, sec. 3, as through escape, the camp commandant or the chief medical officer of the reserve hospital may order a temporary or permanent suspension of their privileges, in

whole or in part.

Collected Communications No. 7 (8 December 1941):

9. *Re: Subsequent proof of noncommissioned officer's rank.*

Cases have come up recently where French prisoners of war have reported as privates when entering camp and later produced evidence of their being noncommissioned officers. They claim to have been led into making the false statement at the time they were admitted to the camp by the belief that as privates they were to be released sooner than otherwise. It may be presumed that they desire to be recognized as noncommissioned officers merely in order to be relieved of work duty.

There is no reason to restore the right due noncommissioned officers to prisoners of war who have renounced these rights at the time they entered the camp.

Collected Communications No. 10 (9 February 1942):

3. *Re: Disciplinary authority with respect to prisoners of war.*

In accordance with [Army Service Regulations] . . . only camp commandants and work detail leaders of officer rank have disciplinary authority over prisoners of war.

However, no objection may be made to combining several work details under one officer, who may be the controlling officer, and who is clothed with the disciplinary authority of a company commander over the prisoners of war.

Further transfers of disciplinary authority to subordinate officers are not permitted.

Compilations of Orders:

21. *Re: Considering the taste of prisoners of war in preparing their food.*

Prisoners of war often complain to foreign commissions that their taste preferences are not sufficiently taken into account in the preparation of food, as they have no say in the matter. According to [Army Service Regulations] . . . "prisoner of war officers are to be widely consulted concerning the preparation of their food." This regulation is to be compiled with, in so far as it has not been done already. It is also to be applied to stalags [prisoner-of war camps] for enlisted personnel and to internment camps.

54. *Confiscation of identification papers of prisoners of war.*

In order to render escapes of prisoners of war more difficult, all identification papers, with the exception of certificates of purely military nature. (Art. 6 of the [Geneva Prisoner-of-war] Convention of 1929), are to be confiscated and held in safekeeping together with the other valuables of the prisoners [of war].

56. *Polish soldiers belonging to the French Army.*

The nationality of a soldier is determined by the uniform he is wearing at the time of capture.

In doubtful cases, the place of residence of the prisoner of war before the war and the present residence of his next of kin will determine his

nationality.

59. *Engagements for work by British noncommissioned prisoner of war officers.*

British noncommissioned officers who signed a pledge to work but are no longer willing to do so are to be returned to the camp. The employment of British noncommissioned officers has resulted in so many difficulties that the latter have by far outweighed the advantages. The danger of sabotage, too, has been considerably increased thereby.

79. *Position of prisoner of war officers with respect to German personnel.*

A particular incident has moved the Fuehrer to emphasize anew that, when considering the relationship between prisoner of war officers and German camp personnel, the most humble German national is deemed more important than the highest ranking subject of an enemy power.

102. *Disciplinary authority over prisoners of war.*

The regulations of Collected Communications No. 10, paragraph 3, are supplemented as follows:

a. Company commanders of regional defense battalions assigned to guarding prisoners of war who are in charge of work details led by noncommissioned officers or enlisted men will be considered as work detail leaders.

b. Battalion commanders in charge of several work details combined under company commanders will also be considered as work detail leaders.

Such a company or battalion commander has the same disciplinary authority over prisoners of war as the commander of a combat company or of a non-independent combat battalion, respectively.

114. *Killing and severe wounding of British prisoners of war or civilian internees.*

Every case of the killing and severe wounding of a British prisoner of war or civilian internee must be reported immediately.

An investigation is to be initiated by a judicial officer or an otherwise qualified officer. Where comrades of the prisoner of war or civilian internee were witnesses to the incident, they, too, must be heard.

The result of the investigation and the minutes of the depositions are to be forwarded to the OKW . . . for notification of the Protecting Power.

116. *Internment and transfer of enemy nationals to German camps.*

1. Numerous foreign nationals have lately been taken into custody, for reasons of security, by Wehrmacht commanders and military governors, and transferred to Germany.

These persons are "interness," regardless of whether they have previously belonged to the enemy armed forces, and include, for instance, *released* prisoners of war.

2. Although no generally binding agreements concerning "*internees*"

— except with England and the United States — exist for the present, the above persons enumerated in "1" in German custody will be treated as prisoners of war.

6. The question as to whether representatives of the Protecting Power or relief organizations should be permitted to visit the internees will be decided in each individual case by the OKW.

117. *Classification and pay of British prisoners of war.*

Since it is impossible to establish a complete correspondence between British and German ranks due to the absence of comparable German ranks, the classification of British prisoners of war will be based on information supplied by the British government and transmitted to the OKW by the Protecting Power. Accordingly, midshipmen, warrant officers, and acting pilot officers are to be treated and paid as officers. They must also be transferred to an officers' camp, if this has not already been done.

140. *Saluting by prisoners of war.*

All forms of saluting among prisoners of war deviating from the established military salute of their native country are to be prohibited.

224. *Shooting and severe wounding of prisoners of war and civilian internees (except Poles, Serbs, and Soviet Russians).*

An inquiry by a court officer or any other qualified officer is to be initiated in each case of the fatal shooting or wounding of a British, French, Belgian, or American prisoner of war or civilian internee. If comrades of the prisoner of war or the civilian internee were witnesses of the incident, they, too, will be heard. The result of the inquiry and a copy of the examination proceedings are to be submitted immediately to the OKW.

226. *Requests of prisoners of war during visits of delegates.*

The listing of requests by prisoners of war during visits of delegates consumes much time. It is therefore ordered that, henceforth, only requests which were written down after the visit had been announced and delivered to the chief spokesman, be given consideration. The spokesman will transmit them to the commandant (in hospitals — the head physician) who will have them examined by the censor's office.

The requests will then be handed over to the delegate by the camp headquarters at the beginning of the inspection (visit).

Direct transmittal of written requests by prisoners of war to the delegate is permitted neither in prisoner of war camps, nor in labor commandos or hospitals. Requests to forward letters are also forbidden.

240. *Association of prisoners of war with German women.*

There are several cases on record where judicial prosecution and punishment of prisoners of war for association with German women

was frustrated by the fact of their having been already punished disciplinarily, the matter being apparently considered as but a slight offense.

266. *Camp seniors in officers' camps with different nationalities.*
In officers' camps occupied by different nationalities, every nationality is to have its own camp senior.
This camp senior is to represent the interests of his nationality before the Protecting Power and the International Red Cross and is authorized to communicate with the camp commandant.
His competence does not extend to matters affecting prisoners of war of other nationalities.

293. *Legal expenses and notary's fees.*
Where the prisoners of war concerned are without means, legal expenses and notary's fees are to be paid out of canteen funds and, should these be exhausted, out of prisoner of war funds, if available.

308. *Use of German uniforms and civilian clothing by prisoners of war.*
All prisoners of war are to be informed that, when escaping in civilian clothes or in German uniforms, they run the risk not only of incurring disciplinary punishment, but also of being committed for trial on the charge of espionage or partisan activities, a charge which carries the death penalty.

334. *Warrant officers in the U.S. armed forces.*
Warrant officers and chief warrant officers in the U.S. Army, Navy, Marine Corps, and Coast Guard occupy an intermediate position between officers and noncommissioned officers. They are to be treated as officers.

341. *Examination of prisoners of war mail — in languages for which no interpreters are available.*
When prisoners of war are unable to communicate with their next of kin except in a language for which no interpreter is available at the censor's officer, their mail, both incoming and outgoing, may be sent to the Interpreter Training Section, Berlin. . . . This applies to the following languages: Hindustani, Urdu, Persian, Arabic, Kurdish, Georgian, Armenian, Boer, and Kusuaheli [*sic*].
The prisoners of war concerned are to be notified that a considerable delay in the handling and forwarding of their mail must be reckoned with.

349. *Communication between prisoners of war and their counsel.*
1. In criminal cases, prisoners of war are to be permitted at all times, upon request, to communicate in writing with their counsel. This correspondence is not to be counted in the monthly quota of letters and cards allowed the prisoners of war concerned.
2. Furthermore, prisoners of war under indictment are to be allowed, upon request of the defense, to speak in person with their counsel before the start of the main proceedings. This conference is to be made possible at least one day before the main proceedings, upon

previous agreement with counsel.

386. *Ill-treatment of prisoners of war.*

Contractors and their employees are not permitted — except in self defense — to physically maltreat prisoners of war, Soviet prisoners included, or otherwise to lay hands on them. Where certain measures must be taken, as in case of refusal or slackening of work, they are to apply to the detail leader or to the control officer.

395. *Handling of funds taken from prisoner of war airmen.*

Money and foreign currency taken from British and American prisoner of war airmen are to be handled like funds taken from other prisoners of war (issuance of receipts, crediting on Personal Card II). However, where the amounts are unusual, or where documents taken from the prisoners of war, or other circumstances, give reason to suspect that the monies involved are not personal, but fiscal property — such monies are to be credited, but at the same time blocked until the question of proprietorship has been cleared up.

410. *Confiscation of uniforms.*

The uniforms of prisoners of war officers, particularly French light infantry officers, French and British naval officers, and British aviation officers, have been frequently confiscated for reasons of security and replaced by other less objectionable as to cut and color. Such procedure is not permissible. The prisoner of war officer has a right to his uniform. It must be left in his possession even if it should make a stricter surveillance of the prisoner of war officer necessary.

415. *Visits to camps by the Mixed Medical Commission.*

The foreign members of the Mixed Medical Commissions endure many inconveniences and financial sacrifices in the performance of their duties in fulfillment of the Geneva [Prisoner-of-War] Convention. They are the guests of the German government for the length of their stay in Germany and are to be accorded every possible consideration.

The foreign members of the Mixed Medical Commissions, who are generally officers, are to be greeted by all German officers and army officials as comrades. Enlisted men and noncommissioned officers are to salute them in the prescribed manner.

439. *Pay of Indian prisoner of war officers.*

In the Indian Army there are:

a. British officers with royal commission, Indian officers with royal commission, and Indian commissioned officers.

b. Officers commissioned by the Viceroy. . . .

The officers enumerated under "a", occupy the same position and hold the same rank as officers of the British Army. They receive, therefore, the same pay as British officers.

The officers enumerated under "b", continue to receive 50.00 reichmarks per month.

462. *Timely use of arms to prevent escapes of prisoners of war.*
In view of the increasing number of individual and mass escapes of prisoners of war, it is hereby again emphasized that guards will be subject to the severest disciplinary punishment, or, when a detailed report is at hand, to court-martial, not only for contributing to the escape of prisoners of war through negligence, but also for the failure to use their arms in time. The frequently observed hesitancy to make use of firearms must be suppressed by all means. Guard personnel must be instructed in this sense again and again. They must be imbued with the idea that it is better to fire too soon than too late.

504. *Use of firearms against prisoners of war.*
The service regulations for prisoner of war affairs do not provide for any warning shots. Should the occasion for the use of firearms arise, they must be fired with the intent to hit.

511. *Exercise of judicial functions by prisoners of war.*
. . . the [Prisoner-of-War] Convention of 1929 grants prisoners of war no right to exercise judicial functions, such as hearings, administering of oaths, etc. Rather, they are subject exclusively to the law of the Detaining Power which, when necessary, provides for the hearing of prisoners of war as witnesses, etc. This must be observed in inquiries concerning fatal shootings, etc.
All senior prisoners of war and spokesmen are forbidden to perform so-called "judicial" acts; violations will be subject to punishment for usurpation of office and disobedience.

513. *U.S. prisoners of war in British uniforms.*
Prisoners of war of U.S. nationality captured as members of the Canadian armed forces are considered British prisoners of war regardless of whether they joined the Canadian services before or after the entry of the United States into the war.
The uniform is the deciding factor.

514. *Classification and pay of British prisoners of war.*
"Leading seamen" and "Leading Stoker" in the British navy are to be considered noncommissioned officers and are to be treated as such. They are to be released from work only at the request of the British chief spokesman.

561. *Polish prisoners of war.*
A sharp distinction . . . is to be drawn between prisoners of war who were members of the former Polish army and those captured in French uniforms as members of the French armed forces. The latter are to be considered French prisoners of war, are to be reported as such to Geneva in the strength reports, and are to be represented by French spokesmen only.

624. *Examinations by Mixed Medical Commission.*
2. A prisoner of war . . . once declared by the Mixed Medical Commission to be eligible for repatriation is no more to be presented to the Commission. Their right to repatriation remains even when

their condition has improved in the meantime.

672. *Money orders in Reichsmarks to Great Britain.*

British bank-notes cannot be sent to Great Britain. In accordance with Art. 24 of the Geneva [Prisoner-of-War] Convention of 27 July 1929, money taken from a prisoner of war may not be exchanged for another currency without his consent. British prisoners of war are at liberty to sell foreign exchange taken from them. . . .

The Convention permits the transfer of sums of Reichsmarks only. The OKW does not know the rate of exchange at which the British government pays the receivers of the Reichsmarks.

691. *Pledges by British prisoners of war.*

1. Originally British prisoners of war were not permitted to pledge themselves not to flee.

Circular letter of the Swiss Legation to the British camp spokesmen . . . was to notify the latter of the lifting of this prohibition by the British government.

3. Formal pledges not to flee (not paroles), as applying to walks permitted under special conditions, are accepted from British *prisoners of war officers* only.

Such pledges will not be accepted from British noncommissioned officers and men, nor from medical corps personnel.

697. *Transfer of foreign currency to America.*

Foreign currency taken from American prisoners of war at the time of their capture may be sent by the respective prisoner of war camp, with the consent of the prisoners concerned, to the Deutsche Bank in Berlin, . . . accompanied by a statement giving full details concerning the sender of the money, the recipient, their bank connections, and also containing a statement that the foreign exchange involved was taken from the prisoner at the time of capture.

The Deutsche Bank will forward the amounts to the recipients and will deduct the transfer costs from the amount transferred.

737. *Handling of money taken from prisoner of war fliers.*

The enemy powers frequently supply their fliers with considerable amounts of money in the currencies of the countries lying in the path of their flying missions. These sums are sometimes packed in special purses, together with compasses, saws, etc.

The camp commandants are to separate these amounts belonging to the fisc from the private funds right after capture. Receipts for the fisc money must be issued to the prisoners.

738. *Air raid shelter trenches.*

In a number of cases prisoners of war have declared through their spokesmen their unwillingness to work on air raid shelter trenches. Such a refusal on the part of a group of prisoners of war, in view of the internationally binding provisions of the [Geneva Prisoner-of-War] Convention of 27 July 1929, is to be ignored.

769. *Tax on turnover of prisoner of war canteens.*

The Reich Minister of Finance will publish the following:

On 20 October 1943 the Supreme Command of the Wehrmacht issued new regulations concerning the operation of canteens for prisoners of war. These regulations have been in force since 1 December 1943. They stipulate that prisoner of war canteens are establishments of the Reich and that their operations (resources) represent economic income and expense of the Reich. The turnover of the prisoner of war canteens is thus, beginning 1 December 1943, a part of the turnover of the Reich and is balanced by the amount paid in settlement of claims by the Supreme Command of the Wehrmacht for the sales (turnovers) of the three Wehrmacht branches.

798. *French legal advisers.*

There are several cases on record where French prisoners of war have been sent from their job to the M. Stalag in order to consult with the French legal adviser of the spokesmen in personal legal matters. Valuable working days have been lost.

The legal consultation must be done by correspondence. Pulling a prisoner of war out of his job for consultation with the legal adviser of the spokesman is inadmissible. On the other hand, there is no objection to the French legal adviser's occasional visits to French labor commandos. But in this case, too, the legal consultation with the prisoners of war must take place in their free periods. No working time is to be lost through the use of the institution of legal counsel. Visits to labor commandos by French legal advisers are to be restricted to specially urgent cases.

802. *Foreign currency.*

Invasion money (bills based on French currency) taken from prisoners of war in France is not legal tender. These bills are not to be sold at the request of the prisoners of war but must be placed in safekeeping, credited to PK under "b. impounded valuables" and returned to the prisoners of war at the time of their release.

Captured invasion money is to be sent to the Central Reich Treasury in Berlin.

811. *Search of prisoner of war quarters for security reasons.*

Searches of prisoner of war quarters for security reasons must generally be performed in the presence of a prisoner of war (e.g. spokesman, chief of barracks or house). Only in the exceptional cases where the purpose of the search makes the presence of a prisoner of war undesirable may the camp commandant disregard this rule.

822. *Working time of prisoners of war; work on Sunday.*

As a matter of principle, prisoners of war are to work the same number of hours as the German workers on the same job. This principle applies also to Sunday work; it is to be noted, however, that prisoners of war, after 3 weeks' continuous work, must be given a continuous rest period of 24 hours which is not to fall on Sunday.

When a plant which normally works on Sunday is closed for that day, the right of the prisoners of war to a continuous period of rest is still to be respected. However, no objection can be raised to prisoners of war working beyond the usual working day and on free Sundays on *emergency jobs* when German workers or the German population are required to take part in such emergency projects. However, the rest period thus lost on the emergency jobs must be made up for — even on a weekday — if the last continuous rest period was taken at least 3 weeks back.

In special emergency cases prisoners of war may be called upon to work for the relief of same [*sic*] even when the services of German workers or the German population are not required. The decision in the matter lies in each individual case with the respective camp commandant, in agreement with the local authorities, the competent Labor Office and the agency in need of assistance.

840. *Killing and serious injuries of prisoners of war and civilian internees (except Poles, Serbs, and Russians).*

The reference order [No. 224] has often not been observed, with the result that the OKW has had again and again to learn of cases of violent deaths of prisoners of war through the Ministry of Foreign Affairs or the Protecting Powers. This situation is unbearable in view of the reciprocity agreements with the enemy governments. The following additional orders are therefore announced herewith:

Every case of violent death of serious injury is to be promptly reported through channels to the OKW. . . . In cases involving the use of arms, written depositions of the participants and witnesses, including prisoners of war are to be attached; action is to be taken by the camp commandant and the prisoner of war commander.

841. *Classification and pay of British prisoners of war.*

In the Royal Air Force, "Leading Aircraftsmen" are considered enlisted personnel.

In the British Fleet Air Arm the

Leading Airmen
Leading Air Fitters
Leading Air Mechanics
Leading Air Artificers, 1-4 class

and the Leading Ranks in the British Navy are considered non-commissioned officers.

876. *Treatment of Jewish prisoners of war.*

The bringing together of Jewish prisoners of war in separate camps is not intended; on the other hand, all Jewish prisoners of war are to be kept separated from the other prisoners of war in Stalags and officers' camps, and — in case of enlisted personnel — to be grouped in closed units for work outside the camp. Contact with the German population is to be avoided.

In all other respects Jewish prisoners of war are to be treated like the

other prisoners of war belonging to the respective armed forces (with respect to work, duty, protected personnel, etc.).

DOCUMENT NO. 52

AGREEMENT BETWEEN THE UNITED STATES AND ITALY SUPPLEMENTING THE 1929 GENEVA PRISONER-OF-WAR CONVENTION

(Berne, December 1941-June 1942)

SOURCE

For. Rel., 1942, III, Europe, at 24

NOTE

During World War I (1914-1918) many bilateral and multilateral agreements were entered into between the belligerents for the purpose of solving specific problems which had arisen with respect to the treatment of prisoners of war (see NOTE to DOCUMENT NO. 37). Their objective was to supplement the patently inadequate provisions concerning prisoners of war contained in the 1907 Hague IV Regulations (DOCUMENT NO. 33). This procedure of special supplementary agreements between belligerents was rarely followed during World War II (1939-1945) and this was certainly not because the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) was so much more all-encompassing than the earlier Regulations. The present agreement with Italy and a very much narrower one with Germany (DOCUMENT NO. 54) were among the very few entered into by the United States during World War II despite the fact that it lasted considerably longer, involved numerically greater armed forces, and covered a much larger part of the globe. Moreover, unlike the World War I agreements, this one was proposed and entered into before any actual problems had arisen and solely for the purpose of supplementing the obvious inadequacies of the 1929 Convention. (Only the inter-office references and cross-references which were included in the original messages because of the form of the agreement, a secondhand exchange of messages, have been omitted. The annexes were not printed in the original.)

EXTRACTS

The Chargé in Switzerland (Huddle) to the Secretary of State

BERN, February 12, 1942.

529. Following is translation of Italian *note verbale* January 2:

"Italian Foreign Office has received Swiss *note verbale* of December 24, 1941, transmitting proposal of American Government to apply during actual state of war between Italy and United States the Geneva prisoners of war and Red Cross conventions extending benefits first convention as far as applicable reciprocally to interned civilians of two countries.

Italian Foreign Office requests Swiss Legation communicate to American Government that Italian Government agrees to above proposal.

Italian Government reserves right to present further proposals for carrying out provisions of above mentioned conventions."

Swiss Foreign Office note February 4 now forwards copy\further Italian *note verbale* of January 22 translated as follows:

"Italian Foreign Office in accordance with reserve contained in its note of January 2 requests Swiss Legation to transmit following communication to American Government:

1. Italian Government confirms former communication and considers in force vis-à-vis United States on reciprocal basis the two international conventions subscribed Geneva 1929 relative prisoners of war and Red Cross.

2. Italian Government in order improve application prisoners of war convention proposes following points: Article 14. In conformity fourth paragraph this article Italian Government disposed on basis reciprocity consent [to] retain in prisoners of war camps doctors and medical orderlies for purpose caring for wounded and sick prisoner compatriots.

Agreement on above whenever reached shall be extended to religious personnel which according article 12 of Red Cross Convention should be repatriated.

For medical and dental care furnishing provisional artificial limbs, eye glasses, et cetera, conditions article 14 would be applied exactly as originally written. Article 21. Conformity this provision there is transmitted (appendix I) table of ranks and grades in force in Italian armed forces.

Regarding assimilated personnel mentioned paragraph 2 article 21 there are attached (annex 2) two copies *Official Gazette* number 125 May 29, 1941, containing regulations for execution of forms of militarization of civil personnel attached to active forces and table of equivalent grades. Article 23. Standards of pay of each grade are given in annex 1. *(a)* Italian Government suggests value of exchange applicable to points which follow be 19 lire to one dollar; *(b)* Italian Government will pay American officers and assimilated persons who are prisoners of war same rate of pay as indicated in aforementioned table for officers of same rank as in Italian armed forces as far as not higher than level which shall be indicated by American Government. Final clause article 23 shall naturally be applicable to these payments; *(c)* Italian Government would like to know if scale of payments indicated above is sufficient to assure normal living conditions (food, clothing,miscellaneous expenses) for Italian prisoners of war in United States as in Italy; *(d)* Italian Government proposes to make following payments on reciprocal basis in addition to treatment contemplated by the convention: Italian lire or equivalent in dollars weekly, 10.80 for noncommissioned officers — home forces, 7.20 for enlisted men, 4.80 for Libyan personnel of all grades, 3.00 for personnel of Italian East African forces of all grades.

If proposals under point *(d)* are accepted Italian Government will accord similar treatment to corresponding American personnel with such differences as American Government may eventually communicate for its colored personnel.

Final clause article 23 would also be applicable to such payments; *(e)* payments must be made in full to Italian prisoners of war as Italian

administration authorities intend to pay directly to families of Italian prisoners a part of other allowances due to respective members of family who are in captivity. Article 24. Regarding maximum amount of cash which prisoners of various grades will be allowed to keep on their persons it is proposed that prisoners be not allowed to receive negotiable money *(disponibilita di valuta coreate [corrente])*, but should be allowed to spend only special monetary substitute issued by commander of camp. Article 27. Adhering to right of employment for work of prisoners of war under conditions specified in this article Italian Government wishes stipulate that imprisoning power should for duration of imprisonment allow prisoners who are victims of accidents occurring during employment, benefits set up by applicable regulations concerning workers of same category according to legislation of imprisoning power. Each Government will then regulate according own laws the question of indemnity to be granted its own nationals when they shall have returned from imprisonment for injuries occurring during imprisonment. Italian Government proposes that proper authorities of imprisoning power will ensure that prisoners of war, victims of industrial accidents during work, shall receive a proper certificate attesting to nature of accident. Article 34. It is proposed that work of tailors, shoemakers, barbers and laundrymen be considered as exceeding ordinary work of camp and be remunerated on following scale: tailors and shoemakers lire 0.45 per hour with limit of 3.60 lire per day, barbers and laundrymen lire 0.22 per hour with limit of 1.80 per day. For labor performed outside of camps scale of payment shall be lire 10.00 for skilled and lire 7.00 daily for unskilled worker.

Payments of above should be in addition to food, lodging and clothing. Article 36. On condition of reciprocity, Italian Government disposed to permit prisoners to send in addition to a card announcing their capture a letter and a postcard per week, each letter not to exceed 24 lines and postcard should only contain several sentences regarding health of prisoners and few words of greeting. Special stationery and postcards shall be adopted to be distributed by imprisoning power.

There shall be no restrictions regarding persons to whom prisoners may address letters except prisoners in different concentration camps cannot write each other unless related. Article 68. Italian Government proposes adoption of model agreement of type annexed to the convention with change that prisoners of war who are to be repatriated, contemplated in numbers 1,2 of letter B of model agreement should be repatriated rather than hospitalized in neutral countries.

Italian Government proposes to extend benefit of repatriation to those military persons, Italian and North American, interned in third countries who meet conditions provided in letters A and B of aforementioned model. Article 69. International Committee of Red Cross will be requested to nominate neutral members of Mixed Medical Commission. Article 76. Confirming execution of this article Italian Government proposes that ordinary funeral expenses and burial of prisoners should be met by imprisoning power. If fellow soldiers desire pay special honors, greater part

of cost shall be at their expense, if authorization of camp commandant is obtained. Article 77. Prisoner Information Bureau *(l'Ufficio Prigionieri Richerche [Ricerche?])* of Italian Red Cross established in Rome (Via Puglie 6) is charged with furnishing information about prsioners of war.

It is proposed that articles for use of prisoners be transmitted through respective offices of information of two countries to International Committee of Red Cross for forwarding to interested government unless accord is reached for direct transmission between above-mentioned offices of information.

3. Italian Government in order improve application of Red Cross Convention proposes following points. Article 12. In accordance with provisions this article and connection with above proposals it is proposed to make following reciprocal payments in lire monthly to this personnel in addition to their lodging: medical officers, chaplains and officers attached to the administration of sanitary establishments: Lieutenant General 4200, Major General 3200, Colonel 2650, Lieutenant Colonel 2300, Major 2000, Captain 1700, Lieutenant 1400, Second Lieutenant 1100. Medical orderlies of recognized organizations will receive 1100 lire monthly. Personnel below rank of officer: Marshall of all ranks 288, Sergeant Major 216, Sergeant 144 monthly, Corporal and enlisted men 3.60 daily.

For last group monthly or daily allowance is in addition to maintenance which should always be provided by imprisoning power.

In line with this procedure it is proposed *(a)* that medical or religious personnel be repatriated during war in case they are wounded or sick on basis of model agreement annexed Red Cross Convention; *(b)* that this same personnel will enjoy treatment provided for by articles 9 to 13 of Red Cross Convention with sole restriction of personal liberty imposed by military exigencies; *(c)* that at end of war the rights be reserved to personnel mentioned above as provided by last paragraph of article 12 of Red Cross Convention; *(d)* that same personnel should be sent to give assistance wherever camps are maintained for Italian prisoners or civil internees with equal distribution among camps.

4. In addition to above proposals which relate to execution of various articles of Geneva Conventions Italian Government also proposes to regulate following questions on basis of reciprocity: *(a)* tobacco — that there be distributed free to prisoners (officers included) an amount of tobacco (pipe tobacco or cigarettes of choice) up to 35 grams per week; *(b)* that mess of noncommissioned officers, prisoners of war, be administered by them or that facilities be given them for running it and to extend also to noncommissioned officers privileges of last sentence of article 22 of Prisoners of War Convention.

5. Italian Government also confirms communication made in *note verbale* January 2 to Swiss Legation regarding extending benefits of the Prisoners of War Convention as far as applicable to civil internees of both countries on reciprocal basis.

Italian Government proposes that two Governments send each other reciprocally, through protective power, lists of civilians of two countries interned in territory of the other and successive changes as these take place.

6. Italian Government awaits the reply of American Government before considering points 2, 3, 4 of the present note as being agreed upon and in force."

HUDDLE

The Acting Secretary of State to the Chargé in Switzerland (Huddle)

WASHINGTON, March 20, 1942.

717. Please request the Swiss Government to inform the Italian Government (1) that proposals 2, 3 and 4 of its note of January 2 [*22*] are receiving consideration and that the attitude of the American Government with regard to them will be communicated in the near future; (2) with reference to point 5, that this Government is drawing up proposals regarding the extent and manner of application of the provisions of the Prisoners of War Convention to civilian internees and detainees which will be communicated to the Italian Government, (3) that pending further agreement between the two Governments as to which provisions of the Convention are applicable to civilians, the Government of the United States will not apply Article 27 of the Convention to civilian internees and (4) that this Government expects the Italian Government to accord like treatment to American civilians who may be detained by it.

WELLES

The Minister in Switzerland (Harrison) to the Secretary of State

BERN, May 26, 1942.

2285. Swiss Legation Rome telegraphs May 19 following text of note dated May 15 from Italian Foreign Office (translation from Italian):

"Ministry of Foreign Affairs refers to *note verbale* 00114 of March 28 by which Swiss Legation transmitted a communication of the United States Government regarding application of the Geneva Convention for treatment of prisoners of war and amelioration of the conditions of the wounded and sick of the army in the field.

Ministry requests Legation forward following reply to American Government:

1. Italian Government takes note of assurance that American Government is examining proposals 2, 3 and 4 of *note verbale* of January 22 (see Legation's 529, February 12) and that it will make clear its stand in regard to these points and Italian Government is awaiting reply in this regard and also in regard to proposal of United States Government concerning point 5 of above mentioned *note verbale*.

2. Italian Government also notes fact that American Government does not intend to apply (pending an agreement between two Governments relative extension to civilian internees of provisions of Geneva Convention) article 27 of that Convention to civilian internees and gives assurances that similar treatment will be applied to American civilians interned in Italy.

3. Italian Government declares that treatment of American civilians

interned in Italy is guided in addition to principles International Law and the Geneva Convention by high humanitarian principles and trusts that similar spirit inspires American Government in treatment of Italian civilians interned in United States."

HARRISON

The Secretary of State to the Minister in Switzerland (Harrison)

WASHINGTON, June 1, 1942.

1400. Request the Swiss Government to communicate the following matters to the Italian Government with reference to the Italian Foreign Officer's *note verbale* 31/01511 of January 22, 1942. Numbers refer to numbered sections of the Italian Foreign Office's note under reference.

2. Geneva Prisoners of War Convention.

Article 14. The American Government reserves the right for the repatriation, in accordance with the provisions of Article 12 of the Geneva Red Cross Convention, of medical personnel and chaplains but agrees that pending such repatriation, doctors, medical orderlies and chaplains shall, in accordance with the provisions of paragraph 4, Article 14, be used reciprocally for the care of their compatriots in prisoners of war camps.

The American Government assents to the proposal of the Italian Government that the provisions of Article 14 for the furnishing of temporary prosthetic equipment and for medical care shall be applied exactly as written.

Article 21. The proposals of the Italian Government with regard to Article 21 are still under study. A further communication with regard to them will be addressed to the Italian Government.

Article 23.

(a) The American Government suggests that the value of exchange applicable to the points which follow should be 20 lire to one dollar U.S.A.

(b) The American Government proposes that there be substituted for the rates of pay provided for under Article 23 the following rates of pay:

First or second lieutenants, chief warrant officers, warrant officers in the Army; lieutenants, junior grade, ensigns, chief warrant officers, warrant officers in the Navy; first and second lieutenants, chief warrant officers, warrant officers in the Marine Corps; and similar grades in the United States Coast Guard and United States Public Health Service, to include corresponding ranks for the Italian armed forces, to receive $20 a month or 400 lire.

Captains in the Army, Lieutenants in the Navy, Captains in the Marine Corps, and similar ranks in the United States Coast Guard and United States Public Health Service, to include corresponding ranks for the Italian armed forces, to receive $30 a month or 600 lire.

Majors and upwards in the Army, Lieutenant Commanders and upwards in the Navy, Majors and upwards in the Marine Corps, and similar ranks in the United States Coast Guard and United States Public Health Service, to include corresponding ranks for the Italian armed forces, to receive $40 a month or 800 lire.

It is suggested that the remaining sums due on the pay accounts of all officer prisoners of war be paid by the Government of origin as an allotment to the family of the prisoner of war.

(c) The money allowances provided for under *(b)* shall be in addition to rations to be distributed at the prisoners of war camps, the cost of which shall be borne by the detaining power.

(d) The American Government proposes that payment in Italian lire or its equivalent in dollars be on a basis of 8 cents American money per diem for non-commissioned officers and 5 cents American money per diem for all other enlisted personnel, no distinction being made in this connection between American white and colored soldiers.

(e) All payments suggested above shall be paid in full, it being understood that the authorities of the country of origin shall pay sums due to their nationals, over and above the amount specified, to the dependents or legal representatives of the nationals in their country of origin.

Article 24. The American Government accepts the proposal of the Italian Government that prisoners of war be not allowed to receive negotiable money and that they should be allowed to spend for their needs only a special monetary substitute issued by the commander of the camp.

Article 27. The American Government proposes that the money allowances provided for enlisted personnel set forth above under Article 23 point *(b)* continue to be paid to such personnel, even though injured, during the complete period of injury with no deductions of any kind, and in addition thereto during the period of injury 50 per cent of the rate of wage paid for the work being performed at the time of injury, these payments being in lieu of compensation.

The American Government accepts the proposal of the Italian Government that each Government should regulate, according to its own laws, the question of allowances to be granted to their own nationals, when they shall have returned from imprisonment, for injuries occurring during imprisonment, and agrees that a proper certificate attesting to the nature and the circumstances of the injuries shall be issued for each victim of an industrial accident.

Article 34. The Italian Government's proposal that work of tailors, shoemakers, barbers, and laundrymen, shall be considered as exceeding the ordinary work of the camp and shall be remunerated under a special scale is still under consideration by the appropriate American authorities.

The American Government accepts the Italian Government's proposal that the scale of payment for labor performed outside of camps shall be 10 lire per day for skilled workers and 7 lire a day for unskilled workers or its equivalent in dollars, this payment to be in addition to food, lodging and clothing.

Article 36. The American Government proposes that instead of one letter and one card per week, each prisoner of war be permitted to write two letters and one card per week, this being the amount of outgoing correspondence now allowed by the American authorities to Italian civilian internees in the

United States. The proposal that there shall be no restrictions regarding the persons to whom prisoners of war may address letters is accepted, except as to that part of the proposal which permits correspondence between related prisoners of war and internees held in different camps, to which the American Government agrees only to the extent that relationship can be satisfactorily established.

Article 68. The American Government accepts the proposal of the Italian government regarding the adoption of the model agreement annexed to the Convention with the change suggested regarding repatriation rather than hospitalization in neutral countries.

The American Government also accepts the proposal of the Italian Government to extend the benefit of repatriation to those military persons interned in third countries who meet the conditions provided in letters *(a)* and *(b)* of the model agreement.

Article 69. The Italian Government's proposal with regard to Article 69 is accepted.

Article 76. The Italian Government's proposal is accepted by the American Government subject to a change in the second sentence to provide that if the fellow soldiers of the dead shall desire to pay special honors, the "difference in" not the "greater part of" the costs shall be at their expense.

Article 77. The prisoners of war and civilian internees Information Bureau in the Office of the Provost Marshal General of the United States is already transmitting information regarding Italian citizens held in custody in the United States to the Central Information Bureau of the International Red Cross Committee at Geneva and the appropriate protecting Power. This office is also charged with furnishing information about the prisoners of war. The American Government proposes that articles for use of prisoners be forwarded through ordinary mail channels, when available, and through the facilities made available by the International Red Cross Committee.

3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field.

Article 12. The American Government proposes that medical officers, chaplains and officers attached to the administration of sanitary establishments be paid in accordance with the proposal made under the heading 2. Prisoners of War Convention, Article 23, above, and that the pay allowance be in addition to maintenance in the case of all such officers, as well as in the case of all enlisted men. With reference to the further Italian proposals, it is proposed and suggested as follows:

(a) The American Government agrees that medical or religious personnel shall be used for the care of their own compatriots but reserves the right of such personnel to repatriation under the provisions of Article 12. It desires that only those members of the medical or religious personnel who voluntarily relinquish their right of repatriation should be retained after a way is opened for their return and military exigencies permit.

(b) The American Government agrees to the Italian Government's

proposals under *(b)*, *(c)*, and *(d)* of this heading.

4. Additional proposals for the regulation of the following questions on a basis of reciprocity:

(a) Tobacco. The American Government agrees to this proposal.

(b) The American Government does not agree to the proposal that a separate mess be established for non-commissioned officer prisoners of war.

HULL

The Secretary of State to the Minister in Switzerland (Harrison)

WASHINGTON, December 3, 1942.

2721. Inform International Red Cross Committee that this Government and Italian Government have agreed to enforce Model Agreement attached to Geneva Prisoners of War Convention (Department's 1400, June 1) and have agreed to ask International Red Cross Committee to appoint neutral members of the Mixed Medical Commissions provided for in Article 69 of the Geneva Prisoners of War Convention.

This Government would, therefore, be grateful if International Red Cross Committee would consent to nominate the neutral members of these commissions. This Government suggests that these commissions be continuing commissions and that in order that they may be able to serve without interruption that the International Red Cross Committee submit simultaneously with the names of the neutral doctors nominated as members of the commissions additional names of neutral doctors to serve as alternate members in case regular members should be unable to perform their duties.

When this Government shall have been informed that the International Red Cross Committee has agreed to nominate these members and that it has been approached by Italian Government in this regard, it will take the action necessary for the appointment of the third member (with an alternate) of the commission in the United States in order that upon a reciprocal basis the repatriation of seriously sick and wounded prisoners of war can be commenced at the earliest opportunity.

Request Swiss Government to communicate substance of this telegram to Italian Government and to ask whether Italian Government has approached International Red Cross Committee regarding nomination of neutral members of Mixed Medical Commissions.

HULL

DOCUMENT NO. 53

REX v. GIUSEPPE AND OTHERS
(South Africa, Supreme Court, Trans. Prov. Div., 21 January 1942)

SOURCES

[1943] S.A.L.R. (T.P.D.) 139
12 Ann. Dig. 411

NOTE

This is a simple, clear-cut case in which the court properly applied the rule that the Protecting Power must be notified of the proposed prosecution of a prisoner of war for a criminal offense at least three weeks before the opening of the trial. At the time of this case that provision was contained in Article 60 of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49). It is now contained in Article 104 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108).

TEXT

MALAN, J.: This matter came before me on review at the special request of the Crown.

The accused are twelve Italian prisoners of war and they were charged and found guilty by the magistrate of Pilgrims Rest on two counts of theft and one of housebreaking with intent to steal and theft, and were sentenced to pay various fines, with alternatives of imprisonment.

It would appear that the accused were not represented by defending counsel or attorney in the court below, and they are now raising objection to the convictions and sentences on the ground that they have not had an opportunity of objecting to the jurisdiction of the Court, that they had not had an opportunity of obtaining legal representation, and that they were not informed by the interpreter of the sentences that were passed, so that they only realised for the first time that they were convicts when a civilian interpreter explained the position to them at the Nelspruit gaol shortly after the conviction. These statements are accepted as correct by the magistrate.

Article 60 of the Geneva Convention reads as follows: —

"At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting power as soon as possible, and in any case before the date fixed for the opening of the hearing.

"The said notification shall contain the following particulars: —

(a) Civil status and rank of the prisoner.

(b) Place of residence or detention.

(c) Statement of the charge or charges, and of the legal provisions applicable",

and there are certain other provisions which do not affect the present case. It is admitted that no notification, as provided in the Article, has been sent and

that there has been no legal representation.

In the circumstances, I think that the irregularity is sufficient to warrant my setting aside the convictions and sentences of the prisoners and an order to this effect is accordingly made.

DOCUMENT NO. 54

ARRANGEMENT BETWEEN THE UNITED STATES OF AMERICA AND GERMANY RESPECTING RECIPROCAL APPLICATION OF THE MODEL AGREEMENT CONCERNING REPATRIATION AND HOSPITALIZATION OF PRISONERS OF WAR ANNEXED TO THE CONVENTION [RELATIVE TO THE TREATMENT OF PRISONERS OF WAR] SIGNED AT GENEVA JULY 27, 1929

(Washington, 4 and 30 March 1942)

SOURCES

56 Stat. 1507
8 Bevans 243
144 BFSP 1166

NOTE

The agreement appearing below is one of the very few entered into by the United States with an enemy belligerent during World War II (1941-1945). (See DOCUMENT NO. 52.) It will be noted that its coverage was extremely limited as it merely made the "Model Agreement Concerning the Direct Repatriation and Hospitalization in a Neutral Country of Prisoners of War for Reasons of Health," which was annexed to the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49), applicable as between Germany and the United States.

TEXT

The Minister of Switzerland, in Charge of German Interests, to the Secretary of State

LEGATION OF SWITZERLAND
WASHINGTON, D.C.

DEPARTMENT OF
GERMAN INTERESTS

The Minister of Switzerland, in charge of German Interests, presents his compliments to the Honorable the Secretary of State and has the honor to submit to him the following proposition received from the German Government:

"The United States as well as the German Government are signatories to the International Convention of July 27, 1929, regarding the treatment of prisoners of war and of the Geneva Agreement of the same date for improvement of the fate of the sick and wounded of the armies in the field.

Article 68 of the Convention regarding the treatment of prisoners of war provides for additional agreements between warring nations relating to impairment and sickness justifying the transport home or sheltering of prisoners of war in a neutral country. The Government of the German Reich proposes to the Government of the United States to enforce the Model Agreement attached to the Geneva Convention concerning direct repat-

riation and hospitalization in a neutral country of prisoners of war for reasons of health. The German Government looks forward to the communication of the views of the American Government in this respect.

The German Armed Forces Information Service located at Hohenstaufenstrasse 47, Berlin W.30, has received the necessary instructions to give information in regard to members of the American Armed Forces taken prisoners by Germany and to give particulars regarding such prisoners of war to the Legation of Switzerland designated by the American Government as protecting power as well as to the Central Information Office for Prisoners of War at Geneva."

WASHINGTON, D.C.
March 4, 1942
To the Honorable
THE SECRETARY OF STATE

The Secretary of State to the Minister of Switzerland, in Charge of German Interests

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland in charge of German interests and has the honor, with reference to his note of March 4, 1942 submitting proposals from the German Government, to communicate the following:

The Government of the United States accepts the proposal of the Government of the German Reich to enforce the Model Agreement attached to the Geneva Convention concerning direct repatriation and hospitalization in a neutral country of prisoners of war for reasons of health.

The Government of the United States has taken note of the statement of the German Government to the effect that the German Armed Forces Information Service located at Hohenstaufenstrasse 47, Berlin W.30, has received the necessary instructions to give information in regard to members of the American Armed Forces taken prisoners of war by Germany and to give particulars regarding such prisoners of war to the Legation of Switzerland designated by the American Government as Protecting Power as well as to the Central Information Office for Prisoners of War at Geneva.

The Prisoners of War Information Bureau established by the Government of the United States in the office of the Provost Marshal General of the United States Army will furnish to the Legation of Switzerland, designated by the German Government as Protecting Power, as well as to the Central Information Office for Prisoners of War at Geneva, particulars regarding members of the German Armed Forces taken prisoners by the United States.

In accordance with the declared intention of the United States to apply to civilian enemy alien internees the provisions of the Geneva Prisoner of War Convention to the fullest extent possible, the Civilian Internee Information Bureau in the office of the Provost Marshal General of the United States Army is already transmitting to the Legation of Switzerland and to the Central Information Office at Geneva particulars regarding German civilians

interned or temporarily detained by the United States.

DEPARTMENT OF STATE,
Washington
March 30, 1942

DOCUMENT NO. 55

EX PARTE RICHARD QUIRIN ET AL
(Supreme Court of the United States, 29 October 1942)

SOURCE
317 U.S. 1

NOTE

This 1942 opinion of the Supreme Court of the United States, handed down in a case which arose very shortly after the United States became involved in World War II (1941-1945), was concerned with the trial by military commission of a group of would-be saboteurs, including one who claimed to be an American citizen, who had been landed in the United States by German submarines. It contains two issues relevant to prisoners of war: first, it draws a distinction between lawful combatants who, upon capture, are entitled to prisoner-of-war status, and unlawful combatants, who are not; and second, it holds that an individual who is a citizen of a belligerent country can still be an "enemy belligerent" if he "associates" himself with the enemy armed forces. (For another opinion holding that citizenship in the Detaining Power does not affect the status of an individual otherwise entitled to prisoner-of-war status, see DOCUMENT NO. 80; to the opposite effect, see DOCUMENT NO. 153.)

EXTRACTS

Mr. Chief Justice Stone delivered the opinion of the Court.

* * * * *

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, Military Law, 2d ed., pp. 1196-97, 1219-21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, §§ IV and V.

* * * * *

Citizenship in the United States of an enemy belligerent does not relieve

him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates v. Goodloe*, 101 U.S. 612, 615, 617-18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

DOCUMENT NO. 56

JAPANESE REGULATIONS FOR THE TREATMENT OF PRISONERS OF WAR (AMENDED TO 1943)

SOURCE

International Military Tribunal for the Far East, Exhibit No. 1965-A, at 3 (National Archives of the United States)

NOTE

These Regulations, originally promulgated during the Russo-Japanese War (1904-1905), a conflict which was marked by an unusual degree of compliance with the laws and customs of war, closely follow the relevant provisions of the 1899 and 1907 Hague Regulations (DOCUMENT NO. 28 and DOCUMENT NO. 33, respectively), to both of which Japan was a Party. (She was not a party to the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49), but she did agree, early in her involvement in World War II (1941-1945), that she would apply it *mutatis mutandis*). When compared with the actual treatment of prisoners of war by the Imperial Japanese Army during World War II (see DOCUMENT NO. 101), these Regulations demonstrate how a nation can sometimes produce surface evidence of compliance with the laws and customs of war while actually paying no attention whatsoever to them. Japan's calculated maltreatment of prisoners of war during World War II reached a level unknown since the Dark Ages of history and was equalled only by the German treatment of Russian prisoners of war and the Russian treatment of all prisoners of war during that conflict.

TEXT

REGULATION FOR THE TREATMENT OF PRISONERS OF WAR

CHAPTER I

GENERAL PROVISIONS

ARTICLE 1

A prisoner of war, as defined in these regulations, is any enemy combatant who has fallen into the power of the Empire or any other person who is to be accorded the treatment of a prisoner of war by virtue of international treaties and customs.

ARTICLE 2

A prisoner of war shall be humanely treated and in no case shall any insult or maltreatment be inflicted upon him.

ARTICLE 3

A prisoner of war shall be given appropriate treatment, according to his status or rank. However, this shall not apply to any persons who do not answer truthfully to interrogations regarding his name and rank or to any person who is guilty of other offenses.

ARTICLE 4

A prisoner of war shall be controlled according to the regulations of the Imperial Army and he shall not otherwise be arbitrarily restrained.

ARTICLE 5

A prisoner of war shall enjoy freedom of religion and may participate in the religious ceremonies of his own denomination, insofar as military discipline and public morals are not prejudiced thereby.

ARTICLE 6

In case a prisoner of war is guilty of an act of insubordination, he shall be subject to imprisonment or arrest; and any other measures deemed necessary for the purpose of discipline may be added.

Troops may be used to halt an attempt at escape by prisoners of war and, in case of necessity, may inflict injury or death upon them.

ARTICLE 7

A prisoner of war, not on parole, who is captured before he succeeds in escaping shall be subject to disciplinary punishment.

Said prisoner of war who initially succeeds in escaping and is again captured shall not be liable to any punishment for his previous escape.

ARTICLE 8

In addition to the disciplinary methods prescribed in the preceding Article the criminal offenses of prisoners of war shall be tried by army court martial according to the Army Disciplinary Punishment Ordinance.

CHAPTER II

Capture and Evacuation of Prisoners of War

ARTICLE 9

Whenever persons who are to be prisoners of war are taken into custody, an immediate inspection shall be made of their personal belongings. Arms, ammunition, and other objects of military use shall be confiscated. All other articles shall be either left in the possession of the prisoners or received for deposit.

ARTICLE 10

Commissioned officers among the prisoners of war mentioned in the preceding Article upon whom it is deemed necessary to confer special honor may be authorized by the commander of an army or of an independent division to retain swords belonging to them in their possession.

In the case specified in the preceding paragraph the names of the officers together with the reasons for the action shall be reported to the Imperial Headquarters and the latter shall in turn notify the Minister of War of the matter. The swords retained by them shall be received for deposit, when they are taken in a prisoner of war camp.

ARTICLE 11

At the close of military engagement, the commander of an army or the commander of an independent division may, by an agreement with the enemy, repatriate or exchange the wounded or sick prisoners of war, and he may, if deemed expedient, set at liberty any prisoners of war; provided that said prisoner of war takes an oath that he will refrain from participating

further in any military engagements during the same war.

In the case mentioned in the preceding paragraph, the rank, the number of prisoners of war, and the reasons for their release shall be reported to the Imperial Headquarters which in turn shall notify the Minister of War.

ARTICLE 12

Any unit which has captured prisoners of war shall interrogate each prisoner of war regarding his name, age, rank, place of origin, the unit to which he has been attached in his home country, and the date and the place at which he was wounded; and said unit shall prepare a roster of the prisoners of war, a prisoner of war journal, and a register of articles confiscated or received for deposit as prescribed in Article 9.

When prisoners of war have been repatriated, exchanged, or set at liberty on parole, such facts shall be stated in the roster of the prisoners of war.

ARTICLE 13

Prisoners of war shall be segregated into officers and personnel lower than warrant officer, and they shall be evacuated under guard to the nearest communication center or to a transportation and communication authority.

In the above case, objects received for deposit, the roster of prisoners of war, the prisoner of war journal, and the register of objects shall be sent along with the prisoners of war.

ARTICLE 14

Any unit, communication center, or transportation and communication authority which has made arrangements with a naval commander for the delivery of prisoners of war will get, along with the prisoners of war, objects kept for deposit, a roster of prisoners of war, a prisoners of war journal, and a register of objects.

ARTICLE 15

The commander of an army or the commander of an independent division shall promptly report the number of prisoners of war to be evacuated to the Imperial Headquarters, which shall notify the Ministry of War.

ARTICLE 16

When the Ministry of War has received the notice mentioned in the preceding article, it shall report to the Imperial Headquarters the port or other place at which the delivery of the prisoners of war is to be made, and the Imperial Headquarters shall in turn notify the Ministry of War as to the time and date of the arrival of the prisoners of war at the said places.

The same procedure shall apply when the Ministry of War has received Notice regarding the delivery of naval prisoners of war.

ARTICLE 17

Any communication center or any transportation and communication authority which has received the delivery of prisoners of war in accordance with either Article 13 or 14 shall evacuate such prisoners under guard to the places mentioned in the preceding Article and then deliver them to the person authorized by the Ministry of War to receive them, together with the objects left for deposit, a roster of prisoners of war, a prisoner of war journal, and a register of objects.

ARTICLE 18

The "Imperial Headquarters" shall read the "General Staff," in case no Imperial Headquarters has been established.

CHAPTER III

Imprisonment and Administration of Prisoner of War

ARTICLE 19

Repealed

ARTICLE 20

Army buildings, temples, and other buildings which are not detrimental to the honor and health of the prisoners of war and which are adequate enough to prevent their escape shall be assigned as prisoner of war camps.

ARTICLE 21

The commander of an army or the commander of a garrison who administers a prisoner of war camp (henceforth called the chief administrator of the prisoner of war camp) shall establish the standing orders of the prisoner of war camp and shall make a report thereof to the Minister of War and to the Director of Prisoners of War Information Bureau.

ARTICLES 22-25

Repealed

ARTICLE 26

Inasmuch as all postal matter sent to or by prisoner of war are exempt from all postal charges by international agreement, the chief administrator of the prisoner of war camp shall provide for adequate postal procedures through arrangements with the post offices in the locality.

ARTICLE 27

The regulations for the administration of prisoners of war in prisoner of war camps shall be established by the chief administrator of the prisoner of war camp.

The regulations mentioned in the preceding paragraph shall be reported to the Minister of War and to the Director of Prisoners of War Information Bureau.

CHAPTER IV

Miscellaneous Provisions

ARTICLE 28

The enemy wounded and sick who, after having received medical treatment at a hospital or a medical dressing station, are deemed to be unfit for military service shall be repatriated if they make an oath that they shall not bear arms again during the same war. However, this article shall not apply to persons who might play an important part in the war.

ARTICLE 29

The personal effects of a prisoner of war which have been deposited with a government office shall be returned to him upon his release.

ARTICLE 30

Articles and money left by deceased prisoners of war shall be sent to the Prisoner of War Information Bureau from the unit, government office, hospital, or medical dressing station which has jurisdiction over them.

However, in cases where the nature of the article is such that they cannot be preserved, they shall be sold and the proceeds thereof shall be sent.

ARTICLE 31

The wills of prisoners of war shall be given the same treatment as that given to the wills of the members of the Imperial Army at any unit, government office, hospital, or medical dressing station which has jurisdiction over them, and they shall be sent to the Prisoner of War Information Bureau.

ARTICLE 32

Repealed

ARTICLE 33

When an application has been made to administer direct relief to a prisoner of war by a relief society which has been duly established with a charitable purpose, permission may be granted therefore, provided that it shall not violate any of the rules for the administration of the prisoners of war.

DOCUMENT NO. 57

JAPANESE DISCIPLINARY LAW FOR PRISONERS OF WAR
(9 March 1943)

SOURCE

International Military Tribunal for the Far East, Exhibit No. 1965-A, at 29 (National Archives of the United States)

NOTE

This "Disciplinary Law," like the Japanese "Detailed Regulations for the Treatment of Prisoners of War" (DOCUMENT NO. 58), indicates that, even officially and publicly, the Imperial Japanese Army did not really intend to comply with the relevant provisions of the 1907 Hague IV Regulations (DOCUMENT NO. 33), by which Japan was bound, or of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49), by which Japan was not bound but which she had agreed to abide by, *mutatis mutandis*, during World War II (1941-1945). For example, the Hague IV Regulations (and the 1929 Convention) provide that an unsuccessful attempt to escape subjects the offending prisoner of war to disciplinary (minor) punishment only. Article 7 of the Japanese Disciplinary Law, on the other hand, provides that the permissible punishment for this offense shall be either death or imprisonment for life to a minimum of imprisonment for one year; and as a matter of actual practice, the unsuccessful escapee could expect to be executed immediately upon recapture, without a trial and in a most cruel manner. (See, for example, DOCUMENT NO. 101 under the rubric "Excessive and Unlawful Punishment was Imposed.")

TEXT

DISCIPLINARY LAW FOR PRISONERS OF WAR

ARTICLE 1

This law applies to prisoners of war who have committed criminal offenses.

ARTICLE 2

The leader among a group of persons guilty of mob violence or mob intimidation shall be subject either to the death penalty or to hard labor or imprisonment for life. The other persons involved shall be subject to either hard labor or confinement for life or for a minimum of one year.

Persons who have made preparations or conspired to commit the crimes mentioned in the preceding paragraph shall be subject to either hard labor or to confinement for life or for a minimum of one year.

ARTICLE 3

Prisoners of war who kill a person supervising, guarding, or escorting them shall be subject to the death penalty.

Persons who have made preparations or conspired to commit the crime mentioned in the preceding paragraph shall be subject to either hard labor or to confinement for a minimum of two years.

ARTICLE 4

Prisoners of war who inflict injury or commit any act of violence or intimidation against any person supervising, guarding, and escorting them shall be subject to either the death penalty, or to hard labor or to imprisonment for life or for a minimum of two years.

The leader of a group of persons who have acted together in committing the offenses mentioned in the preceding paragraph shall be subject to the death penalty, or to hard labor or to imprisonment for life. The other persons involved shall be subject to either the death penalty or to hard labor or imprisonment for life or for a minimum of three years.

Persons who have caused death in committing the offenses mentioned in the preceding two paragraphs shall be subject to the death penalty.

ARTICLE 5

Prisoners of war who defy or disobey the orders of persons supervising, guarding, or escorting them shall be subject to either the death penalty, or to hard labor or imprisonment for life or for a minimum of one year.

The leader of a group of persons who have acted together in committing the offenses mentioned in the preceding paragraph shall be subject to either the death penalty or to hard labor or to imprisonment for life. The other persons involved shall be subject to either the death penalty, or to hard labor or to imprisonment for life or for a minimum of two years.

ARTICLE 6

Prisoners of war who insult persons supervising, guarding, or escorting them either in their presence or publicly shall be subject to either hard labor or imprisonment for a maximum of five years.

ARTICLE 7

The leader of a group of persons who have acted together in effecting an escape shall be subject to either the death penalty, or to hard labor or to imprisonment for life or for a minimum of ten years. The other persons involved shall be subject to either the death penalty, or to hard labor or to imprisonment for life or for a minimum of one year.

ARTICLE 8

Any attempts to commit any of the offenses mentioned in the first paragraphs of Articles 2, 3, and 4, the second paragraph of Article 4, and the preceding article shall be punishable.

ARTICLE 9

Persons on parole who break the parole shall be subject to either the death penalty, or hard labor, or imprisonment for life or for a minimum of seven years.

When the persons mentioned in the preceding paragraph offer armed resistance, they shall be subject to the death penalty.

ARTICLE 10

Those persons who have taken an oath not to escape and who violate this oath shall be subject to either hard labor or imprisonment for a minimum of one year. Those persons who violate any other oaths shall be subject to a maximum of ten years.

ARTICLE 11

A person who, having the intention of committing a disobedient act, incites other persons shall be deemed as a leader and be subject to hard labor or confinement for a minimum of one year and a maximum of ten years. The other persons involved shall be subject to hard labor or confinement for a minimum of six months and a maximum of five years.

ARTICLE 12

The provisions of Article 7 shall not apply to any person, who has been made a prisoner of war for the second time, for any offenses committed during his previous status as a prisoner of war.

DOCUMENT NO. 58

JAPANESE DETAILED REGULATIONS FOR THE TREATMENT OF PRISONERS OF WAR
(21 April 1943, as amended)

SOURCE

International Military Tribunal for the Far East, Exhibit No. 1965-A, at 7
(National Archives of the United States)

NOTE

These "Detailed Regulations for the Treatment of Prisoners of War," like the "Disciplinary Law" (DOCUMENT NO. 57), are considerably more revealing of the actual maltreatment of prisoners of war which could be expected from the Imperial Japanese Army during World War II (1941-1945) than were the basic "Regulations for the Treatment of Prisoners of War" (DOCUMENT NO. 56) themselves; but even so, they still do not tell the whole story. For example, Article 5(1) of these Regulations requires prisoners of war to take an oath not to escape. This is in violations of the laws and customs of war. Article 5(2) of these Regulations provides that those prisoners of war to take an oath not to escape. This is in violation of the laws surveillance." Actually, when the British soldiers captured at Singapore refused to take the oath not to escape, they were denied food and water and they were physically maltreated. (See DOCUMENT NO. 101, under the rubrics "Prisoners and Internees Forced to sign Parole" and "Excessive and Unlawful Punishment was Imposed.")

TEXT

DETAILED REGULATIONS FOR THE TREATMENT OF PRISONERS OF WAR

ARTICLE 1

These detailed regulations provide for matters relating to the treatment of prisoners of war at prisoner of war camps.

ARTILE 2

The commander of an army or the commander of a garrison who administers prisoner of war camps (henceforth called the chief administrator of the prisoner of war camps) may, whenever necesssary, establish temporary detachments of a prisoner of war camp or of a branch thereof.

ARTICLE 3

Warrant officers and commissioned officers shall be separated from non-commissioned officers and enlisted men in the housing arrangement for prisoners of war and they shall be further sub-divided according to nationality, rank, and status, unless the imprisonment facilities do not permit such division.

ARTICLE 4

Orderlies may be chosen from prisoners of war who are enlisted men (or

non-commissioned officers, whenever necessary) to be attached to prisoners of war who are officers or warrant officers. However, the number of such orderlies shall ordinarily be one to every two or more officers.

ARTICLE 5

As soon as prisoners of war have been imprisoned, they shall be administered an oath forbidding them from making an escape.

Prisoners of war who refuse to take the oath mentioned in the preceding paragraph shall be deemed to have intentions of escaping and shall be placed under strict surveillance.

ARTICLE 6

The policing of prisoners of war camps shall ordinarily be done by employees attached to such camps. A few members of the guards may be posted when necessary.

ARTICLE 7

Extreme care and stringent rules shall be adopted for the purpose of taking all possible precautions against the danger of fire at prisoner of war camps.

ARTICLE 8

Prisoners of war shall not be allowed to drink alcoholic liquors or smoke without authorization.

ARTICLE 9

A number of qualified persons may be chosen from the prisoners of war according to the total number of prisoners of war, conditions of housing, etc., in order to assist in the transmission of orders, presentation of petitions, prevention of fires, and the administration of the prisoner of war camp.

ARTICLE 10

Prisoners of war, whenever necessary, may be allowed to go outside the camp accompanied by a custodian. However, care shall be taken as to the choice of the area and provisions made for their control, particularly in regard to the prevention of their escape and their relationships with the local population.

ARTICLE 11

Persons who desire to enter the prisoner of war camps shall obtain permission from the commandant of the camp. However, in the case of foreigners, such permission shall be granted by the Minister of War.

However, relatives of prisoners of war who reside outside of the Empire and who are not included in the preceding provision may obtain permission from the commandant of the camp according to the provisions made by the chief administrator of prisoner of war camps.

ARTICLE 12

An inquiry shall be made as to the object, status, occupation, etc., of any person who desires to enter a prisoner of war camp, and extreme care shall be taken for controlling them and for preventing espionage, and no persons shall be allowed to enter unless it is necessary.

ARTICLE 13

When an interview with a prisoner of war has been authorized, necessary restrictions regarding the place, the time of interview, and the range within

which the conversation may be conducted may be imposed for the purpose of control and a guard shall also be present at this interview.

ARTICLE 14

As soon as the prisoners of war have been interned, the commandant of the prisoner of war camp shall divide each nationality group of the prisoners of war into army, navy, air, and civilian personnel. With respect to the armed forces, a further division shall be made as to commissioned officers and enlisted men, including warrant officer, and the commandant shall send a report thereof to the Minister of War and to the Director of the prisoner of war Information Bureau. The same measures shall be taken when the prisoners of war are released or transferred to another camp.

ARTICLE 15

After the internment of prisoners of war, the commandant of the prisoner of war camp shall immediately record the name, nationality, unit, rank or status, and state of health of the prisoners of war on the form shown in the appendix and make a report thereof to the Director of the Prisoner of War Information Bureau.

ARTICLE 16

After the commandant of the prisoner of war camp has sent the report mentioned in the preceding article, he shall make an inquiry of the name, date of birth, nationality, rank or status, unit, place and date of capture, surnames of parents, place of origin, occupation, etc., and record them on individual record blanks to be supplied by the Prisoner of War Information Bureau, and he shall keep one copy at the prisoner of war camp and send another copy to the Director of the Prisoner of War Information Bureau.

ARTICLE 17

When a prisoner of war is removed from one prisoner of war camp to another, the individual record for said prisoner kept at the former camp shall be sent to the latter camp together with the prisoner.

In the case of the death of the prisoner of war the individual record for such prisoner shall be kept in safe custody until the prisoner of war camp has been closed. The same shall apply in cases where prisoners of war have been released.

When a war or an incident has terminated and a prisoner of war camp has been closed, all individual records in custody thereat shall be transmitted to the Prisoner of War Information Bureau.

ARTICLE 18

At the end of each month the commandant of the prisoner of war camp shall collect all matters concerning internments, removals, releases, deaths, escapes, control, work, pay, correspondence, sanitation, relief, propaganda, crimes, punishments, etc., and prepare a monthly report which shall also include a list of the prisoners of war and he shall report the same to the Minister of War and to the Director of Prisoner of War Information Bureau. However, on urgent matters, this report shall be submitted whenever it is necessary.

ARTICLE 19

A journal shall be kept at each prisoner of war camp which shall record the administration, interviews, and other important items about the prisoners of war and which shall serve as material for future investigations.

Said journal shall be transmitted to the Prisoner of War Information Bureau when the prisoner of war camp is closed.

ARTICLE 20

An infirmary (including recreation room) shall be established for the examination and treatment of prisoners of war whose conditions do not necessitate hospital treatment.

ARTICLE 21

Hospital wards shall be attached to prisoner of war camps, in the event that they are found to be necessary, in which patients requiring admittance shall receive treatment.

Hospital wards shall be furnished with the necessary medical supplies, clothing, bedding, and other miscellaneous articles.

Medical services for the hospital wards mentioned in the preceding articles can be rendered by staff members of the nearest army hospital in addition to their other duties.

However, in cases of necessity, relief squads from the Japanese Red Cross Society may render medical services under the direction and supervision of a medical officer.

ARTICLE 22

[omitted in original]

ARTICLE 23

Members of the enemy medical personnel may assist in the medical treatments to be rendered at the infirmaries and hospital wards mentioned in Articles 21 and 22 whenever necessary.

ARTICLE 24

Prisoner of war patients who require special medical treatments and patients having contagious diseases may be admitted to an army hospital after consultation with the commandant of the prisoner of war camp and the director of the nearest army hospital.

ARTICLE 25

The Minister of War shall determine when the facilities for the handling of postal matter, postal money orders, and telegrams to be dispatched by the prisoners of war shall be open to them.

ARTICLE 26

The commandant of the prisoner of war camp shall be responsible for the censorship of postal matters, postal money orders, and telegrams sent by or to prisoners of war.

ARTICLE 27

All postal matters, postal money orders, and telegrams sent by or to prisoners of war shall be strictly censored, and if they are deemed to be prejudicial to the prevention of espionage or to the administration of the prisoners of war, they may be confiscated or prevented from being sent.

ARTICLE 28

At some easily visible place on the face of all postal matter and postal money order sent by or to prisoners of war shall be stamped a seal-impression which identifies the censoring officer and designates the prisoner of war camp and which attests to the fact that these items have been duly censored.

ARTICLE 29

All postal matter addressed by a prisoner of war to his home government, unit, government office, military school, or warship, and all postal matter addressed by the latter to prisoners of war, and all postal matter sent by or to any important prisoner of war shall, if deemed necessary, be sent to the Prisoner of War Information Bureau for censorship.

ARTICLE 30

The number of postal matters to be dispatched by the prisoner of war, the paper to be used, and the instructions as to the contents, shall be determined by the commandant of the prisoner of war camp. Whenever possible, paper bearing the printed designation of the particular prisoner of war camp shall be used.

ARTICLE 31

Prisoners of war shall not be allowed to dispatch any postal matter or telegrams falling under the following heads, except those articles which fall under heads 1 and 2 and which have been especially approved by the commandant of the prisoner of war camp.

1. Those which have as their object the communication of matters relative to military, political, financial, and economic affairs.

2. Those addressed to prisoners of war at another prisoner of war camp.

3. Those which employ any code or are suspected of employing any secret formulas.

4. Those which have as their object the communication of any matter prejudicial to the Empire relative to the treatment of prisoners of war, etc.

ARTICLE 32

The commandant of the prisoner of war camp shall prescribe rules and regulations for the handling of postal matters, postal money order, and telegrams sent by or to prisoners of war, and he shall make report thereof to the Minister of War and to the Director of the Prisoner of War Information Bureau.

ARTICLE 33

The commandant of the prisoner of war camp shall determine the maximum amount of cash which a prisoner of war may retain in his possession, taking into consideration his rank.

The maximum amount of cash mentioned in the preceding paragraph shall not be excessive, and the balance shall be kept for deposit in the custody of the finance officer at the prisoner of war camp.

ARTICLE 34

When other persons desire to make contributions of gifts and money to prisoners of war, the commandant of the prisoner of war camp shall inquire as to the contents and the reason for the contribution and if he deems it

permissible from the standpoint of the administration of the prisoners of war, he shall grant permission therefor.

The same shall apply in cases where money and articles are sent by the prisoners of war.

ARTICLE 34 Part 2

Money given as contributions to prisoners of war and money left by prisoners of war who die during imprisonment shall be treated as cash not to be included in the annual revenues and expenditures.

The same shall apply to the proceeds from articles left by deceased prisoners of war which are sold in accordance with the proviso of Article 30 of the Regulations for the Treatment of Prisoners of War.

ARTICLE 35

With approval of the chief administrator of the prisoner of war camps, each prisoner of war camp shall be provided with a canteen.

ARTICLE 36

If a prisoner of war desires to purchase articles of luxury or of daily use at his own expense elsewhere than at the canteen in the prisoner of war camp, the commandant of the prisoner of war camp may allow this if he deems it to be unobjectionable from the standpoint of the administration of the prisoners.

ARTICLE 37

When a prisoner of war dies while in internment, a ceremony appropriate to his rank or status shall be conducted.

The corpse shall generally be buried in a proper place. However, it may be cremated after the will, the religion, and the wishes of the deceased's have been taken into consideration.

When the corpse has been cremated according to the provisos of the preceding paragraph, the ashes may either be buried in a proper place or be kept in safe custody.

DOCUMENT NO. 59

JAPANESE REGULATIONS ON THE WORK OF PRISONERS OF WAR
(20 May 1943)

SOURCE

International Military Tribunal for the Far East, Exhibit No. 1965-A, at 14 (National Archives of the United States)

NOTE

Like the Japanese "Regulations for the Treatment of Prisoners of War (DOCUMENT NO. 56), these Regulations are substantially in accordance with the relevant provisions of the 1907 Hague IV Regulations (DOCUMENT NO. 33) and the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49), although they do fail to contain any reference to the restrictive provisions of those agreements prohibiting work that was excessive or that had to do with military operations. Actually, during World War II (1941-1945), the work required of prisoners of war by the Imperial Japanese Army, men who were always underfed and who were frequently seriously ill, was often so excessive and was often required to be performed under such adverse conditions as to cause an extremely high rate of mortality — an average of 27%, and sometimes reaching close to 50%; and no distinction was made between work connected with military operations and work not so connected. See, for example, DOCUMENT NO. 101, under the rubrics "Burma-Siam Railroad," "Illegal Employment, Starvation and Neglect of Prisoners [of War] and Internees," and "Consideration for Racial Needs — Work"; and DOCUMENT NO. 89.

TEXT

REGULATIONS ON THE WORK OF PRISONERS OF WAR

ARTICLE 1

Prisoners of war (excluding prisoners of war who are officers) may be employed on work according to the provisions of this order; however, these provisions shall not apply in cases where the Prisoner of War Dispatch Regulations are applicable.

The work mentioned in the above paragraph shall be determined according to the state of health, skill, status in the home country, etc., of the prisoner of war.

Prisoners of war who are officers may be allowed to be employed on work of their own choosing, in which case these regulations shall apply; however, no pay shall be granted.

ARTICLE 2

The commandant of the prisoner of war camp can assign prisoners of war to labor details within the camp.

ARTICLE 3

The commander of an army or the commander of a garrison (hereinafter called the chief administrator of prisoner of war camps) may order prisoners of war to be employed on work at any military organization outside the prisoner of war camp. In such a case the authorization of the Minister of War must previously be obtained regarding the number of prisoners, place, description, hours of work, and period of work, etc., but no such authorization shall be necessary outside the Empire (which term shall herein after include Japan Proper, Chosen, and Taiwan).

When the chief administrator of prisoner of war camps intends to order prisoners of war to be employed on work at any army organization outside the Empire, he shall immediately submit a report to the Minister of War regarding the number of prisoners, place, description, hours of work, and period of work, etc.

ARTICLE 4

The pay in cases where prisoners are to be employed on work in accordance with the provisions of the preceding two Articles shall be defrayed by the prisoner of war camp concerned.

ARTICLE 5

Persons who desire to employ prisoners of war outside of army units (except in areas outside the Empire) shall submit an application to the Minister of War for permission to employ prisoners of war and the same procedure shall apply to persons who desire to make any changes in the contents of the application or in the work permit approved by the Minister of War.

The procedure for submitting the application for permission to employ prisoners of war, as mentioned in the preceding paragraph, shall be given in a separate proclamation.

ARTICLE 6

When the Minister of War has granted permission for the application referred to in the preceding paragraph, he shall determine the number of prisoners of war, the place of work, type of work, hours, pay, period of work, etc., and shall so notify the chief administrator of prisoner of war camps.

ARTICLE 7

When the chief administrator of prisoner of war camp [*sic*] has received the notice mentioned in the preceding paragraph, he shall make adequate provisions for the control of the prisoners of war and then shall proceed to set them at work.

ARTICLE 8

Persons who desire to employ prisoners of war outside an army unit after [*sic*] in any place outside the Empire shall submit an application for a work permit after [*sic*] the form shown in the appendix to the chief of [*sic*] administrator of prisoner of war camps for his approval and the same procedure shall apply to persons who desire to make any changes in the contents of the application or in the work permit approved by the chief administrator of prisoner of war camps.

ARTICLE 9

When the chief administrator of prisoner of war camps has approved the application mentioned in the preceding Article, he shall make adequate provisions for the administration of the prisoners of war and shall proceed to set them to work.

ARTICLE 10

When the chief administrator of prisoner of war camps has set the prisoners of war to work outside the army units, as mentioned in a preceding Article, he shall submit a report to the Minister of War stating the number of prisoners of war employed, place of work, type of work, pay, hours, period of work, etc.

ARTICLE 11

Applications for permission to employ prisoners of war by a public body or corporation shall be submitted by the representatives. (TN. The application obviously must be submitted to the chief administrator of prisoner of war camps.)

ARTICLE 12

Persons other than military personnel who have received permission to employ prisoners of war (hereafter called the employer of prisoners of war) shall offer the necessary number of guards to be determined by the commandant of the prisoner of war camp for the purpose of control during the period of employment. Said guards shall be under the direction of the commandant.

ARTICLE 13

The employer of prisoners of war shall assume the responsibility of directing the work of the prisoners of war under the supervision of the commandant of the prisoner of war camp. In directing the aforesaid work the employer may rely on use of guards mentioned in the preceding Article.

ARTICLE 14

The employer of prisoners of war shall deliver monthly on or before the date fixed by the commandant of the prisoner of war camp, the wages prescribed by the commandant.

ARTICLE 15

The employer of prisoners of war may offer donations of money or gifts to the commandant of the prisoner of war camp to be distributed for purpose of encouraging the prisoners of war in their work or for mitigating their hardships.

When the commandant of the prisoner of war camp deems the contribution mentioned in the preceding paragraph to be unobjectionable from the standpoint of the administration of the prisoners of war, he may allow the contribution and distribute them to the prisoners of war as required.

ARTICLE 16

The employer of prisoners of war shall at the end of each month submit a report to the commandant of the prisoner of war camp in conformity to his specifications on the progress of the work of the prisoners of war.

ARTICLE 17

When any employer of prisoners of war has violated any of the provisions of the work permit approved either by the Minister of War or by the chief administrator of prisoner of war camps pursuant to Article 5 or 8, or the regulations specified by the commandant of the prisoner of war camp for the administration of the prisoners of war pursuant to Article 7 or 9; the Minister of War (if outside the Empire, the chief administrator of prisoner of war camps) may cancel the authority to employ prisoners of war.

In addition to the provision of the preceding paragraph, the Minister of War can cancel the authority to employ prisoners of war whenever he deems it necesssary.

In the case mentioned in paragraph 1, the employer of prisoners of war may not demand compensation for any damages caused by the revoking of such authorization.

ARTICLE 18

The employer of prisoners of war shall not perform any acts affecting the prisoners of war which are not provided for in this order unless special permission has been given by the Minister of War for the acts.

ARTICLE 19

The pay delivered by the employer of prisoners of war pursuant to Article 14 shall be kept in safe custody by a finance officer at the prisoner of war camp; however a part thereof shall be paid to the national treasury in the form of a supplement allowances to be granted to prisoners of war. The amount to be paid shall be specified in another Article.

The pay which is kept in safe custody by a finance officer at the prisoner of war camp as mentioned in the preceding paragraph shall be considered as cash not to be included in the annual revenues and expenditures.

ARTICLE 20

The money held in custody by a finance officer at the prisoner of war camp according to the previous Article shall be distributed together with the money mentioned in Article 4 to the prisoners of war concerned in a manner to be determined by the commandant of the prisoner of war camp.

Additional Provision

This Order shall become effective on and after day of its promulgation.

Persons who have been employing prisoners of war outside army units according to the provisions heretofore in effect shall submit an application to the Minister of War for permission to employ prisoners of war in accordance with either Article 5 or 8 within thirty days (sixty days, if outside the Empire) after the date on which this order becomes effective.

Additional Provision

This order shall become effective on and after 1 August 1943.

DOCUMENT NO. 60

MILITARY ARMISTICE BETWEEN THE ALLIED FORCES AND ITALY (3 September 1943) and INSTRUMENT OF SURRENDER (29 September 1943)

SOURCES

61 Stat. 2740
3 Bevans 769
40 AJIL Supp. 1

NOTE

This Military Armistice took Italy out of World War II (1939-1945) as a member of the Axis and enabled her to reenter the War on the side of the Allied Powers. Like other agreements of this nature (see, for example, DOCUMENT NO. 50 and DOCUMENT No. 64), there was a provision for the immediate handing over of all members of the armed forces of the victors, the Allied Powers, held by Italy, but no provision for a reciprocal disposition with respect to the members of the Italian armed forces held by the Allied Powers. The "Instrument of Surrender," signed 26 days later (sometimes labelled "Additional Conditions of Armistice"), was to the same effect. (The major problem here was to attempt to prevent the Germans, who continued the war, from obtaining custody of the members of the Allied armed forces who were prisoners of war of the Italians and transferring them to Germany.)

EXTRACTS

MILITARY ARMISTICE:

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.

INSTRUMENT OF SURRENDER:

32. (A) Prisoners of war belonging to the forces of or specified by the United Nations and any nationals of the United Nations, including Abyssinian subjects, confined, interned, or otherwise under restraint in Italian or Italian-occupied territory will not be removed and will forthwith be handed over to representatives of the United Nations or otherwise dealt with as the United Nations may direct. Any removal during the period between the presentation and the signature of the present instrument will be regarded as a breach of its terms.

DOCUMENT NO. 61

REX v. KREBS
(Magistrate's Court of the County of Renfrew, Ontario, Canada, 7 October 1943)

SOURCES

[1943] 4 D.L.R. 553 (Ont.)
80 Can. C.C. 279
38 AJIL 505
12 Ann. Dig. 407

NOTE

This decision of an inferior Canadian court involves the theft by an escaping prisoner of war of a number of items all of which, it was determined, would be of use to him in effectuating his escape. As a result, the court found him not guilty of theft. This same rule of law was actually later applied in *Rex* v. *Brosig* (DOCUMENT NO. 66), even though a different finding on the facts was reached in that case. While the decision in the present case was specifically rejected in two later Canadian cases (DOCUMENT NO. 62 and DOCUMENT NO. 67), the rule exempting prisoners of war from criminal responsibility for thefts of property for use in facilitating escape and not for purposes of self-enrichment has since been included as a part of Article 93(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). The maximum punishment for such an offense is now disciplinary punishment.

EXTRACTS

GALLIGAN P.M.: — Two weeks ago this accused was brought before me on a charge of breaking and entering and theft and elected for trial before me. On hearing the evidence I reserved judgment until to-day.

There seems to be very little authority in the way of case law for the determination of matters of this kind, and although I looked at all the authorities available here, I could find nothing exactly in point.

The accused is a German, a prisoner of war, who was a wireless operator on a German merchant ship. He was taken prisoner in 1939. He was confined at various places throughout the Empire, the last of these being the camp for prisoners of war at Petawawa Military Camp in this County. In July of this year he escaped from his confinement and was later retaken at Hornepayne, Ontario. Some time between the morning of July 16th and July 18th of this year he broke into a small house or cabin owned by one Herman Gould in the Township of Fraser, ate all the food he could find in the house and left taking with him a rifle, a quantity of ammunition therefor, a pouch, a watch, a flash light, batteries, a safety razor, a can opener, a jack knife, some matches and several articles of clothing.

All of the articles taken admittedly are articles which would be useful to a

man who expected to be in the bush for some time. All, in my opinion, can reasonably be considered necessaries under the circumstances, with the possible exception of the rifle and ammunition, and it is not difficult to think of circumstances wherein a lone man, in what is very near to being a wilderness, would find the rifle and ammunition also necessaries. This is particularly so when that man is an enemy of the country in which he finds himself, and is desirous of escaping from that country. He could not, under the circumstances, approach any of the very few settlers in that part of the country for assistance, because his full desire was to escape.

Although it has been represented to me that the onus is on the accused to show that the articles taken by him were essential for the purpose of assisting him in his escape, the evidence does not show this conclusively. In the evidence for the prosecution it is admitted that all the articles taken would be articles useful to a man situate as the accused was.

I believe that I have a right to draw upon my knowledge of the country in which the accused found himself in deciding whether or not the accused could reasonably consider that the articles taken by him were necessaries.

It is necessary to realize that the man could not get shelter except in a clandestine way. He was in part of the country where he might reasonably expect to meet with dangerous animals, and while to the denizen of the country bears and wolves may not be considered dangerous, they are so considered by those who are without real experience in the bush. Unquestionably, the accused was in what is practically a wilderness. He had no legitimate means of securing food, clothing, those things which would be necessary to provide him with fuel and light when needed, and protection against what would be reasonably considered by him danger from wild animals in the country in which he found himself.

It is my opinion that everything which the accused stole from Gould's house or cabin would be necessary, or extremely useful, to the accused in his endeavour to escape from Canada.

It has been suggested to me that once the prisoner escaped from the confinement of the prisoners' camp at Petawawa he was at liberty. In the case of the prisoner, I would think that to say that would be analogous to saying that a prisoner in a penitentiary would be at liberty when he had escaped from his cell, although still within the confines of the penitentiary. My opinion is that the prison of this accused is the domains of the United Nations, and until he passed from those domains he could not be said to be at liberty. I know of no authorities for this proposition, and have been unable to find any. Neither have I been able to find any to the contrary. The proposition appears to me to be a reasonable one. Even if the accused were to be considered as being at liberty, once he escaped from the confines of the prison camp at Petawawa, the question arises as to what are his rights in an endeavour to preserve that liberty.

Our Courts have assumed jurisdiction to try prisoners who are aliens, but in cases such as this, where the accused has been brought within the territorial jurisdiction of our Courts, our Courts have been careful to

differentiate between cases where the alleged offence was committed for the purpose of obtaining or preserving liberty and where it was committed for some other purpose.

* * * * *

The only question then is as to whether or not a person such as the accused, attempting to escape, or, having escaped, attempting to preserve that liberty, is punishable for offences against our law if the acts are reasonably necessary or reasonably calculated to facilitate his escape or to preserve his liberty.

In my opinion — although as I have said I can find no authority directly in point — the accused is not punishable at common law for an attempt to escape. He is not punishable at common law for doing anything reasonably calculated to assist in that escape, and in my opinion the same holds for anything done in an endeavour to preserve his liberty once gained.

This accused owes no allegiance to the Crown. He is an open and avowed enemy of the Crown, a man taken in war and a man who, if it is not his duty, may quite reasonably feel that it is his duty to escape from the domains of his captor state, and, if he can, return to the state to which he owes allegiance and perform his duty to that state.

Whatever may be finally decided in this matter, my opinion is that a prisoner of war is not punishable for anything he may reasonably do to escape, or having escaped, to preserve his liberty. My opinion also is that what the accused did was done with a view to facilitating his escape. He, therefore is not guilty of any crime.

I may say that I regret that this prosecution was not proceeded with by way of indictment so that it could have come in the first instance before a Court of superior jurisdiction. I sincerely hope that my decision will be appealed and that in future we will have some binding authority in a case such as this. Unfortunately most of the trials in the past have not had this particular point for decision, and unfortunately no Court, so far as I have been able to ascertain, has taken note of this issue at all. In this regard I may refer to the *Depardo case* where, although the matter was reserved for the opinion of the Judges and able argument was advanced to the Court by counsel for the Crown and the accused, no judgment was ever given by the Court, but the prisoner was — by what authority I do not know — discharged.

I have come to the conclusion that the prisoner is not guilty and so must dismiss the charge.

DOCUMENT NO. 62

REX v. SHINDLER ET AL
(Police Court, Alberta, Canada, 15 July 1944)

SOURCES

[1944] 3 W.W.R. 125 (Alta.)
82 Can. C.C. 206
12 Ann. Dig. 403

NOTE

This is another of the cases involving thefts committed by prisoners of war during the course of unsuccessful attempts to escape. The accused prisoners of war had stolen a motor vehicle, an item which certainly could have been of assistance to them in effectuating their escape. Nevertheless, this inferior trial court rejected the reasoning of *Rex* v. *Krebs* (DOCUMENT NO. 61) and, based upon a strict interpretation of Article 51(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49), found them guilty of the theft of a motor vehicle and sentenced them to one year's imprisonment at hard labor. Subsequently, one Canadian appellate court impliedly agreed with the law expressed in the *Krebs Case,* even though it found against the accused prisoners of war on the facts (DOCUMENT NO. 66), while another Canadian appellate court agreed with the law expressed in the present case (DOCUMENT NO. 67). Article 93(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) now specifically provides that prisoners of war who commit offenses against property to facilitate their escape, and not for purposes of self-enrichment, may be given disciplinary punishment only.

EXTRACTS

BEAUMONT, P.M. — With reference to the jurisdiction of the Canadian Courts to try prisoners of war, confined in Canada, for crimes alleged to have been committed outside their internment camp, I have come to the conclusion that the Canadian Courts have jurisdiction. I come to that conclusion after considering with great care the judgment of the learned police magistrate who presided in the case of *Rex v. Krebs,* 80 C.C.C. 279, [1943] 4 D.L.R. 553 (Ont.), and the cases therein referred to, and also the notice of appeal in *Rex v. Brosig* (not reported). The learned magistrate in the case just cited, *Rex v. Krebs,* appears to have read and considered a great number of ancient cases, dating back to 1775, and many learned treatises on the legal position of prisoners of war in a detaining country, but he seems to have completely overlooked the provisions of the International Convention relative to the treatment of prisoners of war at Geneva, July 27, 1929. He certainly never refers to them. I respectfully think that the learned magistrate's judgment might have been correct before The Geneva Convention, but I regret that I cannot agree with his judgment or views since that date. And so, with

deference, I refuse to follow his judgment.

Articles 45 and 51 of The Geneva Convention lead me inevitably to the conclusion I have reached. Article 45 says:

> "Prisoners of war shall be subject to the laws, regulations, and orders in force in the armed forces of the detaining Power."

Article 51 says:

> "Attempted escape, even if it is not a first offence, shall not be considered as an aggravation of the offence in the event of the prisoner of war being brought before the courts for crimes or offences against persons or property committed in the course of such attempt."

So also do Articles 52 and 53. Article 52 says:

> "Belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by judicial measures. This provision shall be observed in particular in appraising facts in connection with escape or attempted escape."
>
> "Prisoners qualified for repatriation against whom any prosecution for a criminal offence has been brought may be excluded from repatriation until the termination of the proceedings and until fulfilment of their sentence, if any; prisoners already serving a sentence of imprisonment may be retained until the expiry of the sentence."

Articles 54, 55 and 56 refer to the punishment, disciplinary punishment, thereby distinguishing that punishment from the punishment referred to in Articles 51 and 52.

In Article 75 provision is made for dealing with prisoners of war subject to criminal proceedings for a crime or offence at common law, and providing also for the prisoners of war being detained until the expiration of the sentence.

Articles 60 to 67, both inclusive, deal solely with the rights and so forth of prisoners of war in judicial proceedings.

Ch. 3, Part 2, of The Geneva Convention deals with disciplinary punishments. Part 3 deals with judicial proceedings. The only judicial proceedings I can contemplate are civil proceedings to answer for crimes committed by prisoners of war in our civil Courts. The prisoner of war in Canada is in the same position as a member of His Majesty's Canadian Forces.

For the above reasons I am clearly of the opinion that, in spite of the judgment referred to, a prisoner of war in this country, whose country was a signatory to The Geneva Convention, is subject to the civil laws of this country for crimes committed while escaping or attempting to escape, or after he has escaped from lawful custody.

Now, with reference to the facts: On the night of July 11 and 12, 1944, a car belonging to one Jacobs disappeared from his yard on sec. 8, tp.6, rge. 22, west of the fourth meridian. The car had in it at the time an old coat, Ex. 1. On the night of July 12 and 13, 1944, the four accused prisoners of war at the hostel near Magrath, and near the home of the owner of the car, escaped. One of them, Schulte, frequently went to Jacobs' farm and must have known of the

car. Later the car was found abandoned, plentifully bespattered with white pepper, about 15 miles away from where it had been taken from.

On July 13 one Peter Entz met the accused at his well about 10 a.m., 27 miles from the Jacobs home and prisoner of war hostel. Later, near there, the Royal Canadian Mounted Police found all four of the accused together some way from the Entz well.

Being brought to Lethbridge under arrest as escaped prisoners, the accused were put through the ordinary routine search of their belongings. In the belongings was a large quantity of white pepper, that is, a large quantity for such a commodity, and the coat of Jacobs, which was missing from the car when it was recovered. When asked where they got the coat, Schulte said they got it in the car. I am of the opinion that was only the one car they could have referred to, and that was the car taken from Jacobs' yard.

Taking the evidence as a whole, I am of the opinion that the Crown has proved beyond a reasonable doubt that the four accused stole the car in question, and I find each of them guilty of the charge laid against them.

DOCUMENT NO. 63

AGREEMENT FOR AN ARMISTICE BETWEEN THE SOVIET UNION AND THE UNITED KINGDOM, ACTING ON BEHALF OF ALL THE UNITED NATIONS AT WAR WITH FINLAND, ON THE ONE HAND, AND FINLAND ON THE OTHER HAND

(Moscow, 19 September 1944)

SOURCES

39 AJIL Supp. 85
145 BFSP 513

NOTE

Unlike most armistice agreements entered into at a point in time where the war continues between other belligerents (see, for example, DOCUMENT NO. 50 and DOCUMENT NO. 64), this agreement has a reciprocal provision concerning the repatriation of prisoners of war. This can probably be explained by the fact that while Finland could not possibly have won its war with the Soviet Union, when this armistice was signed Finland had not really lost it.

EXTRACTS

Article 10. Finland undertakes immediately to transfer to the Allied (Soviet) High Command, to be returned to their homeland, all Soviet and allied prisoners of war now in her power and also Soviet and allied nationals who have been interned in or deported by force to Finland. From the moment of signing the present agreement and up to the time of repatriation Finland undertakes to provide at her cost for all Soviet and allied prisoners of war and also nationals who have been deported by force and also interned, adequate food, clothing, and medical service in accordance with hygienic requirements, and also with means of transport for their return to their homeland. At the same time Finnish prisoners of war and interned persons now located on the territory of allied States will be transferred to Finland.

Article 13. Finland undertakes to collaborate with the allied Powers in the apprehension of persons accused of war crimes and in their trial.

DOCUMENT NO. 64

AGREEMENT CONCERNING AN ARMISTICE BETWEEN THE UNION OF SOVIET SOCIALIST REPUBLICS, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AND THE UNITED STATES OF AMERICA ON ONE HAND AND HUNGARY ON THE OTHER

(Moscow, 20 January 1945)

SOURCES

59 Stat. 1332
3 Bevans 995
39 AJIL Supp. 97
145 BFSP 788

NOTE

In this Armistice Agreement Hungary admitted its defeat by the Allied Powers (United Nations). It had already switched sides by declaring war on Germany. Nevertheless, like other armistice agreements between a victor and a vanquished (see, for example, DOCUMENT NO. 50), the provision with respect to the release of prisoners of war was unilateral, calling for the release of Allied prisoners of war but making no mention of the fate of the members of the Hungarian armed forces held by the Allies. Actually, it was only the Peace Treaty with Hungary, signed on 10 February 1947 (DOCUMENT NO. 90), which provided for the release and repatriation of these latter; and even then further bilateral agreements were required.

EXTRACTS

1. (a) Hungary has withdrawn from the war against the Union of Soviet Socialist Republics and other United Nations, including Czechoslovakia, has severed all relations with Germany and has declared war on Germany.

(b) The Government of Hungary undertakes to disarm German armed forces in Hungary and to hand them over as prisoners of war.

4. The Government of Hungary will immediately release all allied prisoners of war and internees. Pending further instructions the Government of Hungary will at its own expense provide all allied prisoners of war and internees, displaced persons and refugees, including nationals of Czechoslovakia and Yugoslavia, with adequate food, clothing, medical services, and sanitary and hygienic requirements, and also with means of transportation for the return of any such persons to their own country.

DOCUMENT NO. 65

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS RESPECTING LIBERATED PRISONERS OF WAR AND CIVILIANS LIBERATED BY FORCES OPERATING UNDER SOVIET COMMAND AND FORCES OPERATING UNDER UNITED STATES OF AMERICA COMMAND

(Yalta, 11 February 1945)

SOURCES

59 Stat. 1874
11 Bevans 1286
149 BFSP 934
For. Rel., The Conferences at Malta and Yalta, 1945, at 985
7 Documents on American Foreign Relations, 1944-1945, at 356

NOTE

Although signed by military officers, this agreement was actually a political decision. It is almost unique in that it is an agreement between two allies for the care and repatriation of members of the armed forces of one who are freed from enemy prisoner-of-war custody by the other. (A similar agreement was entered into by the Soviet Union with the United Kingdom and the Commonwealth countries at the same time. 147 BFSP 1047.) This situation has always arisen where a war is fought with allies, but normally the turnover is automatic and is accomplished by the military commanders without any need for a formal political decision and signed agreement. Subsequent developments disclosed that Stalin and the Soviet Union were fully aware of the fact that, given their choice, as Russian prisoners of war had been in the agreements entered into by the Soviet Union in its early years (see, for example, DOCUMENT NO. 38, DOCUMENT NO. 45, and DOCUMENT NO. 46), many members of the Soviet armed forces who had been prisoners of war would have elected to be released, but not repatriated. As a result, the charge is often made that this agreement reached at Yalta was responsible for causing thousands of suicides among Russian prisoners of war recovered by U.S. forces; and that it was also responsible for placing the Soviet Union in a position to execute other thousands who were repatriated, and to exile still other thousands to Siberia.

TEXT

The Government of the United States of America on the one hand and the Government of the Union of Soviet Socialist Republics on the other hand, wishing to make arrangements for the care and repatriation of United States citizens freed by forces operating under Soviet command and for Soviet

citizens freed by forces operating under United States command, have agreed as follows: —

Article 1.

All Soviet citizens liberated by the forces operating under United States command and all United States citizens liberated by the forces operating under Soviet command will, without delay after their liberation, be separated from enemy prisoners of war and will be maintained separately from them in camps or points of concentration until they have been handed over to the Soviet or United States authorities, as the case may be, at places agreed upon between those authorities.

United States and Soviet military authorities will respectively take the necessary measures for protection of camps, and points of concentration from enemy bombing, artillery fire, etc.

Article 2.

The contracting parties shall ensure that their military authorities shall without delay inform the competent authorities of the other party regarding citizens of the other contracting party found by them, and will at the same time take the necessary steps to implement the provisions of this agreement. Soviet and United States repatriation representatives will have the right of immediate access into the camps and points of concentration where their citizens are located and they will have the right to appoint the internal administration and set up the internal discipline and management in accordance with the military procedure and laws of their country.

Facilities will be given for the despatch or transfer of officers of their own nationality to camps or points of concentration where liberated members of the respective forces are located and there are insufficient officers. The outside protection of and access to and from the camps or points of concentration will be established in accordance with the instructions of the military commander in whose zone they are located, and the military commander shall also appoint a commandant, who shall have the final responsibility for the overall administration and discipline of the camp or point concerned.

The removal of camps as well as the transfer from one camp to another of liberated citizens will be effected by agreement with the competent Soviet or United States authorities. The removal of camps and transfer of liberated citizens may, in exceptional circumstances, also be effected without preliminary agreement provided the competent authorities are immediately notified of such removal or transfer with a statement of the reasons. Hostile propaganda directed against the contracting parties or against any of the United Nations will not be permitted.

Article 3.

The competent United States and Soviet authorities will supply liberated citizens with adequate food, clothing, housing and medical attention both in camps or at points of concentration and en route, and with transport until they are handed over to the Soviet or United States authorities at places

agreed upon between those authorities. The standards of such food, clothing, housing and medical attention shall, subject to the provisions of Article 8, be fixed on a basis for privates, non-commissioned officers and officers. The basis fixed for civilians shall as far as possible be the same as that fixed for privates.

The contracting parties will not demand compensation for these or other similar services which their authorities may supply respectively to liberated citizens of the other contracting party.

Article 4.

Each of the contracting parties shall be at liberty to use in agreement with the other party such of its own means of transport as may be available for the repatriation of its citizens held by the other contracting party. Similarly each of the contracting parties shall be at liberty to use in agreement with the other party its own facilities for the delivery of supplies to its citizens held by the other contracting party.

Article 5.

Soviet and United States military authorities shall make such advances on behalf of their respective governments to liberated citizens of the other contracting party as the competent Soviet and United States authorities shall agree upon beforehand.

Advances made in currency of any enemy territory or in currency of their occupation authorities shall not be liable to compensation.

In the case of advances made in currency of liberated non-enemy territory, the Soviet and United States Governments will effect, each for advances made to their citizens necessary settlements with the Governments of the territory concerned, who will be informed of the amount of their currency paid out for this purpose.

Article 6.

Ex-prisoners of war and civilians of each of the contracting parties may, until their repatriation, be employed in the management, maintenance and administration of the camps or billets in which they are situated. They may also be employed on a voluntary basis on other work in the vicinity of their camps in furtherance of the common war effort in accordance with agreements to be reached between the competent Soviet and United States authorities. The question of payment and conditions of labour shall be determined by agreement between these authorities. It is understood that liberated members of the respective forces will be employed in accordance with military standards and procedure and under the supervision of their own officers.

Article 7.

The contracting parties shall, whenever necessary, use all practicable means to ensure the evacuation to the rear of these liberated citizens. They also undertake to use all practicable means to transport liberated citizens to places to be agreed upon where they can be handed over to the Soviet or United States authorities respectively. The handing over of these liberated citizens shall in no way be delayed or impeded by the requirements of their temporary employment.

Article 8.

The contracting parties will give the fullest possible effect to the foregoing provisions of this Agreement, subject only to the limitations in detail and from time to time of operational, supply and transport conditions in the several theatres.

Article 9.

This Agreement shall come into force on signature.

DOCUMENT NO. 66

REX v. BROSIG
(Ontario, Canada, Court of Appeals, 1 March 1945)

SOURCES

[1945] 2 D.L.R. 232
12 Ann. Dig. 404
83 Can. C.C. 199

NOTE

Although the problem with respect to punishment for offenses committed by a prisoner of war during the course of an attempted escape has confronted civilian courts only rarely, this is probably because the offending prisoner of war has usually been tried by a military court, and not because the problem has not arisen. In fact, unlike Article 51(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49), which, as the present case demonstrates, was not exactly clear on the matter, Article 93(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) specifically immunizes the prisoner of war from punishment for offenses committed in aid of an attempted escape with two exceptions: (1) those involving violence against life or limb; and (2) those involving theft with the intention of self-enrichment. The decision in the present case would probably be correct even in the light of the 1949 Convention because of the specific finding made by the trial court that certain of the stolen items were taken, not to aid the escape effort, but "for his own comfort."

EXTRACTS

ROBERTSON C.J.O.: — I have had the privilege of reading the reasons for judgment prepared by Mr. Justice Gillanders, and I concur in the conclusion reached by him.

Any exemption that this prisoner of war may have from the criminal law of Canada can, I think, only be such as may be found in the Convention relating to the treatment of prisoners of war, concluded at Geneva, and dated July 27, 1929. While, no doubt a body of international law that has made great changes in the position of a prisoner of war, has developed since the time when prisoners of war were put to death, and, as more humane notions prevailed, that practice gave way to that of making slaves of them, and, still later, of putting them to ransom, it is in comparatively recent times that arrangements came to be made between warring nations, for the exchange of prisoners between the States themselves. There does not, however, appear to be any rule of international law, apart from whatever the Conventions between States may provide, whereby prisoners of war are entitled to exemption from the municipal laws of the country where they are held prisoner.

The Convention of 1929, in its articles dealing with prisoners of war, is not silent in respect to judicial proceedings against them, as distinguished from disciplinary punishment administered by the military authorities. It is plain from its express provisions that judicial proceedings are contemplated, such as may be taken against members of the armed forces of the detaining power who offend.

* * * * *

No doubt, cases will arise where it becomes a question whether the conduct of a prisoner of war is more properly to be regarded as a matter for military discipline, rather than for judicial proceedings as a breach of the criminal law. The question put by Lord Campbell in *Reg. v. Sattler* (1848), Dears. & Bell 525 at p. 543, 169 E.R. 1105, quoted by my brother Gillanders in his judgment in this case, may serve as an illustration. No such question arises in this case. The "looting" of the mail bag was not an act necessary for the escape of the prisoner of war. In my opinion it stands upon no different or higher footing than a similar act committed by a member of the armed forces of Canada. The act served no military purpose. It was an offence against the civil power for the personal advantage of the respondent.

In view of the considerations that I have stated, it is, in my opinion, the duty of the Court to deal with the charge against the respondent in the same way as we would deal with a similar charge against a member of the armed forces of Canada. The charge of stealing a parcel sent by parcel post was proved. His status as a prisoner of war does not exempt him from conviction, and it only remains to fix the penalty. No doubt, there were mitigating circumstances, and it so happens that since this charge was laid, the section of the *Criminal Code* that applies, has been amended so that we are able to prescribe for this offence a less severe sentence than a term of three years' imprisonment, which was formerly the minimum sentence allowed. I agree with my brother Gillanders that a term of two months' imprisonment is proper in the circumstances of this case.

Supplementing the references to authorities by my brother Gillanders, I refer to Wheaton's International Law, 7th ed., vol. 2. pp. 177 *ff.*; an article on Prisoners of War in 190 L.T. Jo. p. 150, and an article in 35 American Journal of International Law (pp. 522-3), dealing with escaped prisoners of war in a neutral jurisdiction.

HENDERSON J.A.: — I have had the privilege of reading the opinions of my Lord the Chief Justice and of my brother Gillanders, with which I agree.

GILLANDERS J.A.: — The respondent is a German prisoner of war, a paratrooper of the German Air Force, taken prisoner in Holland in 1942, transported first to England and later moved to Canada, where he has since been kept. On December 21, 1943, he secreted himself in a prisoner of war mail bag at the prisoner of war camp where he was detained. The mail bag was in due course placed with others in the mail car on a Canadian National train, its weight exciting comment but apparently not the suspicion of the railway mail clerks who moved it from place to place. The mail bag was finally placed close to a radiator in the mail car. Finally the accused, oppressed by heat and lack of fresh air, released himself from the bag by cutting it open

with a knife which he had in his possession. After getting out of the bag in which he had concealed himself, he cut open another mail bag in the car and removed some parcels from it. He broke these parcels open and discovered a quantity of cigarettes, some gum, and a bottle of perfume. He smoked some of the cigarettes and used some of the gum and perfume. He was later apprehended and subsequently charged with theft from the mails. The charge was dismissed by the Magistrate before whom he came, and the Crown now appeals to this Court.

Counsel for the Crown necessarily accepts and relies upon the facts found, but submits that the accused as a prisoner of war was, under the, circumstances, subject to the complete restraint of the criminal law and that he should have been convicted of the offence charged.

Counsel for the respondent submits that what the accused did were in fact acts which were part of or incidental to his escape and that such acts by a prisoner of war, that is those forming part of or incidental to his escape from the detaining Power, should be deemed to be acts of war rather than criminal offences.

There is little definite authority in the decided cases.

Counsel for the respondent draws attention to a question put by Lord Campbell, Chief Justice, in *Reg. v. Sattler*, Dears. & Bell 525 at p. 543:

"A prisoner at war committing murder would be triable; but the question is, what constitutes murder? If a prisoner at war who had not given his parole killed a sentinel in endeavouring to effect his escape, would that be murder?"

In discussing exceptions to the general rule that the criminal law applies to all persons who are within certain local limits, Mr. Justice Stephen in his work "The History of the Criminal Law of England", vol. 2, p. 8, after examining the few authorities then existing which referred to alien enemies and prisoners of war, expresses the view:

"It is difficult to extract any definite proposition from these authorities as to the cases in which foreigners are liable to English criminal law, when they are brought, against their will, into places where that law is, as a general rule, administered. None of them, however, is inconsistent with, and each of them more or less distinctly illustrates, the proposition that protection and allegiance are co-extensive, and that obedience to the law is not exacted in cases in which it is avowedly administered, not for the common benefit of the members of a community of which the alleged offender is for the time being a member, but for the benefit of a community of which he is an avowed and open enemy."

It is material to consider the provisions of the convention relative to the treatment of prisoners of war concluded at Geneva on July 27, 1929. His Majesty the King and the President of the German Reich were parties to this convention and it was signed by plenipotentiaries for Canada.

Section 5, c. 3, deals with penal sanctions with regard to prisoners of war. Without attempting to set out at length all the provisions of this chapter, the following may be observed:

Article 45 provides:

"Prisoners of war shall be subject to the laws, regulations and orders in force in the armed forces of the detaining Power.

"Any act of insubordination shall render them liable to the measures prescribed by such laws, regulations, and orders, except as otherwise provided in this Chapter."

Article 46 provides:

"Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalites other than those which are prescribed for similar acts by members of the national forces."

And further: "prisoners of war, undergoing disciplinary punishment shall not be subjected to treatment less favourable than that prescribed as regards the same punishment, for similar ranks in the armed forces of the detaining Power."

"Article 47 provides, *inter alia*:

"The judicial proceedings against a prisoner of war shall be conducted as quickly as circumstances will allow." This article later refers to the sentence "whether disciplinary or judicial, provided such deduction is permitted in case of members of the national forces."

Article 48 provides in part:

"After undergoing the judicial or disciplinary punishment which has been inflicted on them, prisoners of war shall not be treated differently from other prisoners."

Article 50 provides in part:

"Escaped prisoners of war who are re-captured before they have been able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment."

Article 51 provides in part:

"Attempted escape, even if it is not a first offence, shall not be considered as an aggravation of the offence in the event of the prisoner of war being brought before the courts for crimes or offences against persons or property committed in the course of such attempt."

Article 52 provides:

"Belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by judicial measures.

"This provision shall be observed in particular in appraising facts in connexion with escape or attempted escape.

"A prisoner shall not be punished more than once for the same act or on the same charge."

Part 2 makes provisions respecting disciplinary punishments, and Part 3 is headed "Judicial Proceedings." This provides rules and requirements relating to judicial hearings of charges against prisoners of war, for notice being given of the name and rank of the prisoner; the place of detention, and

statement of the charges to the protecting power; that no prisoner should be sentenced without an opportunity to defend himself; that no prisoner should be compelled to admit his guilt, and he has a right to a qualified advocate of his own choice, and if necessary, to a competent interpreter, and various other provisions aimed at safeguarding the rights of a prisoner of war in judicial proceedings.

It is quite apparent that the convention anticipates judicial proceedings against prisoners of war, as well as disciplinary proceedings by military authorities.

In view of the provisions of Art. 45, it is of interest to keep in mind to what extent our own armed forces which in this case are those of the detaining Power, are subject to proceedings in the Courts. The question may be answered in the words of Sir Lyman P. Duff, Chief Justice of Canada, in *Reference re Exemption of U.S. Forces from Canadian Criminal Law*, [1943], 4 D.L.R. 11 at p. 14, S.C.R. 483 at p. 490, 80 Can. C.C. 161 at p. 165: "My view can be stated very briefly. It is, I have no doubt, a fundamental constitutional principle, which is the law in all the Provinces of Canada, that the soldiers of the army of all ranks are not, by reason of their military character, exempt from the criminal jurisdiction of the civil (that is to say, non-military) courts of this country."

In amplification of this view, the Chief Justice continues, later (pp. 15-6 D.L.R., pp. 490-1 S.C.R., pp. 165-7 Can. C.C.):

"That is a well settled principle which has always been jealously guarded and maintained by the British people as one of the essential foundations of their constitutional liberties. I quote two passages on the subject — the first is from Dicey's Law of the Constitution;, and the second is from Dr. Goodhart, the distinguished lawyer who is the successor of Maine and Pollock in the chair of jurisprudence at Oxford University and is the editor of the Law Quarterly Review; this passage is taken from an article written by Dr. Goodhart for the American Bar Association Journal for the information of American lawyers. At pp. 300-1 of Dicey it is stated:

" 'A *soldier's position as a citizen.* — The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. "Nothing in this Act contained" (so runs the first Mutiny Act) "shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law." These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.

" 'The results of this principle are traceable throughout the Mutiny Acts. Acts.

" 'A soldier is subject to the same criminal liability as a civilian. He may when in the British dominions be put on trial before any competent "civil" (*i.e.* non-military) court for any offence for which he would be triable if he were not

subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal. Thus, if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Dieman's Land, his military character will not save him from standing in the dock on the charge of murder or theft.'

"Referring to the legislation introduced in 1942 and passed by the Parliament of the United Kingdom, Dr. Goodhart says (American Bar Association Journal, vol. 28, p. 763):

" 'The important constitutional principle which was involved is one of the essential ones on which the English constitution is based. It is described by Dicey as "the fixed doctrine of English law that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen." It is part — and perhaps the most important part — of the "rule of law" which is the distinctive feature of the British system. "It becomes, too, more and more apparent that the means by which the courts have maintained the law of the constitution have been the strict insistence upon the two principles, first of 'equality before the law,' which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts, and, secondly, of 'personal responsibility of wrongdoers,' which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors." This means that the British soldier is subject to the jurisdiction of the ordinary courts, and is responsible to them for any breaches of the law which he may commit. So long as this principle is maintained, it will be impossible for anyone to establish a military dictatorship in Great Britain.' "

There is nothing in the provisions of the Convention to exclude the application of the *Criminal Code* here.

Counsel for the appellant urges that prisoners of war are subject to the complete restraint of the criminal law whether or not the acts in question are a part of or incidental to escape from the detaining Power. It is unnecessary and undesirable to express here an opinion as to what view should be taken under other circumstances, for instance, if a prisoner of war were accused of assaulting a military guard who endeavoured to prevent his escape.

In this case the Magistrate has found as a fact: "With regard to the perfume, I have given him the benefit of the doubt and say that he used it in order to assist his escape by concealing the extreme odour of perspiration. With regard to the cigarettes and gum I am unable to see that they would assist his escape materially and I feel that he took them for his own comfort."

I see no reason to disagree with the finding of fact that the taking of the cigarettes and gum from the mail bags was for personal comfort of the accused and not a part of or incidental to his escape. Under the circumstances he is liable to the restraint of the criminal law and to proceedings in the Courts in the same way as a member of the armed forces of this country.

The appeal must be allowed and a conviction recorded.

As to sentence — the provisions of the Code with respect to such a charge have been recently amended so that now the minimum sentence is in the

discretion of the Court. Counsel for the Crown suggests only a moderate sentence. Under the circumstances a sentence of two months should be imposed.

Appeal allowed: accused convicted.

DOCUMENT NO. 67

REX v. KAEHLER and STOLSKI
(Supreme Court, Appellate Division, Alberta, Canada, 26 March 1945)

SOURCES

[1945] 3 D.L.R. 272
[1945] 1 W.W.R. 566
83 Can. C.C. 353

NOTE

This is another case involving the theft of a motor vehicle by prisoners of war, allegedly to facilitate their escape, in which the Canadian appellate court found no legal justification for the view that a prisoner of war was less criminally responsible for an offense committed to facilitate escape from custody than for an offense unconnected with an attempt to escape. The decision was, as in the case of *Rex v. Shindler et al* (DOCUMENT NO. 62), largely based on a strict construction of the language contained in Article 51(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49). It is contrary to the decision in *Rex v. Krebs* (DOCUMENT NO. 61) and, at least inferentially, to the decision in *Rex v. Brosig* (DOCUMENT NO. 66). A rule contrary to that expressed in the present case has been incorporated into Article 93(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) so that a prisoner of war may now be subjected only to disciplinary punishment for offenses against property committed in furtherance of an attempted escape and not for self-enrichment.

EXTRACTS

The judgment of the Court was delivered by

HARVEY C.J.A.: — The defendants, appellants, are German prisoners of war who were convicted by Police Magistrate Sinclair of Calgary (1) of breaking and entering a warehouse with intent to commit an indictable offence therein, and (2) of stealing a motor car. They have appealed from their convictions.

The breaking and entering occurred on August 4, 1944, and the theft of the motor car on the 8th day of the same month. The informations charging the two offences were both sworn on August 9th by different employees of the owner of the warehouse and motor car.

The appellants were two members of a group of prisoners of war working under the supervision of an official of the Labour Department on the farm of the Western Irrigation District at Strathmore a short distance out of Calgary. Stolski was cook for the group and did not go out to the fields as Kaehler did. Stolski was supposed to be supplied with the necessary utensils required for his cooking operations by the District and Gunn its employee, says he was willing to supply anything that was needed. Any utensils

available were in the warehouse in question.

On the trial the appellants were represented by counsel instructed by the Swiss Government, as the protecting Power under the terms of the Geneva Convention to which reference will be made later. As regards the first mentioned conviction counsel claimed no immunity for them as prisoners of war under the said Convention or otherwise.

The breaking and entering was established beyond doubt and indeed was admitted by both appellants in written statements and in the evidence they gave on the trial, but they denied that they intended to commit any indictable offence.

At the close of the argument on the appeal we allowed the appeal and quashed the conviction being all of opinion that the evidence fell short of being sufficient to justify the inference of the intent to steal. Both appellants had been in the warehouse earlier and had an opportunity of seeing what it contained and it did not contain anything that would appear to be of any value or attraction to them that they could want to steal.

We reserved judgment on the appeal from conviction of stealing a motor car.

From the time the men left their work until the next morning they were practically free as far as their movements were concerned.

On the morning of August 8th it was discovered that a motor truck belonging to the district had disappeared during the night preceding and when it came time for the appellants to go to work it was found that they also had disappeared.

It cannot be said that the Magistrate was not justified in finding the appellants guilty of the theft of the motor truck. There was evidence of possession that called for an explanation but none was given. There was in addition quite a strong chain of circumstantial evidence apart from the presumption arising from recent possession. The mere fact that they and the car were at Strathmore the evening before and that the next morning they and the car were at Vulcan some 60 miles away and that they were with the car and that attempts were made to obtain gas and that one of them had the gas ration book in his possession furnish a chain of strong circumstantial evidence.

Counsel for the appellants however, contends that even if guilty of stealing the truck they are not liable to punishment because as prisoners of war they are entitled to escape and any act done to facilitate escape is justified and does not impose criminal liability. This is a rather startling proposition because a most effective means of securing their freedom would be by the killing of their guard, and anyone else who attempted to stop them. Their counsel however goes that far and claims immunity even for such an act.

It is somewhat singular that with the thousands of prisoners of war that have been confined in England and Canada as well as the United States during the years of the present war and also during the war of 1914 to 1918 during which there have been thousands of attempts to escape no authority in support of this proposition can apparently be found beyond that of two Police

Magistrates in Ontario. The only decisions on the point to which counsel has been able to refer are the two mentioned, supporting his contention, and two in this Province, including the one now under consideration to the opposite effect.

Only one of the two Ontario cases has been reported, *R. v. Krebs* decided in October 1943, and reported in [1943] 4 D.L.R. 553, 80 Can. C.C. 279. The other Ontario case was in February 1944, *R. v. Brosig* which is not reported. The Attorney-General, however, appealed from the acquittal in the latter case and at the time of the argument in this case the decision on the appeal had not been given [See now [1945], 2 D.L.F. 232, O.W.N. 225, 83 Can. C.C 199]. Judgment has now been given but unfortunately it does not settle the question presently under consideration.

In the *Brosig* case the prisoner of war had concealed himself in a post office mail bag and had subsequently cut his way out and stolen some articles from another mail bag.

The Magistrate found that some of the articles stolen could not be deemed to be necessary or useful in aiding his escape. Such being the case, the Court contented itself with restricting its decision to the facts of the case. Mr. Justice Gillanders, who wrote the main reasons, stated [1945] 2 D.L.R. at p. 239, 83 Can. C.C. at p. 207):

"Counsel for the appellant urges that prisoners of war are subject to the complete restraint of the criminal law whether or not the acts in question are a part of or incidental to escape from the detaining Power. It is unnecessary and undesirable to express here an opinion as to what view should be taken under other circumstances, for instance, if a prisoner of war were accused of assaulting a military guard who endeavoured to prevent his escape."

And the Chief Justice of Ontario who also wrote a short judgment said (p. 233 D.L.R., p. 201 Can. C.C.): "The 'looting' of the mail bag was not an act necessary for the escape of the prisoner of war."

I think, however, we are entitled to accept the decision as authoritative for the propositions that the Geneva Convention of 1929 is a part of the law of Canada, and that under it a prisoner of war has no immunity from the consequences of his committing an act which if committed by a member of one of our own armed forces would be punishable as a crime. Indeed, Order in Council P.C. 4121 [Proclamations & Orders in Council, vol. 1, p. 218] hereafter referred to specifically so provides. But since no Canadian soldier could have occasion in Canada to attempt to escape from custody as a prisoner of war he could never commit an act in aid of such an attempt.

The Court based its conclusion on the terms of the Geneva Convention as relating to prisoners of war and set out many of the Articles. It is unnecessary to repeat them, but it suffices to point out that no distinction seems to be made in any of them which would justify the conclusion that offences committed in aid of escape occupy a preferred position. Indeed, Article 51 seems to indicate the exact opposite. It is as follows:

"51. Attempted escape, even if it is not a first offence, shall not be considered as an aggravation of the offence in the event of the prisoners of

war being brought before the courts for crimes or offences against persons or property committed in the course of such attempt."

That clearly envisages offences punishable by the Courts when committed in the course of an attempt to escape.

Article 52, which also deals with the subject of escape, provides:

"52. Belligerents shall ensure that the competent authorities exercise the greatest leniency in considering the question whether an offence committed by a prisoner of war should be punished by disciplinary or by judicial measures.

"This provision shall be observed in particular in appraising facts in connexion with escape or attempted escape."

On December 13, 1939 shortly after the outbreak of the present war an Order in Council (P.C. 4121) was passed under the authority of the *War Measures Act,* R.S.C. 1927, C. 206 making "Regulations governing the maintenance of discipline among and treatment of Prisoners of War". These regulations follow very closely the Articles of the Geneva Convention, some of them being in the exact words. Regulation 7 provides that:

"7. A prisoner of War shall be subject to the law relating to the Naval Service, the Militia or The Air Force of Canada, as the case may be, in like manner as if he were a member of the naval Service, the Militia or the Air Force except that a Prisoner of War, Class 1, holding Naval, Militia or Air Force rank in the Service of his own country may not be deprived of such rank by Canadian Tribunal or Officials."

Regulation 53 provides that:

"53. The Commandant of any camp or other place set apart for the internment of Prisoners of War, or the officer commanding a body of troops having custody of Prisoners of War in field or upon the line of march, upon receiving information of a charge made against a Prisoner of War under his custody of having committed an offence, shall dismiss the charge if he in his discretion thinks it ought not to be proceeded with, but where he thinks the charge ought to be proceeded with, he may forthwith submit a report to the District Officer commanding the Military District in which the Camp is situated, who shall give such orders as may be necessary, or he may deal with the case summarily."

Then 63 is as follows:

"63. When the District Officer Commanding a Military District to whom a case has been submitted under paragraph 53 of these regulations considers that the charge cannot properly be disposed of in any other manner, he shall take steps to bring the accused to trial before a military court, or may, in the case of a civil offence, communicate with civil powers in order that the accused may be dealt with by a civil court of criminal jurisdiction."

It is under the final portion of this Article that this case came before the Civil Courts. If attention had been given to the fact that for the theft of a motor car a Judge or Magistrate in a Civil Court is not permitted to exercise an unfettered discretion in imposing such a sentence as he thinks the case deserves, but is compelled to impose a term of imprisonment of one year at

the least, it might not have been thought desirable to have the case dealt with in a Civil Court. One can hardly think that any Magistrate or Judge would have deemed this offence, under its special circumstances, deserving of more than a very short term of imprisonment.

It is contended that the prisoner of war has a right, even a duty to endeavour to escape. If he has any such duty it is to his own country and armed forces, not to Canada, and even if he had the right there is no rule applicable to our armed forces and therefore to prisoners of war, that a legitimate end justifies illegitimate means. But it is an error to say that he has the right for Art. 50 provides:

"50. Escaped prisoners of war who are recaptured before they have been able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment."

"Prisoners who, after succeeding in rejoining their armed forces or in leaving the territory occupied by the armed forces which captured them, are again taken prisoner shall not be liable to any punishment for their previous escape."

It is clear from this Article that it is a punishable offence though as the Article and the two subsequent ones show it is not considered a very heinous offence.

In vol. 32 of the 12th ed. of the Encyclopaedia Britannica there is a quite lengthy article on prisoners of war commencing at p. 150 of which the author is Sir Reginald Brodie Duke Acland, K.C., who was a Judge Advocate of the Fleet and a member of a Government Committee on the treatment by the enemy of prisoners of war. This was before the Geneva Convention of 1929 but after the Hague Conventions of 1899 and 1907 and after the World War of 1914 to 1918.

On pp. 154-5 it is stated: "In one respect, viz. the punishments for attempted escape, the German military law was less severe than the British, the greater severity of the latter having apparently arisen from a misunderstanding of the expression 'peines disciplinaires' in the second paragraph of the 8th Article of the Hague Convention. This seems to have been understood on the Continent as a punishment which could be awarded summarily: that is, arrest, open, medium or close, for a period not exceeding six weeks. In Great Britain the punishment was limited to 12 months' imprisonment; in Germany it was far less for the simple offence, though it was frequently added to by the addition of charges for damaging Government property, and the like. The matter came under discussion between the British and German Delegates at The Hague in 1917 and 1918, and an agreement was arrived at by which the punishment for a simple attempt to escape was to be limited to fourteen days, or if accompanied with offences relating to the appropriation, possession of or injury to property to two months' military confinement."

A consideration of Arts. 50 and 51 discloses that under the Geneva Convention the attempt to escape is an offence quite distinct from offences

committed in the endeavour to escape, but that while the attempt to escape if unsuccessful is punishable, it is not to be considered an aggravation of those other offences. Indeed Art. 53 suggests that it should be taken as an amelioration of such other offences but not as an excuse or justification for them.

In neither the *Krebs* nor the *Brosig* case did the Magistrate consider the Geneva Convention.

In the *Brosig* case the Magistrate states: "It was practically agreed between counsel that the case of *R. v. Krebs* is a correct statement of the law" and he did not consider the law further. In the *Krebs* case ([1943] 4 D.L.R. 553, 80 Can. C.C. 279) the Magistrate made a careful and thorough examination of the cases and text-books that had a bearing on the subject and concluded (p. 557 D.L.R., pp. 283-4 Can. C.C.):

"In my opinion — although as I have said I can find no authority directly in point — the accused is not punishable at common law for an attempt to escape. He is not punishable at common law for doing anything reasonably calculated to assist in that escape, and in my opinion the same holds for anything done in an endeavour to preserve his liberty once gained.

"This accused owes no allegiance to the Crown. He is an open and avowed enemy of the Crown, a man taken in war and a man who, if it is not his duty, may quite reasonably feel that it is his duty to escape from the domains to which he owes allegiance and perform his duty to that state."

It seems clear that the purpose of the Geneva Convention as relating to prisoners of war was to ameliorate their condition, not to impose heavier burdens on them, but if before the Geneva Convention they were under no obligation to observe the laws of the captor country in an endeavor to escape, to impose such an obligation would have the opposite effect.

As above pointed out Art. 51 while not specifically declaring criminal liability for acts committed in the endeavor to escape, clearly recognizes criminal liability for offences so committed. That would seem however to be irreconcilable with the decision in the *Krebs* case. It is important therefore to consider whether that decision is correct.

* * * * *

While an attempt to escape, especially a successful attempt to escape is looked on with approbation in many armies and countries as regards their own forces, particularly Britain and Germany yet it is not so considered by the captor countries. Since our criminal law was codified in 1892 there has been a section, now s. 186, imposing a penalty of five years' imprisonment on anyone assisting a prisoner of war to escape. As far back as 1812 by 52 Geo. III, c. 156, this was declared to be a felony. The Act recites that: "Whereas many Prisoners of War confined and on Parole in different Parts of His Majesty's Dominions have of late escaped by the Aid and Assistance of many of His Majesty's Subjects and others; and it is necessary to repress such Practices and Violations of the Allegiance due to His Majesty and of the Law by more effectual Punishment." The last words of the recital suggest that there had previously been less effectual punishment, but I find no reference

to anything earlier than this statute. Notwithstanding the seriousness recognized by the statutory law of the escape of a prisoner of war we have contracted with the other countries parties to the Geneva Convention to restrict the punishment to what is specified in its Articles. Article 51, above quoted, exempts comrades of a prisoner of war from this provision of our criminal law though not exempting them completely from punishment.

For the reasons given it appears that there is no justification for the view that at common law before the Convention relating to prisoners of war, there was any less criminal responsibility for the commission of an offence by a prisoner of war in attempting to escape because it was done to assist him in escaping, than for any offence unconnected with an attempt to escape and that there is, therefore, no justification for making any qualification of the general terms imposing criminal liability in the Geneva Convention. Moreover, as already stated, the liability to punishment for such offences is clearly recognized by Art. 51.

The appeal must be dismissed.

DOCUMENT NO. 68

AGREEMENT BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, THE GOVERNMENT OF THE UNITED STATES OF AMERICA, THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC AND THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS

(London, 8 August 1945)

SOURCES

82 UNTS 280
59 Stat. 1544
3 Bevans 1238
39 AJIL Supp. 257
145 BFSP 872

NOTE

This Agreement, with the annexed Charter of the International Military Tribunal which was to try the major German personalities charged with the commission of war crimes having no particular geographical location, was negotiated over the period of 26 June 1945 to 8 August 1945 by representatives of the Governments of France, the Soviet Union, the United Kingdom, and the United States. It was signed by them on 8 August 1945 and was subsequently adhered to by 19 other Governments. It was the legal basis upon which the trial of the major Nazi war criminals was conducted at Nuremberg during 1945 and 1946 (DOCUMENT NO. 85) and served as a major source for the Charter of the International Military Tribunal for the Far East which was promulgated by General MacArthur in Tokyo on 19 January 1946 (DOCUMENT NO. 75) and which conducted the trial of the major Japanese war criminals (DOCUMENT NO. 101).

TEXT

AGREEMENT:

Whereas the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

And whereas the Moscow Declaration of the 30th October, 1943, on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

And whereas this Declaration was stated to be without prejudice to the case of major criminals whose offences have no particular geographical

location and who will be punished by the joint decision of the Governments of the Allies;

Now therefore the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorised thereto have concluded this Agreement.

Article 1

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.

Article 2

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this Agreement.

Article 3

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4

Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5

Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Article 7

This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

I. — CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1

In pursuance of the Agreement signed on the 8th August, 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union [of] Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2

The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

Article 3

Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its members of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

Article 4

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5

In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II. — JURISDICTION AND GENERAL PRINCIPLES

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the

interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

The following acts, or any of them, are crimes within the jurisdiction of the Tribunal for which there shall be individual responsibility: —

(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 accomplishments of any of the foregoing;

(b) *War crimes:* namely, violations of the laws or customs of war. Such violations shall include, but not be 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:* namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution 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, organisers, 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 plans.

Article 7

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

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.

Article 9

At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10

In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

Article 11

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.

Article 12

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III. — COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14

Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes:

(a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,

(b) to settle the final designation of major war criminals to be tried by the Tribunal,

(c) to approve the Indictment and the documents to be submitted therewith,

(d) to lodge the Indictment and the accompanying documents with the Tribunal,

(e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15

The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(a) investigation, collection and production before or at the Trial of all necessary evidence,

(b) the preparation of the Indictment for approval by the Committee in accordance with paragraph *(c)* of Article 14 hereof,

(c) the preliminary examination of all necessary witnesses and of the Defendants,

(d) to act as prosecutor at the Trial,

(e) to appoint representatives to carry out such duties as may be assigned to them,

(f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. — Fair Trial for Defendants

Article 16

In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.

(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution.

V. — Powers of the Tribunal and Conduct of the Trial

Article 17

The Tribunal shall have the power:

(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,

(b) to interrogate any Defendant,

(c) to require the production of documents and other evidentiary material,

(d) to administer oaths to witnesses,

(e) to appoint officers for the carrying out of any task designated by the

Tribunal including the power to have evidence taken on commission.

Article 18

The Tribunal shall:

(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20

The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21

The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22

The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23

One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorised by him.

The function of Council [*sic*] for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorised thereto by the Tribunal.

Article 24

The proceedings at the Trial shall take the following course:

(a) The Indictment shall be read in court.

(b) The Tribunal shall ask each Defendant whether he pleads "guilty"

or "not guilty".

(c) The Prosecution shall make an opening statement.

(d) The Tribunal shall ask the Prosecution and the Defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defence.

(f) The Tribunal may put any question to any witness and to any Defendant, at any time.

(g) The Prosecution and the Defence shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.

(h) Defence shall address the court.

(i) The Prosecution shall address the court.

(j) Each Defendant may make a statement to the Tribunal.

(k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25

All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. —JUDGMENT AND SENTENCE

Article 26

The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27

The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28

In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29

In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof for such action as they may consider proper, having regard to the interests of justice.

VII. — EXPENSES

Article 30

The expenses of the Tribunal and of the Trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

DOCUMENT NO. 69

TRIAL OF GENERAL ANTON DOSTLER
(U.S. MILITARY COMMISSION, Rome, 8-12 October 1945)

SOURCES
1 LRTWC 22
13 Ann. Dig. 280

NOTE

The accused Dostler was charged with ordering the summary execution of 15 American commandos who had been captured after being landed behind the German lines in Italy while on a mission to destroy a railroad tunnel on the main line between La Spezia and Genoa. The defense of superior orders was based upon the so-called "Commando Order" which had been issued by Hitler personally on 18 October 1942 and pursuant to which quarter was to be denied enemy commandos and any who were captured were to be handed over to the SD, the Nazi intelligence agency for the security police. (See also DOCUMENT NO. 83, DOCUMENT NO. 100, and DOCUMENT NO. 104.) Note that here the accused went even beyond the requirements of Hitler's order as he did not turn his prisoners of war over to the SD, he himself ordered their execution without trial.

EXTRACTS

2. THE CHARGE AND SPECIFICATION

Anton Dostler was charged with violations of the laws of war in that, as commander of the 75th German Army Corps, he, on or about 24th March, 1944, in the vicinity of La Spezia, Italy, ordered to be shot summarily a group of United States Army personnel consisting of two officers and 13 enlisted men, who had then recently been captured by forces under General Dostler, which order was carried into execution on or about 26th March, 1944, resulting in the death of the said 15 members of the United States Army.

4. THE CASE FOR THE PROSECUTION

The Prosecution claimed, by virtue of the witnesses and evidence produced, to be able to establish the following facts: —

On the night of 22nd March, 1944, two officers and 13 men of a special reconnaissance battalion disembarked from some United States Navy boats and landed on the Italian coast about 100 kilometres north of La Spezia. The front at the time was at Cassino with a further front at the Anzio beach head. The place of disembarkation was therefore 250 miles behind the then established front. The 15 members of the United States Army were on a *bona fide* military mission, which was to demolish the railroad tunnel on the mainline between La Spezia and Genoa. On the morning of 24th march, 1944, the entire group was captured by a party consisting of Italian Fascist soldiers and a group of members of the German army. They were brought to La Spezia where they were confined near the headquarters of the 135th Fortress

Brigade. The 135th Fortress Brigade was, at that time, commanded by a German Colonel, Almers (who was not before the Military Commission). His next higher headquarters was that of the 75th German Army Corps then commanded by the accused, Anton Dostler. The next higher headquarters was that of the Army Group von Zangen, commanded by the General of the Infantry von Zangen, who was called as a witness in the case. The next higher command was that of the Heeresgruppe C or Heeresgruppe South West, which was at that time under Field Marshal Kesselring.

The captured American soldiers were interrogated in La Spezia by two German Naval Intelligence Officers. In the course of the investigation one of the officers of the American party revealed the story of the mission. On 24th March a report was made by the 135th Fortress Brigade to the 75th Army Corps about the capture. On the next morning (25th March, 1944) a telegram was received at the headquarters of the 135th Fortress Brigade signed by the accused Dostler, saying in substance "the captured Americans will be shot immediately."

On receiving this cable, the commanding officer of the 135th Fortress Brigade and the Naval Officers interrogating the prisoners got in touch with the 75th Army Corps headquarters in order to bring about a stay of the execution. Late on the afternoon of the 25th March, Colonel Almers (then commanding the brigade) received another telegram from 75th Army Corps which said in substance that by 7 o'clock the next morning (26th March) he would have reported compliance with the order of execution.

Colonel Almers then gave orders for the conduct of the execution, for the digging of a grave, etc. During the night from Saturday 25th to Sunday, 26th March, two attempts were made by officers of the 135th Fortress Brigade and by the Naval Officers to bring about a change in the decision by telephoning to the accused Dostler. All these attempts having been unsuccessful, the 15 Americans were executed on the 26th March, early in the morning.

They were neither tried, nor given any hearing.

The argument of the Prosecution was that since the deceased had been soldiers of the United States Army, dressed as such and engaged on a genuine military mission, they were entitled to be treated as prisoners of war. Their execution without trial, therefore, was contrary to the Hague Convention of 1907 and to a rule of customary International law at least 500 or 600 years old.

5. THE EVIDENCE

Witnesses for the Prosecution included a Captain in the United States Army who had directed the operation against the tunnel. He stated that the fifteen soldiers had been *bona fide* members of the United States Forces; he also bore witness as to the nature of the mission on which they were sent, and as to the clothing and equipment which they wore. Witnesses for the Prosecution included also an Italian employee of the Todt Organisation and two German naval Intelligence Officers who gave further evidence regarding the deceased's clothing. One of the last two identified a document before the Commission as representing in substance the Führerbefehl to which reference was made by the Defence. Three ex-members of the Wehrmacht

gave evidence of attempts made to induce Dostler to change the order regarding the execution, and on the circumstances of the execution. General Zangen appeared in the witness box and denied having ordered the execution of the prisoners.

Two depositions and the notes of a preliminary interrogation of General Dostler were also allowed as evidence. The first deposition was made by a German lieutenant in the hospital, who bore witness to the contents of the telegram containing Dostler's orders regarding the immediate execution of the prisoners and to the efforts which were made to avert the latter. The second deposition was made by a Captain in the United States Army who had been present at the exhumation of the bodies of the soldiers.

The Defence recalled General Zangen, who bore witness to the accused's merits as a soldier, and called a second Wehrmacht General, von Saenger, who described the oath which officers of the German Army had had to take on the accession of Hitler to power. As will be seen, General Dostler himself also appeared as a witness under oath.

Although it was not possible to produce the witnesses primarily needed by the Defence (one of them, the commander of the Brigade, had escaped from captivity and had not been recaptured, while the others could not be traced in the American and British zones), the decisive facts were not controversial, namely that the victims had been members of the American Forces, carrying out a military mission, that the accused had ordered their shooting without trial and that they had been so shot.

6. THE ARGUMENTS OF THE DEFENSE AND REPLIES MADE BY THE PROSECUTION

(i) *That the Deceased were not entitled to the Benefits of the Geneva Convention*

The Defence claimed that for any person to be accorded the rights of a prisoner of war under the Geneva Convention, it was necessary, under Article 1 thereof, for that person, *inter alia*, "to have a fixed distinctive emblem recognisable at a distance." The submission of the Defence was that the American soldiers had worn no such distinctive emblem, and that their mission had been undertaken for the purpose of sabotage, to be accomplished by stealth and without engaging the enemy. They were not therefore entitled to the privileges of lawful belligerents, though it was admitted that they were entitled to a lawful trial even if they were treated as spies.

(ii) *The Plea of Superior Orders*

The accused relied on the defence of superior orders which was based on two alleged facts: —

(a) The Führerbefehl of 18th October, 1942, the text of which is provided in the Appendix. The Führerbefehl laid down that if members of Allied commando units were encountered by German troops they were to be exterminated either in combat or in pursuit. If they should fall into the hands of the Wehrmacht through different channels they were to be handed over to the Sicherheitsdienst without delay.

The Defence Counsel submitted that pursuit could go on for

weeks, and that it was not ordered that the allied troops should necessarily be killed on the spot.

In answer to the arguments of the Prosecution that Dostler had exceeded the terms of the Führerbefehl (see later), the Defence pointed out that Dostler had received no punishment for his action, whereas para. 6 of the order stated that all leaders and officers who failed to carry out its instructions would be summoned before the tribunal of war.

(b) Alleged orders received from the Commander of the Army Group, General von Zangen, and from the Commander of the Heeresgruppe South West, Field Marshal Kesselring.

Dostler also claimed that he had revoked his first order to shoot the men and that he had eventually re-issued it on higher order.

The Defence tried to establish the fact that in 1933 all officers of the German Army had had to take a special oath of obedience to the Führer Adolf Hitler. This fact was confirmed both by General von Zangen and Dostler himself in the witness box. The Prosecution put a question to General von Saenger whether he could cite to the Commission any single case of a general officer in the German Army who was executed for disobedience to an order. Von Saenger replied that he had heard of two cases, one of which he knew; the second was only a rumour. The witness did not know a case in the German Army in which a general officer was executed for disobedience to the Führerbefehl of 18th October, 1942.

General von Saenger admitted that the Führer gave out orders which in their way interfered with International Law. The officers at the front who had to execute these orders were convinced, however, that in those cases Hitler would make a statement or by some other means inform the enemy governments of his decisions, so that the officers were not responsible for crimes committed while carrying out his orders. He also said that during the war officers could not resign from the German Army.

Dostler himself said that under the oath to Hitler he understood that it was mandatory upon him to obey all orders received from the Führer or under his authority.

Defence Counsel quoted a statement from Oppenheim-Lauterpacht, *International Law*, 6th edition, volume 2, page 453, to the effect that an act otherwise amounting to a war crime might have been executed in obedience to orders conceived as a measure of reprisals, and that a Court was bound to take into consideration such a circumstance.

The Defence invoked the text of the Führerbefehl which in its first sentence itself refers to the Geneva Convention and represents itself as a reprisal order made in view of the alleged illegal methods of warfare employed by the Allies. Counsel claimed that retaliation was recognised by the Geneva Convention as lawful, that the Führerbefehl stated the basis on which it rested and that the accused therefore had a perfect right to believe that the order, as a reprisal order, was legitimate.

The Defence quoted also paragraph 347 of the United States Basic Field Manual F.M.27-10 (*Rules of Land Warfare*), which says that individuals of the armed forces will not be punished for war crimes if they are committed under the orders or sanction of their government or commanders.

In so far as the defence was based on the Führerbefehl, the Prosecution submitted that, apart from an illegal order being no defence, the shooting of the prisoners in the present case had not even been covered by the terms of the Führerbefehl, because the latter ordered that Commandos should be annihilated in combat or in pursuit, but that if they came into the hands of the Wehrmacht, through other channels, they should be handed over without delay to the Sicherheitsdienst. The prosecuting Counsel pointed out that the deceased had not been killed in combat or in pursuit, and had been executed instead of being given up to the Sicherheitsdienst.

As far as the Defence relied on orders received from Army Group headquarters, and headquarters of the Heeresgruppe South West, this defence had not been substantiated. As far as the Army Group command was concerned, it had not been confirmed by the witness, General von Zangen, and as far as a command of the Heeresgruppe South West was in question, it was even rebutted by the statement of a witness that some hours after the execution a cable had been received from the headquarters of Heeresgruppe South West to the effect that the execution of the 15 Americans should not take place.

With regard to the text of the Führerbefehl of 18th October 1942, which was used in evidence, the Defence counsel said: "It is a matter of common knowledge that this Führerbefehl was kept extremely secret. As a matter of fact practically no originals of it have even been found. This does not purport to be an original we have; it is a copy on which the signature of whoever signed it is illegible. I understand it was secured from the French intelligence and they passed it on, and that one copy is the only one they have been able to find."

During his examination, the accused, on being handed a copy of the text of the Führerbefehl of October, 1942, said that a document which he had received in 1944 through Army Group channels contained substantially everything that was in the 1942 text, but with certain additions. He stated further that "this copy is not the complete Führerbefehl as it was valid in March, 1944. In the order that laid on my desk in March, 1944, it was much more in detail. . . The Führerbefehl which was laying in front of me listed the various categories of operations which may come under the Führerbefehl. In addition there was something said in that Führerbefehl about the interrogation of men belonging to sabotage troops and the shooting of these men after their interrogation. . . . I am not quite clear about the point, whether a new Führerbefehl covering the whole matter came out of whether only a supplement came out and the former Führerbefehl was still in existence. . . The Führerbefehl has as its subject commando operations and there was a list of what is to be construed as commando operations. I know exactly that a mission to explode something, to blow up something, came

under the concept of commando troops."

With regard to the mission of the 15 American soldiers he claimed that, after making consultations with staff officers, "as it appeared without doubt that the operation came under the Führerbefehl an order was given by me and sent out that the men were to be shot."

General von Saenger said that in the Autumn of 1943 he had been acquainted with a Führerbefehl on the same subject which was different in contents from that before the Commission. On the other hand, three witnesses, namely, one of the German Naval Intelligence Officers, an ex-Wehrmacht Adjutant and General von Zangen, could remember no amendments to the Führerbefehl of October, 1942.

7. THE VERDICT

The Commission found General Dostler guilty.

8. THE SENTENCE

General Dostler was sentenced to be shot to death by musketry. The sentence was approved and confirmed, and was carried into execution.

DOCUMENT NO. 70

TRIAL OF ERICH KILLINGER AND FOUR OTHERS
(British Military Court, Wuppertal, Germany, 3 December 1945)

SOURCES
3 LRTWC 67
13 Ann. Dig. 290

NOTE

This is one of the comparatively few reported World War II (1939-1945) war crimes trials involving the question of allowable and prohibited methods of interrogating prisoners of war in the quest for information of military value. It is of particular importance because of the several colloquies between counsel and the Court which are given in the "Notes on the Case."

EXTRACTS

A. OUTLINE OF THE PROCEEDINGS

Erich Killinger, Heinz Junge, Otto Boehringer, Heinrich Eberhardt and Gustav Bauer-Schlichtergroll, former officers of the Luftwaffe, were charged with "committing a war crime in that they at or near Oberursel, Germany, between 1st November, 1941 and 15th April, 1945, when members of the staff of the Luftwaffe Interrogation Centre known as Dulag Luft, in violation of the laws and usages of war were together concerned as parties to the ill-treatment of British Prisoners of War." All pleaded not guilty.

The Prosecution claimed that the accused belonged to the German Air Force Interrogation Centre at Oberursel, near Frankfurt. This Centre was known to the German Air Force authorities as Auswertestelle West, but, more widely as Dulag Luft. The function of Dulag Luft was, shortly, to obtain information of an operational and vital nature from the captured crews of Allied machines. The allegation was that excessive heating of the prisoners cells took place at Dulag Luft between the dates laid in the charge for the deliberate purpose of obtaining from prisoners of war information of a kind which under the Geneva Convention they were not bound to give, and that the accused were concerned in that ill-treatment. The Prosecution also alleged a "lack of and refusal of required medical attention" and "in some cases, blows." At first the Prosecutor also claimed that the methods used included prolonged solitary confinement and threats of delivery of the prisoner of war to the Gestapo and of shooting by the Gestapo, "on the basis that the prisoner of war might, because he did not answer sufficiently fully, be a saboteur." After a consultation with one of the Defence Officers, however, the Prosecutor withdrew the last two allegations.

Killinger, Junge and Eberhardt were found guilty and sentenced to imprisonment for five, five and three years respectively. The remaining two accused were found not guilty. The sentences were confirmed by higher

military authority.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE CHARGE

The Prosecutor rested his case on the Geneva Prisoners of War Convention of 1929, and in particular Arts. 2 and 5. Art 5 reads as follows:

> "Art. 5. Every prisoner of war is required to declare, if he is interrogated on the subject, his true names [sic] and rank, or his regimental number. If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category.
>
> "No pressure shall be exerted on prisoners to obtain information regarding the situation of their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.
>
> "If, by reason of his physical or mental condition, a prisoner is incapable of stating his identity, he shall be handed over to the Medical Service."

Pointing out that the prisoners who passed through Dulag Luft appeared to have had no exercise while there, Counsel quoted Art. 13 of the Convention:

> ". . . They shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors."

During his closing address, one of the Defence Counsel made three submissions regarding the scope of the Convention. The first was that under the Geneva Convention interrogation was not unlawful. The second was that to obtain information by a trick was not unlawful, under the same Convention. The third point was that to interrogate a wounded prisoner was not in itself unlawful unless it could be proved that that interrogation amounted to what could be described as physical or mental ill-treatment. The Court expressed its agreement with these three principles.

It will be noticed that the charge alleged that the accused "were together concerned as parties to the ill-treatment of British Prisoners of War." In connection with this part of the charge the Prosecutor quoted Paragraph 8 (ii) of the Royal Warrant:

> "Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court."

During the hearing of the closing addresses for the Defence, the Legal Member of the Court asked the Prosecutor what his attitude would be if the commandant of a prisoner-of-war camp, although completely ignorant of the ill usage of prisoners of war, was negligent in his supervision of his subordinates. Would the Prosecutor say that that made him a party to the

ill-treatment, or would he say that in order to make a person a party he must be guilty of more than negligence, and must at least come within the category of an aider and abettor as that phrase is commonly known to English criminal law? The Prosecutor submitted that a man might be concerned as a party either through intention, where "malice — a designed plan —" was present, or through neglect so acute that the established standards of English criminal law would apply. The standard of negligence would have to be of such a degree that it was considered criminal, gross, flagrant, "or those other strong terms with which our English law books are familiar." He agreed with the Legal Member when the latter claimed that the only standard of neglect in accordance with English criminal law which would make a man guilty of a crime of a major nature was the neglect necessary to prove manslaughter, in other words, a recklessness and a complete disregard of the situation. Later during the hearing of the closing of the case for the Defence, the Legal Member announced that the Court had come to a decision on the interpretation of the phrase "were concerned together as parties to the ill-treatment of British prisoners of war." The Court had agreed that no amount of mere negligence, however gross, could bring a person within the category of a party as defined in the particulars of the charge; that the word "parties" must of necessity mean that the person concerned must have had some knowledge of what was going on and must have deliberately refrained from stopping such practice; and that the person, in order to be a party, must come within the category of a principal in the second degree or aider and abettor in the ill-treatment alleged. The words "aider and abettor" and "principal in the second degree" would have the same meanings as in the ordinary criminal law of England.

DOCUMENT NO. 71

UNITED STATES OF AMERICA v. TOMOYUKI YAMASHITA
(U.S. Military Commission, Manila, 7 December 1945)

SOURCES

National Archives of the United States
4 LRTWC 1
2 Friedman 1596

NOTE

Shortly after the end of World War II hostilities in the Pacific (1941-1945), General Tomoyuki Yamashita, who had been the Japanese commander in the 1944-1945 Battle of the Philippines, was charged with having failed to exercise proper control over the troops under his command, allowing them to commit widespread violations of the laws and customs of war. He was tried before a United States Military Commission in Manila, found guilty, and sentenced to death by hanging. One of the main contentions advanced by the defense was that he was a prisoner of war and was, therefore, entitled to all of the trial safeguards contained in the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49). (For the action of the Supreme Court of the United States with respect to this contention, announced while passing on an application for leave to file a petition for writs of habeas corpus and prohibition, see DOCUMENT NO. 76.) Unlike the usual procedure of military commissions, which normally only announce findings of guilt or innocence and the sentence, if any, the President of this Military Commission delivered a statement which appears to have been a short summary of the basis for its findings. Thereafter, General of the Army Douglas MacArthur, the United States Commander-in-Chief, in confirming the sentence and ordering it executed, also made a statement giving the reasons for his action.

TEXTS

DECISION OF THE COMMISSION (7 December 1945):

GENERAL REYNOLDS: The charge against the Accused is as follows:

"Tomoyuki YAMASHITA, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of 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, General Tomoyuki YAMASHITA, thereby violated the laws of war."

It is backed by Bills of particulars specifying one hundred twenty-three separate items or offenses, most of which were presented for our consideration.

The crimes alleged to have been permitted by the Accused in violation of the laws of war may be grouped into three categories: (1) Starvation, execution or massacre without trial and mal-administration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offenses extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far most of the incredible acts occurred on Luzon. It is noteworthy that the Accused made no attempt to deny that the crimes were committed, although some deaths were attributed by Defense Counsel to legal execution of armed guerrillas, hazards of battle and action of guerrilla troops favorable to Japan.

The Commission has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw. They included doctors and nurses; lawyers, teachers, businessmen; men and women of religious orders; prisoners of war and civilian internees; officers of the United States Army; officers of the Japanese Army and Navy; Japanese civilians; a large number of men, women and children of the Philippines; and the Accused. Testimony has been given in eleven languages or dialects. Many of the witnesses displayed incredible scars of wounds which they testified were inflicted by Japanese from whom they made miraculous escapes followed by remarkable physical recovery. For the most part, we have been impressed by the candor, honesty and sincerity of the witnesses whose testimony is contained in 4055 pages in the record of trial.

We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, The United States State Department, and the Commonwealth of the Philippines; affidavits; captured enemy documents or translations thereof; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers.

The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the Accused, or secretly ordered by the Accused. Captured orders issued by subordinate officers of the Accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under the guise of eliminating the activities of guerrillas hostile to Japan. With respect to civilian internees and prisoners of war, the proof offered to the Commission alleged criminal neglect, especially with respect to food and medical supplies, as well as complete failure by the higher echelons of command to detect and prevent cruel and inhuman treatment accorded by local commanders and guards. The Commission considered evidence that the provisions of the Geneva Convention received

scant compliance or attention, and that the International Red Cross was unable to render any sustained help. The cruelties and arrogance of the Japanese Military Police, prison camp guards and officials, with like action by local subordinate commanders were presented at length by the prosecution.

The Defense established the difficulties faced by the Accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defense contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service. As to the crimes themselves, complete ignorance that they had occurred was stoutly maintained by the Accused, his principal staff officers and subordinate commanders; further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the Accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.

We have considered carefully the final statements of the Prosecution and Defense Counsel.

This Accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soliders commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control,

among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principle [*sic*] considerations of the Commission during its deliberations.

The Accused, his Senior Counsel and personal interpreter will take position before the Commission.

(Whereupon, Colonel Clarke, Mr. Hamamoto, and the Accused stood before the Commission.)

(Whereupon the Accused addressed in the Commission in native tongue.)

GENERAL REYNOLDS: Mr. Hamamoto may read the statement.

MR. HAMAMOTO: "In my capacity as Commander-in-Chief of the Japanese 14th Area Army I met and fought, here in the Philippines, numerically and qualitatively superior armed forces of the United States. Throughout this engagement I have endeavored to fulfil to the best of my ability the requirements of my position and have done my best to conduct myself at all times in accordance with the principles of fairness and justice.

"I have been arraigned and tried before this Honorable Commission as a war criminal. I wish to state that I stand here today with the same clear conscience as on the first day of my arraignment and I swear before my Creator and everything sacred to me that I am innocent of the charges made against me.

"With reference to the trial itself I wish to take this opportunity to express my gratitude to the United States of America for having accorded to an enemy General the unstinted services of a staff of brilliant, conscientious and upright American officers and gentlemen as Defense Counsel."

Thank you.

GENERAL REYNOLDS: General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging.

ACTION OF THE REVIEWING AUTHORITY

"HEADQUARTERS
UNITED STATES ARMY FORCES WESTERN PACIFIC
OFFICE OF THE COMMANDING GENERAL
APO 707

12 December 1945

In the foregoing case of Tomoyuki Yamashita, the sentence is approved.

Pursuant to paragraph 2, Letter, General Headquarters, United States Army Forces, Pacific, AG 000.5 (24 September 45) DCS, subject: Trial of War Criminals, execution of sentence is withheld pending the action of the Commander in Chief.

(signed) W.D. Styer
(typed) W.D. STYER
Lieutenant General, United States Army
Commanding"

ACTION OF THE CONFIRMING AUTHORITY
"GENERAL HEADQUARTERS
UNITED STATES ARMY FORCES, PACIFIC

A. P. O. 500
7 February 1946

It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze. Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits, - sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten. Peculiarly callous and purposeless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.

It is appropriate here to recall that the accused was fully forewarned as to the personal consequences of such atrocities. On October 24 - four days following the landing of our forces on Leyte - it was publicly proclaimed that I would "hold the Japanese Military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and the protection to which they of right are entitled."

No new or retroactive principles of law, either national of international, are involved. The case is founded upon basic fundamentals and practice as immutable and as standardized as the most matured and irrefragable of social codes. The proceedings were guided by that primary rational of all judicial purpose — to ascertain the full truth unshackled by any artificialities of

narrow method or technical arbitrariness. The results are beyond challenge.

I approve the findings and sentences of the Commission and direct the Commanding General, United States Army Forces, Western Pacific, to execute the judgment upon the defendant, stripped of uniform, decorations and other appurtenances signifying membership in the military profession.

(signed) Douglas MacArthur
(typed) DOUGLAS MacARTHUR,
General of the Army, United States Army,
Commander-in-Chief

DOCUMENT NO. 72

TRIAL OF NISUKE MASUDA AND FOUR OTHERS (THE JALUIT ATOLL CASE) (U.S. Military Commission, Kwajalein, 13 December 1945)

SOURCES
1 LRTWC 71
13 Ann. Dig. 286

NOTE

This is a typical case involving the summary, and often extremely cruel, execution of prisoners of war by the Japanese Imperial armed forces during World War II (1941-1945). (For other examples, see DOCUMENT NO. 101 under the rubric "Murder of Captured Aviators.")

EXTRACTS

2. THE CHARGE AND SPECIFICATION

The accused were Rear-Admiral Masuda, Lieutenant Yoshimura, Ensign Kawachi, Ensign Tasaki, and Warrant Officer Tanaka, all of the Imperial Japanese Navy.

The charge against the five accused, as approved by the Convening Authority, was one of murder. The specification stated that they "did, on or about 10th March, 1944, on the Island of Aineman, Jaliut Atoll, Marshall Islands, at a time when a state of war existed between the United States of America and the Japanese Empire, wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers, then and there attached to the Armed forces of the United States of America, and then and there captured and unarmed prisoners of war in the custody of the said accused, all in violation of the dignity of the United States of America, the International rules of warfare and the moral standards of civilised society."

An objection made by the accused on the grounds that the inclusion in the charge of the words "moral standards of civilised society" was improper and non-legal was over-ruled by the Commission.

The charge as originally drafted contained the word "unlawfully" instead of "wilfully"; the change was authorised by the Convening Authority on the request of the Commission.

Rear-Admiral Masuda did not appear at the trial, and during its course and on the direction of the Convening Authority, a *nolle prosequi* was entered by the Judge Advocate as to the charge and specification against him. He had committed suicide before the opening of the trial, and had before his death written a statement in which he confessed that he had ordered the execution of the airmen.

3. THE ARGUMENTS USED BY THE PROSECUTION IN SUPPORT OF THE CHARGE AND SPECIFICATION

The Prosecution brought forward a number of witnesses to show that the three American airmen on or about February, 1944, were forced to land near Jaluit Atoll, Marshall Islands, and subsequently became unarmed prisoners of war on Emidj Island, on which was established the Japanese Naval Garrison Force Headquarters under the command of Rear-Admiral Masuda. Approximately one month later, on the orders of Masuda, and without having been tried, the airmen were taken to a cemetery on Aineman, an adjoining island, where they were secretly shot to death and then cremated. Yoshimura, Kawachi and Tanaka had admitted to having killed the prisoners by shooting; one had also used a sword. Tasaki had admitted that, having been in charge of the prisoners, he had arranged their release to the executioners, knowing that they were to be killed. Signed statements to the above effect were produced before the court.

One of the two Judge Advocates, in his opening argument, stated that one of the basic principles which had actuated the development of the laws and customs of war was the principle of humanity which prohibited the employment of any such kind or degree of violence as was not necessary for the purposes of war. Among the many and numerous restrictions and limitations imposed by virtue of this principle was "the universally recognised and accepted rule" provided in Article 23 *(c)* of the 1907 Hague Convention which states: "It is particularly forbidden . . . to kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion." If this rule did not suffice, a variety of additional rules had been universally recognised and accepted, protecting prisoners of war from outrages, indignities and punishment.

His colleague relied instead on Article 2 of Part I of the Geneva Convention of 1929 relative to the Treatment of Prisoners of War which states that: "Prisoners of War are in the power of the hostile Government, but not of the individuals of formations which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisals against them are forbidden."

4. THE CASE FOR THE DEFENCE

(ii) *The Defence of Superior Orders*

The accused pleaded not guilty. They admitted their part in the execution of the American Prisoners of War, but claimed as a defence that, as military men of the Japanese Empire, they were acting under orders of a superior authority, which they were bound to obey.

One of the defending Counsel, himself a Lieutenant-Commander in the Imperial Japanese Navy, described the absolute discipline and obedience which was expected from the Japanese forces, and quoted an Imperial Rescript which included the words: "Subordinates should have the idea that the orders from their superiors are nothing but the orders personally from His Majesty the Emperor." The Japanese forces were exceptional among the world's armed forces in this respect and, therefore, he claimed, it was

impossible to apply therein "the liberal and individualistic ideas which rule usual societies unmodified to this totalistic and absolutistic military society." The strategic situation was so critical in early 1944 that the characteristic referred to was displayed in the Jaluit unit to an exceptional degree. Furthermore the order was given direct by a Rear-Admiral to "mere Warrant Officers and Petty Officers." If they had refused to obey it, "everyone would have fallen upon them."

As the accused had no criminal intent, it was clear that they had committed no crime.

The other defending Counsel pointed out that the executioners each requested that they should not be assigned the task of carrying out the killing, but when emphatically ordered by Masuda, a man of strong character, they had obeyed, in accordance with their training. Their actions were not of their own volition; they were the will of another.

Tasaki, the custodian of the prisoners of war, who arranged their handing over to the executioners, also merely acted in accordance with the orders of the Rear-Admiral. Certainly the latter had told him why he was to surrender the prisoners, but this fact in no way placed him in the position of a participant in the commission of a crime.

5. THE ARGUMENTS OF THE PROSECTUION USED IN COUNTERING THE PLEAS OF THE DEFENCE

(ii) *Concerning the Defence of Superior Orders*

One of the two Judge Advocates quoted three authorities with the intention of securing the rejection by the Commission of the plea of superior orders. The Judge Advocate General, he said, had made reference, in Court Martial orders 212-1919, to the following dictum in *U.S. v. Carr* (25 Fed. Cases 307): "Soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime."

In another case, involving the killing of a Nicaraguan citizen by a member of the United States forces, the Judge Advocate stated: "An order illegal in itself and not justified by the rules and usages of war, or in its substance clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same crime in law" (CMO 4-1929).

In the opinion of the Judge Advocate, however, the statement of the law most clearly in point was contained in "the rules promulgated by the Supreme Command of the Allied Powers for use in war crime cases. This body of international law, briefly known as the SCAP rules and adopted by the Commission at the direction of the Judge Advocate General of the Navy, has the following provision applicable to the defence raised by the accused, quoting sub-paragraph *(f)* of paragraph 16:

'The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defence but may be considered in mitigation of punishment if the commission determines that justice so requires.' "

6. THE EVIDENCE

The evidence is not here set out at length, since, in the main, the facts were not disputed, and the case turned essentially on a question of law. The facts derived from an examination of the witnesses for the Prosecution are set out in brief under heading 3 *(supra)*. These witnesses comprised a legal officer who had acted as war crimes and atrocities investigator for the Marshalls Gilberts Area, an islander who had witnessed the capturing of the prisoners, one of the captors, a Japanese Lieutenant who had interrogated them, an interpreter who was present during the interrogation, a Japanese truck-driver who had been ordered by Kawachi to take the airmen to the cemetery, the seaman who cremated their bodies, a Japanese Major who testified to the authenticity of Masuda's written statements on the killing of the prisoners, a United States soldier who translated from the Japanese various documents before the Court, and one of the two Judge Advocates in the trial, who testified that the statements by the four accused which were before the Commission had actually been signed by them.

The three accused of having been the actual executioners gave evidence on their own behalf. Tasaki's evidence was given only by way of a signed statement.

7. THE VERDICT

All four accused were found guilty.

8. THE SENTENCE

Yoshimura, Kawachi and Tanaka were sentenced to death by hanging.

Tasaki was sentenced to ten years' imprisonment. His punishment was lighter than that of the others because of the "brief, passive and mechanical participation of the accused."

The proceedings, findings and sentences were approved by the Commander of the Marshalls Gilberts Area, Rear-Admiral Harrill.

DOCUMENT NO. 73

CONTROL COUNCIL LAW NO. 10
(ALLIED CONTROL COUNCIL, Berlin, 20 December 1945)

SOURCE
1 T.W.C. xvi

NOTE

It was originally anticipated that the International Military Tribunal created by the London Agreement of 8 August 1945 (DOCUMENT NO. 68) would conduct more than one trial of major accused war criminals after the end of World War II in Europe. (It did not.) Nevertheless, it was realized that there would be a need for the creation of other courts to try the many individual accused violators of the law of war as to whom information had been collected by the United Nations War Crimes Commission or the various Allied nations. Of particular importance was the system of cooperation to be employed by the four Powers which occupied zones in Germany under the military occupation which followed the end of hostilities. The present law, promulgated by the four Zone Commanders who constituted the Control Council for Germany as a whole, established the basic system. (For the Ordinance issued by the Military Government of the U.S. Zone of Occupation in implementation of the Control Council Law, see DOCUMENT NO. 86.)

TEXT

CONTROL COUNCIL LAW NO. 10

PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and 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 Control Council enacts as follows:

ARTICLE I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

ARTICLE II

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of 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. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from 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. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was *(a)* a principal or *(b)* was an accessory to the commission of any such crime or ordered or abetted the same or *(c)* took a consenting part therein or *(d)* was connected with plans or enterprises involving its commission or *(e)* was a member of any organization or group connected with the commission of any such crime or *(f)* with reference to paragraph 1 *(a)*, if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any person found guilty of any of the Crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one of more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labour.

(a) Fine, and imprisonment with or without hard labour, in lieu thereof.

(d) Forfeiture of property.

(e) Restitution of property wrongfully acquired.

(f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. *(a)* The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government

or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

ARTICLE III

1. Each occupying authority, within its Zone of occupation,

(a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

(b) shall report to the Legal Directorate the names of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and location of witnesses.

(c) shall take appropriate measures to see that witnesses and evidence will be available when required.

(d) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1 *(b)* of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.

5. The execution of death sentences may be deferred by not to exceed one month after the sentence has become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his

Zone.

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant hereto, as he may deem proper in the interest of justice.

ARTICLE IV

When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone in which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.

2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its determination to be communicated to the Zone Commander.

(a) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence outside Germany, as the case may be, except upon approval of the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.

(b) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:

(1) If wanted for trial in the Zone in which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere;

(2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere;

(3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;

(4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;

(5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV *(b)* (3) above, that which has the most serious charges against him, which are moreover supported by evidence, should have priority.

ARTICLE V

The delivery, under Article IV of this Law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of

defeating or unnecessary delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by the Court of the zone or country to which he has been delivered, then such person shall be returned upon demand of the Commander of the Zone where the person was located prior to delivery.

DOCUMENT NO. 74

TRIAL OF ERICH HEYER AND SIX OTHERS
(THE ESSEN LYNCHING CASE)
(British Military Court, Essen, 22 December 1945)

SOURCES
1 LRTWC 88
13 Ann. Dig. 287

NOTE

Among the numerous illegal general orders issued by the Nazis in Germany during World War II (1939-1945) was one which directed the police and the military not to interfere if members of the civilian population demonstrated their displeasure concerning the bombings to which they were being subjected by attacking enemy airmen who had parachuted on to German territory from crippled aircraft and had thereafter been taken into custody as prisoners of war. (See DOCUMENT NO. 104.) Although that order was not directly involved here, this case graphically illustrates the result to be expected when prisoners of war are not given the protection to which they are entitled under the laws and customs of war.

EXTRACTS

2. THE CHARGE

The seven accused were jointly charged with committing a war crime in that they, at Essen-West on the 13th December 1944, in violation of the laws and usages of war, were with other persons, concerned in the killing of three unidentified British airmen, prisoners of war.

At the material time, one of the accused, Erich Heyer, had been a Captain in the German army; and the accused Peter Koenen had been a private in the German army.

The rest of the accused were German civilians, inhabitants of Essen.

3. THE CASE FOR THE PROSECUTION

The Prosecutor stated that the three captured British airmen had been handed by the German police into the custody of the military unit which was under the command of the accused Hauptmann Heyer. The three airmen were placed by Hauptmann Heyer under an escort consisting of an N.C.O., who was not before the Court, and the accused, Private Koenen.

The Prosecution alleged that Heyer had given to the escort instructions that they should take the prisoners to the nearest Luftwaffe unit interrogation. It was submitted by the Prosecution that this order, though on the face of it correct, was given out to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. It was alleged that he had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners.

When the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.

The allegation of the Prosecution was that there were three stages in the killing, starting with the incitement at the entrance to the barracks, continuing with the beating and finally the throwing over the parapet and shooting. The accused Heyer "lit the match." Each person who struck a blow was "putting flame to the fuel," which was the enraged population, and finally "the explosion" came on the bridge. It was, therefore, the submission of the Prosecution that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen, was guilty in that he was concerned in the killing. It was impossible to separate any one of these acts from another; they all made up what is known as a lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.

Hauptmann Heyer admittedly never struck any physical blow against the airmen at all. His part in this affair was an entirely verbal one; in the submission of the Prosecution this was one of those cases of words that kill, and he was as responsible, if not more responsible, for the deaths of the three men as any one else concerned.

The Prosecutor expressly stated that he was not suggesting that the mere fact of passing on the secret order to the escort that they should not interfere to protect the prisoners against the crowd was sufficiently proximate to the killing, so that on that alone Heyer was concerned in the killing. The Prosecutor advised the Court that, if it was not satisfied beyond reasonable doubt that he had incited the crowd to lynch these airmen, he was then entitled to acquittal, but if the Court was satisfied that he did in fact say these people were to be shot, and did in fact incite the crowd to kill the airmen, then, in the submission of the Prosecution, he was guilty.

The Prosecution referred to the rule of British law in which an instigator may be regarded as a principal. The same held good in this case if a man incited someone else to commit a crime and that crime was committed, he was triable and punishable as a principal and it made no difference in this repsect whether the trial took place under British law or under the Regulations for the trial of war criminals.

Referring to the member of the escort, Private Koenen, the Prosecutor pointed out that his position was somewhat difficult because his military duty and his conscience must have conflicted. He was given an order not to interfere and he did not interfere. He stood by while these three airmen were

murdered. Mere inaction on the part of a spectator is not in itself a crime. A man might stand by and see someone else drowning and let him go and do nothing. He has committed no crime. But in certain circumstances a person may be under a duty to do something. In the Prosecutor's submission this escort, as the representative of the Power which had taken the airmen prisoners, had the duty not only to prevent them from escaping but also of seeing that they were not molested. Therefore it was the duty of the escort, who was armed with a revolver, to protect the people in his custody. Koenen failed to do what his duty required him to do. In the Prosecutor's opinion, his guilt was, however, not as bad as the guilt of those who took an active part, but a person who was responsible for the safety of the prisoners and who deliberately stood by and merely held his rifle up to cover them while other people killed them, was "concerned in the killing."

4. THE EVIDENCE

The allegation of the Prosecution that Heyer had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners was proved in evidence, and was also admitted by Heyer himself. It was confirmed by some German witnesses, though not admitted by Heyer, that he made remarks to the effect that the airmen ought to be shot or that they would be shot.

One of the accused, Boddenberg, expressly admitted having hit the airmen with his belt. The part played by each of the others was described by one or more German witnesses.

5. THE VERDICT

Hauptmann Heyer and Private Keonen were found guilty. Two of the accused civilians were acquitted. The other civilians were found guilty.

6. THE SENTENCES

The Court sentenced Heyer to death by hanging, and Koenen to imprisonment for five years.

The sentences on the three civilians who were found guilty were as follows:

Johann Braschoss was sentenced to death by hanging.

Karl Kaufer to imprisonment for life, and

Hugo Boddenberg to imprisonment for ten years.

The executions were carried out on March 8th, 1946.

DOCUMENT NO. 75

SPECIAL PROCLAMATION BY THE SUPREME COMMANDER FOR THE ALLIED POWERS AT TOKYO ESTABLISHING AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST; AND THE TRIBUNAL'S [AMENDED] CHARTER

(Tokyo, 19 January 1946, as amended 26 April 1946)

SOURCES

4 Bevans 20 and 27
8 Documents on American Foreign Relations, 1945-1946, at 353
Judgment of the International Tribunal for the Far East, Annex A-4

NOTE

Unlike the International Military Tribunal (Nuremberg), which was established by an agreement negotiated and signed by the political representatives of the four major Allies in World War II (1939-1945), and which was later adhered to by the governments of 19 other Allied Powers (DOCUMENT NO. 68), the International Military Tribunal for the Far East (IMTFE) which sat in Tokyo for the trial of the major Japanese personalities charged with war crimes was established by proclamation of the military commander in Occupied Japan, the Supreme Commander for the Allied Powers (SCAP), General of the Army Douglas MacArthur, USA, who simultaneously issued an order promulgating the Tribunal's Charter. (He acted pursuant to the general authority delegated to him by the Moscow Conference Agreement of 26 December 1945. 3 Bevans 1341.) This Charter was subsequently superseded by an amended one which actually governed the Tribunal during the trial. (The amended Charter is the one given below.) While it is obvious that the London Charter of the International Military Tribunal served as the basic source for the Charter of the IMTFE, a number of important differences are obvious. Thus, while only France, the USSR, the United Kingdom, and the United States had judges on the Tribunal which sat at Nuremberg, the nine nations which had signed the Instrument of Surrender of Japan on 15 September 1945, plus India and the Philippines, all had judges on the IMTFE. On the other hand, while each of the four major Powers had a prosecutor at Nuremberg, in Tokyo the chief prosecutor, appointed by SCAP, was from the United States and the other 10 nations were only entitled to designate associate prosecutors.

SPECIAL PROCLAMATION:

ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

Whereas, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time

made declarations of their intentions that war criminals should be brought to justice;

Whereas, the Governments of the Allied Powers at war with Japan on the 26th July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all criminals including those who have visited cruelties upon our prisoners;

Whereas, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd September 1945, the signatories for Japan by command of and in behalf of the Emperor and the Japanese Government, accepted the terms set forth in such Declaration at Potsdam;

Whereas, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is authorized to take such steps as he deems proper to effectuate the terms of surrender;

Whereas, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces;

Whereas, the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender.

Now, therefore, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Terms of Surrender which requires the meting out of stern justice to war criminals, do order and provide as follows:

ARTICLE 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.

ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal for the Far East, approved by me this day.

ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

Given under my hand at Tokyo, this 19th day of January, 1946.

DOUGLAS MACARTHUR
General of the Army, United States Army
Supreme Commander for the Allied Powers

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

GENERAL ORDERS — APO 500
NO. ————20 — 26 APRIL 1946

General Orders No. 1, General Headquarters, Supreme Commander for the Allied Powers, 19 January 1946, subject as below, is superseded. The Charter of the International Military Tribunal for the Far East established by Proclamation of the Supreme Commander for the Allied Powers, 19 January 1946, is amended, and as amended, reads as follows:

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

SECTION I

CONSTITUTION OF TRIBUNAL

ARTICLE 1. *Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

ARTICLE 2. *Members.* The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

ARTICLE 3. *Officers and Secretariat.*

a. President. The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

b. Secretariat.

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its members, and perform such other duties as may be designated by the Tribunal.

ARTICLE 4. *Convening and Quorum, Voting, and Absence.*

a. Convening and Quorum. When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

b. Voting. All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

c. Absence. If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

SECTION II

JURISDICTION AND GENERAL PROVISIONS

ARTICLE 5. *Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a. Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

b. Conventional War Crimes: Namely, violations of the laws or customs of war;

c. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial 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 person in execution of such plan.

ARTICLE 6. *Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation if the Tribunal determines that justice so requires.

ARTICLE 7. *Rules of Procedure.* The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

ARTICLE 8. *Counsel.*

a. Chief of Counsel. The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal and will render such legal assistance to the Supreme Commander as is appropriate.

b. Associate Counsel. Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

SECTION III

FAIR TRIAL FOR ACCUSED

ARTICLE 9. *Procedure for Fair Trial.* In order to insure fair trial for the accused the following procedure shall be followed:

a. Indictment. The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment, including any

amendment, and of this Charter, in a language understood by the accused.

b. Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

c. Counsel for Accused. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

d. Evidence for Defense. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

e. Production of Evidence for the Defense. An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

ARTICLE 10. *Applications and Motions before Trial.* All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

SECTION IV

POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

ARTICLE 11. *Powers.* The Tribunal shall have the power:

a. To summon witnesses to the trial, to require them to attend and testify, and to question them.

b. To interrogate each accused and to permit comment on his refusal to answer any question.

c. To require the production of documents and other evidentiary material.

d. To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths.

e. To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

ARTICLE 12. *Conduct of Trial.* The Tribunal shall:

a. Confine the trial strictly to an expeditious hearing of the issues raised by the charges.

b. Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever.

c. Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

d. Determine the mental and physical capacity of any accused to proceed to trial.

ARTICLE 13. *Evidence.*

a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

b. Relevance. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

c. Specific evidence admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Trubunal to have personal knowledge of the matters contained in the report.

(3) An affidavit, deposition or other signed statement.

(4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.

(5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.

d. Judicial Notice. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation or of the proceedings, records, and findings of military or other agencies of any of the United Nations.

e. Records, Exhibits, and Documents. The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

ARTICLE 14. *Place of Trial.* The first trial will be held at Tokyo, and any subsequent trials will be held at such places as the Tribunal decides.

ARTICLE 15. *Course of Trial Proceedings.* The proceedings at the Trial will take the following course:

a. The indictment will be read in court unless the reading is waived by all accused.

b. The Tribunal will ask each accused whether he pleads "guilty" or "not

guilty".

c. The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.

d. The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.

e. The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.

f. Accused (by counsel only, if represented) may address the Tribunal.

g. The prosecution may address the Tribunal.

h. The Tribunal will deliver judgment and pronounce sentence.

SECTION V

JUDGMENT AND SENTENCE

ARTICLE 16. *Penalty.* The Tribunal shall have the power to impose upon an accused, on conviction, death, or such other punishment as shall be determined by it to be just.

ARTICLE 17. *Judgment and review.* The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action. Sentence will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity.

By command of General MAC ARTHUR:

RICHARD J. MARSHALL
Major General, General Staff Corps
Chief of Staff

DOCUMENT NO. 76

IN RE YAMASHITA
(Supreme Court of the United States, 4 February 1946)

SOURCE

327 U.S. 1

NOTE

General Tomoyuki Yamashita, the commander of the Imperial Japanese armed forces in the Philippines during the 1944-1945 battle for those islands, was tried by a United States Military Commission sitting in Manila on a charge that he had failed to exercise proper control over the troops under his command with the result that they had committed widespread violations of the laws and customs of war. He was found guilty and was sentenced to death by hanging and the sentence was confirmed by the United States commander, General of the Army Douglas MacArthur (DOCUMENT NO. 71). He then made an application to the Supreme Court of the United States for leave to file a petition for writs of habeas corpus and prohibition claiming, *inter alia*, that he had not received all of the trial safeguards to which he was entitled under the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49). The pertinent portion of the opinion of the Court, given below, holds that a prisoner of war being tried for "precapture" offenses ("war crimes") is not entitled to the judicial safeguards of the Convention. This decision was widely followed in other war crimes trials conducted by various countries after the cessation of the hostilities of World War II (1939-1945). This procedure did not meet with universal approval and the Diplomatic Conference which drafted the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) adopted, with only minor editorial change, the provision recommended by the 1948 Stockholm Conference (see DOCUMENT NO. 98) which became Article 85 of the 1949 Convention. Contrary to the holding of the Supreme Court in the *Yamashita Case*, Article 85 preserves to the prisoner of war being tried for a precapture offense all of the benefits of the Convention, both prior to and during trial, and even after conviction. (According to the Soviet Union, its reservation to this article was not intended to remove the prisoner of war from the protection of the Convention until he has actually been convicted of a war crime and the conviction has become final (DOCUMENT NO. 109).) The opinion is also notable for its holding that a military commander is personally responsible for the criminal misconduct of the members of his command directed against protected persons, including prisoners of war, if he fails to take the necessary steps to prevent such misconduct before it occurs, and to bring it to a halt and to punish offenders if it does occur. (To the same effect, see DOCUMENT NO. 101.) Articles 86 and 87 of the 1977 Protocol I (DOCUMENT NO. 175) are the most recent attempts to deal with this problem.

EXTRACTS

Mr. Chief Justice Stone delivered the opinion of the Court:

The charge. Neither congressional action nor the military orders

constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of 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."

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of a "deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306-7. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

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 the Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article 1 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 property 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 commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, [of the convention] as well as for unforseen 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 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. A like principle has been applied so as to impose liability on the United States in international arbitrations. *Case of Jeannaud,* 3 Moore, International Arbitrations, 3000; *Case of The Zafiro,* 5 Hackworth, Digest of International Law, 707.

We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances. We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See *Smith v. Whitney,* 116 U.S. 167, 178. It is plain that the charge on which petitioner was tried charged him with

a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. *Collins v. McDonald, supra*, 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war and that the commission had authority to try and decide the issue which it raised. Cf. *Dealy v. United States*, 152 U.S. 539; *Williamson v. United States*, 207 U.S. 425, 447; *Glasser v. United States*, 315 U.S. 60, 66, and cases cited.

The proceedings before the commission. The regulations prescribed by General MacArthur governing the procedure for the trial of petitioner by the commission directed that the commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man," and that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority. The petitions in this case charged that in the course of the trial the commission received, over objection by petitioner's counsel, the deposition of a witness taken pursuant to military authority by a United States Army captain. It also, over like objection, admitted hearsay and opinion evidence tendered by the prosecution. Petitioner argues, as ground for the writ of habeas corpus, that Article 25 of the Articles of War prohibited the reception in evidence by the commission of depositions on behalf of the prosecution in a capital case, and that Article 38 prohibited the reception of hearsay and of opinion evidence.

We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates "the persons . . . subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them. Articles 12, 13 and 14, before the adoption of Article 15 in 1916, made all "persons subject to military law" amenable to trial by courts-martial for any offense made punishable by the Articles of War. Article 12 makes triable by general court-martial "any other person who by the law of war is subject to trial by military tribunals." Since Article 2, in its 1916 form, includes some persons who, by the law of war, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional

jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles. It declared that "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that . . . by the law of war may be triable by such military commissions."

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

Petitioner further urges that by virtue of Article 63 of the Geneva Convention of 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.

Article 63 of the Convention appears in part 3, entitled "Judicial Suits," of Chapter 3, "Penalties Applicable to Prisoners of War," of § V, "Prisoners' Relations with the Authorities," one of the sections of Title III, "Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity as such. Chapter 1 of § V, Article 42 deals with complaints of prisoners of war because of the conditions of captivity. Chapter 2, Articles 43 and 44, relates to those of their number chosen by prisoners of war to

represent them.

Chapter 3 of § V, Articles 45 through 67, is entitled "Penalties Applicable to Prisoners of War." Part 1 of that chapter, Articles 45 through 53, indicate what acts of prisoners of war, committed while prisoners, shall be considered offenses, and defines to some extent the punishment which the detaining power may impose on account of such offenses. Punishment is of two kinds — "disciplinary" and "judicial," the latter being the more severe. Article 52 requires that leniency be exercised in deciding whether an offense requires disciplinary or judicial punishment. Part 2 of Chapter 3 is entitled "Disciplinary Punishments," and further defines the extent of such punishment, and the mode in which it may be imposed. Part 3, entitled "Judicial Suits," in which Article 63 is found, describes the procedure by which "judicial" punishment may be imposed. The three parts of Chapter 3, taken together, are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offenses, and of the procedure by which guilt may be adjudged and sentence pronounced.

We think it clear, from the context of these recited provisions, that part 3, and Article 63, which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war. Section V gives no indication that this part was designed to deal with offenses other than those referred to in parts 1 and 2 of Chapter 3.

Effect of failure to give notice of the trial to the protecting power. Article 60 of the Geneva Convention of July 27, 1929, 47 Stat. 2051, to which the United States and Japan were signatories, provides that "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial." Petitioner relies on the failure to give the prescribed notice to the protecting power to establish want of authority in the commission to proceed with the trial.

For reasons already stated we conclude that Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, § V, Title III of the Geneva Convention, applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war.

It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command. We have considered, but find it unnecessary to discuss, other contentions which we find to be without merit. We therefore conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful, and that the petition for certiorari, and leave to file in this Court petitions for writs of habeas corpus and prohibition should be, and they are

Denied.

Rutledge, J., dissenting:

* * * * *

The Geneva Convention of 1929.

If the provisions of Articles 25 and 38 were not applicable to the proceeding by their own force as Acts of Congress, I think they would still be made applicable by virtue of the terms of the Geneva Convention of 1929, in particular Article 63. And in other respects, in my opinion, the petitioner's trial was not in accord with that treaty, namely, with Article 60.

The Court does not hold that the Geneva Convention is not binding upon the United States and no such contention has been made in this case. It relies on other arguments to show that Article 60, which provides that the protecting power shall be notified in advance of a judicial proceeding directed against a prisoner of war, and Article 63, which provides that a prisoner of war may be tried only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power, are not properly invoked by the petitioner. Before considering the Court's view that these Articles are not applicable to this proceeding by their terms, it may be noted that on his surrender petitioner was interned in conformity with Article 9 of this Convention.

The chief argument is that Articles 60 and 63 have reference only to offenses committed by a prisoner of war while a prisoner of war and not to violations of the laws of war committed while a combatant. This conclusion is derived from the setting in which these Articles are placed. I do not agree that the context gives any support to this argument. The argument is in essence of the same type as the argument the Court employs to nullify the application of Articles 25 and 38 of the Articles of War by restricting their own broader coverage by reference to Article 2.

Neither Article 60 nor Article 63 contains such a restriction of meaning as the Court reads into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view. For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the opposite one leaves prisoners of war open to any form of trial and punishment for offenses against the laws of war their captors may wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offense. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.

The United States has complied with neither of these Articles. It did not notify the protecting power of Japan in advance of trial as Article 60 requires it to do, although the supplemental bill charges the same failure to petitioner in Item 89. It is said that, although this may be true, the proceeding is not thereby invalidated. The argument is that our noncompliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. I cannot agree. The treaties made by the United States are by the Constitution made the supreme law of the land. In the absence of something in the treaty indicating that its provisions were not

intended to be enforced, upon breach, by more than subsequent indemnification, it is, as I conceive it, the duty of the courts of this country to insure the nation's compliance with such treaties, except in the case of political questions. This is especially true where the treaty has provisions — such as Article 60 — for the protection of a man being tried for an offense the punishment for which is death; for to say that it was intended to provide for enforcement of such provisions solely by claim, after breach, of indemnity would be in many instances, especially those involving trial of nationals of a defeated nation by a conquering one, to deprive the Articles of all force. Executed men are not much aided by post-war claims for indemnity. I do not think the adhering powers' purpose was to provide only for such ineffective relief.

Finally, the Government has argued that Article 60 has no application after the actual cessation of hostilities, as there is no longer any need for an intervening power between the two belligerents. The premise is that Japan no longer needs Switzerland to intervene with the United States to protect the rights of Japanese nationals, since Japan is now in direct communication with this Government. This of course is in contradiction of the Government's theory, in other connections, that the war is not over and military necessity still requires use of all the power necessary for actual combat.

Furthermore the premise overlooks all the realities of the situation. Japan is a defeated power, having surrendered, if not unconditionally then under the most severe conditions. Her territory is occupied by American military forces. She is scarcely in a position to bargain with us or to assert her rights. Nor can her nationals. She no longer holds American prisoners of war. Certainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now. In my opinion the failure to give the notice required by Article 60 is only another instance of the commission's failure to observe the obligations of our law.

What is more important, there was no compliance with Article 63 of the same Convention. Yamashita was not tried "according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Had one of our soldiers or officers been tried for alleged war crimes, he would have been entitled to the benefits of the Articles of War. I think that Yamashita was equally entitled to the same protection. In any event, he was entitled to their benefits under the provisions of Article 63 of the Geneva Convention. Those benefits he did not receive. Accordingly, his trial was in violation of the Convention.

DOCUMENT NO. 77

TRIAL OF KARL AMBERGER
(THE DREIERWALDE CASE)
(British Military Court, Wuppertal, Germany, 14 March 1946)

SOURCES

1 LRTWC 81

13 Ann. Dig. 291

NOTE

This was one of a number of cases involving the shooting of prisoners of war in which the defense asserted was that they had been shot "while attempting to escape." While the issue presented is thus one of fact, it should be noted that it is one frequently raised and one in which there are usually no survivors to give an eyewitness account for the prosecution.

EXTRACTS

2. THE CHARGE

The accused, Karl Amberger (formerly Oberfeldwebel), a German National, was charged with "Committing a War Crime in that he at Dreierwalde Aerodrome on or about 22nd March, 1945, in violation of the laws and usages of War, was concerned in the killing of . . . (two members of the Royal Australian Air Force and two members of the Royal Air Force) . . ., allied Prisoners of War."

In his closing speech the Prosecutor stated that the legal basis of the charge lay in Article 23 *(c)* of the Hague Rules of 1907, which bound both the German and the British Governments. This laid down that "In addition to the prohibitions provided by special Conventions it is particularly forbidden: *(c)* to kill or wound any enemy who, having laid down his arms, no longer having means of defence, has surrendered at discretion."

3. THE CASE AND EVIDENCE FOR THE PROSECUTION

The Prosecutor opened his case by stating that Karl Amberger was acting on the relevant date in March, 1945, as senior instructing warrant officer at the Aerodrome between the villages of Hopsten and Dreierwalde. During a severe air raid made in the vicinity of the Aerodrome on the 21st March, 1945, the four deceased allied prisoners of war, together with Flight-Lieutenant Berick of the Royal Australian Air Force, were forced to bale out, and were on capture taken to the Aerodrome. Towards the evening of the 22nd March, a party, consisting of Amberger in charge, and two German N.C.O.s, set off ostensibly to conduct the five prisoners of war to a railway station for the purpose of taking them to a Prisoner of War camp or Interrogation Centre. After going about a mile and a half the party turned on to a track leading into a wood. Here, despite the fact that the prisoners were proceeding with decorum, the three N.C.O.s, including Amberger, began firing on them. All were killed except Flight-Lieutenant Berick, who escaped, though wounded. The case for the Prosecution was that the prisoners made no attempt to

escape, and that the shooting was cold and calculated murder.

It had proved impossible to bring F/Lt. Berick from Australia to attend the trial, but two sworn affidavits made by him were submitted.

In these, he stated, *inter alia*, that, as the prisoners were proceeding along the track in the wood five abreast, having been ordered to do so, they "heard a click" behind them; F/Lt. Berick looked round and saw one of the guards cocking the action of his Schmeizer. All three had their weapons at the ready. The firing then began.

Authenticated photostatic reproductions of two photographs, which F/Lt. Berick maintained that he had subsequently taken at the scene of the shooting, were also submitted to the Court.

Werner Lauter (formerly Oberfeldwebel), a witness, stated that he was acting at the Aerodrome in March, 1945, as the Chief Clerk of the Kommandatur. He claimed that Amberger had volunteered to do the escort duty and had detailed the other N.C.O.s from his own unit. Lauter maintained that he had heard remarks made by the accused to this effect: "I shall finish off these Allied P.O.W.s, these Allied Airmen." The witness had therefore been so doubtful as to the fitness of Amberger for the task that he had communicated his doubts to the Adjutant. It had proved impossible, however, to find a substitute for Amberger.

An authenticated photostatic reproduction of an affidavit of Joachim Erdmann, clerk of the Aerodrome in March, 1945, was then submitted. Extensive efforts to find the witness had failed. His evidence was, *inter alia*, that, on 22nd March, 1945, on returning with a girl, Elfriede Nicklas, from a walk, he passed the five prisoners and certain German N.C.O.s, on a track leading into some woods. After he and the girl had walked about 300 yards past the party, they heard firing from the direction in which it had gone.

Elfriede Nicklas, a German national, identified Amberger as being one of the guard party. She testified that the prisoners were quite disciplined as they passed, and claimed that Erdmann had said that N.C.O.s in the Aerodrome had been asked to volunteer to shoot the prisoners. After the shooting, Erdmann, she claimed, had told her that it was to have taken place at a spot further along the route, and not where it actually did happen.

As a result of F/Lt. Berick's complaint on finally returning to England, Major William Davidson, R.A.M.C., a pathologist, proceeded to Dreierwalde Cemetery, where he exhumed a grave and found four bodies which he identified as being those of the prisoners. All four had been shot through the head. His report was submitted to the Court.

4. THE CASE AND EVIDENCE FOR THE DEFENCE

The accused pleaded not guilty.

Giving evidence himself as a witness on oath, Amberger denied having volunteered for escort duty or having made remarks hostile to prisoners of war. He had himself decided that the party should proceed through the woods instead of by the road way, since thus there would be less danger of meeting civilians. Feeling among the civilians was high due to Allied air-raids. He maintained that the prisoners were certainly marching abreast immediately

before the alleged attempt to escape, but that he had not ordered them to do so. Amberger claimed that he saw the prisoners talking to one another in a suspicious way, and taking their bearings from canal bridges and from the stars. He had therefore honestly believed that they were going to attempt to escape. In the failing light four of the prisoners had then tried to escape in various directions, while the fifth had attacked him.

There were no other witnesses for the defence.

The defending Counsel did not deny the shooting of the four airmen, but asked the Court to believe that "there was an attempt to escape, or what appeared to be an attempt to escape which, in the contention of the defence, means the same thing."

The defending Counsel, in his closing speech, attempted to reconcile F/Lt. Berick's statement that no attempt had been made to escape with Amberger's evidence to the contrary, by saying that the cocking of the action of a weapon by one guard was not unnatural given the fact that five prisoners had to be guarded in a lane in the growing dusk. Having previously suffered ill-treatment, Berick and the other prisoners probably regarded it as likely that they were to be shot, as others in their position had been, and began to run when it was not necessary for them to do so.

5. THE VERDICT

The accused was found guilty of the charge, subject to confirmation by the Superior Military Authority.

6. THE SENTENCE

Counsel for the Defence, pleading in mitigation on behalf of Amberger, asked the Court to take into account the latter's previous record as a brave, responsible soldier. He may have considered that the airmen in his hands were responsible for the attack, which killed around 40 civilians and airmen on the airfield at Dreierwalde, and that he was justified in acting as judge over the acts of these men.

Nevertheless, the accused was sentenced to death by hanging. The sentence was confirmed and carried out on 15th May, 1946.

DOCUMENT NO. 78

TRIAL OF LIEUTENANT GENERAL SHIGERU SAWADA AND THREE OTHERS
(U.S. Military Commission, Shanghai, 15 April 1946)

SOURCE

5 LRTWC 1

NOTE

This is one of the post-World War II (1941-1945) war crimes trials in which the accused were charged with denying a fair trial to prisoners of war. (See also DOCUMENT NO. 101) (under the rubric "Murder of Captured Aviators.") The victims here were eight of the "Doolittle" fliers who had bombed Japan proper on 18 April 1942 and then had made forced landings and had been captured by the Japanese. They were tried under a subsequently enacted law for allegedly having attacked non-military targets.

EXTRACTS

1. THE CHARGES

The charge against Major-General Shigeru Sawada, formerly Commanding General of the Japanese Imperial 13th Expeditionary Army in China, was that, on or about August, 1942, he did "at or near Shanghai, China, knowingly, unlawfully and wilfully and by his official acts cause" eight named members of the United States forces "to be denied the status of Prisoners of War and to be tried and sentenced by a Japanese Military Tribunal in violation of the laws and customs of war."

It was also charged that the second and third accused, Second-Lieutenant Okada Ryuhei and Lieutenant Wako Yusei, both of the Japanese Imperial 13th Expeditionary Army in China, as members of a Japanese Military Tribunal, "did at Kiangwan Military Prison, Shanghai, China, knowingly, unlawfully and wilfully try, prosecute and adjudge" the eight members of the United States forces "to be put to death in violation of the laws and customs of war."

Finally, a charge was brought against Tatsuta Sotojiro, Captain in the Japanese Imperial 13th Expeditionary Army in China, stating that he "did at Shanghai, China, knowingly, unlawfully and wilfully command and execute an unlawful Order of a Japanese Military Tribunal, and did thereby cause the death of 'three of the victims' who were lawfully and rightfully Prisoners of War" and in his capacity as "Commanding Officer of the Kiangwan Military Prison, Shanghai, China" did between 28th August, 1942 and 17th April, 1943, at Kiangwan Military Prison, "deny the status of Prisoners of War to" all eight, in violation of the laws and customs of war.

The accused pleaded not guilty.

In greater detail the allegations made by the Prosecution concerned the following acts of commission and omission:

(i) That Sawada, as commanding general of the 13th Japanese Army in

China, caused the eight captured American fliers to be tried and sentenced to death by a Japanese military tribunal on false, and fraudulent charges; that he had the power to commute, remit and revoke such sentences and failed to do so, thereby causing the unlawful death of four of the fliers and the imprisonment of the others; that he was responsible for the improper treatment of all the captured airmen, having denied them the lawful status of prisoners of war; that in addition, he was responsible for the cruel and brutal atrocities and other offences, including the denial of proper food, clothing, medical care and shelter, committed against one of the eight.

(ii) That the two accused Okada and Wako unlawfully tried and adjudged the eight fliers under false and fraudulent charges without affording them a fair trial, interpretation of the proceedings, counsel, or an opportunity to defend, and sentenced them to death.

(iii) That Tatsuta commanded and executed an unlawful order of a Japanese military tribunal which caused the death of three of the fliers, and that as commanding officer of Kiangwan Military Prison he forcibly detained all eight in solitary confinement and otherwise unlawfully treated them by denying them adequate and proper shelter, bedding, food, water, sanitary facilities, clothing, medical care and other essential facilities.

2. THE EVIDENCE

Eight United States airmen, after taking part in a bombing raid on a Japanese steel mill, an oil refinery and an aircraft factory on 18th April, 1942, were forced to earth and captured by the Japanese and eventually held in Tokyo for about fifty-two days, during which time they were imprisoned in solitary confinement. There was evidence that, both during their period in Tokyo and previously, they were subjected to various forms of torture during interrogations.

On 28th August, 1942, after spending approximately seventy further days at the Bridge House Jail, Shanghai, in small verminous and insanitary cells, all eight fliers were removed to the Kiangwan Military Prison, on the outskirts of Shanghai. At the time of their transfer, all the fliers were weak and underweight and one was very ill. On arriving, they were assembled in a room before several Japanese officers, who, they later learned, constituted their court-martial. The accused Wako and Okado were among the members of the court. The accused Tatsuta attended the trial voluntarily and not officially, as a spectator, for a short time. The fliers stood before the Japanese officers who conversed in their own language. The sick prisoner was carried in on a stretcher where he continued to lie during the proceedings. He was ill but was not attended by a doctor or a nurse. He did not, by his eyes or facial expression, appear to recognize the others; nor did he make any statements. The fliers were asked a few questions about their life histories, their schooling and training. After they answered, one of the Japanese stood up and read from a manuscript in Japanese. The fliers made no other statement. There

was an interpreter present, but he did not interpret anything except the fliers' names and ranks, and similar details. The proceedings lasted about two hours at the very most. The fliers were not told that they were being tried; they were not advised of any charges against them; they were not given any opportunity to plead, either guilty or not guilty; they were not asked (nor did they say anything) about their bombing mission. No witnesses appeared at the proceedings; the fliers themselves did not see any of the statements utilized by the court that they had previously made at Tokyo; they were not represented by counsel; no reporter was present; and to their knowledge no evidence was presented against them.

Prior to the trial, a draft of a Japanese law concerning the punishment of captured enemy airmen was sent from higher headquarters at Tokyo to the Headquarters of the China Expeditionary Forces in Nanking in July, 1942, and at the same time Tokyo requested the 13th Japanese Army Headquarters to defer its trial of the eight American fliers until the new military law had been enacted. Soon afterwards the supreme commander at Nanking (General Hata) issued this "Enemy Airmen's Act" to the 13th Army. This law stated in substance that it should take effect on 13th August, 1942 and be applied to all enemy airmen taking part in raids against Japanese territories; that any one who should participate in the bombing or strafing of non-military targets or who should participate in any other violation of international law would be sentenced to death, which sentence might be commuted to life imprisonment or to a term of imprisonment not less than ten years; and that imprisonment under the Act would be in accordance with the provisions of Japanese criminal law. A staff officer from Tokyo was sent to China to give instructions regarding the trial of the fliers and to demand that General Hata have the prosecutor require the death sentence and report the court's decision to Tokyo.

The evidence of the accused Sawada, Okada, and Wako showed that only a permissive death sentence existed under Japanese law prior to the enactment of the Enemy Airmen's Act.

The defence in the United States trial contended that the Japanese court was regularly appointed and consisted of Major Itsuro Hata as prosecutor, Lieutenant-Colonel Toyoma Nakajo, as chief judge, and the two accused, Wako and Okada, as associate judges; that the proceedings in the trial of the fliers on 28th August, 1942, did not differ from the regular proceedings of other Japanese trials; that no pleadings were authorized by Japanese law; and that no defence counsel were authorized. Further contentions by the defence were that the court proceedings lasted at least two hours; that documentary evidence, consisting of at least the gist of the air raid damage reports from Tokyo and the fliers' alleged confessions made to the Tokyo Gendarmerie admitting attacks on non-military targets, were read to the court. (The accused Wako, however, denied this).

Although these purported confessions were supposed to have had the signatures and thumb prints of the several American fliers on them, there is no evidence that any attempt was made to verify or prove that these were

genuine or actually those of the fliers. After a two hour session the court adjourned for lunch, and then deliberated for another hour and unanimously decided on the death sentences for all eight fliers. There was some evidence that a record of the trial proceedings was made at the trial, and either was filed with the 13th Army or was transferred to Headquarters at Tokyo in December 1944, where it was destroyed in a fire.

After the trial a telegram was sent to Tokyo through Nanking announcing the sentence of the court, and later a written report was sent. Headquarters of the 13th Army had been instructed to withhold any action on the sentences until Tokyo acted on them. Later instructions were received from Tokyo to execute three of the victims, including the prisoner who had been ill throughout the trial. The sentences passed on the other five were commuted to life imprisonment.

The executions were carried out on 15th October, 1942. The five surviving fliers were returned to confinement in the Kiangwan prison.

The accused General Sawada was in command of the 13th Army, with headquarters at Shanghai, at the time when the fliers were captured. He remained in command until he received orders relieving him on 8th October, 1942 or thereabouts. From 7th May, 1942 until 17th September, 1942 Sawada, though still the Commanding General of the 13th Army with his heaquarters functioning for him at Shanghai, was absent at the front about three hundred miles away. Nevertheless, though he was not in Shanghai at the time of the trial, the tribunal that sentenced the fliers was appointed under his command authority as Commanding General of the 13th Army. Colonel Ito, Sawada's chief legal officer, did not accompany Sawada to the front but remained behind at Headquarters with Sawada's delegated authority to act for him on all legal matters, and the authority to use General Sawada's name was given him prior to the former's departure for the front.

On General Sawada's return to Shanghai on the 17th September, 1942, after the trial of the fliers which took place in his absence, he was personally informed of all the proceedings involving the fliers that took place during his absence. Colonel Ito informed General Sawada of the proceedings he had directed under his delegated authority before trial, during the trial, and immediately following the trial and told him that a report thereof had been sent on to Tokyo. He also gave Sawada a copy of the record of the trial and the "statement of judgment," and Sawada placed his own mark thereon. Sawada stated that he felt that the death sentences were too severe and went to Nanking and protested to the Commanding General of the China Forces but that he, General Hata, said that nothing could be done about the matter as it was exclusively up to Tokyo to make a decision. Thereafter, General Sawada did not make further attempts to have the sentences changed. The accused General Sawada, prior to his leaving Shanghai on 12th October, 1942, made no attempt to exercise any powers with respect to suspension, remission or mitigation of the sentences given by the court. Sawada stated that he did not have the authority to do so or to disapprove any of the court's proceedings. Sawada testified that he personally was familiar with the rules of the Geneva

Convention on the treatment of prisoners of war, and that whatever Colonel Ito did in connection with the American fliers, he, Sawada, assumed responsibility for. Sawada stated in evidence that he had jurisdiction over Kiangwan Prison. He admitted that although this prison was only three hundred yards from his personal headquarters he never went inside it or concerned himself about its prisoners.

The accused Lieutenant Yusei Wako was an officer in the judicial department of the Japanese Army and was assigned to the judicial department of the 13th Army in Shanghai in May, 1942. His immediate superior was Colonel Ito, the head of the legal department of the 13th Army. Wako, who was a lawyer, was told by Colonel Ito that he (Wako) would be a judge in the trial of the fliers and that the trial was considered to be an important case. Wako testified that Colonel Ito and Major Hata discussed the case with him prior to the trial, that these discussions began about 15th August, 1942, when the 13th Army received the Enemy Airmen's Act from Nanking Headquarters, and, further, that the court received instructions from Colonel Ito that under the Enemy Airmen's Act the death sentence was mandatory if the fliers were found guilty. Wako read all the evidence prior to the trial. He claimed that "since the entire charges were long we told the Americans they would be tried for bombing of Tokyo and Nagoya." He stated also that only a gist of the documentary evidence was read in court, that the fliers denied firing on schools, and that the statements personally given by the fliers in Toyko were not read in court. At the trial, Wako was not only a judge; since the judicial section of the 13th Army was required to have one of its members on the court, he acted also in the capacity of its legal adviser.

The accused Captain Okada was an officer with the 13th Japanese Army in Shanghai, China, and in August 1942, he was ordered to sit as one of three judges at the trial of the fliers. About three days prior to the trial when he received his orders to sit as a judge he was given advance notice as to the nature of the proceedings. He had sat as a judge on other courts and was not unfamiliar with trial procedure. On the morning of the trial, 28th August, 1942, he spoke to the accused Wako about the case. Also prior to the trial of the eight fliers he heard about the evidence in the case, namely, the Tokyo Gendarmerie interrogation and damage reports. He "looked through" two reports and Wako explained them to him prior to trial. Major Hata, the prosecutor, also talked to Okada about the case prior to trial. Okada testified that during the trial the sick prisoner appeared weak and lay on a blanket or mattress of some kind throughout the trial. Although he acted as a judge he heard only the gist of the documents comprising the interrogation report from the Gendarmerie in Tokyo. He also stated that "it was not possible to prove which bomber dropped what bomb on what part of the city according to the report," that no witnesses were brought before the court, that no defence counsel was provided for the fliers, that only documentary evidence was presented, that Wako alone asked the fliers questions about the raid, their training, etc., and that half of the trial, or about an hour, was spent in this line of questioning. He also testified that only the gist of the reports were read to

the court; no member of the court asked the fliers to write out their signatures for comparison with the purported signatures on the statements obtained from the fliers in Tokyo; no real evidence of the Nagoya and Tokyo raids was offered by the prosecution, and the prosecution did not require any witness to come into court from the Tokyo Gendarmerie to substantiate the documentary evidence from Tokyo. Okada said that he personally based his finding of guilty and the death sentences on the Gendarmerie investigations, the damage report, the reading of the charges and the statements made in court by the fliers.

The accused Tatsuta became warden of the Kaingwan Military Prison in Shanghai on 24th December, 1938, and remained its head until it was closed in March 1944. Captain Ooka at the Nanking Prison was his superior who gave him orders in regard to Kiangwan Prison. Tatsuta confined the fliers after trial on a writ of detention issued by Lieutenant Colonel Toyoma Nakajo, the chief judge of the 13th Army military tribunal and so informed Captain Ooka, his superior.

In his official capacity as warden or chief of the guards Tatsuta was also in charge of the execution of the three fliers and signed the report of execution. The evidence indicated, however, that the order which Tatsuta received to carry out the unlawful sentences was of apparent legality, that is to say, on its face it appeared to be legal to one who neither knew or was bound to inquire whether the order was in fact illegal. Tatsuta visited the courtroom for a short time while the so-called trial was in progress and he observed the sick condition of one of the prisoners. There was no conclusive proof, however, of either actual or constructive knowledge on Tatsuta's part of the illegality of the Enemy Airmen's Act, the trial under it, or the sentences passed at the trial.

Following the executions the other five fliers continued to remain in the prison serving their life sentences until they were transferred to the military prison at Nanking, China on 17th April, 1943. Excepting the sick flyer who was returned to Bridge House Prison, the fliers were kept in solitary confinement from 28th August, 1942 to 5th December, 1942. They were given the same facilities for exercise as other prisoners which was about thirty minutes a day. When they remained in their cells they were not permitted to talk or walk around. No heat was provided in the cells although it was cold enough to freeze water on many nights. They were never given any additional clothing or any change of clothing, except one pair of stockings. The cells were infested with lice and fleas. The only furnishings were grass mats on the floor; there were no beds, chairs or tables. The only latrine facility was a hole in the floor of each cell with a can in it. Several requests were made to Tatsuta for additional food and clothing that he either refused or ignored. The fliers were never visited by the Red Cross or any representative of a neutral government.

The fliers received about six ounces of rice three times a day and some soup or a few greens. There were no medical facilities at Kaingwan, and when the fliers left the prison for Nanking all of them were in a weak condition. At

Nanking a fourth prisoner died of malnutrition, beriberi, dysentery and general lack of care.

3. THE VERDICT AND SENTENCES

At the close of the trial of the case the Commission announced to the accused in open court its conclusions as follows:

"*Conclusions.* After deliberation for two days, the Commission in arriving at its findings and sentences, from the evidence presented, draws the following conclusions:

"The offences of each of the accused resulted largely from obedience to the laws and instructions of their Government and their Military Superiors. They exercised no initiative to any marked degree. The preponderance of evidence shows beyond reasonable doubt that other officers, including high governmental and military officials, were responsible for the enactment of the *Ex Post Facto* 'Enemy Airmen's Law' and the issuance of special instructions as to how these American prisoners were to be treated, tried, sentenced and punished.

"The circumstances set forth above do not entirely absolve the accused from guilt. However, they do compel unusually strong mitigating consideration, applicable to each accused in various degrees.

"As for Shigeru Sawada: Although he was Commanding General of the 13th Japanese Army, he was absent at the front and had no knowledge of the trial and special instructions issued by his superiors until his return to Shanghai three weeks after the results of the trial had been sent to the Imperial Headquarters in Tokyo over his 'Chop.' Although he did not make strong written protests to Imperial Headquarters in Tokyo, he did make oral protest to his immediate superior, the Commanding General of the Japanese Imperial Expeditionary Forces in China to the effect that in his opinion the sentences were too severe. Although he was negligent in not personally investigating the treatment being given the American prisoners, he was informed by his responsible staff that they were being given the treatment accorded Japanese officer prisoners.

"As for Yusei Wako: He, as Judge and law member of the Military Tribunal, had before him purported confessions of the American fliers and other evidence obtained and furnished by the Military Police Headquarters in Tokyo. Although he held this position and was legally trained, he accepted the evidence without question and tried and adjudged the prisoners on this evidence which was false and fraudulent. However, in voting the death penalty he was obeying special instructions from his superiors.

"As for Ryuhei Okada: Although he sat as a Judge at the trial and enjoyed freedom of conscience in determining as to the guilt or innocence of the prisoners, he adjudged them guilty. This officer however had no legal training and did register a protest to being a judge on any court. In voting the death penalty, as in Wako's case, he was obeying special instructions from his superiors.

"As for Sotojiro Tatsuta: Although he did act as executioner at the execution and was directly in charge of these prisoners at the Kaingwan

Military Prison, he did this in his official capacity as warden. Although he did not accord them the treatment provided for Prisoners of War, he was obeying special instructions from his superiors, and there is no evidence to show that he personally mistreated these prisoners or treated them in a manner other than that which was provided for in this instructions."

Shigeru Sawada was found guilty of the charge with the exception of the words "knowingly" and "and wilfully", but in pronouncing upon the individual specifications, the Commission found the accused General Sawada not guilty of having the power and failing to use it to commute, remit and revoke the sentences given the fliers. He was sentenced to be confined at hard labour for five years.

Yusei Wako and Ryuhei Okada were found guilty and were sentenced to hard labor for nine and five years respectively.

Sotojiro Tatsuta was found guilty of the charge against him, except as regards one of the victims and excepting the words "command and" and "commanding officer", substituting for the latter words "Warden". He was sentenced to hard labour for five years.

The findings and sentences were approved by the Reviewing Authority, with the exception of the finding that Tatsuta had acted unlawfully in being in charge of the execution of three prisoners.

DOCUMENT NO. 79

TRIAL OF KURT STUDENT
(British Military Court, Luneberg, Germany, 10 May 1946)

SOURCES
4 LRTWC 118
13 Ann. Dig. 296

NOTE

This post-World War II (1939-1945) war crimes trial concerns the problem, among others, all involving prisoners of war, of the extent of the applicability of the restrictions on the treatment of prisoners of war contained in the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) to airborne capturing units which control only a limited airhead. It should be noted that while the accused airborne commander was convicted of three of the eight charges filed against him, including the charge of employing prisoners of war to perform prohibited work (unloading arms, ammunition, and other warlike supplies from German aircraft which had landed on the airfield in the airhead), the findings and sentence were not confirmed by the British commander who had convened the court.

EXTRACTS

The accused was faced with eight charges alleging war crimes committed by him in the kingdom of Greece (according to the last three charges, on the Island of Crete itself) as Commander-in-Chief of the German forces in Crete, at various times during May and June 1941. The charges alleged respectively that he was "responsible for," first, the use on or about 22nd May of British prisoners of war as a screen for the advance of German troops, when, near Maleme on the Island of Crete, troops under his command drove a party of British prisoners of war before them resulting in at least six of these British prisoners of war being killed by the fire of other British troops; secondly, the employment in May of British prisoners of war on prohibited work, when, at Maleme aerodrome on the Island of Crete, troops under his command compelled British prisoners of war to unload arms, ammunition and warlike stores from German aircraft; thirdly, the killing on or about 23rd May of British prisoners of war, when, at Maleme aerodrome on the Island of Crete, troops under his command shot and killed several British prisoners of war for refusing to do prohibited work; fourthly, the bombings on or about 24th May of No. 7 General Hospital when, near Galatos on the Island of Crete, aircraft under his command bombed a hospital which was marked with a Red Cross; fifthly, the use on or about 24th May of British prisoners of war as a screen for the advance of German troops, when, near Galatos on the Island of Crete, troops under his command drove a party of British prisoners of war before them (these British prisoners of war being the staff and patients of No. 7 General Hospital), resulting in a named Staff Sergeant of the Royal Army Medical Corps and other British prisoners of war being killed by the fire of

British troops; sixthly, the killing on or about 27th May of British prisoners of war, when, near Galatos, troops under his command killed three soldiers of the Welch Regiment who had surrendered to them; seventhly, the killing on or about 27th May of a British prisoner of war, when, near Galatos, troops under his command wilfully exposed British prisoners of war to the fire of British troops, resulting in the death of a named Private of the Welch Regiment; and finally, the killing in June of British prisoners of war, when, at a prison camp near Maleme, troops under his command shot and killed several British prisoners of war. He pleaded not guilty to all the charges.

The offences alleged all took place in connection with an attack by German parachutists on the Island of Crete under the direction of the accused. The latter, then General Student, was shown to have been at his base in Greece until the morning of 25th May, 1941, and to have been in Crete from that time until the end of June 1941. Air support was in the control of General von Richthoven, Commander of the 8th Air Corps, though a certain degree of co-operation between the two generals was shown to have existed.

The evidence on the first charge was that of an R.A.F. Sergeant who testified that, on 20th May, 1941, he was among a number of British personnel who were captured by German parachutists in Crete and forced to advance up a hill towards lines held by New Zealand troops; when the latter shot at the prisoners, the Germans following behind returned fire. The witness was certain that at least two prisoners were killed and thirteen others fell to the ground.

The same witness also gave evidence relevant to the second and third charges. He described how he and other prisoners were forced, on the 21st May, to repair shell damage on Maleme aerodrome, which was captured by the Germans and under continuous fire. They were shot at if they tried to stop work; though no one was killed or wounded, he was beaten when, due to a wound, he did not work fast enough. When ordered to unload guns, shells, cases and stores from landed aircraft, the prisoners refused to do so. Whereupon the officer in charge marched three aside and had them shot in the sight of the others. A second R.A.F. Sergeant also told how, on 22nd May, he and others were forced at the point of a gun to repair the Maleme aerodrome and to unload food and arms from German aircraft under fire from British artillery and subject to bombing. Both witnesses added that the prisoners were not allowed to take cover.

A former Sergeant in the R.A.M.C. provided evidence relative to the fourth and fifth charges. He described a bombing on 18th May, and a bombing and machine-gunning on 20th May, of the hospital, which occupied a promontory on the coast and was clearly marked with a Red Cross. After the capture on the same day of the hospital, the staff and the wounded were marched towards their own lines in the Galatos area. The witness concluded that they were intended as a shield for the German troops. A Staff Sergeant and some others were killed by fire from the New Zealanders.

Three affidavits were put in in which members of the Imperial forces who had since returned to Canada and New Zealand, stated that the date on which

the hospital was bombed was 25th May.

Evidence relating to the sixth and seventh charges were given by two former members of the Welch Regiment. They described how on 27th May, 1941, three men of their section were shot by the Germans after capture and the Private named in the seventh charge was made to stand on the skyline so that he was killed by fire from his own lines.

The only direct evidence on the eighth charge was that of the first-mentioned witness, but it was not clear whether the alleged shootings took place before 30th June, 1941, when the accused gave up his command in Crete.

The accused claimed that he knew nothing of the bombing of the hospital and that if any atrocities occurred in the field they were without his consent or knowledge and against his wishes. In a pre-trial statement he expressed the opinion that: "The question of temporarily detailing prisoners to work in the fighting zone must in my opinion be judged separately." When he went into the witness box he distinguished between unloading medical supplies and food and unloading arms and ammunition, and said that he thought it perfectly possible that prisoners did unload one plane as it came in containing medical supplies and were then withdrawn when another came in with arms and ammunition.

A former Major attached to the accused's Staff said that the reconnaissance photograph of the area of the hospital showed a tented camp but no Red Cross markings. Two other German officers stated that no one in the accused's headquarters realised that the camp was a hospital. One of these two witnesses, the accused's former Chief of Staff, said that Student's superior, General Lohr, had ordered the accused to allow General Ringl, the commander in the western part of the Island (which included Maleme), a free hand, and that Lohr had also said that requests for targets to be bombed should be made directly by General Ringl to General von Richthoven. Orders had gone out, added the witness, that as many prisoners as possible should be taken and sent back for interrogation.

A Brigadier in the New Zealand Expeditionary Force, who had been very near the hospital at the time of its bombing, came forward to give evidence for the Defence. He stated that on the 18th or 19th May, 1941, one bomb fell inside the hospital area, but that it seemed clear that the attack was intended for a large crowd of troops who were bathing in the sea. The witness stated that the invasion of Crete began on 20th May, and pointed out that after 10 a.m. on that date the tented area ceased to be a hospital, the staff and patients having been driven out by the Germans themselves. He did not think that these prisoners had been used as a screen, because no attack was actually launched behind them. The position was very fluid at the time, men of his own brigade were hunting parachutists and there were many isolated battles in progress. The prisoners taken from the hospital were later retaken by the Imperial troops, but were not put back there because the whole area of the hospital had become a battleground. The witness observed that the red cross must have been visible on any reasonable photograph taken of the hospital

from the air. His general opinion, however, was that the German troops had maintained good conduct, and that the red cross had subsequently been respected.

The accused was found not guilty of the first, fourth, fifth, seventh and eighth charges but guilty of the second, third and sixth.

Subject to confirmation by superior military authority, he was sentenced to imprisonment for five years. The finding and sentence were not, however, confirmed.

DOCUMENT NO. 80

IN RE TERRITO
(U.S. Court of Appeals, 9th Circuit, 8 June 1946)

SOURCES

156 F.2d 142

13 Ann. Dig. 284

NOTE

This case involved an individual who had been born in the United States and who had been captured by the armed forces of the United States in battle in Italy while he was serving in the Italian army. While being held in the United States as a prisoner of war, he sought release through habeas corpus on the ground of his citizenship and also because of the cessation of active hostilities. Concerning the question of citizenship as affecting prisoner-of-war status, see DOCUMENT NO. 55 and DOCUMENT NO. 153. Concerning the problem with respect to the cessation of the active hostilities, note the rather radical difference between the provisions of Article 75 of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) and those of Article 118 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). However, it appears exceedingly doubtful that, even under the provisions of the 1949 Convention, a court would consider that a prisoner of war is entitled to release from custody by habeas corpus upon the mere cessation of hostilities. (For an instance of improper delay in the release and repatriation of prisoners of war under Article 118 of the 1949 Convention after the cessation of hostilities, see DOCUMENT NO. 167.)

EXTRACTS

STEPHENS, Circuit Judge.

Gaetano Territo is being held by officers of the United States Army under the claim that he is a prisoner of war. Through the interposition of Frances Territo Di Maria, Territo petitioned the District Court to issue the writ of habeas corpus by which the restraining officer should be required to produce Territo in court and justify the restraint. It is alleged that the restraint is without legal support. We shall refer to Territo by name or as petitioner. The basis of the claimed illegal detention and restraint rests upon the allegation that petitioner was born in the United States and that at all times has been and is an American citizen.

The District Court issued an order to show cause why a writ of habeas corpus should not issue, and the restraining officer made his return and answer, setting out inter alia that Territo was captured in Italy upon the field of battle, . . .

Petitioner claims on appeal, as he claimed in the district court, that he is and always has been an American citizen and because of that fact the circumstances of the case do not make him legally a prisoner of war. But for the claim of United States citizenship, petitioner does not question that he

was taken a prisoner of war.

We have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.

Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war. Hale Int.Law, 8th Ed., Ch. III, Ch. II, § 131; Winthrops Mil.Law & Precedents, 2nd Ed., Vol. 2, Pt. II, p. 1228 Oppenheims Int. Law, 6th Ed. Rev. (Lauterpacht Ed.) [sic], Vol. II, Ch. IV, #128, p. 300.

. . . Mr. Floury in his richly authenticated book "Prisoners of War" at page 30 refers to the fact that Irishmen, though then subjects of Great Britain, who had taken the oath of allegiance to the South African Republic during the Boer war, were treated as prisoners of war. See Moyer v. Peabody, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410; Sterling v. Constance, 287 U.S. 378, 53 S.Ct. 190, 77 L. Ed. 375.

While not directly in point, an expression in Ex Parte Quirin, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3, is indicative of the proper conclusion upon the point under consideration. We quote from pages 37-38 of 317 U.S., 63 S.Ct. 15: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."

The obvious practical implication inherent in the question, as it seems to us, directs its solution. The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released.

* * * * *

It is further argued that the cessation of hostilities between United States and Italy, an axis power, and the change of Italy from belligerency against the United States to that of active participation against another of the axis powers together with the service units in some manner changes the status of petitioner. However, no treaty of peace has been negotiated with Italy and petitioner remains a prisoner of war. We hold, as did the District Court, that petitioner's restraint by the respondent is a legal one.

Affirmed.

DOCUMENT NO. 81

TRIAL OF TANAKA CHUICHI AND TWO OTHERS
(Australian Military Court, Rabaul, 12 July 1946)

SOURCE

11 LRTWC 62

NOTE

The accused were charged with the offense of maltreatment of prisoners of war. Of particular interest is the fact that while one aspect of the evidence supporting the charge was concerned with a clearcut case of maltreatment consisting of tying to a post and beating with a stick, another aspect of what was apparently considered to constitute such maltreatment was the rather unusual one that the accused had cut the hair and beards of Sihk prisoners of war and had compelled one such prisoner of war to smoke a cigarette, all contrary to the tenets of the Sihk religion and thus, presumably, in violation of Article 16(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) which provides that "[p]risoners of war shall enjoy complete liberty in the exercise of their religion." (Article 34(1) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) contains an almost identical provision.)

EXTRACTS

1. THE CHARGE

The three accused were charged with the ill-treatment of prisoners of war. They were convicted and sentenced to terms of imprisonment varying from 6 months to 2 years.

2. THE EVIDENCE

The evidence for the prosecution, which was entirely documentary, showed that the accused, who were non-commissioned officers of the Japanese forces guarding the prisoners, had on two occasions severely ill-treated them by tying them to a post and beating them with a stick until they lost consciousness. The beatings were administered for alleged infringements of camp discipline by the prisoners of war. In each case the ill-treatment was aggravated by the fact that the accused, after beating the prisoners, cut off their hair and beards and in one instance forced a prisoner to smoke a cigarette. The prisoners were Indians, of the Sikh religion, which forbids them to have their hair or beards removed or to handle tobacco.

DOCUMENT NO. 82

TRIAL OF LIEUTENANT GENERAL HARUKEI ISAYAMA AND SEVEN OTHERS
(U.S. Military Commission, Shanghai, 25 July 1946)

SOURCE

5 LRTWC 60

NOTE

This is another of the post-World War II (1941-1945) war crimes trials in which the accused were charged with denying a fair trial to prisoners of war. (See also DOCUMENT NO. 78; and DOCUMENT NO. 101, under the rubric "Murder of Captured Aviators.")

EXTRACTS

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

It was charged that the accused, Lieutenant-General Harukei Isayama, Colonel Seiichi Furukawa, Lieutenant-Colonel Naritaka Suguira, Captain Yoshio Nakano, Captain Tadao Ito, Captain Maraharu Matsui, First-Lieutenant Jitsuo Date and First-Lieutenant Ken Fujikawa did each "at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American Prisoners of War, by permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war." The charges asserted that the offences of the first two accused were committed "on or between 14th April, 1945 and 19th June, 1945," and those of the others "on or between 21st May, 1945 and 19th June, 1945"; and that each of the accused except the first two mentioned above committed the offences charged "as a member of a Japanese Military Tribunal."

When taken together, the charge and accompanying Bill of Particulars, which specified the offences asserted that the accused Lieutenant-General Harukei Isayama did "permit, authorize and direct an illegal, unfair, unwarranted and false trial" before a Japanese Military Tribunal of certain American prisoners of war, did "unlawfully order and direct a Japanese Military Tribunal" to sentence to death these American prisoners of war, and did, "unlawfully order, direct and authorize the illegal execution" of the American prisoners of war. The charge and accompanying Bill of Particulars against the accused, Colonel Seiichi Furukawa, were similar except as to those relating to the appointment and convening of the Japanese Military Tribunal. With respect to the accused Lieutenant-Colonel Naritaka Sugiura, Captain Yoshio Nakano, Captain Tadao Ito, Captain Marashara Matsui, First-Lieutenant Jitsuo Date and First-Lieutenant Ken Fujikawa, the Charges and Bills of Particulars asserted that they as members of the Japanese Military Tribunals did "knowlingly, wrongfully, unlawfully and

falsely try, prosecute and adjudge certain charges" against the several American prisoners of war "upon false and fraudulent evidence and without affording said prisoners of war a fair hearing," did "knowingly, unlawfully and wilfully sentence" the several American prisoners of war to be put to death, resulting in their unlawful death. Several of the accused were further charged in their capacities as chief judge and prosecutors and those who acted as judges were further charged with the wrongful and wilful failure to perform their duties as such judges and with the failure and neglect to provide a fair and proper trial.

The accused pleaded not guilty.

2. THE EVIDENCE BEFORE THE COMMISSION

The evidence showed that fourteen United States airmen were captured by the Japanese Formosan Army and interrogated for alleged violations of the Formosa Military Law relating to the punishment of enemy airmen for acts of bombing and strafing in violation of International Law. These fourteen airmen were for the most part radiomen, photographers and gunners, and were captured between 12th October, 1944, on which the Military Law was issued, and 27th February, 1945. The senior members of the plane crews — the pilots and co-pilots — were sent to Tokyo for intelligence purposes and were not tried by the Japanese with their fellow crew-members.

The Law in question provided that its terms would apply to all enemy airmen within the jurisdiction of the 10th Area Army and that punishment would be meted out to all enemy airmen who carried out any of the following: bombing and strafing with intent to destroy or burn private objectives of non-military nature; bombing and strafing non-military objectives apart from unavoidable circumstances; disregarding human rights and carrying out inhuman acts; or entering into the jurisdiction with intentions of carrying out any of the foregoing. Death was provided as the punishment, but this, according to circumstances, could be changed to imprisonment for life or for not less than 10 years. The law stated that the punishment would be carried out by the appropriate commander; and provided for the establishment of a Military Tribunal at Taihoku composed of officers of the 10th Area Army and other units under its command, and for the applicability of the regulations of the special court-martial to the Military Tribunal. It was further provided that anyone violating this law would be tried by Military Tribunal; that the commander would be in charge of the Tribunal and that the Tribunal would be composed of three judges — two ordinary army officers and one judicial officer — to be appointed by the commander.

All of the fourteen were interrogated by members of the 10th Area Army Judicial Department. There was some evidence that, during the investigation, the chief of the Judicial Department, the accused Furukawa, inquired in Tokyo as to the disposition of the captured airmen, and that he was told that the fourteen should be tried if they came within the scope of the Military Law. On his return to Formosa he instructed his subordinates to complete the investigations. The evidence before the United States Military Commission disclosed that the records of the interrogations of several of the American

airmen were falsified before the trial by the Japanese Court or before the Japanese Court records were completed.

The interpreter who was present when the falsified statements were taken testified that none of the airmen concerned made any admissions of indiscriminate bombing or strafing. This evidence was supported by the testimony of certain of those who had the task of recording the interrogations. The accused denied the falsification and claimed that admissions of guilt had been made by the airmen.

It was the contention of the accused in the present trial that, in accordance with Japanese War Department directives, the 10th Area Army asked instructions of the Central Government during the pre-trial investigations and forwarded statements of opinion prior to referring the cases for trial. A reply came back from Tokyo stating that if the opinions given were correct, severe judgment should be meted out. The accused Isayama, Chief of Staff, 10th Area Army, was advised of all proceedings. During the absence of Furukawa from headquarters on a trip around Formosa, his assistant, Major Matsuo sent the final reports of investigation to General Ando and Ando ordered the trials of the American airmen and appointed the Military Tribunal.

The accused Sugiura was the chief judge on all cases; Nakano was associate judge on all cases; Date was the judicial judge on the trial of three airmen; Matsui was the prosecutor in the case against two airmen, and the judicial judge in the cases against five other airmen; Fujikawa was the judicial judge in the case of two airmen; and Ito was the prosecutor in the trial of one airmen and the judicial judge in the trial of another airmen.

The fourteen Americans were tried in units according to the planes of which they were crew members. There were six cases, all brought to trial on 21st May, 1945. The American airmen were not afforded the opportunity to obtain evidence or witnesses on their own behalf. The defence attempted to justify this, first on the ground that lack of personnel and facilities made it impossible to permit the airmen to go to the scenes of their alleged indiscriminate bombings and strafings, and secondly on the ground that the airmen were given full opportunity in court to make whatever statements they wished. Some testimony was adduced by the prosecution in the United States trial to show that, except for the charges, no other document or evidence was interpreted to the airmen, and that they were not defended by counsel.

There was some evidence indicating that, under the Japanese system of military justice, an accused was not allowed defence counsel in time of war; the evidence before a tribunal was largely documentary, based on admissions and statements of the accused in pre-trial interrogations and reports of damage and investigations by the gendarmerie; and the accused might testify before the tribunal and might introduce evidence on his behalf. It was the contention of the defence that this was the procedure followed in each of the trials of the fourteen American airmen, and this procedure, it was testified, was the normal one.

It was the contention of the defence that since an intention on the part of the Japanese Prosecution to demand the death penalty had been approved by Tokyo, and since the death penalty had been demanded at the trials, the military tribunal had to adjudge death and the commander had to order its execution unless Tokyo ordered otherwise when advised of the results of the trials. The commander, Ando, issued an order for the execution of all fourteen after final instructions were received from Tokyo. On the morning of 19th June, 1945, the American fliers were lined up in front of an open ditch, shot to death and then buried in that ditch.

The Japanese records of trial relating to these American airmen, and which were turned over to American authorities in September 1945, were not completed until after the Japanese surrender, and were written up as directed by Furukawa. The accused did not sign the records of the trials until after the war.

3. THE FINDINGS AND SENTENCES

All of the accused were found guilty.

Seiichi Furukawa and Naritaka Sugiura were sentenced to death; Haukei Isayama and Yoshio Nakano were sentenced to life imprisonment; Masaharu Matsui, Jitsuo Date, Ken Fujikawa and Tadao Ito were awarded terms of imprisonment of 40, 30, 30 and 20 years respectively.

The findings of guilty were approved by the Reviewing Authority with the exception of those against Jitsuo Date and Ken Fujikawa. The sentences against Seiichi Furukawa and Naritaka Sugiura were commuted to life imprisonment. The sentences passed on the remaining four defendants were approved.

DOCUMENT NO. 83

TRIAL OF GENERALOBERST NICKOLAUS VON FALKENHORST
(British Military Court, Brunswick, Germany, 29 July - 2 August 1946)

SOURCE

11 LRTWC 18

NOTE

This is another of the cases involving the transmission of or compliance with the provisions of the so-called "Commando Order" issued by Hitler on 18 October 1942 pursuant to which quarter was to be denied to enemy commandos and any of them who were captured were to be handed over to the SD (Sicherheitsdienst), the Nazi party intelligence agency for the security police. Such an action was known to be the equivalent of execution for the individual concerned. (The International Military Tribunal found the SD to be a "criminal organization.") Here the accused did not take the execution function upon himself, as did General Dostler (DOCUMENT NO. 69). However, he did re-issue Hitler's order to his subordinate commands and he did turn prisoners of war captured by his forces over to the SD knowing that they would then be denied the protections to which they were entitled as prisoners of war.

EXTRACTS

A. OUTLINE OF THE PROCEEDINGS

The defendant, Nickolaus von Falkenhorst, a German national and former Generaloberst in the German army, was tried at Brunswick before a British Military Court sitting with a Judge Advocate. The defendant was charged with nine charges pursuant to Regulation 4 of the Regulations attached to the Royal Warrant for the trial of War Criminals, dated 6th June, 1945. The charges covered the period from October, 1942, to July, 1944, and were as follows:

1st Charge

Committing a war crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), in an order dated on or about 26th October, 1942, in violation of the laws and usages of war, incited members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen, taking part in Commando Operations, and, further, in the event of any Allied soldier, sailor or airman taking part in such Commando Operations being captured, to kill them after capture.

3rd Charge

Committing a War Crime in that in the Kingdom of Norway, in or about the month of November, 1942, in violation of the laws and usages of war, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), was concerned in the killing of

fourteen British Prisoners of War.

4th Charge

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of November, 1942, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdient (Security Service) of nine British Prisoners of War who had taken part in Commando Operations, with the result that the said Prisoners were killed.

6th Charge

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of May, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of one officer, one Non-Commissioned Officer and five Naval Ratings, British Prisoners of War, who had taken part in Commando Operations, with the result that the said Prisoners were killed.

7th Charge

Committing a War Crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces of Norway (Wehrmachtbefehlshaber Norwegen), in an order dated 15th June, 1943, in violation of the laws and usages of war, incited members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen taking part in Commando Operations, and, further, in the event of any Allied soldier, sailor or airman taking part in such Commando Operations being captured, to kill them after capture.

8th Charge

Committing a War Crime in that he in the Kindgom of Norway, in or about the month of July, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of one Norwegian Naval Officer, five Norwegian Naval Ratings, and one Royal Navy Rating, Prisoners of War, with the result that the said Prisoners were killed.

9th Charge

Committing a War Crime in that he at Oslo, in the Kindgom of Norway, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), in a document dated 19th July, 1944 in violation of the laws and usages of war, ordered troops under his command to deprive certain Allied Prisoners of War of their rights as Prisoners of War, under the Geneva Convention.

To each of the nine charges the defendant pleaded Not Guilty.

In his opening speech, the Prosecuting Officer claimed that during the relevant period covered by the nine charges, the defendant was the

Commander-in-Chief (Wehrmachtbefehlshaber) of the German Armed Forces in Norway, which included the Army, Navy and the Air Force. In this capacity the defendant was directly responsible to the OKW (the Supreme Headquarters of the German Armed Forces) in Berlin.

The facts were that during 1941 and 1942, the Allied Forces made a series of raids on Norwegian shipping and vital installations in the territory of Norway which were known as "Commando Raids". These raids had a certain damaging effect upon the German war effort and to discourage such raids in the future, Hitler himself issued an order dated 18th December, 1942 [sic], referred to in this report as the "Commando Order". This order was received by the defendant, who passed it on to the subordinate military units under his command and also distributed it to the naval and air force commanders in Norway in the latter part of October, 1942. A photostat of the original Commando Order was exhibited in the case, and its contents have been set out here as an authentic version of this well-known order:

Paragraph 1

"For some time our enemies have been using in their warfare, methods which are outside the international Geneva Conventions. Especially brutal and treacherous is the behaviour of the so-called Commandos who, as is established, are partially recruited even from freed criminals in enemy countries. Their capture orders divulge that they are directed not only to shackle prisoners but also to kill defenceless prisoners on the spot at the moment in which they believe that the latter, as prisoners, represent a burden in the further pursuance of their purpose or can otherwise be a hindrance. Finally, orders have been found in which the killing of prisoners has been demanded in principle.

Paragraph 2

"For this reason it was already announced in an addendum to the Armed Forces Report of 7th October, 1942, that in the future Germany in the face of these sabotage troops of the British and their accomplices will resort to the same procedure, i.e., that they will be ruthlessly mowed down by the German troops in combat wherever they may appear.

Paragraph 3

"I therefore Order, from now on all opponents brought to battle by German troops in so-called commando operations in Europe or Africa, even when it is outwardly a matter of soldiers in uniform or demolition parties with or without weapons, are to be exterminated to the last man in battle or while in flight. In these cases it is immaterial whether they are landed for their operations by ship or aeroplane or descend by parachute. Even should these individuals on their being discovered, make as if to surrender, all quarter is to be denied them on principle. A detailed report is to be sent to the O.K.W. on each separate case for publication in the Wehrmacht communique."

Paragraph 4

"If individual members of such commandos working as agents,

saboteurs, etc., fall into the hands of the Wehrmacht by other means, e.g. through the police in any of the countries occupied by us, they are to be handed over to the S.D. immediately. It is strictly forbidden to hold them in military custody, e.g. in PW camps, etc., even as a temporary measure."

Paragraph 5

"This order does not apply to the treatment of any enemy soldier who in the course of normal hostilities (large scale offensive actions, landing operations and air-born operations) are captured in open battle or give themselves up. Nor does this order apply to enemy soldiers falling into our hands after battles at sea or enemy soldiers trying to save their lives by parachute after battles.

Paragraph 6

"In the case of non-execution of this order, I shall make responsible before the Court martial all commanders and officers who have either failed to carry out their duty in instructing the troops in this order, or who acted contrary to this order in carrying it out.

Signed Adolf Hitler."

At the end of a supplementary Order issued by the fuhrer on the same day, namely, 18th October, 1942, Hitler set out to explain to his officers why it had become necessary to issue this Commando Order and this Supplementary Order, and ended with this passage, which constituted an addition to the original order:

"If it should become necessary for reasons of interrogation to spare initially one man or two, then they are to be shot immediately after interrogation."

The prosecution submitted that paragraph 3 was illegal and that it constituted an order to deny quarter to combatant troops.

At the same time that Hitler signed this Order, he issued the supplementary order of the same date already mentioned which was addressed to Commanding Officers only, and in which he stated that the main Order was a counter measure to the partisan activities on the eastern front.

The supplementary order also stated that the system of commando operations was an illegal method of warfare in that if commandos were caught in their operation they immediately surrendered, thereby preserving their lives, and if not so caught, they escaped to neutral countries. The importance of the last paragraph of the supplementary order (quoted above) was stressed by the prosecutor.

The defendant received the Commando Order and the Supplementary Order on or about 24th October, 1942, whereupon he re-issued the order himself. No copy of the actual document so issued by the defendant was available at the trial. The re-issuing of the Commando Order formed the subject matter of the first charge against the defendant.

In the document dated 15th June, 1943, the defendant issued a second document addressed to officers only in which he referred to the original Commando Order of 18th October, 1942, in these terms:

"Saboteurs. . . . I am under the impression that the wording of the above order" (the Commando Order) " which had to be destroyed, is no longer clearly in mind, and I therefore again bring to particular notice paragraph 3" (above quoted).

In a later passage in the same document appeared the words: "A further order of the Wehrmacht Commander, Norway, Top Secret, of 26.10.42, since destroyed, lays down: 'If a man is saved for interrogation he must not survive his comrades for more than 24 hours.'." The issuing of that document by the defendant was relied upon by the Prosecution to substantiate the 7th charge.

The intervening charges 2—6 inclusive, and charge No. 8, all dealt with specific instances in which British or Norwegian prisoners of war were killed by German troops in Norway or were handed over to the S.D., with the result that they were killed by that agency. In each case the captured commandos were wearing uniform, with the addition that in the case of those captured and killed as alleged in the third charge, they were wearing ski-ing clothes underneath their uniforms. Further, in each case the commandos were engaged on attacking targets directly connected with the German war effort.

The 9th charge was in respect of a document which the defendant had issued in July, 1944, and was of a different nature from the Commando Order, being an order whereby certain prisoners of war, e.g. Jews, were not to be held in prisoner of war camps but were to be handed over to the S.D.

The evidence produced in support of these charges by the prosecution consisted of the oral evidence of a former German officer, Major-General von Behrens, who served under the defendant at the relevant time and in whose area of command those victims were killed whose death formed the subject matter of the 3rd charge. There was also the oral evidence of Colonel Scotland, who gave formal evidence as to the statements of the defendant made prior to trial, and expert evidence as to the position of the defendant when Wehrmachtbefehlshaber in Norway. The witness giving this last-mentioned testimony stated, *inter alia*, the following:

"His (the defendant's) duties would be to act as the representative of the O.K.W. to pass on any orders which were issued to him by the O.K.W. and these orders through him would reach all branches of the armed forces in Germany. It was in evidence that the Fuhrer's Commando Order had been received by the defendant from the O.K.W."

On this point the witness was asked the following question and gave the answer stated:

Q. "You know the Fuhrerbefehl which is addressed to Norway. Would it be the duty of the Wehrmachtbefehlshaber to forward that on to everybody, whether of the army, navy or the air force?" A. "Yes, such an order, coming from the highest authority, his would be the only final channel through which it could reach the armed forces in Norway."

The remaining evidence for the prosecution consisted of documentary evidence in the form of affidavits put in under Regulation 8 (i) (a) of the Royal Warrant, most of which dealt with the fate of allied service personnel who were captured on Commando raids and were either shot by the armed forces

or handed over to the S.D. and shot by that agency at a later stage.

Although the prosecution did not suggest that any of the victims in the various charges met their death as a result of his direct order, they contended that the evidence showed that the death of the victims or their being handed over to the S.D. and subsequent death was the result of the defendant's re-issuing the Commando Order in October, 1942, and republishing it in 1943, with the amendment to the original order providing that those spared for interrogation should be liquidated within 24 hours.

The prosecution withdrew the fifth charge . . . .

The accused was acquitted on charge No. 2 . . . .

On all other charges the defendant was found guilty, and sentenced to death. His sentence was, however, commuted to one of life imprisonment.

DOCUMENT NO. 84

TRIAL OF LIEUTENANT GENERAL KURT MAELZER
(U.S. Military Commission, Florence, Italy, 9-14 September 1946)

SOURCES

11 LRTWC 53

13 Ann. Dig. 289

NOTE

This case involves the only known instance of a war crimes trial in the European area after World War II (1939-1945) in which the accused was charged with the offense of violating Article 2(2) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) which requires that prisoners of war be protected from insults and public curiosity, a provision now found in Article 13(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). This type of violation of the laws and customs of war was committed much more frequently by the Japanese during World War II (1941-1945) (see DOCUMENT NO. 101, under the rubric "Prisoners of War Humiliated.") From news photographs and reports made during the course of the hostilities in Vietnam (c. 1965-1973), this was also the practice of the North Vietnamese.

EXTRACT

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The accused was charged with ". . . exposing prisoners of war . . . in his custody . . . to acts of violence, insults and public curiosity."

2. THE EVIDENCE

Some time in January, 1944, Field Marshal Kesselring, commander-in-chief of the German forces in Italy, ordered the accused who was commander of Rome garrison to hold a parade of several hundreds of British and American prisoners of war in the streets of the Italian capital. This parade, emulating the tradition of the triumphal marches of ancient Rome, was to be staged to bolster the morale of the Italian population in view of the recent allied landings, not very far from the capital. The accused ordered the parade which took place on 2nd February, 1944. 200 American prisoners of war were marched from the Coliseum, through the main streets of Rome under armed German escort. The streets were lined by forces under the control of the accused. The accused and his staff officers attended the parade. According to the Prosecution witnesses (some of whom were American ex-prisoners of war who had taken part in the march), the population threw stones and sticks at the prisoners, but, according to the defence witnesses, they threw cigarettes and flowers. The prosecution also alleged that when some of the prisoners were giving the "victory sign" with their fingers the accused ordered the guards to fire. This order, however, was not carried out. A film was made of the parade and a great number of photographs taken which appeared in the Italian press under the caption "Anglo-Americans enter Rome after all . . .

flanked by German bayonettes." The accused pleaded in the main that the march was planned and ordered by his superiors and that his only function as commander of Rome garrison was to guarantee the safe conduct and security of the prisoners during the march, which he did. He stated that the march was to quell rumours of the German defeat and to quieten the population of Rome, not to scorn or ridicule the prisoners.

3. FINDINGS AND SENTENCE

The accused was found guilty and sentenced to 10 years' imprisonment. The sentence was reduced to three years' imprisonment by higher military authority.

DOCUMENT NO. 85

UNITED STATES AND OTHERS v. HERMAN W. GOERING AND OTHERS
(International Military Tribunal, Nuremberg, Germany, 30 September - 1 October 1946)

SOURCES

Nazi Conspiracy and Aggression: Opinion and Judgment
22 Trial of Major War Criminals 411
41 AJIL 172

NOTE

This trial of the major German (Nazi) personalities charged with the commission of war crimes having no particular geographical location, conducted pursuant to the London Agreement and Charter of 8 August 1945 (DOCUMENT NO. 68), began on 20 November 1945 and ended on 31 August 1946. The Tribunal reconvened on 30 September - 1 October 1946 for the reading of its opinion and the announcement of the sentences. The members of the Tribunal were unanimous in their opinion on the law and on the findings of guilty. The Soviet member of the Tribunal dissented from the findings that Schacht, von Papen, and Fritsche were not guilty, from the decision to sentence Hess to life imprisonment only, and not death, and from the findings that the Reich Cabinet, the General Staff, and the OKW were not criminal organizations.

EXTRACTS

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. 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."

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.

* * * * *

VI. WAR CRIMES AND CRIMES AGAINST HUMANITY

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 Fuehrer 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.

(A) MURDER AND ILL-TREATMENT OF PRISONERS OF WAR

Article 6 (b) of the Charter defines war crimes in these words:

"War Crimes: namely, 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."

In the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy. On the 18th October 1942, the defendant Keitel circulated a directive authorized by Hitler, which ordered that all members of Allied "commando" units, often when in uniform and whether armed or not, were to be "slaughtered to the last man", even if they attempted to surrender. It was further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the SD. This order was supplemented from time to time, and was effective throughout the remainder of the war, although after the Allied landings in Normandy in 1944 it was made clear that the order did not apply to "commandos" captured within the immediate battle area. Under the provisions of this order, Allied "commando" troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia, and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind. For example, an American military mission which landed behind the German front in the Balkans in January 1945, numbering about 12 to 15 men and wearing uniforms, were taken to Mauthausen under the authority of this order, and according to the affidavit of Adolf Zutte, the adjutant of the Mauthausen Concentration Camp, all of them were shot.

In March 1944 the OKH issued the "Kugel" or "Bullet" decree, which directed that every escaped officer and NCO prisoner of war who had not been put to work, with the exception of British and American prisoners of war, should on recapture be handed over to the SIPO and SD. This order was distributed by the SIPO and SD to their regional offices. These escaped officers and NCOs were to be sent to the concentration camp at Mauthausen, to be executed upon arrival, by means of a bullet shot in the neck.

In March 1944, 50 officers of the British Royal Air Force, who escaped from the camp at Sagan where they were confined as prisoners, were shot on recapture, on the direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It was not contended by the defendants that this was other than plain murder, in complete violation of international law.

When Allied airmen were forced to land in Germany they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them.

The treatment of Soviet prisoners of war was characterized by particular

inhumanity. The death of so many of them was not due merely to the action of individual guards, or to the exigencies of life in the camps. It was the result of systematic plans to murder. More than a month before the German invasion of the Soviet Union the OKW were making special plans for dealing with political representatives serving with the Soviet armed forces who might be captured. One proposal was that "political Commissars of the army are not recognized as prisoners of war, and are to be liquidated at the latest in the transient prisoner of war camps." The defendant Keitel gave evidence that instructions incorporating this proposal were issued to the German army.

On the 8th September 1941, regulations for the treatment of Soviet prisoners of war in all prisoner of war camps were issued, signed by General Reinecke, the head of the prisoner of war department of the high command. These orders stated:

> "The Bolshevist soldier has therefore lost all claim to treatment as an honorable opponent, in accordance with the Geneva Convention . . . The order for ruthless and energetic action must be given at the slightest indication of insubordination, especially in the case of Bolshevist fanatics. Insubordination, active or passive resistance, must be broken immediately by force of arms (bayonets, butts, and firearms) . . . Anyone carrying out the order who does not use his weapons, or does so with insufficient energy, is punishable . . . Prisoners of war attempting escape are to be fired on without previous challenge. No warning shot must ever be fired . . . The use of arms against prisoners of war is as a rule legal."

The Soviet prisoners of war were left without suitable clothing; the wounded without medical care; they were starved, and in many cases left to die.

On the 17th July 1941, the Gestapo issued an order providing for the killing of all Soviet prisoners of war who were or might be dangerous to National Socialism. The order recited:

> "The mission of the commanders of the SIPO and SD stationed in Stalags is the political investigation of all camp inmates, the elimination and further 'treatment' (a) of all political criminal, or in some other way unbearable elements among them, (b) of those persons who could be used for the reconstruction of the occupied territories . . . Further, the commanders must make efforts from the beginning to seek out among the prisoners elements which appear reliable, regardless of whether there are Communists concerned or not, in order to use them for Intelligence purposes inside of the camp, and if advisable, later in the occupied territories also. By use of such informers, and by use of all other existing possibilities, the discovery of all elements to be eliminated among the prisoners must proceed step by step at once . . .
>
> "Above all, the following must be discovered: All important functionaries of State and Party, especially professional revolutionaries . . . all People's Commissars in the Red Army, leading personalities of the State . . . leading personalities of the business world, members of the Soviet Russian Intelligence, all Jews, all persons who are found to be

agitators or fanatical Communists. Executions are not to be held in the camp or in the immediate vicinity of the camp . . . The prisoners are to be taken for special treatment if possible into the former Soviet Russian territory."

The affidavit of Warlimont, deputy chief of staff of the Wehrmacht, and the testimony of Ohlendorf, former chief of Amt III of the RSHA, and of Lahousen, the head of one of the sections of the Abwehr, the Wehrmacht's Intelligence Service, all indicate the thoroughness with which this order was carried out.

The affidavit of Kurt Lindown, a former Gestapo official, states:

". . . There existed in the prisoner of war camps on the Eastern Front small screening teams (Einsatz commandos), headed by lower ranking members of the Secret Police (Gestapo). These teams were assigned to the camp commanders and had the job of segregating the prisoners of war who were candidates for execution according to the orders that had been given, and to report them to the office of the Secret Police."

On the 23d October 1941, the camp commander of the Gross Rosen concentration camp reported to Meuller, chief of the Gestapo, a list of the Soviet prisoners of war who had been executed there on the previous day.

An account of the general conditions and treatment of Soviet prisoners of war during the first 8 months after the German attack upon Russia was given in a letter which the defendant Rosenberg sent to the defendant Keitel on the 28th February 1942:

"The fate of the Soviet prisoners of war in Germany is on the contrary a tragedy of the greatest extent . . . A large part of them has starved, or died because of the hazards of the weather. Thousands also died from spotted fever.

"The camp commanders have forbidden the civilian population to put food at the disposal of the prisoners, and they have rather let them starve to death.

"In many cases, when prisoners of war could no longer keep up on the march because of hunger and exhaustion, they were shot before the eyes of the horrified population, and the corpses were left.

"In numerous camps, no shelter for the prisoners of war was provided at all. They lay under the open sky during rain or snow. Even tools were not made available to dig holes or caves."

In some cases Soviet prisoners of war were branded with a special permanent mark. There was put in evidence the OKW order dated the 20th July 1942, which laid down that:

"The brand is to take the shape of an acute angle of about 45 degrees, with the long side to be 1 cm. in length, pointing upwards and burnt on the left buttock . . . This brand is made with the aid of a lancet available in any military unit. The coloring used is Chinese ink."

The carrying out of this order was the responsibility of the military authorities, though it was widely circulated by the chief of the SIPO and the SD to German police officials for information.

Soviet prisoners of war were also made the subject of medical experiments of the most cruel and inhuman kind. In July 1943, experimental work was begun in preparation for a campaign of bacteriological warfare; Soviet prisoners of war were used in these medical experiments, which more often than not proved fatal. In connection with this campaign for bacteriological warfare, preparations were also made for the spreading of bacterial emulsions from planes, with the object of producing widespread failures of crops and consequently starvation. These measures were never applied, possibly because of the rapid deterioration of Germany's military position.

The argument in defense of the charge with the regard to the murder and ill-treatment of Soviet prisoners of war, that the USSR was not a party to the Geneva Convention, is quite without foundation. On the 15th September 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on the 8th September 1941. He then stated:

> "The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the USSR. Therefore only the principles of general international law on the treatment of prisoners or war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different view-point."

This protest, which correctly stated the legal position, was ignored. The defendant Keitel made a note on this memorandum:

> "The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures."

* * * * *

(D) Slave Labor Policy

* * * * *

. . . . . Allied prisoners of war were also regarded as a possible source of labor. Pressure was exercised on noncommissioned officers to force them to consent to work, by transferring to disciplinary camps those who did not consent. Many of the prisoners of war were assigned to work directly related to military operations, in violation of Article 31 of the Geneva Convention. They were put to work in munition factories and even made to load bombers, to carry ammunition and to dig trenches, often under the most hazardous conditions. This condition applied particularly to the Soviet prisoners of war. On the 16th February 1943, at a meeting of the Central Planning Board, at which the defendants Sauckel and Speer were present, Milch said:

> "We have made a request for an order that a certain percentage of men in the Ack-Ack artillery must be Russians; 50,000 will be taken altogether. 30,000 are already employed as gunners. This is an amusing thing, that Russians must work the guns."

And on the 4th October 1943, at Posen, Himmler, speaking of the Russian prisoners captured early in the war, said:

> "At that time we did not value the mass of humanity as we value it today, as raw material, as labor. What, after all, thinking in terms of generations, is not to be regretted, but is now deplorable by reason of the loss of labor, is that the prisoners died in tens and hundreds of thousands of exhaustion and hunger."

The general policy underlying the mobilization of slave labor was stated by Sauckel on the 20th April 1942. He said:

> "The aim of this new gigantic labor mobilization is to use all the rich and tremendous sources conquered and secured for us by our fighting armed forces under the leadership of Adolph Hitler, for the armament of the armed forces, and also for the nutrition of the Homeland. The raw materials, as well as the fertility of the conquered territories and their human labor power, are to be used completely to the profit of Germany and her Allies . . . All prisoners of war from the territories of the west, as well as east, actually in Germany, must be completely incorporated into the German armament and nutrition industries . . . Consequently, it is an immediate necessity to use the human reserves of the conquered Soviet territory to the fullest extent. Should we not succeed in obtaining the necessary amount of labor on a voluntary basis, we must immediately institute conscription or forced labor . . . The complete employment of all prisoners of war, as well as the use of a gigantic number of new foreign civilian workers, men and women, has become an indisputable necessity for the solution of the mobilization of the labor program in this war."

DOCUMENT NO. 86

ORDINANCE NO. 7 OF THE MILITARY GOVERNMENT OF GERMANY, U.S. ZONE OF OCCUPATION
(18 October 1946, amended by ORDINANCE NO 11, 17 February 1947)

SOURCE

1 TWC XXIII

NOTE

The four Allied Powers occupying Germany after the end of hostilities in Europe in World War II (1939-1945) had issued Control Council Law No. 10 on 20 December 1945 (DOCUMENT NO. 73). That Law established the general overall system for the trial of persons charged with the commission of war crimes during the hostilities. In this respect, it supplemented the London Agreement and Charter of 8 August 1945 (DOCUMENT NO. 68) and was effective throughout Occupied Germany. Ordinance No. 7 was the implementation of Control Council No. 10 by the Military Government of the U.S. Zone of Occupation. (It was later amended by Ordinance No. 11.) Twelve cases, generally referred to as the "Subsequent Proceedings," were tried pursuant to this Ordinance. (See DOCUMENT NO. 91, DOCUMENT NO. 94, DOCUMENT NO. 97, DOCUMENT NO. 100, AND DOCUMENT NO. 104, for examples of these trials.) Although established by the Military Government, and although designated "Military Tribunals," the three judges who constituted each of these Tribunals were civilians, usually members of state courts in the United States.

TEXT

MILITARY GOVERNMENT — GERMANY

UNITED STATES ZONE

ORDINANCE NO. 7

ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS

Article I

The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences.

Article II

(a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.

(b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to

any tribunal if deemed advisable by the Military Governor. Except as provided in subsection *(c)* of this Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

(c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

(d) The Military Governor shall designate one of the members of the tribunal to serve as the presiding judge.

(e) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel.

(f) In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial. Members may be replaced for reasons of health or for other good reasons, except that no replacement of a member may take place, during a trial, other than by the alternate. If no alternate has been designated, the trial shall be continued to conclusion by the remaining members.

(g) The presence of three members of the tribunal or of two members when authorized pursuant to subsection *(f) supra* shall be necessary to constitute a quorum. In the case of tribunals designated under *(c)* above the agreement shall determine the requirements for a quorum.

(h) Decisions and judgments, including convictions and sentences, shall be by majority vote of the members. If the votes of the members are equally divided, the presiding member shall declare a mistrial.

Article III

(a) Charges against persons to be tried in the tribunals established hereunder shall originate in the Office of the Chief of Counsel for War Crimes, appointed by the Military Governor pursuant to paragraph 3 of the Executive Order Number 9679 of the President of the United States dated 16 January 1946. The Chief of Counsel for War Crimes shall determine the persons to be tried by the tribunals and he or his designated representative shall file the indictments with the Secretary General of the tribunals (see Article XIV, *infra*) and shall conduct the prosecution.

(b) The Chief of Counsel for War Crimes, when in his judgment it is advisable, may invite one or more United Nations to designate representatives to participate in the prosecution of any case.

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

(a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment,

translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

(b) The trial shall be conducted in, or translated into, a language which the defendant understands.

(c) A defendant shall have the right to be represented by counsel of his own selection, provided such counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country, or any other person who may be specially authorized by the tribunal. The tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.

(d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI *(c)*. The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.

(e) A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to crossexamine any witness called by the prosecution.

(f) A defendant may apply in writing to the tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located and shall also state the facts to be proved by the witness or the document and the relevancy of such facts to the defense. If the tribunal grants the application, the defendant shall be given such aid in obtaining production of evidence as the tribunal may order.

Article V

The tribunals shall have the power

(a) to summon witnesses to the trial, to require their attendance and testimony and to put questions to them;

(b) to interrogate any defendant who takes the stand to testify in his own behalf, or who is called to testify regarding another defendant;

(c) to require the production of documents and other evidentiary material;

(d) to administer oaths;

(e) to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission;

(f) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunal or by the committee of presiding judges as provided in Article XIII.

Article VI

The tribunals shall

(a) confine the trail strictly to an expeditious hearing of the issues raised by the charges;

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind

whatsoever;

(c) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article VII

The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

Article VIII

The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof.

Article IX

The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

Article X

The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

Article XI

The proceedings at the trial shall take the following course:

(a) The tribunal shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty."

(b) the prosecution may make an opening statement.

(c) The prosecution shall produce its evidence subject to the cross

examination of its witnesses.

(d) The defense may make an opening statement.

(e) The defense shall produce its evidence subject to the cross examination of its witnesses.

(f) Such rebutting evidence as may be held by the tribunal to be material may be produced by either the prosecution or the defense.

(g) The defense shall address the court.

(h) The prosecution shall address the court.

(i) Each defendant may make a statement to the tribunal.

(j) The tribunal shall deliver judgment and pronounce sentence.

Article XII

A Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable. The main office of the Secretariat shall be located in Nurnberg. The Secretariat shall consist of a Secretary General and such assistant secretaries, military officers, clerks, interpreters and other personnel as may be necessary.

Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

Article XIV

The Secretariat shall:

(a) Be responsible for the administrative and supply needs of the Secretariat and of the several tribunals.

(b) Receive all documents addressed to tribunals.

(c) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.

(d) Secure such information for the tribunals as may be needed for the approval or appointment of defense counsel.

(e) Serve as liaison between the prosecution and defense counsel.

(f) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the tribunals.

(g) Be responsible for the preparation of the records of the proceedings before the tribunals.

(h) Provide the necessary clerical, reporting and interpretative services to the tribunals and its members, and perform such other duties as may be required for the efficient conduct of the proceedings before the tribunals, or as may be requested by any of the tribunals.

Article XV

The judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Article XVII, *infra*.

Article XVI

The tribunal shall have the right to impose upon the defendant, upon conviction, such punishment as shall be determined by the tribunal to be just, which may consist of one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10.

Article XVII

(a) Except as provided in *(b) infra,* the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.

(b) In cases tried before tribunals authorized by Article II *(c),* the sentence shall be reviewed jointly by the zone commanders of the nations involved, who [may] mitigate, reduce or otherwise alter the sentence by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders.

Article XVIII

No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Article III, Section 5 of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes.

Article XIX

Upon the pronouncement of a death sentence by a tribunal established thereunder and pending confirmation thereof, the condemned will be remanded to the prison or place where he was confined and there be segregated from the other inmates, or be transferred to a more appropriate place of confinement.

Article XX

Upon the confirmation of a sentence of death the Military Governor will issue the necessary orders for carrying out the execution.

Article XXI

Where sentence of confinement for a term of years has been imposed the condemned shall be confined in the manner directed by the tribunal imposing sentence. The place of confinement may be changed from time to time by the Military Governor.

Article XXII

Any property declared to be forfeited or the restitution of which is ordered by a tribunal shall be delivered to the Military Governor, for disposal in accordance with Control Council Law No. 10, Article II (3).

Article XXIII

Any of the duties and functions of the Military Governor provided for herein may be delegated to the Deputy Military Governor. Any of the duties and functions of the Zone Commander provided for herein may be exercised by and in the name of the Military Governor and may be delegated to the Deputy Military Governor.

This Ordinance becomes effective 18 October 1946.

BY ORDER OF MILITARY GOVERNMENT.

MILITARY GOVERNMENT—GERMANY
ORDINANCE NO. 11

AMENDING MILITARY GOVERNMENT ORDINANCE NO. 7 OF 18 OCTOBER 1946, ENTITLED "ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS"

Article I

Article V of Ordinance No. 7 is amended by adding thereto a new subdivision to be designated "*(g)*", reading as follows:

"*(g)* The presiding judges, and, when established, the supervisory committee of presiding judges provided in Article XIII shall assign the cases brought by the Chief of Counsel for War Crimes to the various Military Tribunals for trial."

Article II

Ordinance No. 7 is amended by adding thereto a new article following Article V to be designated Article V-B, reading as follows:

"*(a)* A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected, to hear arguments upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals.

"*(b)* A joint session of the Military Tribunals may be called in the same manner as provided in subsection *(a)* of this Article to hear argument upon and to review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural. Any motion with respect to such final ruling shall be filed within ten (10) days following the issuance of decision or judgment.

"*(c)* Decisions by joint sessions of the Military Tribunals, unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.

"*(d)* The presence of a majority of the members of each Military Tribunal then constituted is required to constitute a quorum.

"*(e)* The members of the Military Tribunals shall, before any joint session begins, agree among themselves upon the selection from their number of a member to preside over the joint session.

"*(f)* Decisions shall be by majority vote of the members. If the votes of the

members are equally divided, the vote of the member presiding over the session shall be decisive."

Article III

Subdivisions *(g)* and *(h)* of Article XI of Ordinance No. 7 are deleted; subdivision *(i)* is relettered "*(h)*"; subdivision *(j)* is relettered "*(i)*"; and a new subdivision, to be designated "*(g)*", is added, reading as follows:

"*(g)* The prosecution and defense shall address the court in such order as the Tribunal may determine."

This Ordinance becomes effective 17 February 1947.

(BY ORDER OF THE MILITARY GOVERNMENT)

DOCUMENT NO. 87

REX v. PERZENOWSKI, REX v. WOLF, REX v. BUSCH, REX v. MUELLER
(Supreme Court, Appellate Division, Alberta, Canada, 24 October 1946)

SOURCES

[1947] 1 D.L.R. 705
3 Can.C.C. 254
13 Ann. Dig. 300

NOTE

This is the earliest of a series of cases presented herein (DOCUMENT NO. 92, DOCUMENT NO. 130, DOCUMENT NO. 137, and DOCUMENT NO. 139), all of which are concerned with various aspects of the same problem: the extent to which the national law of the prisoner of war continues to be applicable to his actions while he is in that status. Article 82(1) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), like its predecessor provisions, Article 45(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) and Article 8(1) of the Regulations annexed to the 1907 Hague Convention IV (DOCUMENT NO. 33) and to the 1899 Hague Convention II (DOCUMENT NO. 28), very clearly makes the prisoner of war "subject to the laws, regulations, and orders in force in the armed forces of the Detaining Power"; but does this mean, as is frequently contended, that this is to the exclusion of his own military law? The cases have uniformly answered that question in the negative. The real problem will arise when a valid law of the Detaining Power requires a prisoner of war to do some act which his own military law prohibits. While such a situation is conceivable, it is, fortunately, rather rare. (The cases which came closest to presenting this situation were the post-Korea courts-martial of former American prisoners of war for misconduct while in the Communist prisoner-of-war camps in North Korea, assuming, of course, that what the Communists required of prisoners of war represented "valid law," an assumption which it is frequently extremely difficult to make. See, for example, DOCUMENT NO. 131 and DOCUMENT NO. 134.) The present case involved the murder of a fellow German prisoner of war in a Canadian prisoner-of-war camp after the decision to do so was apparently reached by a sort of consensus of certain other German prisoners of war who had decided that the victim was a Communist and not to be trusted. (See DOCUMENT NO. 92.) (The portion of the decision dealing with the jurisdictional problem is included below because the accused prisoners of war contended that their act was excusable as an "act of war.")

EXTRACTS

The judgment of the Court was delivered by

HARVEY C.J.A.: — These are appeals from convictions for murder after separate jury trials before the Chief Justice of the Trial Division and verdicts of guilty.

It was only one murder and as the facts were the same and the evidence substantially so, the appeals were all argued together.

* * * * *

The appellants are all German prisoners of war who, at the time of the murder, September 10, 1944, were confined in a prisoners of war camp at Medicine Hat in this Province, and the murder was that of a fellow German prisoner of war.

The argument most strenuously advanced by appellants' counsel was that our Court had no jurisdiction to try them for the offence, that their act was an act of war, and that in any event only the military authorities had jurisdiction unless they transferred the jurisdiction to the civil Court.

These matters were considered by the Ontario Court of Appeal in *R.* v. *Brosig*, [1945], 2 D.L.R. 232, O.R. 240, 83 Can.C.C. 199, and by this Division in *R.* v. *Kaehler*, [1945] 3 D.L.R. 272, 83 Can, C.C. 353, in both of which the offence was that of theft, and it was in both of these cases definitely held that the civil Courts had jurisdiction there being no difference in that respect between an offence by a prisoner of war and one by a member of our own armed forces, and that equally the liability was the same.

As regards the offence of murder, the case is even stronger. Section 69 of the *Militia Act*, R.S.C. 1927, c. 132, declares the Imperial *Army Act*, 1881, 44 & 45 Vict., c. 48, to be applicable as if enacted by the Canadian Parliament, and by s. 41 of that Act, it is provided that: "A person subject to military law shall not be tried by court martial for . . . murder . . . committed in the United Kingdom" or in any place within Her Majesty's Dominions unless on active service or unless committed more than a hundred miles from a competent civil Court.

It is further provided in the same section that: "A person subject to military law when in Her Majesty's dominions may be tried by any competent civil court for any offence for which he would be triable if he were not subject to military law."

It is clear, therefore, that not merely is this Court qualified to try the offence, but it is the only tribunal so qualified.

Whatever might have been argued as to the offence dealt with in the *Kaehler* case in an attempt to escape from the custody of its enemies by a prisoner or war, being an act of war, which, however, was held to be untenable, is no basis whatever for the contention that the killing of a fellow prisoner of war is an act of war.

For the common law apart from the statute reference may be made to *R.* v. *Depardo* (1807), 1 Taunt. 26, 127 E.R. 739, a trial before Lord Mansfield C.J. in which reference is made to the case of François Antoine Sauvajot, a French prisoner of war, who was indicted for the murder of Mosteau, another French prisoner of war, on board the "Triton East Indiaman", upon the high seas at the entrance of the English Channel in September 1799, who was convicted of manslaughter and burnt in the hand.

There were several thousand prisoners of war in the camp and the Canadian military authorities permitted them a measure of self-government, and they had their own organization with officers and sub-officers. The appellant Perzenowski was a sub-officer with supervision over a group that included the other three appellants. It was rumoured that the murdered prisoner of war named Lehmann, who was employed as a teacher, was a communist, or that he was engaged in a plot to change the management, or something of the sort, that he was thought to be a traitor to his fellows and to his country. The circumstances of the killing are succinctly stated in a confession made by the appellant Perzenowski. He made and signed two statements, one which he wrote in his own handwriting by himself, being apparently alone, which was in German, and signed in the presence of a peace officer, the other written in English by one of the peace officers and signed by Perzenowski in the presence of peace officers. There is little difference between them in substance, but the latter has a little more detail. It relates the events as follows:

"I have fully understood from Corporal Bull that any statement which I have made previously is to be disregarded by me at this time. I also fully understand that the fact that I may have been acting under orders would not excuse me under the Canadian laws. I freely admit my guilt in the killing of Lehmann and I wish to take the full responsibility from those who were acting under my orders. I did not receive any order to kill Lehmann but after discussing the matter with others I made my own decision and carried out my plans myself. When I decided at that time to undertake this deed I was convinced that I had acted according to the German Military law. It was also clear to me that the Canadian authorities would consider me as a murderer. Since the Canadian authorities have received information as to my participation I will take the full responsibility. The decision for the first time came under consideration on the Saturday before the big transfer from Medicine Hat to Neys, which was during September, 1944. On the Sunday morning the final decision was made by me. . . .

* * * * *

In addressing the jury appellants' counsel urged them if they found the appellants guilty, to find them guilty only of manslaughter, the belief that Lehmann was a traitor being sufficient provocation to reduce it from murder to manslaughter. The trial Judge directed the jury that any such belief could not be such provocation for the deliberate acts resulting in the killing of Lehmann as to reduce it from murder to manslaughter under our law, and while he might have left it at that he gave the appellants the advantage of explaining to the jury what is such provocation under our law.

On the evidence before the jury there was clearly nothing that would justify a verdict of manslaughter.

Objection was also taken that the appellants at least other than Perzenowski, believed they were compelled by their military law to comply with the orders given them and that the jury should have been told that that furnished some excuse or at least some extenuation. As the trial Judge told them, it could not furnish any excuse or justification and as far as extenuation

is concerned that was not a matter for either Judge or jury, and if any consideration is to be given to it, it is for the executive not the judicial branch of government. As Perzenowski admitted he knew he was committing murder and the others probably knew it as well.

There were some other minor grounds of appeal which, however, were all considered unsound and do not call for further observations.

None of the grounds of appeal have validity, but even if there had been error, on the evidence the only legitimate verdict was the one that was given and all the trials were conducted with the utmost fairness. Indeed, after the verdict of guilty against Wolf, when he was asked if he had anything to say before sentence, he said:

Your Lordship and Gentlemen of the Jury: I stand here as a soldier of a foreign power which, until recently, was at war with Canada. I could not place full confidence in this Court, but, through sitting in and listening to everything, everything the witness said, and the evidence, it was shown to me and has fully convinced me that this trial was very fair."

The appeals are all dismissed.

Appeals dismissed.

DOCUMENT NO. 88

RESOLUTION 95(I), "AFFIRMATION OF THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED BY THE CHARTER OF THE NURNBERG TRIBUNAL," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS (11 December 1946)

SOURCE

1 Djonovich 175

NOTE

This resolution was adopted by the General Assembly of the United Nations just a short time after the issuance of the opinion and judgment in the trial of the major German war criminals by the International Military Tribunal (IMT) sitting at Nuremberg. The resolution "affirmed" the principles of international law recognized by the Charter of the "Nurnberg Tribunal" (DOCUMENT NO. 68) and by the judgment of the Tribunal (DOCUMENT NO. 85). Then, in effect, it directed its Committee on the Codification of International Law, established on the same day, to "formulate" those principles. This was not done by the Committee and the following year the newly-created and not-yet-functioning International Law Commission was directed to do so (DOCUMENT NO. 96). The International Law Commission complied with the directive of the General Assembly, submitting its "formulation" of the principles to the General Assembly in 1950. (See DOCUMENT NO. 111 and DOCUMENT NO. 114.)

TEXT

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a

general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal.

DOCUMENT NO. 89

TRIAL OF TANABE KOSHIRO
(Netherlands Temporary Court-Martial, Macassar, Celebes, 5 February 1947)

SOURCES
11 LRTWC 1
14 Ann. Dig. 210

NOTE

Article 31(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) provided that prisoner-of-war labor "shall have no direct relation with war operations" and specifically prohibited the use of such labor "for manufacturing and transporting arms or munitions of any kind, or for transporting material intended for combatant units." The present case is a classic example of the violation of these provisions. (See also, DOCUMENT NO. 101, under the rubric "Illegal Employment.") At times the applicability of the prohibitions to a particular act was difficult of determination. (See, for example, DOCUMENT NO. 79 and DOCUMENT NO. 100.) Article 50 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) attempts to eliminate the problems encountered in this area in the past by a completely new approach to the matter. Its overall efficacy remains to be tested.

EXTRACTS

A. OUTLINE OF THE PROCEEDINGS

The accused, Tanabe Koshiro, was a 1st Lieutenant of the Japanese Navy, and at the time of the alleged crimes, officer commanding the Sukei (Coast Guard) of 23 Special Naval Base Forces at Macassar, Netherlands East Indies. He was tried for violations of the rules of warfare concerning the treatment of Dutch and other Allied prisoners of war at Macassar.

1. THE CHARGES

The prosecution charged the accused with having "as a subject of the enemy power, Japan, at Macassar, about August, 1944, therefore in time of war," committed two types of offences:

"*(a)* unnecessarily exposed about twelve hundred Dutch, Americans British and Australian prisoners of war to acts of war";

"*(b)* employed prisoners of war in war work;; in that the accused "had an ammunition depot built by prisoners of war at a distance "of approximately 50 yards from the prisoner-of-war camp" and "ordered the depot to be filled with ammunition".

The prosecution asked the court to find the accused guilty of "intentionally and unnecessarily exposing prisoners of war to acts of war", and of "employing prisoners of war on war work, and to convict him to 5 years' imprisonment.

2. FACTS AND EVIDENCE

The accused pleaded not guilty. According to the evidence submitted to the

court, which included the testimony of Dutch and Japanese witnesses heard during the proceedings, the facts were as follows:

In July or August, 1944, a large ammunition depot was built opposite the prisoners-of-war camp at Macassar, and was located about 50 yards from the fence surrounding the camp. The depot was built by the prisoners from the camp on the order of the accused. The witnesses heard on this last point included the Japanese commandant of the prisoners-of-war camp. The ammunition stored in the depot was brought by Japanese soldiers belonging to the Sukei (Coast Guard) under the accused's command.

In view of the proximity of the depot, air-raid shelters were built in the camp, but were inadequate. They were made of rotten trunks of coconut palms and old timber, with a covering of thin sheets of old zinc.

3. THE JUDGMENT

The accused was found guilty of both charges, namely, of "unnecessarily subjecting prisoners of war to danger" and of "employing prisoners of war in an unlawful way". He was sentenced to 7 years' imprisonment.

DOCUMENT NO. 90

TREATY OF PEACE BETWEEN THE ALLIED AND ASSOCIATED POWERS, ON THE ONE PART, AND HUNGARY, ON THE OTHER PART
(Paris, 10 February 1947)

SOURCES
41 UNTS 135
61 Stat. 2065
4 Bevans 453
148 BFSP 363

NOTE

The 1945 Agreement concerning an Armistice between the Allied Powers and Hungary (DOCUMENT NO. 64), while providing for the immediate release of all Allied prisoners of war held by Hungary, contained no provision for the disposition of Hungarian prisoners of war held by the various Allied Powers. Official action with respect to these latter prisoners of war was only taken in this Treaty of Peace, entered into more than two years later; and, as will be seen, even the provisions contained in the Treaty of Peace required the reaching of further agreements between Hungary and the several Detaining Powers, with consequent additional delay. The Hungarian Armistice Agreement and the Treaty of Peace are included herein, not because they are in any way unusual, but rather because they were typical of a procedure which was very generally followed and which was the major reason for the inclusion in Article 118 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) of the requirement for the release and repatriation of *all* prisoners of war (except those covered by Article 119(5) of the Convention), whether held by the victor or by the vanquished, "without delay after the cessation of active hostilities." (Concerning India's violation of this specific provision of the 1949 Convention, see DOCUMENT NO. 167.)

EXTRACT

Article 21

1. Hungarian prisoners of war shall be repatriated as soon as possible, in accordance with arrangements agreed upon by the individual Powers detaining them and Hungary.

2. All costs, including maintenance costs, incurred in moving Hungarian prisoners of war from their respective assembly points, as chosen by the Government of the Allied or Associated Power concerned, to the point of their entry into Hungarian territory, shall be borne by the Hungarian Government.

DOCUMENT NO. 91

U.S. v. ERHARD MILCH
(Case No. 2, U.S. Military Tribunal, Nuremberg, 16-17 April 1947)

SOURCE
2 TWC 773

NOTE

This case involved one of the major problems which arose as a result of Nazi disregard of specific and unambiguous provisions of the law of war — in this instance, the provisions contained in Article 6(1) of the Regulations annexed to the 1907 Hague Convention IV (DOCUMENT NO. 33) and Article 31(1) of the 1929 Geneva Prisoner-of-War Convention (DOCUMENT NO. 49) prohibiting the use of prisoner-of-war labor on work having "connection with the operations of war" or having "direct relations with war operations," respectively. (The official French versions of these two provisions are identical except for the addition of the word "direct" in the latter.) The 1929 Convention additionally prohibited the "use [of] prisoners [of war] for manufacturing and transporting arms or munitions of any kind, or for transporting material intended for combatant units." Field Marshal Milch, who had the responsibility of keeping the Luftwaffe equipped and supplied during World War II (1939-1945), was accused of violating those provisions. For other cases involving the use of prisoners of war on prohibited work, see DOCUMENT NO. 85, under the rubric "Slave Labor Policy"; DOCUMENT NO. 101, under the rubric "Illegal Employment"; and DOCUMENT NO. 89. But see DOCUMENT NO. 100. (Although this is "Case No. 2" of the U.S. Military Tribunal, it was the first case tried and decided so that it is appropriate to mention here, as well as in the NOTE on "Case No. 1" (DOCUMENT No. 94) that there were 12 cases, referred to in general as the "Subsequent Proceedings," tried by the U.S. Military Tribunals at Nuremberg; and that although these Military Tribunals were established by the military authorities in the U.S. Zone of Occupation of Germany pursuant to Control Council Law No. 10 (DOCUMENT NO. 73), the judges composing each of these Tribunals were American civilians, mostly from the benches of state courts.)

EXTRACTS
COUNT ONE

Count one of the indictment charges the defendant with the commission of specified war crimes, as defined by Article II of Control Council Law No. 10, in that he was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving slave labor and deportation to slave labor, resulting in the enslavement, torture and murder of civilians of foreign countries. The indictment further charges that he similarly participated in the use of prisoners of war in war operations and

work having a direct relation to war operations, resulting in inhuman treatment and death to captured members of the armed forces opposed to Germany. The indictment alleges that these acts were in violation of international law and the recognized principles of civilized warfare and in specific violation of numerous treaties and conventions to which Germany was a party.

It is claimed by the prosecution that the defendant's responsibility for these alleged crimes arises from his activities in three capacities (1) as Aircraft Master General (Generalluftzeugmeister); (2) member of the Central Planning Board; and (3) chief of the Jaegerstab. The Central Planning Board was established by a decree of the Furhrer, dated 29 October 1943. That decree fitted the task of production of material goods of every kind into the framework of the Four Year Plan and charged the Central Planning Board with the procurement and distribution of material of every description. The Board consisted of Reich Minister Speer, Under Secretary Koerner, and the defendant. On 1 March 1944, the Jaegerstab was established, consisting of Speer, Saur (a subordinate of Speer), and the defendant. The Jaegerstab concerned itself exclusively with the material needs of the Luftwaffe, and was headed, naturally, by the defendant. It became apparent that neither of these two bodies could adequately deal with the problems of production without constantly dealing with the question of labor supply. Meetings of the Central Planning Board were held at least weekly and the minutes of those meetings which were offered in evidence show a constant and unremitting concern with the problem of labor . . .

* * * * *

The next question to be answered is whether or not the defendant Milch in this case knew that foreign slave labor and prisoners of war were being procured by Sauckel and used in the aircraft industry, which the defendant controlled. The defendant's own words, as gleaned from the minutes of the Central Planning Board and from his own testimony, conclusively answer this question in the affirmative. He testified that he knew that prisoners of war were employed in the airplane factory at Regensburg and that some twenty thousand Russian prisoners of war were used to man antiaircraft guns protecting the various plants. He stated further that he saw this type of war prisoners manning 8.8 and 10.5 [centimeter] antiaircraft guns at airplane factories in Luftgau 7 near Munich. Sauckel, the Plenipotentiary for Labor, sat in on at least fifteen meetings of the Central Planning Board, over which the defendant presided, and discussed at great length and in elaborate detail the problems involved in procuring sufficient foreign laborers for the German war effort. He frankly disclosed the cruel and barbarous methods used in forcing civilians of the eastern countries into the Reich for war work. He related the difficulties, and resistance which confronted him and the methods which he used and proposed to use in forcibly rounding up and transporting foreign workers. The advisability of using prisoners of war and inmates of concentration camps in the Luftwaffe was frankly discussed, with the defendant offering advice and suggestions as to the most effective methods to be used. In the face of this overwhelming evidence, disclosing page after page

of discussion between Speer, Sauckel, and the defendant in which the defendant urged more severe and coercive methods of procuring foreign labor from the East, it would violate all reason to conclude that he had no knowledge of the source of this labor or of the methods used in procuring it.

* * * * *

At the 53rd meeting of the Central Planning Board (16 February 1944), the defendant stated:

"Our best new engine is made 88 percent by Russian prisoners of war and the other 12 percent by German men and women."

Instances could be multiplied in which the defendant not only listened to stories of enforced labor from eastern civilians and other prisoners of war and thereby became aware of the methods used in procuring such labor, but in which he himself urged more stringent and coercive means to supplement the dwindling supply of labor in the Luftwaffe. As Germany's plight became more desperate, her loss of military personnel presented an alarming dilemma, resulting in the defection of thousands of workmen to the armed forces. This resulted in a shifting of the dilemma to industry, and spurs were put to the labor procurement officers to fill the widening gap in the industrial labor ranks. Every branch of war industry constantly clamored for replacements and each vied with the others for a greater quota from the labor pool. Confronted by the desperate situation the labor procurement officers, headed by the implacable Sauckel, cast aside all restraint and set out systematically to herd into the Reich any human being who could contribute to Germany's war effort. Under Sauckel's whip, no means however harsh were overlooked, and no person however exempt was spared.

The defense on this count is ingenious but unconvincing. As to the use of prisoners of war, the defendant testified that he had been advised by some unidentified person high in the National Socialist Councils that it was not unlawful to employ prisoners of war in war industries. The defendant was an old and experienced soldier, and his testimony revealed that he was well acquainted with the provisions of the Geneva and Hague Treaties on this subject, which are plain and unequivocal. In the face of this knowledge, the advice which he claims to have received should have raised grave suspicions in his mind. Presenting an entirely different aspect to his defense, he testifies that many of the Russian prisoners of war volunteered to serve in the war industries and apparently enjoyed the opportunity of manufacturing munitions to be used against their fellow countrymen and their allies. Other Russian prisoners of war, he states, were discharged as such and immediately enrolled as civilian workers. The photographs introduced in evidence, however, show that they still retained their Russian army uniforms, which makes their status as civilians suspect. Be that as it may, it does not adequately answer the charge that hundreds of thousands of Polish prisoners of war were cast into concentration camps and parceled out to the various war factories, nor the further fact that thousands of French prisoners of war were compelled to labor under the most harrowing conditions for the Luftwaffe.

The Tribunal therefore finds the defendant guilty of the war crimes

charged in count one of the indictment, to wit, that he was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving slave labor and deportation to slave labor of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorization of such persons; and further that the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in, and was connected with, plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation to war operations.

DOCUMENT NO. 92

REX v. WERNER AND ANOTHER
(Union of South Africa, Supreme Court, Appellate Division, 20 May 1947)

SOURCE

[1947] 2 S.A.L.R. 828
14 Ann. Dig. 202

NOTE

This is another of the series of cases (see also DOCUMENT NO. 87, DOCUMENT NO. 130, DOCUMENT NO. 137, and DOCUMENT NO. 139) concerned with the problem of the extent to which the national military law of the prisoner of war continues to be applicable to his actions while he is in that status. This case involves the "execution" murder of a German prisoner of war by his fellows in a prisoner-of-war camp in South Africa after he had been "sentenced" to death by a prisoner-of-war "court," the other prisoners of war having reached the decision that he was a spy who might reveal the presence of several German officers who were in concealment in preparation for an attempt to escape. In addition to the problem of the applicability of national military law to prisoners of war, the issue of the defense of superior orders was also presented. Despite numerous efforts to clarify this latter problem (see, for example, DOCUMENT NO. 111), no solution so far proposed can be said to have eliminated it, or even to have been universally accepted. (For evidence of the continued existence of the problem, see the three opinions in the case of *U.S.* v. *Calley* (DOCUMENT NO. 171).)

EXTRACTS

WATERMEYER, C.J.: The appellants were charged in the Natal Provincial Division with the murder of one Helmuth Haensel. They were tried before Mr. JUSTICE CARLISLE, sitting with two assessors, convicted and sentenced to imprisonment with hard labour for five years.

From the record it appears that the appellants and Haensel were all prisoners-of-war who had been captured in North Africa, and they were being detained in a camp near Pietermaritzburg; that on 6th June, 1942, the appellants together with certain other prisoners caused the death of Haensel by placing a rope round his neck and hanging him to a tent pole. The events which led up to the killing of Haensel are set out in the judgment of the trial court as follows:

> "The two accused were members of a batch of about one thousand prisoners-of-war brought to Pietermaritzburg in June, 1942. In this batch, which was the second to arrive here, there were no officers. After their arrival No. 1 accused was elected camp leader by his fellow prisoners and his appointment as such was confirmed by the officer commanding the P.O.W. camp. This second lot of prisoners occupied the

camp immediately after the first lot, consisting of officers and men, had been removed in transit for Canada. Some officers of this batch, however, did not go with it. They had had a dugout made in the music pavilion and hid in it intending to escape if possible. The existence of this dugout and the absence of these officers was not discovered by the Union soldiers in the camp. Two of these officers were Major von Lubke and Lieut. von Grabert, both of whom remained hidden in the camp. They were still hiding there when the second batch of prisoners arrived. It was not long before their presence became known to No. 1 accused and to the other prisoners-of-war. There is no reason to doubt No. 1 accused's evidence that he was ordered by Major von Lubke to see to it that the presence of these officers should be kept secret. Soon after this the deceased Haensel re-arrived at Pietermaritzburg; he had tried to escape from a ship at the Cape by jumping overboard, had been re-captured and had, after a spell in hospital, been returned to the camp. There is sufficient evidence on the record to show that Haensel's loyalty was deeply suspected by his fellow prisoners. No. 1 accused said, and there is no reason to disbelieve him, that Major von Lubke had heard of Haensel's arrival in the hospital and had given orders to No. 1 to see to it that the German prisoners-of-war in hospital should be careful of their talk in Haensel's presence. On Haensel's arrival in camp, which was on the forenoon of the 6th June, when he was discharged from hospital, there was a demonstration by some of the prisoners-of-war against him. The current opinion amongst the P.O.W.'s appears to have been that Haensel was looked upon as a spy, as a traitor and as a British agent. There is no evidence, naturally, upon which the Court can say whether or not this estimate of Haensel was justified but it seems reasonably clear that it was held by the majority of the prisoners. Now No. 1 accused, as the camp leader, was, of course, in close touch with the two hidden officers. He says that on the morning of the 6th June he was sent for and found both officers in his tent. He was told that the presence of Haensel was a source of danger and that if Haensel had been sent as a spy it might lead to the discovery of the two officers. Major von Lubke said that he intended to ascertain the truth of these rumours by calling before him such men in the camp who were in a position to depose what they knew about Haensel. These men were brought in and were told by Major von Lubke that they were to give evidence upon oath as they would do in Germany; that they were not to repeat hearsay statements but to confine their statements to what they personally knew. No. 1 says that the Major further told the men that they would have to repeat this evidence in Germany when they got back there. The evidence of these men was then heard. The conclusion of the matter was that Major von Lubke gave his decision. It was that on his responsibility and by his order Haensel should be executed that night. He ordered No. 1 to carry out the sentence that evening and to get men to assist him to do so. Some time that day, after this sentence had been pronounced and the order given,

No. 1, who was friendly with Regimental Sergeant Major Smale, a member of the Union forces in the camp, asked Smale whether it would be possible to have Haensel moved out of the camp because of his unpopularity with the other men. Smale referred this request to the camp commandant who refused it. In his evidence, and there is no reason to disbelieve it, No. 1 accused said that he made this request entirely on his own responsibility and without the knowledge or authority of either of the two officers. He thought that it would have met with the full approval of Major von Lubke had that officer known that it was to be made. It is, I think, clear that No. 1 desired, if possible, to have Haensel moved out of the camp even temporarily for by his removal any danger of his discovering and reporting the presence of the two officers would disappear. It is, in our opinion, a fair inference that the motive behind this request made by No. 1 accused was to avoid the commission of any violence upon Haensel. That evening Haensel was brought into the music pavilion in accordance with Major von Lubke's instructions. Major von Lubke was not there. Those present were Lieut. von Grabert, the two accused and some others. Haensel was overpowered, gagged and throttled. His body was hung by the neck from the tent pole, into which two nails had been driven to retain the rope. All the arrangements for this atrocious deed were made by No. 1 accused. The dead body was found soon after. No foul play was suspected by the Defence Force officers or, if it was, no proof of it was available. No. 1 accused had seen to that by telling the prisoners of war at roll call early next morning that if any questions were put to them about Haensel they were to reply by saying that they knew nothing about the matter. It was only after the cessation of hostilities between His Majesty's Forces and those of the German Reich that any knowledge of the true facts was obtained."

After conviction the following question of law was reserved for the consideration of this Court:

> "Whether there is legal evidence on the record on which a reasonable man could properly convict Wener and Wallat of murder."

That stereotyped form of reservation does not disclose the real question of law which counsel for the appellant sought to raise. The main contention which he advanced was that the killing of Haensel was not murder because the accused acted under orders given to them by a superior officer, which they thought they were under a duty as soldiers to obey.

Before considering that contention it is necessary to be clear as to the legal principles which must be applied, in particular as to the system of law which governs the matter.

With regard to the system of law to which the accused were subject, it appears from Article 45 of the Geneva Convention of 27 July, 1929, that, while they were prisoners-of-war, they were subject to the laws, regulations and orders in force in the armed forces of the detaining power. Consequently, in terms of that convention, the legal quality of their acts must be determined by the laws which at that time regulated the conduct of the Union forces.

Moreover, apart from the Geneva Convention, since criminal law is territorial, the question whether the acts done by them in South Africa constituted a crime, and, if so, what crime, must be decided by the law of South Africa.

Now it is clear that according to the law of South Africa, including in that law the statutory provisions and rules which govern the South African forces, the so-called trial of Haensel by Major von Lubke was entirely illegal and the order given by him that Haensel should be executed was an unlawful order for which no legal justification exists in our law. Consequently the execution of Haensel under that order was an unlawful homicide according to the law of South Africa. The accused took part in that homicide and are therefore criminally responsible for it unless their actions were in some way justified or excused.

It was contended on their behalf that they were excused because they acted in consequence of the orders given which they were bound to obey, or, at any rate, thought they were bound to obey.

In dealing with the duties of a soldier to obey the orders of a superior officer the learned Judge who gave the judgment accepted the law laid down in *Reg.* v. *Smith* (17, S.C. 561) as governing the situation. In that case SOLOMON, J. said:

> "After looking at authorities quoted from the bar and such other authorities as have been accessible, it seems to me that the rule laid down in the 'Manual of Military Law' is a reasonable and proper rule to apply in such a case as this. This states that if the commands are obviously illegal, an inferior would be justified in questioning or even refusing to execute such commands, but as long as the orders of the superior are not obviously and decidedly in opposition to the law of the land, or to the well-known established customs of the army, so long must they meet with complete and unhesitating obedience. There is an opinion of Mr. JUSTICE WILLS to the effect that an officer or soldier acting under orders from his superior which are not necessarily or manifestly illegal, would be justified. I think the rule a reasonable one, and one which has become a well-established principle of law. The well-known principle of criminal law demands that there must be some blame-worthy condition of mind, some guilty knowledge shown to the Court to justify finding a person guilty of a crime. It would shock one's ideas of what is right and just if a man were convicted of a crime if there is not blame in some way or other. If he did a thing without knowing he was doing wrong, or had reasonable grounds for believing that certain facts existed which justified his doing a thing, he would be excused on the ground that there was no guilty knowledge on his part. I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer."

I am inclined to think that some portions of these remarks require quali-

fication. For example, the words:

> "If he did a thing without knowing he was doing wrong . . . he would be excused"

would suggest that ignorance of law is an excuse. But, for the most part, this statement of the law seems to agree with the views held by many modern writers on the subject (see, for example, a statement by LORD WRIGHT in 1946, L.Q.R., p. 46; Article by Prof. Sack on *Punishment of War Criminals and the Defence of Superior Orders* in 1944, L.W.R., p. 63; Hall, *International Law* (8th Edition, p. 499); Article by J. H. Morgan, K.C., in the *Quarterly Review*, April, 1947, entitled Nuremberg and After. See also *Digest* (50.17.169); Grotiús, *de Jure Belli*, Bk. II, Ch. 26; Grueber, *Lex Aquilia* (9.2.37), p. 140; *Leyser* (Sp. 534)).

I think it is clear, however, that SOLOMON, J., was referring to soldiers engaged in military operations, or, at any rate, actually under the command of the officer who gave the order, and not to a state of affairs such as existed in this camp for prisoners-of-war, where the prisoners were under the command of a South African officer and not under the command of the German officer who was secretly in hiding in the camp.

CARLISLE, J., accepted the law laid down in *Rex* v. *Smith*, and in seeking to apply it made the following remarks:

> "It will be seen from this rule that it is not enough for a soldier to honestly believe he is doing his duty in obeying the command of his superior. He must, in addition be satisfied that the order is not so manifestly illegal as to be unlawful."

He then came to the conclusion that the order was illegal, and continued:

> "The next question that we have to consider is whether this order was so manifestly or obviously illegal that each of the accused must, or ought to have known that he was doing wrong in obeying it. We find that the answer to that question is in the affirmative. Each of the accused is a man of keen intelligence. In the circumstances we find them guilty."

From these passages it will be seen that the learned Judge took it for granted that the accused believed that it was their duty to obey such orders, but came to the conclusion that they knew or ought to have known that the orders were illegal and, therefore, that their belief was unreasonable or at any rate blameworthy, and consequently that it was not a state of mind which excused or justified their acts. Consequently, judging their conduct by the standard applicable to a soldier who was engaged in military operations or, at any rate, under the command of the officer who gave the order, he came to the conclusion that they were legally responsible for the death of Haensel. Their position, however, so far as legal immunity for crimes committed in consequence of orders is concerned, was, in my opinion, less favourable in the camp for prisoners-of-war than it would have been if they had been under the command of von Lubke. He was in hiding in the camp and had, by South African Law, no authority to give orders to the accused and they were under no duty to obey such orders, even if those orders had not been so obviously illegal that they should have known them to be illegal. It may, however, be

that the accused thought that they were bound to obey von Lukbe's orders. They say that they thought the law prevailing in the German armed forces was applicable to them and that it compelled them to obey von Lubke's order. No expert evidence was given to show what the German military law was in the situation which arose, but whatever it might have been it did not operate in a camp for prisoners-of-war in South Africa. Consequently, even if it be accepted that the accused believed that by German law they were bound to obey von Lubke's orders, they were mistaken in thinking that the duties imposed on them by German law compelled them to take Haensel's life in a camp for prisoners-of-war in South Africa. That mistake was a mistake of law, and, since it is a recognised principle of our criminal law that ignorance of law does not excuse, it follows that, even if it be assumed in their favour that in fact they believed that they were bound to obey the orders given by an officer, such a belief did not relieve them of criminal responsibility for the killing of Haensel.

I have, in what has been said above, assumed that the accused acted as unwilling participants in the killing of Haensel, being compelled thereto by what they conceived to be their duty as soldiers. But it is not clear on the evidence that the accused were unwilling participants in the homicide, who took part in it merely from a sense of duty. The evidence of the accused Werner, who was the camp-leader, shows that he regarded Haensel as a traitor who had to be dealt with either in the camp or when he returned to Germany, that his presence in the camp was a menace to the safety of the hidden officers, and that if he could not be removed from the camp he should be killed. He tried to procure his removal by reporting to the South African sergeant in charge that Haensel's life was in danger, but when no action was taken on that report he acquiesced in and assisted at the execution. In the circumstances, it is somewhat difficult to come to the conclusion that he was an unwilling instrument in the execution, acting solely from a sense of duty, induced by the belief that he was bound to obey an order given him by a superior officer.

The evidence of Wallat was given very shortly. He does not say that he took part in the killing of Haensel solely because he thought he was bound to obey orders, but he does say that he feared that he would be punished if he did not obey the orders given to him.

There is also other evidence tending to show that the accused feared that, if they did not obey the orders given them, they would have been regarded as traitors and would have run the risk of severe punishment, possibly death, on their return to Germany. It was suggested in argument that such a fear of punishment on the part of the accused, particularly when such fear was allied to an apprehension that they might themselves be killed by the other prisoners if they did not assist in killing Haensel justified their acts and relieved them of criminal responsibility. This argument is an attempt to extend the principle that immunity from criminal liability is sometimes granted to an accused person who acts under compulsion or from necessity far beyond its commonly recognised limits. There is no evidence of any direct

threat or compulsion by anyone but merely evidence by the accused of a fear of some sort of reprisal. No authority dealing with this aspect of the case was quoted by counsel, and I have been unable to find among Roman-Dutch writers on criminal law any clear statement of the limits of the immunity. In English law it seems clear that the circumstances existing in this case did not relieve the accused of criminal responsibility. See Hale, *Pleas of the Crown* (Vol. 1, sec. 51), and *Rex* v. *Dudley & Stephens* (14, Q.B.D. 273). From what appears in those authorities it seems that though a man may in self-defence kill an aggressor, he cannot, in order to save his own life, kill an innocent person.

* * * * *

The question which was reserved is whether there was legal evidence on the record on which the accused could properly be convicted. As there clearly was ample evidence the answer to this must be in favour of the Crown. Beyond the discussion of the other points contained in these remarks no answer can be given to the various contentions put forward on behalf of the accused.

As to the sentence, CARLISLE, J., rightly found that mitigating circumstances existed which justified the imposition of a comparatively light sentence (see *v.d. Linden* (2-1-5-11)). He imposed one of five years imprisonment. It was contended however that this was excessive and should be reduced. We are unable to come to the conclusion that it is excessive and see no reason for reducing it.

TINDALL, J.A., and GREENBERG, J.A., concurred.

DOCUMENT NO. 93

TRIAL OF LIEUTENANT-GENRAL BABA MASAO
(Australian Military Court, Rabaul, New Briton, 28 May - 2 June 1947)

SOURCES
11 LRTWC 56
14 Ann. Dig. 205

NOTE

This case involved one of the several inhuman "death marches" perpetrated by the Imperial Japanese Army during the course of World War II (1941-1945). It was the subject of a lengthy statement by the International Military Tribunal for the Far East (DOCUMENT NO. 101) under the rubric "Death Marches." While the United Nation War Crimes Commission's report of the case refers to "British and American prisoners of war," the Tribunal refers to "Australian prisoners of war" as having been the victims of the death march for which the accused here was charged with responsibility. As the accused was tried by an Australian military court, this latter appears more likely. (During the hostilities in Korea (1950-1953), the North Korean Communists also indulged in the inhuman practice of conducting death marches for prisoners of war. (See DOCUMENT NO. 131.))

EXTRACTS

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The charge alleged that the accused "while commander of armed forces of Japan . . . unlawfully disregarded and failed to discharge his duty as a . . . commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes . . ."

2. THE EVIDENCE

The accused was General Officer Commanding the 37th Japanese Army in Borneo from December, 1944, until the cessation of hostilities. At the time when the accused assumed command of the 37th Army there were about a thousand British and American prisoners of war in a prisoner of war camp at Sandakan. These prisoners were moved from Sandakan to Ranau (a march of 165 miles over extremely difficult country) in two parties. One went in December, 1944, and the other in May, 1945. Owing to the very meagre rations that the prisoners had been receiving over a long period, their state of health in December, 1944, was very poor. The order for the march had been given before the accused took over command of the 37th Army, but the accused admitted that he was aware of the conditions of the prisoners and that he ordered a reconnaisance of the country through which the prisoners were to march. He failed to alter the orders for the march after this reconnaisance. During the march a great number of prisoners died as a result of the hardships they had had to suffer, many were severely ill-treated and

some who could not keep up with the marching column were shot by the guards on orders from the officer in charge of the party, who was an officer subordinate to the accused.

The accused received a report of this march early in 1945, in spite of which report he ordered the evacuation of the remaining 540 prisoners over the same route in May, 1945. This second march proved even more disastrous than the first. Only 183 prisoners reached Ranau and of these another 150 died there shortly after their arrival. By the end of July, only 33 of the whole party were alive. They were killed on 1st August, on the orders of an officer who was under the command of the accused.

With regard to the two marches the defence pleaded that the evacuation of the prisoner of war camp at Sandakan was an operational necessity as the camp was near the seashore and an allied landing was to be anticipated. Allied troops did in fact land there in July, 1945, after the camp had been evacuated. The defence also pointed out that the Japanese army were themselves short of food and medical supplies and many of the guards died on the march as a result of the same hardships which the prisoners had suffered. This was not denied by the prosecution.

The accused gave evidence of the measures he had taken to secure provisions and medical supplies for the second march and said that he had done his best to provide for the prisoners. With regard to the killing of the 33 survivors at Ranau on 1st August, he claimed that by that time Ranau was cut off from his headquarters as a result of the allied landings and that he therefore could no longer exercise any effective control over the officers there who had previously been under his command. He gave evidence that he did not hear of this murder until after the cessation of hostilities.

3. THE FINDINGS

The accused was found guilty and sentenced to death by hanging. The sentence was executed.

DOCUMENT NO. 94

U.S. v. KARL BRANDT ET AL
(THE MEDICAL CASE)
(Case No. 1, U.S. Military Tribunal, Nuremberg, 19 August 1947)

SOURCE
2 TWC 171

NOTE

Among the numerous unpleasant novel ideas first adopted by the Nazis during the course of World War II (1939-1945) was that of using prisoners of war and other helpless individuals as guinea pigs for medical experiments, many of which really had little or no relationship to valid scientific research. In passing on this subject in Case No. 1 (aptly titled "The Medical Case") of the 12 "Subsequent Proceedings" conducted by U.S. Military Tribunals at Nuremberg, the Tribunal enumerated the requirements for "permissible medical experiments." (It should be noted again (see DOCUMENT NO. 91) that although these Military Tribunals were established by the military authorities in the U.S. Zone of Occupation of Germany pursuant to Control Council Law No. 10 (DOCUMENT NO. 73), the judges composing them were American civilians, mostly from the benches of state courts.) Since the end of World War II and the trials which condemned such medical experimentation as a war crime, Article 13 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) has been drafted and adopted with a provision specifically prohibiting this practice; and Article 130 thereof makes "inhuman treatment, including biological experiments," a grave breach of the Convention. See also Articles 11 and 85 of the 1977 Protocol I (DOCUMENT NO. 175)

EXTRACTS

THE PROOF AS TO WAR CRIMES AND CRIMES AGAINST HUMANITY

Judged by any standard of proof the record clearly shows the commission of war crimes and crimes against humanity substantially as alleged in counts two and three of the indictment. Beginning with the outbreak of World War II criminal medical experiments on non-German nationals, both prisoners of war and civilians, including Jews and "asocial" persons, were carried out on a large scale in Germany and the occupied countries. These experiments were not the isolated and casual acts of individual doctors and scientists working solely on their own responsibility, but were the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels, conducted as an integral part of the total war effort. They were ordered, sanctioned, permitted, or approved by persons in positions of authority who under all principles of law were under the duty to know about these things and to take steps to terminate or prevent them.

PERMISSIBLE MEDICAL EXPERIMENTS

The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well-defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts:

1. The voluntary consent of the human subject is absolutely essential.

This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

Of the ten principles which have been enumerated our judicial concern, of course, is with those requirements which are purely legal in nature — or which at least are so clearly related to matters legal that they assist us in determining criminal culpability and punishment. To go beyond that point would lead us into a field that would be beyond our sphere of competence. However, the point need not be labored. We find from the evidence that in the medical experiments which have been proved, these ten principles were much more frequently honored in their breach than in their observance. Many of the concentration camp inmates who were the victims of these atrocities were citizens of countries other than the German Reich. They were non-German nationals, including Jews and "asocial persons", both prisoners of war and civilians, who had been imprisoned and forced to submit to these tortures and barbarities without so much as a semblance of trial. In every single instance appearing in the record, subjects were used who did not consent to the experiments; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons; were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.

Obviously all of these experiments involving brutalities, tortures, disabling injury, and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, and Control Council Law No. 10. Manifestly human experiments under such conditions are contrary to "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."

DOCUMENT NO. 95

TRIAL OF MAX WIELEN AND 17 OTHERS (THE STALAG LUFT III CASE) (British Military Court, Hamburg, 3 September 1947)

SOURCE
11 LRTWC 31

NOTE

This trial involves one of the more horrendous events of World War II (1939-1945) insofar as British prisoners of war held by the Germans were concerned. Eighty Royal Air Force officers held as prisoners of war at Stalag Luft III escaped from that prisoner-of-war camp. Four were quickly recaptured and three were successful in reaching home. Of the remaining 73 all of whom were probably recaptured, 50 are known to have been killed by the Gestapo pursuant to the specific orders of Hitler who, when he was informed of the escape, instructed that after interrogation more than half of those recaptured were to be " 'shot whilst trying to escape' or 'shot whilst resisting.' " (This episode was characterized by the International Military Tribunal (DOCUMENT NO. 85) as "plain murder, in complete violation of international law.")

EXTRACTS

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The court was presided over by a Major-General and consisted of three army officers and three representatives of the Royal Air Force, in accordance with Regulations 5 (1) of the Royal Warrant.

2. THE CHARGES

All the accused were charged with:

(i) Committing a war crime in that they at divers places in Germany and German occupied territory, between 25th March, 1944, and 13th April, 1944, were concerned together and with SS Gruppenfuhrer Mueller and SS Gruppenfuhrer Nebe and other persons known and unknown, in the killing in violation of the laws and usages of war of prisoners of war who had escaped from Stalag Luft III.

(ii) Committing a war crime in that they at divers places in Germany and German occupied territory, between 25th March, 1944, and 13th April, 1944, aided and abetted SS Gruppenfuhrer Mueller and SS Gruppenfuhrer Nebe and each other and other persons known and unknown, in carrying out orders which were contrary to the laws and usages of war, namely, orders to kill prisoners of war who had escaped from Stalag Luft III.

The other charges were as follows:

(iii) (Against the accused Emil Schulz and Walter Breithaupt): Committing a war crime in that they between Homburg and Kaiserslautern, Germany, on or about 29th March, 1944, when members of the Saarbrücken Gestapo, in violation of the laws and usages of war, were concerned in the killing of Squadron Leader R.J. Bushell and Pilot Officer B.W.M. Scheidhauer, both of the Royal Air Force, prisoners of war.

(iv) (Against the accused Alfred Schimmel): Committing a war crime in that he in the vicinity of Natzweiler, occupied France, on or about 6th April, 1944, when Chief of the Strasbourg Gestapo, in violation of the laws and usages of war, was concerned in the killing of Flight Lieutenant A.R.H. Hayter, Royal Air Force, a prisoner of war.

(v) (Against the accused Josef Albert Andreas Gmeiner, Walter Herberg, Otto Preiss and Heinrich Boschert): Committing a war crime in that they in the vicinity of Natzweiler, occupied France, on or about 31st March, 1944, when members of the Karlsruhe Gestapo, in violation of the laws and usages of war, were concerned in the killing of Flying Officer D.H. Cochran, Royal Air Force, a prisoner of war.

(vi) (Against the accused Emil Weil, Eduard Geith and Johann Schneider): Committing a war crime in that they in the vicinity of Schweitenkirchen, Germany, on or about 29th March, 1944, when members of the Munich Gestapo, in violation of the laws and usages of war, were concerned in the killing of Lieutenant H.J. Stevens and Lieutenant J.S. Gouws, both of the South African Air Force, prisoners of war.

(vii) (Against the accused Johannes Post, Hans Kahler and Arthur Denkmann): Committing a war crime in that they in the vicinity of Roter Hahn, Germany, on or about 29th March, 1944, when members of the Kiel Gestapo, in violation of the laws and usages of war, were concerned in the killing of Squadron Leader J. Catanach, D.F.C., Royal Australian Air Force, Pilot Officer H. Espelid, Royal Air Force, Flight Lieutenant A.G. Christensen, Royal New Zealand Air Force, and Pilot Officer N. Fuglesang, Royal New Zealand Air Force, prisoners of war.

(viii) (Against the accused Oskar Schmidt, Walter Jacobs and Wilhelm Struve): Committing a war crime in that they in the vicinity of Roter Hahn, Germany, on or about 29th March, 1944, when members of the Kiel Gestapo, in violation of the laws and usages of war, were concerned in the killing of Pilot Officer H. Espelid, Royal Air Force, Flight Lieutenant A.G. Christensen, Royal New Zealand Air Force, and Pilot Officer N. Fuglesang, Royal New Zealand Air Force, prisoners of war.

(ix) (Against the accused Erich Hermann August Zacharias): Committing a war crime in that he in the vicinity of Moravska-Ostrava, occupied Czechoslovakia, on or about 29th March, 1944, when a

member of the Zlin Grenzpolizei, in violation of the laws and usages of war, was concerned in the killing of Flying Officer G.A. Kidder, Royal Canadian Air Force, and Squadron Leader T.G. Kriby-Green, Royal Air Force, prisoners of war.

All the accused pleaded not guilty to the charges brought against them.

In the Prosecution's interpretation, the first two charges were charges of conspiracy against all the accused jointly for participation in the killing of 50 Royal Air Force officers who were shot between 25th March and 13th April, 1944. Charges 1 and 2 were not alternative charges. In charges 3-9 six groups of accused were each charged with the killing of one or several officers of the R.A.F. and Dominion Air Forces. Every accused with the exception of Max Wielen figures in one of these charges, no accused figures in more than one.

3. THE CASE FOR THE PROSECUTION

On the night of 24th-25th March, 1944, 80 officers of the Royal Air Force and other Allied Air Forces who were prisoners of war at the prisoners of war camp Stalag Luft III at Sagan, in Silesia, escaped from that camp through an underground tunnel. The escape had been carefully planned and the officers, furnished with partly civilian clothes and false papers, fanned out in all directions in an effort to reach the borders of the Reich, mainly France and Belgium in the west, Czechoslovakia in the south and Denmark in the north. 80 officers escaped from the camp through an underground tunnel. Four were recaptured shortly afterwards in the vicinity of the camp, 76 got away. Only 3 of these 76 reached home safely. 15 were returned to Stalag Luft III and 50 were shot by the Gestapo and of the remaining 8, 4 were sent to a concentration camp, 3 were held by the Gestapo headquarters in Czechoslovakia, and of one, the witness had not heard anything at all.

The German authorities were perturbed by the escape, and the Head of the Criminal Police at Breslau, in whose area it had occurred, ordered a "Grossfahndung" in accordance with the regulations on important escapes. This was a nation-wide hue and cry and meant that every policeman and quasi-policeman in Germany and occupied Europe had the task of looking for the escaped officers, whose photographs were published in the German Police Gazette. On 26th March the news of the escape reached Hitler at Berchtesgarten and after consultations with Goering, Keitel and Himmler, he gave the verbal order that "more than half of the escapees" were to be shot. The order was eventually issued from the R.S.H.A. (Reichs-Sicherheits-Haupt-Amt, the German Central Security Office), by teleprint to the various regional Gestapo headquarters which it concerned. The teleprint itself could not be produced, but in the recollection of the witness Mohr, who had repeatedly dealt with it in his department (Amt 5) at the Central Security Office, it read something like this:

"The frequent mass escapes of officer prisoners constitute a real danger to the security of the State. I am disappointed by the inefficient security measures in various prisoner of war camps. The Fuhrer has ordered that as a deterrent, more than half of the escaped officers will be shot. The recaptured officers will be handed over to Amt 4 for

interrogation. After interrogation the officers will be transferred to their original camps and will be shot on the way. The reason for the shooting will be given as 'shot whilst trying to escape' or 'shot whilst resisting' so that nothing can be proved at a future date. Prominent persons will be exempted. Their names will be reported to me and my decision will be awaited whether the same course of action will be taken."

The chart at page 52 [not reprinted] illustrates the chain of command within the branches of the Central Security Office and the way the order, once given by Himmler, was carried out, can be followed on this chart. It was sent by teleprint to all Gestapo regional headquarters through Amt 4 and to all Kripo (Criminal Police) regional headquarters through Amt 5. It was thus the task of the Kripo (Criminal Police), headed by Amt 5 at the Central Security Office, to apprehend the escaped officers and on recapture to select more than half of them to be handed over to the Gestapo "for interrogation", i.e. to be shot. It was the task of the Gestapo to take the escaped prisoners of war over from the Kripo and to carry out the shooting. As soon as the news of the recapture of some prisoners of war was reported by the local Kripo to the Central Security Office at Berlin, Amt 5 gave out orders to the Kripo regional headquarters to hand over these prisoners to the Gestapo and Amt 4 gave out orders to the regional headquarters of the Gestapo to take over a certain number of enemy prisoners of war to be shot and to report the killing to Berlin. The orders were given out by teleprint to the Kripo and Gestapo regional offices throughout the country.

Charges (iii)-(ix) relate to the shooting of 12 officers carried out by six Gestapo regional headquarters, Saarbrucken, Karlsruhe, Strasbourg, Munich, Kiel and Zlin frontier police. All the accused in charges (iii)-(ix) were members of the staff of these six regional headquarters, ranging from officers commanding down to duty drivers. Identical orders were given to these six regional headquarters and the execution of these orders followed the same pattern in each case. In every case the officer commanding received orders from the Central Security Office in Berlin. He then made the necessary arrangements for their execution. The party carrying out the shooting usually consisted of either the Commanding Officer himself or another officer detailed by the Commanding Officer to be in charge of the party, of one or more Gestapo officials as escort and of a driver. Those detailed were briefed by the Commanding Officer as to their duties and pledged to absolute secrecy by hand-shakes and by a reminder of the SS oath to the Fuhrer. They then set out at night in one or more cars to fetch the prisoners from the local gaol where they were handed over by the Kripo. After a short drive the car stopped by the roadside, the excuse being always that the prisoners wanted to relieve nature. The place selected was always near a crematorium. The driver or another man remained by the car to see that no cars or passersby would stop in the vicinity. The other Gestapo officials would take out the prisoners and kill them by shooting them in the back, usually only a short distance from the road. The bodies were inspected by the nearest doctor, who issued a death certificate, and then cremated and the urns sent to the Kripo

regional headquarters at Breslau for onward transmission to Stalag Luft III, as set out in the orders. After the shooting a report was sent by the regional Gestapo headquarters concerned to Amt 4 saying: "Orders carried out, prisoners shot whilst trying to escape". A few weeks afterwards when the German authorities had learned from a statement made by the British Foreign Secretary in the House of Commons that the news had leaked out, an official from each of the Gestapo headquarters concerned was summoned to Amt 4 in Berlin or received a message to the effect that their reports had to be re-written as they were all identical. They had to be made "more realistic" and more varied because a visit from the Protecting Power was to be expected and the representatives of the Protecting Power would almost certainly want to see the scene of the shooting and would also require a description of what had occurred.

Based on these facts, the prosecution alleged "that these 18 accused were concerned with their masters in Berlin, General Müller and General Nebe and with other persons known and unknown — and, of course, that includes Hitler, Himmler and Kaltenbrunner — in the killing of prisoners of war who had escaped from Stalag Luft III" and that they were acting for a common purpose.

So far as *mens rea* is concerned, the prosecutor based his case on the fact that owing to the "Grossfahndung" (the nation-wide search), notified to every police headquarters, all policemen in Germany must have known that prisoners of war were at large and that therefore the accused, being members of the Gestapo, could not be heard to say that they did not know the identity of the prisoners they went out to kill.

The position of Max Wielen, who was officer commanding the Kripo regional headquarters at Breslau, differs from that of the other accused in that:

(1) he was only charged with his participation in the general conspiracy (charges (i) and (ii)) and not with participating in any of the particular murders (charges (iii)-(ix));
(2) he was the only Kripo official in the dock, all the other accused being members of the Gestapo;
(3) he was the only one among the accused who was called to Berlin personally and was shown the Hitler order;
(4) the escape occurred in his area, 36 out of the 76 officers who had escaped were recaptured in his area and 27 of them were handed over by the Kripo under his command to the Gestapo and shot.

When informed of the mass escape from Stalag Luft III, which was in his police area, Wielen ordered the "Grossfahndung" and the central control of this nation-wide search remained in his hands until its completion. As a result of the search nearly half of the escapees were captured in his area and it was therefore natural and logical that the central authorities in Berlin should seek his co-operation when dealing with the execution of the Hitler order.

Wielen was then summoned to the RSHA, where General Nebe showed him the order signed by Kaltenbrunner and instructed him to put nothing in

the way of the Gestapo carrying out their task.

Kripo regional headquarters at Breslau was to furnish the list of the ringleaders of the escape to enable General Nebe to select the victims ("more than half of 80, in accordance with the Hitler order"). This list was sent to the RSHA by Wielen's headquarters. General Nebe selected the names of those to be shot to make up "more than half" of the 80, to comply with Hitler's orders. He put some cards on one pile with remarks like "He is still very young, he may live" and some on another pile with remarks like "He is married but has no children, it will get him". After Wielen's return from Berlin he contacted his opposite number in the Gestapo in Breslau, Dr. Scharpwinkel, and informed him of the Hitler order.

At that time some of the officers recaptured in the Breslau area were removed from Sagan gaol to Goerlitz gaol, further away from Stalag Luft III, to which they should have been returned. This was done, in the prosecution's submission, to concentrate the prisoners and facilitate the handing over to the Gestapo of those to be shot.

Having seen the Hitler order and having been briefed by General Nebe, Wielen knew that the handing over of any one of these prisoners to the Gestapo was tantamount to handing them to their executioner. Yet, 27 out of 36 were handed over, it is to be assumed on Wielen's orders, and subsequently shot by the Gestapo. The nine officers not handed over, of whom the witness Wing Commander Marshall was one, were returned to Stalag Luft III.

The urns containing the ashes of the murdered officers from all over Germany were sent to Wielen's office. From there they were forwarded to Stalag Luft III with the explanation that these prisoners had been shot whilst attempting to escape. Wielen was thus covering up the actions of the Gestapo.

After the news of the shooting of the 50 R.A.F. officers had been given out in the House of Commons, Wielen was summoned, together with Scharpwinkel, to a conference in Berlin with General Mųller and General Nebe. There, the orders for the whitewashing of these shootings were given and the details of the faked reports were settled. In the prosecution's submission, Wielen would not have been asked to attend this conference on a Top Secret matter if he had not played an important part in the earlier stages of the affair, looking after the Kripo side, whereas Scharpwinkel was looking after the Gestapo side of it. There was, in the prosecution's submission, perfect co-operation between the Gestapo and Kripo on the top level at the RSHA, i.e. between General Mųller and General Nebe, and it was an irresistible inference that unless there had also been such co-operation on the next lower level between regional headquarters of the Gestapo and Kripo, the smooth execution of the Hitler order would have been impossible.

4. THE CASE FOR THE DEFENCE

The defence contended that in order to prove his case the prosecutor had to prove:

(i) that all the accused knew that 80 prisoners of war had escaped from

Stalag Luft III in Sagan;

(ii) that all accused knew that Hitler had given the order that 50 of these 80 prisoners of war would be shot;

(iii) that all accused knew that the prisoners whom they were accused of having killed were some of those officers who had escaped from Stalag Luft III;

(iv) that in view of this knowledge they were aware of the fact that the shooting of these British officers was illegal;

(v) that they had the power to prevent this shooting.

To establish points (i) and (ii) the prosecution had relied mainly on two facts:

(a) that in view of the nation-wide search published in the Police Gazette, every member of the Gestapo must have had knowledge of the escape of the prisoners and the Hitler order, and

(b) on the teleprints which were sent out by the RSHA to all Gestapo regional headquarters.

As to the Police Gazette, this was a publication to facilitate the apprehension of criminals or escapees. Since such apprehension was the job of the Kripo (Criminal Police) and not of the Gestapo, most Gestapo officials would not be concerned with this Gazette and therefore would not read it. Also, the special issue of the Gazette was published on 28th March, 1944; the shooting with which the accused were charged occurred between 29th and 30th March, 1944. Bearing in mind the state of communications in Germany at that time, and the constant allied bombardment, the relevant copy of the Police Gazette could not have reached the accused many hundreds of miles away from Berlin in two or three days. The prosecution's arguments that every policeman or quasi-policeman in Germany must have known that there was a "Grossfahndung" on had been refuted by the witness General Westhoff, who stated in cross-examination that the number of prisoners who escaped in 1943 amounted to 4,200, and by the witness Mohr, who testified that 5 or 6 nation-wide searches took place in 1943 and that there had already been 2 or 3 such searches in 1944, previous to the one after the Stalag Luft III escape. Thus, these searches were such a common occurrence that the overworked Gestapo officials did not take much notice of them.

As to the teleprints, counsel for the defence argued that, supposing even that they were sent to and received by all heads of Gestapo regional headquarters concerned, the prosecution had failed to prove that they were communicated to all the individuals accused by their commanding officers. On the contrary, the evidence produced by the prosecution showed that some of the accused were not informed of the teleprints, some were even deliberately misled about the contents of these teleprints by their commanding officers. The fact that the teleprints were marked "Top Secret" showed that they were designed for the officers commanding regional headquarters only, and not to be communicated to such junior officials as were some of the accused.

The defence maintained that the prosecution had clearly failed to prove point (iii), i.e. that the accused were aware of the identity of the prisoners

they were to shoot, partly because of the clothes the prisoners of war were wearing for purposes of camouflage, partly because of their day-long treks across country, causing them to look more like tramps than like British officers. In view of these facts, the accused assumed or believed when they were told, that these escapees were saboteurs, spies or enemy agents found in civilian clothes and that it was not only legal but necessary in the interest of German security to shoot them and that they therefore raised no objections when they were ordered to take them over from the Kripo and carry out the executions. The handing over of these prisoners by the Kripo to the Gestapo was not suspicious in itself, since interrogations dealing with foreigners, saboteurs and agents were outside the sphere of the Kripo and came within the proper field of the activities of the Gestapo.

The defence pointed out that there was no connection between the different local Gestapo officers and officials in carrying out the shooting. They did not know of each other's activities, e.g. the members of the Kiel Gestapo did not know what members of the Munich Gestapo at the other end of Germany were doing on 29th April, 1944, [*sic*] the day on which all but one of the alleged murders were committed. "The accused prepared nothing, planned nothing, plotted nothing. They had no consultations among themselves nor with their colleagues in the Kripo, nor with their superiors in Amt 4 in Berlin." Thus, "every factor was lacking from which collaboration and participation in a common plan or conspiracy could be deduced which would bear out the prosecution's contention that they were together concerned or that they were aiding or abetting the commission of the alleged crimes. The very thought that two SS Generals, Mueller and Nebe, on the one hand, and two simple drivers like the accused Denkmann and Struve on the other hand, should have planned something together is absurd and contrary to all principles of a dictatorship, with its strict discipline and blind obedience to orders".

With regard to the accused Wielen, the defence pointed out that if there had been a conspiracy, the conspirators were Hitler and Himmler, who had committed suicide, Goering and Keitel and Kaltenbrunner, who had been sentenced to death by the International Military Tribunal at Nuremberg, General Mueller, who was dead, and General Nebe, who was executed for complicity in the attempt on Hitler's life in July, 1944, and Scharpwinkel, who was in Russian custody. Instead of all these, the accused Wielen was in the dock alone as a scapegoat.

Referring to the case for the prosecution, point by point, the defence case was as follows:

To organise a nation-wide search and to re-arrest escapees was his duty as a Kripo officer and was in accordance with international law. That the whole search and the scheme for the recapture should be centred at Breslau was logical in the circumstances and showed no special participation or eagerness on the part of Max Wielen.

He was summoned to Berlin by his superior officer, General Nebe. The evidence shows that he was called not to obtain his co-operation, but to eliminate the possibility of his resistance. Nebe stated categorically that the

responsibility for the execution of the Hitler order lay with the Gestapo and threatened Wielen with an SS court martial should he make trouble. It was not proved that Wielen had ever received a written order.

As to the list of ringleaders, such a list was requested by the RSHA. It was compiled by the investigating Gestapo officials and only contained a few names. It was sent through ordinary staff channels and therefore passed through the regional headquarters at Breslau, but it was never a list of "officers to be shot". The only long list of names in existence was a list of "officers shot" compiled after the execution of the 50 officers and forwarded to Stalag Luft III with the urns.

Mohr's evidence proved that Nebe based his selection of the 50 officers, not on any list from Wielen, but on the officers' index cards showing their age and family ties obtained from the Central Registry of Prisoners of War.

On his return from Berlin, Wielen telephoned Scharpwinkel, but there is no evidence that he gave any orders for handing over any of the 36 prisoners in his area, or any of the prisoners outside his area to the Gestapo. Scharpwinkel acted on the orders received from his superiors at Amt 4. The Gestapo fetched the officers from the prisons. Since every Gestapo official could demand the handing over of prisoners from the police for interrogation as of right, there would have been no need to give any orders to the Kripo for handing the prisoners over and there was no evidence that Wielen ever gave such orders.

That the urns with the ashes of the dead officers should be collected at Breslau regional headquarters of the Kripo for onward transmission to Stalag Luft III for a military burial means only that they were sent through ordinary staff channels and does not reflect on Wielen.

About the conference in Berlin, the prosecution witness Mohr said:

> "I have never been able to find out why Wielen was asked for this meeting at all. Our presence was absolutely useless. The whole thing was nothing but the chief of Amt 4 verbally giving orders to the chief of the Gestapo at Breslau" and further "Nebe said to Mueller that the Kripo could do nothing in this matter."

As to Wielen's acts of omission: even by sacrificing his life, Wielen could not have prevented the shooting of these 50 officers after they had been ordered by Himmler and agreed to by Goering and Kietel.

5. SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate advised the court to disregard the first two charges. He said: "The real gravamen of the accusation against the accused apart from Wielen is what they did when they were present or when they were ordering these shootings. If they are not guilty of that, is it likely that you will find them guilty of the first and second charge? In my view it is because the prosecution say they did what is set out in the charges (iii)-(ix), that they bring them into charges (i) and (ii)."

With regard to the accused Wielen the Judge Advocate said that there could be no doubt that Wielen went to Berlin and there learned from his General, General Nebe, the contents of the Hitler order. "It is clear that

Wielen is telling you that he did not see any way out and he goes back to Breslau and as far as I can see he is not going to take any steps that lie within his power to make the handing over of these officers to the Gestapo difficult."

The Judge Advocate pointed to an early statement made by Wielen in which the latter said that Amt 5 sent a copy "for the information" of the Kripo containing a list of officers who were to be shot by the Gestapo so that the Kripo would know about it when the officers were asked for. Wielen later denied this statement. The Judge Advocate said "Gentlemen, it seems to me an irresistible inference that this scheme of Hitler's to shoot secretly these 50 officers could not go through without the connivance and cooperation of the Kripo and the Gestapo and, Gentlemen, why should that cease when you come down to the lower stage of the 'Leitstellen (regional headquarters) level'? Is it not going to be equally effective to say 'When we come down to the Leistelle Breslau, we must ensure that Scharpwinkel and Wielen work together? If they do not, then it won't work smoothly and there is a risk of secrecy being allowed to be interfered with and that, Gentlemen, as I see it, is the real case for the Prosecution."

6. FINDING AND SENTENCE ON CHARGES (i) AND (ii)

The Court found all accused with the exception of Wielen not guilty of the first and not guilty of the second charge.

The accused Wielen was found guilty of the first and of the second charge and sentenced to life imprisonment.

7. EVIDENCE ON CHARGES (iii)-(ix)

The essential features of the evidence are the same in all six cases: The receipt of the Hitler Order by the Officer Commanding the Regional Headquarters, the orders given and the arrangements made for the execution of this order, and the actual shooting of the prisoners in which the accused participated under the leadership of the Commanding Officer himself, or of an officer appointed by him. A further common feature was that the prosecution's case rested entirely on the depositions made by the accused. The general line of the defence was that some of the depositions were obtained under duress and therefore none of them should be relied upon. In court the accused (with the exception of Gmeiner and Schimmel, who had only given orders) all admitted that they were present when the airmen were shot. The issues to be decided by the court, therefore, were: (1) what part the individual accused played in the shooting of the prisoners, and (2) whether they knew that the prisoners were prisoners of war. The sixth case formed an exception to the abovesaid, inasmuch as there was some independent evidence and the accused pleaded in his defence that the prisoners tried to escape and were shot in the attempt.

8. FINDINGS ON CHARGES (iii)-(ix)

All accused (with the exception of Wielen) were found guilty of charges (iii)-(ix) brought against them.

DOCUMENT NO. 96

RESOLUTION 177(II), "FORMULATION OF THE PRINCIPLES RECOGNIZED IN THE CHARTER OF THE NURNBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS

(21 November 1947)

SOURCE

1 Djonovich 302

NOTE

The General Assembly of the United Nations had originally assigned the task of "formulating" the principles of international law to be derived from the London Charter (DOCUMENT NO. 68) and the judgment of the International Military Tribunal (DOCUMENT NO. 85) to its Committee on Codification of International Law (DOCUMENT NO. 88). That Committee was subsequently replaced by the International Law Commission. In this resolution the General Assembly directed the Commission to accomplish the task of "formulation" which it had previously directed the Commission's predecessor to do; and, having done so, to prepare a draft code of offenses against the peace and security of mankind based upon those principles. (The International Law Commission complied with these directives of the General Assembly, submitting its "formulation" of the principles to the General Assembly in 1950 (DOCUMENT NO. 111) and a draft code of offenses against the peace and security of mankind in 1951 (DOCUMENT NO. 117). For the subsequent action of the General Assembly with respect to the principles, see DOCUMENT NO. 114.)

TEXT

The General Assembly

Decides to entrust the formulation of the principles of international law recognized in the charter of the Nyrnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174(II), be elected at the next session of the General Assembly, and

Directs the Commission to

(a) Formulate the principles of international law recognized in the Charter of the Nyrnberg Tribunal and in the judgment of the Tribunal and

(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph *(a)* above.

DOCUMENT NO. 97

U.S. v. OTTO OHLENDORF ET AL
(THE EINSATZGRUPPEN CASE)
(Case No. 9, U.S. Military Tribunal, Nuremberg, 8-9 April 1948)

SOURCE
4 TWC 411

NOTE

This was Case No. 9 tried by the U.S. Military Tribunals at Nuremberg as a part of the so-called "Subsequent Proceedings" (see NOTE to DOCUMENT NO. 91 and to DOCUMENT NO. 94). It involved the Einsatzgruppen, the special "murder squads" created by Hitler to accompany the German army in its 1941 campaign against Russia with the function of disposing of all "undesirables," including many categories of prisoners of war. The opinion is particularly notable for its lengthy discussion of the defense of superior orders.

EXTRACTS

PRISONERS OF WAR

The extermination program on racial and political grounds also extended to prisoners of war. Even in the first weeks of Germany's war against Russia, large numbers of civilians from the invaded areas were indiscriminately thrown into prisoner-of-war camps, run by the PW department of the High Command of the Wehrmacht. On 17 July 1941, Heydrich issued Operational Order No. 8, which contained "directives" for the Einsatz units "detailed to permanent PW camps (Stalags) and transit camps (Dulags)". These directives not only grossly violated the provisions of the Hague Regulations on prisoners of war and civilians in belligerently occupied territories and of century-old rules and customs of warfare, but outraged every principle of humanity. They provided for nothing less than the cold-blooded mass-murder of prisoners of war and of civilians held in PW camps. The directives state as their "purpose" —

> "The Wehrmacht must immediately free itself of all those elements among the prisoners of war who must be regarded as Bolshevist influence. The special situation of the campaign in the East, therefore, demands *special measures* [Italics original] which have to be carried out in a spirit free from bureaucratic and administrative influences, and with an eagerness to assume responsibility." *(NO-3414.)*

The directives instruct the Einsatz units as to which categories of persons to seek out "above all". This list mentions in detail all categories and types of Russian government officials, all influential Communist Party officials. "the leading personalities of the economy", "the Soviet Russian intellectuals", and as a separate category — the category which was again to yield the largest number of victims of this "action" — "all Jews".

It, in fact, emphasized that in — "taking any decisions, the racial origin has to be taken into consideration." *(NO-3414.)*

Concerning executions, the directives specified—

> "The executions must not be carried out in the camp itself or in its immediate neighborhood. They are not public and are to be carried out as inconspicuously as possible" *(NO-3414.)*

Further—

> "In order to facilitate the execution of the purge, a liaison officer is to be sent to Generalmajor von Hindenburg, commander in chief of the PW camps in Military District I, East Prussia, in Koenigsberg, Prussia, and to Generalleutnant Herrgott, commander in chief of the PW camps in the general government in Kielce."

Under this program doctors, if found in the PW camps, were doomed either because they were "Russian intellectuals" or because they were Jews. However, by 29 October 1941, Heydrich found it necessary to rule—

> "Because of the existing shortage of physicians and medical corps personnel in the camps, such persons, even if Jews, are to be excluded from the segregation and to be left in the PW camps, except in particularly well-founded cases." *(NO-3422.)*

Another passage in this order of Heydrich vividly demonstrates to what extent the Reich went officially in flouting the most basic rules of international law and the principles of humanity—

> "The chiefs of the Einsatzgruppen decide on the suggestions for executions on their own responsibility and give the Sonderkommandos the corresponding orders."

It is apparent that all those involved in this program were aware of its illegality.

> "This order must not be passed on in writing — not even in the form of an excerpt. District commanders for prisoners of war and commanders of transit camps must be notified verbally." *(NO-3422.)*

It is to the credit of an occasional army officer that he objected to this shameful and degrading repudiation of the rules of war. In one report we find—

> "As a particularly clear example the conduct of a camp commander in Vinnitsa is to be mentioned who strongly objected to the transfer of 362 Jewish prisoners of war carried out by his deputy and even started court martial proceedings against the deputy and two other officers." *(NO-3157.)*

Field Marshal von Reichenau, commanding the Sixth Army, however, was not so chivalrous as the officer indicated. The report states further—

> "Generalfeldmarschall von Reichenau has, on 10 October 1941, issued an order which states clearly that the Russian soldier has to be considered on principle a representative of bolshevism and has also to be treated accordingly by the Wehrmacht."

Perhaps the nadir in heartlessness and cowardice was reached by these murder groups when one of the Kommandos brutally killed helpless,

wounded prisoners of war. Einsatzgruppe C, reporting (November 1941) on an execution performed by Sonderkommando 4a, stated—

> "* * * the larger part were again Jews, and a considerable part of these were again Jewish prisoners of war who had been handed over by the Wehrmacht. At Borispol, at the request of the commander of the Borispol PW camp, a platoon of Sonderkommando 4a shot 752 Jewish prisoners of war on 14 October 1941, and 357 Jewish prisoners of war on 10 October 1941, among them some commissioners and 78 wounded Jews, handed over by the camp physician." *(NO-2830.)*

* * * * *

Superior Orders

Those of the defendants who admit participation in the mass killings which are the subject of this trial, plead that they were under military orders and, therefore, had no will of their own. As intent is a basic prerequisite to responsibility for crime, they argue that they are innocent of criminality since they performed the admitted executions under duress, that is to say, superior orders. The defendants formed part of a military organization and were, therefore, subject to the rules which govern soldiers. It is axiomatic that a military man's first duty is to obey. If the defendants were soldiers and as soldiers responded to the command of their superiors to kill certain people, how can they be held guilty of crime? This is the question posed by the defendants. The answer is not a difficult one.

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do. A very simple illustration will show to what absurd extreme such a theory could be carried. If every military person were required, regardless of the nature of the command, to obey unconditionally, a sergeant could order the corporal to shoot the lieutenant, the lieutenant could order the sergeant to shoot the captain, the captain could order the lieutenant to shoot the colonel, and in each instance the executioner would be absolved of blame. The mere statement of such a proposition is its own commentary. The fact that a soldier may not, without incurring unfavorable consequences, refuse to drill, salute, exercise, reconnoiter, and even go into battle, does not mean that he must fulfill every demand put to him. In the first place, an order to require obedience must relate to military duty. An officer may not demand of a soldier, for instance, that he steal for him. And what the superior officer may not militarily demand of his subordinate, the subordinate is not required to do. Even if the order refers to a military subject it must be one which the superior is authorized, under the circumstances, to give.

The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order. If one

claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionally greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he himself would risk a few days of confinement. Nor if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases.

The International Military Tribunal, in speaking of the principle to be applied in the interpretation of criminal superior orders, declared that—

> "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."

The Prussian Military Code, as far back as 1845, recognized this principle of moral choice when it stated that a subordinate would be punished if, in the execution of an order, he went beyond its scope or if he executed an order knowing that it "related to an act which obviously aimed at a crime".

This provision was copied into the Military Penal Code of the Kingdom of Saxony in 1867, and of Baden in 1870. Continuing and even extending the doctrine of conditional obedience, the Bavarian Military Penal Code of 1869 went so far as to establish the responsibility of the subordinate as the rule, and his irresponsibility as the exception.

The Military Penal Code of the Austro-Hungarian Monarchy of 1855 provided—

> *Article 158.* "A subordinate who does not carry out an order is not guilty of a violation of his duty of subordination if *(a)* the order is obviously contrary to loyalty due to the Prince of the Land; *(b)* if the order pertains to an act or omission in which evidently a crime or an offense is to be recognized."

In 1872 Bismarck attempted to delimit subordinate responsibility by legislation, but the Reichstag rejected his proposal and instead adopted the following as Article 47 of the German Military Penal Code:

> *Article 47.* "If through the execution of an order pertaining to the service, a penal law is violated, then the superior giving the order is alone responsible. However, the obeying subordinate shall be punished as accomplice (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offense."

This law was never changed, except to broaden its scope by changing the word "civil" to "general", and as late as 1940 one of the leading commentators of the Nazi period, Professor Schwinge wrote—

> "Hence, *in military life,* just as in other fields, *the principle of absolute,* i.e., *blind obedience,* does not exist."

Yet, one of the most generally quoted statements on this subject is that a German soldier must obey orders though the heavens fall. The statement has become legendary. The facts prove that it is a myth.

When defendant Seibert was on the stand, his attorney asked him—

"Witness, do you remember a proverb said by a German Kaiser concerning the carrying out of orders by soldiers?

And the defendant replied—

"I do not know whether it was William I or William II, but certainly one Kaiser emperor used the expression, 'If the military situation or the entire situation makes it necessary a soldier has to carry out an order, even if he has to shoot his own parents'."

The defendant was then asked whether, in the event he received such an order, he would execute it. To the surprise of everybody he replied that he did not know. He declined to answer until he should have time to consider the problem. The Tribunal allowed him until the next morning to deliberate, and then the following ensued:

"Q. Now, if in accordance with this declaration by the Chief of State of the German empire at the time, the military situation made it necessary for you — after receiving an order — to shoot your own parents, would you do so?

"A. I would not do so.

"Q. Then there are some orders which are issued by the Chief of State which may be disobeyed?

"A. I did not regard this as an order by the Chief of State but as a symbolic example towards the whole soldiery how far obedience had to go, but never actually asking a son to shoot his own parents. I imagine it only as follows, your Honor: if I am an artillery officer in the war and I have to fire at a very important sector, which is decisive for the whole military situation and I received the order to fire at a certain village and I know that in this village my parents are living, then I would have to shoot at this village. This is the only way in which I can imagine this order, but never — it is inhuman — to ask a son to shoot his parents.

"Q. So, therefore, if you received such an order coming down the line, you would disincline to obey it? You would not obey it?

"A. I would not have obeyed such an order.

"Q. Suppose the order came down for you to shoot the parents of someone else, let us say, a Jew and his wife. And in your view you saw the children of these parents. Now it is established beyond any doubt that this Jewish father and Jewish mother have not committed any crime — absolutely guiltless, blemishless. The only thing that is established is that they are Jews. The children are standing by and they implore you not to shoot their parents. Would you shoot the parents?

"A. I would not shoot these parents."

Then, in summing up, the witness was asked—

"And, therefore, as a German officer, you now tell the Tribunal that if an order were submitted to you, coming down the line militarily to execute two innocent parents only because they were Jews, you would refuse to obey that order?"

And the answer was—

"I answered your example affirmatively, I said 'Yes, I could not have

obeyed'."

Although defense counsel's query intended to establish the utter helplessness of a German soldier in the face of a superior command, the inquiry finally resulted in the defendant's declaring that he would not only ignore the order of the supreme war lord to shoot his own parents, but also to shoot anybody else's parents. He thus demonstrated that under his own interpretation of German Military Law, he did have some choice in the matter of obeying superior orders. Why then did he participate in the execution of the parents of other people? Why did other defendants do the same if they had a choice, as the defendant Seibert indicated?

Superior Orders Defense Must Establish Ignorance of Illegality

To plead superior orders one must show an excusable ignorance of their illegality. The sailor who voluntarily ships on a pirate craft may not be heard to answer that he was ignorant of the probability he would be called upon to help in the robbing and sinking of other vessels. He who willingly joins an illegal enterprise is charged with the natural development of that unlawful undertaking. What SS man could say that he was unaware of the attitude of Hitler toward Jewry?

* * * * *

It is to be presumed that, if the defendants had been suddenly ordered to kill the grey-eyed population, they would have balked and found no difficulty in branding such an act as a legal and moral crime. If, however, fifteen years before, the Nazi Party program had denounced all grey-eyed people and since then the defendants had listened to Hitler vituperating against the grey-eyes, if they had seen shops smashed and houses destroyed because grey-eyes had worked and lived there; if they had learned of Himmler's ordering all grey-eyes into concentration camps, and then had heard speeches in Pretzsch wherein the mighty chieftains of the SS had declared that all grey-eyes were a menace to Germany — if this had happened, can we be so certain that the defendants would not have carried out a Fuehrer Order against grey-eyed people? And in that event, would there not have been the same defense of superior orders?

* * * * *

Duress Needed for Plea of Superior Orders

But it is stated that in military law even if the subordinate realizes that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment. But were any of the defendants coerced into killing Jews under the threat of being killed themselves if they failed in their homicidal mission? The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of

superior orders fails. The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders.

If the mental and moral capacities of the superior and subordinate are pooled in the planning and execution of the illegal act, the subordinate may not subsequently protest that he was forced into the performance of an illegal undertaking.

Superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. It could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead superior orders in defense of his crime.

If the cognizance of the doer has been such, prior to the receipt of the illegal order, that the order is obviously but one further logical step in the development of a program which he knew to be illegal in its very inception, he may not excuse himself from responsibility for an illegal act which could have been foreseen by the application of the simple law of cause and effect. From 1920, when the Nazi Party program with its anti-Semitic policy was published, until 1941 when the liquidation order went into effect, the ever-mounting severity of Jewish persecution was evident to all within the Party and especially to those charged with its execution. One who participated in that program which began with Jewish disenfranchisement and depatriation and led, step by step, to deprivation of property and liberty, followed with beatings, whippings, and measures aimed at starvation, may not plead surprise when he learns that what has been done sporadically; namely, murder, now is officially declared policy. On 30 January 1939, Hitler publicly declared in a speech to the Reichstag that if war should come it would mean "the obliteration of the Jewish race in Europe".

One who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to.

In order successfully to plead the defense of superior orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defense of superior orders is closed to him.

Many of the defendants testified that they were shocked with the order when they first heard it. This assertion is, of course, contradicted by the other assertion made with equal insistence, and already disposed of, that the Fuehrer Order was legal because the ordered executions were needed for the defense of the Fatherland. But if they were shocked by the order, what did they do to oppose it? Many said categorically that there was nothing to do. It would be enough, in order to escape legal and moral stigmatization to show the order was parried every time there was a chance to do so. The evidence indicates that there was no will or desire to depreciate its fullest intent. When the defendant Braune testified that he inwardly opposed the Fuehrer Order,

he was asked as to whether, only as a matter of salving his conscience in the multiplicitous executions he conducted, he ever released one victim. The interrogation follows:

> "Q. But you did not in compliance with that order attempt to salve your conscience by releasing one single individual human creature of the Jewish race, man, woman, or child?
>
> "A. I have already said that I did not search for children. I can only say the truth. There were no exceptions, and I did not see any possibility."

One may accuse the Nazi military heirarchy of cruelty, even sadism of [*sic*] one will. But it may not be lightly charged with inefficiency. If any of these Kommando leaders had stated that they were constitutionally unable to perform this cold-blooded slaughter of human beings, it is not unreasonable to assume that they would have been assigned to other duties, not out of sympathy or for humanitarian reasons, but for efficiency's sake alone. In fact, Ohlendorf himself declared on this very subject—

> "In two and a half years I had sufficient occasion to see how many of my Gruppe [group] did not agree to this order in their inner opinion. Thus, I forbade the participation in these executions on the part of some of these men, and I sent some back to Germany."

Ohlendorf himself could have got out of his execution assignment by refusing cooperation with the army. He testified that the Chief of Staff in the field said to him that if he, Ohlendorf, did not cooperate, he would ask for his dismissal in Berlin.

The witness Hartel testified that Thomas, Chief of Einsatzgruppe B, declared that all those who could not reconcile their conscience to the Fuehrer Order, that is, people who were too soft, as he said, would be sent back to Germany or assigned to other tasks, and that, in fact, he did send a number of people including commanders back to the Reich.

This might not have been true in all Einsatzgruppen, as the witness pointed out, but it is not enough for a defendant to say, as did Braune and Klingelhoefer, that it was pointless to ask to be released, and, therefore, did not even try. Exculpation is not so easy as that. No one can shrug off so appalling a moral responsibility with the statement that there was no point in trying. The failure to attempt disengagement from so catastrophic an assignment might well spell the conclusion that the defendant involved had no deep-seated desire to be released. He may have thought that the work was unpleasant but did it nonetheless. Even a professional murderer may not relish killing his victim, but he does it with no misgivings. A defendant's willingness may have been predicated on the premise that he personally opposed Jews or that he wished to stand well in the eyes of his comrades, or by doing the job well he might earn rapid promotion. The motive is unimportant if he killed willingly.

The witness Hartel also related how one day as he and Blobel were driving through the country, Blobel pointed out to him a long grave and said, "Here my Jews are buried." One can only conclude that Blobel was proud of what he had done. "Here my Jews are buried." Just as one might speak of the game he

had bagged in a jungle.

Despite the sustained assertion on the part of the defendants that they were straight-jacketed in their obedience to superior orders, the majority of them have, with testimony and affidavits, demonstrated how on numerous occasions they opposed decrees and orders handed down by their superiors. In an effort to show that they were not really Nazis at heart, defendant after defendant related his dramatic clashes with his superiors. If one concentrated only on this latter phase of the defense, one would conclude that these defendants were all ardent rebels against National Socialism and valiantly fought against the inhuman proposals put to them. Thus, one affiant says of the defendant Willy Seibert that he "was strongly opposed to the measures taken by the Party and the government".

Of Steimle an affiant said, "Many a time he opposed the Party agencies and so-called superior leaders." Another affidavit not only states that Steimle opposed violence but that in his zeal for justice he shrewdly joined the SD in order to be able "to criticize the short comings in the Party". Again it was stated that "repeatedly his sense of justice led him to oppose excesses, corruptions, and symptoms of depravity by Party officers."

Of Braune an affiant states, "over and over again Dr. Braune criticized severely our policy in the occupied territories (especially in the East, Ukraine, and Baltic States)".

During the time he served in Norway, Braune was a flaming sword of opposition to tyranny and injustice in his own camp. He bitterly opposed the Reich Commissioner Terboven, cancelled his orders, condemned large-scale operations, released hostages, and freed the Norwegian State Minister Gerhardsen. One affidavit said that in these actions "Braune nearly always went beyond his authority." And yet in spite of this open rebellion Braune was not shot or even disciplined. Why is it that in Norway he acted so differently from the manner in which he performed in Russia? Was he more the humanitarian in Norway? The answer is not difficult to find. One of the affidavits very specifically states—

> "Right from the beginning of our conferences, Braune opposed the large-scale operations which Terboven and Fehlis continually carried out. He did not expect the slightest success from such measures, and saw in them only the danger of antagonizing the Norwegian population more and more against German policy and the danger of increasing their spirit of resistance."

Thus, the defendants could and did oppose orders when they did not agree with them. But when they ideologically espoused an order such as the Fuehrer Order they had no interest in opposing it.

German Precedent on Superior Order Doctrine

The defense of superior orders has already been passed upon by a German court. In 1921 two officers of the German U-boat 68 were charged with violation of the laws of war in that they fired at and killed unarmed enemy citizens seeking to escape from the sinking Hospital Ship H.M.S. Llandovery Castle. The defendants pleaded lack of guilt in that they had merely carried

into effect the order given them by their commander, First Lieutenant Patzig. The German Supreme Court did find as a fact that Patzig ordered his subordinates Dithmar and Bodlt to fire at the lifeboats, but it adjudicated them guilty nonetheless, stating—

> "It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But, no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But, this case was precisely one of them. For in the present instance, it was perfectly clear to the accused that killing defenseless people in the lifeboats could be nothing else but a breach of law. As naval officers by profession they were well aware, as the naval expert, Saalwaechter, has strikingly stated, that one is not legally authorized to kill defenseless people. They quickly found out the facts by questioning the occupants in the boats when these were stopped. They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of law. They should, therefore, have refused to obey. As they did not do so they must be punished." (*American Journal of International Law, Vol. 16, 1922 p. 721-2.*).

Despite this very telling precedent several of the attorneys for the defense asked in behalf of their clients, What could they have done? After all, the defendants were soldiers and were required to obey orders. Ordinarily, in war, the proposition of unquestioning obedience involves a set of circumstances which subjects the subordinate to the possibility of death, wounding, or capture. And it is traditional in such a situation that, in consonance with the honor of his calling, the soldier does not question or delay but sets out stoically to face the peril and even self-immolation. Lord Tennyson immortalized this type of glorious self-sacrifice when he commemorated the Cavalry Charge at Balaklava in the Crimea:

> "Theirs not to make reply,
> Theirs not to reason why,
> Theirs but to do and die."

The members of the Einsatzgruppen, which, by a twist of ironic fate, were operating in the same Crimea and surrounding territory about one hundred years later, were not, however, facing the same situation which confronted Tennyson's Light Brigade. The Einsatz battalions were not being called upon to face shot and shell. They were not ordered to charge into the mouths of cannon. They were called upon to shoot unarmed civilians standing over their graves.

No soldier would be disgraced in asking to be excused from so one-sided a battle. No soldier could be accused of cowardice in seeking relief from a duty which was, after all, not a soldier's duty. No soldier or officer attempting escape from such a task would be pleading avoidance of a military obligation. He would simply be requesting not to be made an assassin. And if the leaders

of the Einsatzgruppen had all indicated their unwillingness to play the assassin's part, this black page in German history would not have been written.

What could the defendants have done, if they could not have been relieved? They could have been less zealous in the execution of the inhuman order. Whole populations of cities, districts, and wide lands were within their power. No Roman emperor had greater absolutism of decision over life and death than they possessed in their areas of operation. They were not ordered within any given town to shoot a precise number of people and a fixed number of women and children. But men like Braune could see no reason for making exceptions.

Several of the defendants stated that it would have been useless to avoid the order by subterfuge, because had they done so, their successors would accomplish the task and thus nothing would be gained anyway. The defendants are accused here for their own individual guilt. No defendant knows what his successor would have done. He could possibly have also indicated his reluctance and with a succession of refusals properly submitted, the order itself might have lost its efficacy. But in any event no execution would have taken place that day. One defendant stated that to have disobeyed orders would have meant a betrayal of his people. Does he really mean that the German people, had they known, would have approved of this mass butchery?

The masses of the home-loving German people, more content to have a little garden in which to grow a plant or two than the promise of vast lands beyond the horizon, will here learn how they were betrayed by their supposed champions. Here they will also learn of the inhumanity and the oppression and the shedding of innocent blood committed by the regime founded on the Fuehrerprinzip [leadership principle].

In his attack on Control Council Law No. 10, Dr. Mayer declared that it invalidates two fundamental principles of the legal systems of all civilized nations:

"(1) The principle *nulla poena sine lege.*

"(2) Validity of the excuse of having acted under order."

The Tribunal has already disposed of objection number 1. Objection number 2 is no more convincing than was objection number 1. Law No. 10 does not invalidate the excuse of superior orders. It states—

> "*(b)* The fact that any person acted pursuant to the order of his Government or of his superior does not free him from responsibility for a crime, but may be considered in mitigation."

Dr. Mayer, like others, misreads this provision and substitutes for the word "crime" some other word, possibly "act". This makes the provision to read that anyone acting pursuant to the orders of his Government or superior does not free himself from responsibility for any "act". But the provision specifically states "crime". Unless it is established that the deed in question is a crime, then naturally there needs to be no explanation for its commission. If, however, the act is a crime then there can be no excuse for its commission.

No superior can authorize a crime. No one can legalize what is demonstrated categorically and definitely to be a crime.

The main objective of the defense in this case has been to prove that the acts of the Einsatzgruppen were not crimes, that they were acts of self-defense committed in accordance with the rules of war. If, however, it is proved that they were crimes, then, naturally, the approval of another criminal would not make the acts any the less crimes. Once it is juridically established that a certain act is a crime, then all those who participated in it, both superior and subordinates, are accomplices.

How could the approval of Hitler possibly condone the offense, if offense it was? Hitler was not above international law. Let us suppose that in 1935 Hitler ordered one of his men to go to Siam and there assassinate its King. Would it be argued that the assassin in that situation would be immune because acting under superior orders? Any judicial inquiry would establish that the Siam assassin had committed a crime and the fact that he had acted in pursuance to the order of his government or a superior could not possibly free him from responsibility for the crime. This is exactly what Control Council Law No. 10 says, and this is what the law has always said, or ever since there was international law.

As a matter of fact, Article 47 of the German Military Penal Code goes much farther than Control Council Law No. 10. Under the German code the subordinate may be convicted even if no crime was actually committed. It is sufficient if the order aims at the commission of a crime or offense. The German code makes the obeying subordinate responsible even for any "civil" or "general offenses", i.e., for comparatively insignificant breaches of law which are not contemplated in the Allied law. Nor does the German code, as contrasted to the Allied law, mention the defense of superior orders as a possible mitigating circumstance.

Several counsel have quoted article 347 of the American Rules of Land Warfare in support of their position on superior orders. The section in question, after listing various offenses against the rules of warfare, declares—

> "* * * Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

What has escaped some analysts of this provision is that the word "individuals" is intended to apply to individuals who make up a military unit, that is, ordinarily, soldiers of lower rank. It applies naturally also to officers, but only provided they are serving under another officer of a higher rank. Unless one accepts this meaning the word "commanders" appearing in his second sentence would be entirely elusive as to its significance. But it is to be noted that in square juxtaposition to the men (and perhaps officers) who make up the military unit, the Article puts the *commanders* of such units; and by

"commanders" is obviously meant the officers or acting officers, in charge of any armed unit.

As the colonel is commander of a regiment, the major of a battalion, and the captain of a company, the sergeant or 2d lieutenant may be in charge of a platoon. If the unit commander were not responsible, and the responsibiity climbed upward from grade to grade, the result would be that the only one who could ever be accountable for an illegal order would be the chief executive of the nation, that is, the President, King, or Prime Minister, depending on the country involved. That such singular responsibility was not intended is evidenced in the use of the plural "commanders" instead of the singular "commander". Making this meaning absolutely clear, the provision specifically mentions *two* types of "commanders" who are to be held responsible—

(a) commanders who *order* their units to commit war crimes; and

(b) commanders if the troops *under their authority* commit such crimes.

Thus, the provision proclaims clearly that the commander is to be responsible — whether *he* gives the order to commit war crimes, or whether the troops under his authority commit them at the behest of somebody else, since he has the control over the troops and is responsible for their acts.

Since it has not been denied that the defendants were commanders of Einsatz units, they clearly would fall within the provisions of Article 347, American Rules of Land Warfare. This Article 347 was repealed in 1944, but it has here been discussed at length because defense counsel made much of it, and because it was still law at the time the Einsatzgruppen were operating.

In further confirmation of the interpretation above given of Article 347, reference is made to Article 64 of the American Articles of War which announces punishment for the disobedience of any *lawful* command of a superior officer. Obviously if the order is *unlawful* he may not be punished for refusing to obey it.

The subject of superior orders is not so confusing and complicated as it had been made by some legal commentators. In considering the law in this matter, we must keep in mind that fundamentally there are some legal principles that stand out like oak trees. Much underbrush has grown up in the vicinity and they seem to confuse the view. But even the most casual observation will catch on the legal landscape these sturdy oaks which announce that—

1. Every man is presumed to intend the consequences of his act.

2. Every man is responsible for those acts unless it be shown that he did not act of his own free will.

3. Deciding the question of free will, all the circumstances of the case must be considered because it is impossible to read what is in a man's heart.

Dr. Aschenauer correctly referred to one of these trees in Lord Mansfield's charge to the jury in Stratton's case (1780) Howell, State Trials, Volume 21, page 1062-1224—

> "A state of emergency is a reason for justification, since nobody can be guilty of a crime without having intended it. If there is irresistible,

physical duress, then the acting person has no violition with regard to the deed."

Was there irresistible, physical duress? Was there volition with regard to the deed? The answering of these two questions will serve as safe guides in applying the criteria herein announced in the discussion on the subject of superior orders.

DOCUMENT NO. 98

RESOLUTION XIX, "DRAFT INTERNATIONAL CONVENTIONS," ADOPTED BY THE XVIIth INTERNATIONAL CONFERENCE OF THE RED CROSS (Stockholm, August 1948)

SOURCE

Report of the XVIIth International Conference of the Red Cross, Stockholm, 1948, at 92

NOTE

The International Conference of the Red Cross, the "supreme deliberative body" of the Red Cross movement, is composed of representatives of the International Committee of the Red Cross, the League of Red Cross Societies, the national Red Cross Societies, and the Governments of States which are parties to the various Geneva Conventions. After two years of preliminary conferences of various categories of experts conducted by the International Committee of the Red Cross (ICRC) resulted in the preparation of four draft conventions, including one relating to prisoners of war, the ICRC presented them to the International Conference held in Stockholm in August 1948. That Conference reviewed them at length, made a number of changes, and adopted the resolution of which the portion relating to the draft prisoner-of-war convention is set forth below. (The Swiss Government then convoked the 1949 Geneva Diplomatic Conference which, using the Stockholm-approved drafts as the working documents, evolved the four 1949 Geneva Conventions, including the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108).)

EXTRACT

XIX

Draft International Conventions

3

Prisoners of War Convention

The XVIIth International Red Cross Conference,

having studied and approved the draft revised text of the Convention concluded at Geneva on 27 July 1929 relative to the treatment of Prisoners of War, drawn up by the International Committee of the Red Cross with the assistance of Government Experts, national Red Cross Societies and other humanitarian associations,

requests the International Committee of the Red Cross to take all necessary steps to ensure that the said draft, with the amendments which the Conference has made therein, be transmitted to the Governments, with a view to its adoption by a diplomatic Conference,

attaches thereto the Report of its discussions and recommends that this draft be implemented at the earliest possible moment.

DOCUMENT NO. 99

RESOLUTION XXII, "PROTESTS CONCERNING ALLEGED VIOLATIONS OF THE [1929 GENEVA] CONVENTIONS," ADOPTED BY THE XVIIth INTERNATIONAL CONFERENCE OF THE RED CROSS (Stockholm, August 1948)

SOURCE

Report of the XVIIth International Conference of the Red Cross, Stockholm, 1948, at 93

NOTE

The receipt and transmittal of protests concerning alleged violations of humanitarian conventions has always been a difficult and generally unwanted task as the messenger is frequently considered to have taken sides against the recipient merely because he has acted as a go-between in the delivery of an unpleasant communication. Where there is a Protecting Power, it will normally perform this function; where there is no Protecting Power, as has occurred all too frequently since the end of World War II (1939-1945), there is only the International Committee of the Red Cross (ICRC) to perform this essential function. Because it has so frequently been accused of partisanship by the Government to which a protest is delivered, there have been numerous suggestions that it discontinue the performance of this function. This resolution attempts to reduce the impact of the ICRC's role in bearing the bad news by bringing about a greater involvement of the national Red Cross Societies in the process. (The action of a subsequent International Conference indicates that the ICRC is attempting, where possible, to withdraw from the role which it has hitherto played in this respect. See DOCUMENT NO. 150.)

TEXT

XXII

Protests concerning alleged Violations of the Conventions

The XVIIth International Red Cross Conference,

considers that the International Committee of the Red Cross should continue to transmit protests alleged violations of the Conventions,

emphasizes the duty of national Societies to forward these protests to their Governments,

recommends that national Societies do all in their power to ensure that their Governments make a thorough investigation, the results of which shall be communicated without delay to the International Committee of the Red Cross.

DOCUMENT NO. 100

U.S. v WILHELM von LEEB ET AL
(THE HIGH COMMAND CASE)
(Case No. 12, U.S. Military Tribunal, Nuremberg, 27-28 October 1948)

SOURCE

11 TWC 462

NOTE

The accused here were all former members of the German High Command. Among other matters, they were charged with the issuance or transmittal of orders, such as the Commando Order (see DOCUMENT NO. 69 and DOCUMENT NO. 83), which were, on their face, in violation of the laws and customs of war. The defense of superior orders was once again a major item of discussion (see also DOCUMENT NO. 85, DOCUMENT NO. 92, DOCUMENT NO. 97, and DOCUMENT NO. 171).

EXTRACTS

OBJECTIONS DURING THE TRIAL

The objection has been raised that this Tribunal is not a proper forum in which to try the defendants for the crimes charged. It is said that they were prisoners of war and that they are subject to trial only by a general court martial. We find no merit in such contention.

There is no doubt of the criminality of the acts with which the defendants are charged. They are based on violations of international law well recognized and existing at the time of their commission. True, no court had been set up for the trial of violations of international law. A state having enacted a criminal law may set up one or any number of courts and vest each with jurisdiction to try an offender against its internal laws. Even after the crime is charged to have been committed we know of no principle of justice that would give the defendant a vested right to a trial only in an existing forum. In the exercise of its sovereignty the state has the right to set up a tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign state owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him — where he may produce witnesses in his behalf, and where he may speak in his own defense. Similarly, a defendant charged with a violation of international law is in no sense done an injustice if he is accorded the same rights and privileges. The defendants in this case have been accorded those rights and privileges.

As regards the contention that the defendants are prisoners of war and that the Geneva Convention, Article 63, requires that a prisoner of war be tried by a general court martial, we call attention to the fact that this provision referred to is found in an international agreement, that was entered into, and to which both the United States and Germany were signatories, to protect

prisoners of war after they acquire such status and not to extend to them any special privileges or prerogatives with respect to crimes they may have committed before acquiring a prisoner of war status. Such is the reasoning of the Yamashita Case (*327 U.S. 1;66 Sup. Ct. 348*). We think the reasoning sound.

Article 63 of the Geneva Convention provides:

> "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."

Therefore, say defense counsel, the defendants must be tried by a general court martial since the defendants were prisoners of war taken by the United States, and members in the armed forces of the United States committing crimes are tryable by court martial. But the trial of men in the military forces of the United States by court martial can be only for crimes committed after the accused acquires and during the time he possesses the status of a member of the armed forces of the United States. One who committed murder and thereby violated the law of the state before he was inducted into the military service clearly could not be tried for that crime by a court martial for violating articles of war which did not apply to him when he committed the murder.

Nor do we think it necessary that defendants be discharged as prisoners of war before being brought to trial. Certainly if a man is arrested for violating a municipal traffic ordinance which subjects him only to a civil penalty in a magistrate's court and while he is in custody it is discovered that the day before he committed a murder, there is no violation of any principle of justice in holding him in custody and surrendering him to the officers of a court that has competency to try him for murder.

We are not deciding whether the United States or France or any other nation lawfully could or could not try the defendants in a court martial for a violation of international law. That is not before us. If that may be done, a court martial has not exclusive jurisdiction.

The crimes including the war crimes charged against the defendants are for violations of international criminal law. This Tribunal by Control Council Law No. 10 is vested with authority to try defendants for the crimes charged. That such jurisdiction possibly may be exercised by another military court is also of no consequence. If two courts have concurrent jurisdiction to try the same case the first court that exercises jurisdiction may properly dispose of the case.

* * * * *

SUPERIOR ORDERS

Control Council Law No. 10, Article II, paragraphs 4 *(a)* and *(b)*, provides:

> "4 *(a)* The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.
>
> "*(b)* The fact that any person acted pursuant to the order of his

Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

These two paragraphs are clear and definite. They relate to the crimes defined in Control Council Law No. 10, Article II, paragraphs 1*(a)*, *(b)*, and *(c)*. All of the defendants in this case held official positions in the armed forces of the Third Reich. Hitler from 1938 on was Commander in Chief of the Armed Forces and was the supreme civil and military authority in the Third Reich, whose personal decrees had the force and effect of law. Under such circumstances to recognize as a defense to the crimes set forth in Control Council No. 10 that a defendant acted pursuant to the order of his government or of a superior would be in practical effect to say that all the guilt charged in the indictment was the guilt of Hitler alone because he alone possessed the law-making power of the state and the supreme authority to issue civil and military directives. To recognize such a contention would be to recognize an absurdity.

It is not necessary to support the provision of Control Council Law No. 10, Article II, paragraphs 4*(a)* and *(b)*, by reason, for we are bound by it as one of the basic authorities under which we function as a judicial tribunal. Reason is not lacking.

In as much as one of the reiterated arguments advanced is the injustice of even charging these defendants with being guilty of the crimes set forth in the indictment, when they were, it is said, merely soldiers and acted under governmental directives and superior orders which they were bound to obey, we shall briefly note what we consider sound reasons for the rejection of such a defense.

The rejection of the defense of superior orders without its being incorporated in Control Council law No. 10 that such defense shall not exculpate would follow of necessity from our holding that the acts set forth in Control Council Law No. 10 are criminal not because they are therein set forth as crimes but because they then were crimes under international common law. International common law must be superior to and, where it conflicts with, take precedence over national law or directives issued by any national governmental authority. A directive to violate international criminal common law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.

The purpose and effect of all law, national or international, is to restrict or channelize the action of the citizen or subject. International law has for its purpose and effect the restricting and channelizing of the action of nations. Since nations are corporate entities, a composite of a multitude of human beings, and since a nation can plan and act only through its agents and representatives, there can be no effective restriction or channelizing of national action except through control of the agents and representatives of the nation, who form its policies and carry them out in action.

The state being but an inanimate corporate entity or concept, it cannot as such make plans, determine policies, exercise judgment, experience fear, or be restrained or deterred from action except through its animate agents and

representatives. It would be an utter disregard of reality and but legal shadow-boxing to say that only the state, the inanimate entity, can have guilt, and that no guilt can be attributed to its animate agents who devise and execute its policies. Nor can it be permitted even in a dictatorship that the dictator, absolute though he may be, shall be the scapegoat on whom the sins of all his governmental and military subordinates are wished; and that, when he is driven into a bunker and presumbly destroyed, all the sins and guilt of his subordinates shall be considered to have been destroyed with him.

The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense. To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case.

Furthermore, it is not a new concept that superior orders are no defense for criminal action. Article 47 of the German Military Penal Code, adopted in 1872, was as follows:

> "If through the execution of an order pertaining to the service [Dienstsachen], a penal law is violated, then the superior giving the order is alone responsible. However, the obeying subordinate shall be punished as accomplice [Teilnehmer]: (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offense."

The amendment of this in 1940 omitted the last two words "to him" in paragraph (1) above, and in paragraph (2) changed the words "civil or military crime or offense" to "general or military crime or offense." If this amendment had any effect, it extended rather than restricted the scope of the preceding act.

It is interesting to note that an article by Goebbels, the Reich Propaganda Minister, which appeared in the "Voelkischer Beobachter", the official Nazi publication, on 28 May 1944, contained the following correct statement of the law:

> "It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare."

ORDERS

A question of general interest to the various defendants in this case involves the criminal responsibility for drafting, transmitting, and implementing illegal orders of their superiors.

For the first time in history individuals are called upon to answer criminally for certain violations of international law. Individual criminal responsibility has been known, accepted, and applied heretofore as to certain offenses

against international law, but the Nurenberg trials have extended that individual responsibility beyond those specific and somewhat limited fields.

This Tribunal is therefore charged not only to determine whether certain acts infringe international law, but also whether criminal responsibility attaches to an individual for such infringement, and we must look not only to the international law itself but to fundamental principles of criminal law as generally accepted by the civilized nations of the world for determination of that question. Such has been the principle applied by the Tribunals which have preceded us and we conform to that standard. For a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law.

Control Council Law No. 10 [Article II, paragraph 4*(b)*] provides that:

> "The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility of a crime, but may be considered in mitigation."

It is urged that a commander becomes responsible for the transmittal in any manner whatsoever of a criminal order. Such a conclusion this Tribunal considers too far-reaching. The transmittal through the chain of command constitutes an implementation of an order. Such orders carry the authoritative weight of the superior who issues them and of the subordinate commanders who pass them on for compliance. The mere intermediate administrative function of transmitting an order directed by a superior authority to subordinate units, however, is not considered to amount to such implementation by the commander through whose headquarters such orders pass. Such transmittal is a routine function which in many instances would be handled by the staff of the commander without being called to his attention. The commander is not in a position to screen orders so transmitted. His headquarters, as an implementing agency, has been bypassed by the superior command.

Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.

Many of the defendants here were field commanders and were charged with heavy responsibilities in active combat. Their legal facilities were limited. They were soldiers — not lawyers. Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine

distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal.

While, as stated, a commanding officer can be criminally responsible for implementing an illegal order of his superiors, the question arises as to whether or not he becomes responsible for actions committed within his command pursuant to criminal orders passed down independent of him. The choices which he has for opposition in this case are few: (1) he can issue an order countermanding the order; (2) he can resign; (3) he can sabotage the enforcement of the order within a somewhat limited sphere.

As to countermanding the order of his superiors, he has no legal status or power. A countermanding order would not only subject him to the severest punishment, but would be utterly futile and in Germany, it would undoubtedly have focussed the eyes of Hitler on its rigorous enforcement.

His second choice — resignation — was not much better. Resignation in wartime is not a privilege generally accorded to officers in an army. This is true in the Army of the United States. Disagreement with a state policy as expressed by an order affords slight grounds for resignation. In Germany, under Hitler, to assert such a ground for resignation probably would have entailed the most serious consequences for an officer.

Another field of opposition was to sabotage the order. This he could do only verbally by personal contacts. Such verbal repudiation could never be of sufficient scope to annul its enforcement.

A fourth decision he could make was to do nothing.

Control Council Law No. 10, Article II, paragraph 2, provides in pertinent part as follows:

> "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article, if he * * * *(b)* was an accessory to the commission of any such crime or ordered or abetted the same or *(c) took a consenting part therein* or *(d) was connected with* plans or enterprises involving its commission * * *." [Emphasis supplied.]

As heretofore stated, his "connection" is construed as requiring a personal breach of a moral obligation. Viewed from an international standpoint, such has been the interpretation of preceding Tribunals. This connection may however be negative. Under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility. His only defense lies in the fact that

the order was from a superior which Control Council Law No. 10 declares constitutes only a mitigating circumstance.

In any event in determining the criminal responsibility of the defendants in this case, it becomes necessary to determine not only the criminality of an order in itself but also as to whether or not such an order was criminal on its face. Certain orders of the Wehrmacht and the German army were obviously criminal. No legal opinion was necessary to determine the illegality of such orders. By any standard of civilized nations they were contrary to the customs of war and accepted standard of humanity. Any commanding officer of normal intelligence must see and understand their criminal nature. Any participation in implementing such orders, tacit or otherwise, any silent acquiescence in their enforcement by his subordinates, constitutes a criminal act on his part.

There has also been much evidence and discussion in this case concerning the duties and responsibilities of staff officers in connection with the preparation and transmittal of illegal orders. In regard to the responsibility of the chief of staff of a field command, the finding of Tribunal V in Case No. 7 as to certain defendants has been brought to the attention of the Tribunal. It is pointed out that the decision as to chiefs of staff in that case was a factual determination and constitutes a legal determination only insofar as it pertains to the particular facts therein involved. We adopt as sound law the finding therein made, but we do not give that finding the scope that is urged by defense counsel in this case to the effect that all criminal acts within a command are the sole responsibiliity of the commanding general and that his chief of staff is absolved from all criminal responsibility merely by reason of the fact that his commanding general may be charged with responsibiility therefor. It is further pointed out that the facts in that case are not applicable to any defendant on trial in this case.

The testimony of various defendants in this case as to the functions of staff officers and chiefs of staff has not been entirely consistent. Commanding generals on trial have pointed out that there were certain functions which they necessarily left to the chiefs of staff and that at times they did not know of orders which might be issued under authority of their command. Staff officers on trial have urged that a commanding officer was solely responsible for what was done in his name. Both contentions are subject to some scrutiny.

In regard to the functions of staff officers in general as derived from various documents and the testimony of witnesses, it is established that the duties and functions of such officers in the German Army did not differ widely from the duties and functions in other armies of the world. Ideas and general directives must be translated into properly prepared orders if they are to become effective in a military organization. To prepare orders is the function of staff officers. Staff officers are an indispensable link in the chain of their final execution. If the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to those units where it becomes effective, commits a

criminal act under international law.

Staff officers, except in limited fields, are not endowed with command authority. Subordinate staff officers normally function through the chiefs of staff. The chief of staff in any command is the closest officer, officially at least, to the commanding officer. It is his function to see that the wishes of his commanding officer are carried out. It is his duty to keep his commanding officer informed of the activities which take place within the field of his command. It is his function to see that the commanding officer is relieved of certain details and routine matters, that a policy having been announced, the methods and procedures for personal activities vary according to the nature and interests of his commanding officer and increase in scope dependent upon the position and responsibilities of such commander.

Since a chief of staff does not have command authority in the chain of command, an order over his own signature does not have authority for subordinates in the chain of command. As shown by the record in this case, however, he signs orders for and by order of his commanding officer. In practice, a commanding officer may or may not have seen those orders. However, they are presumed to express the wishes of the commanding officer. While the commanding officer may not and frequently does not see these orders, in the normal process of command he is informed of them and they are presumed to represent his will unless repudiated by him. A failure to properly exercise command authority is not the responsibility of a chief of staff.

In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitely upon his commander.

Under normal military procedure a commanding officer signs communications to higher commanders. He also in certain cases signs orders to subordinates which are considered to establish basic policy or whose importance he wishes to emphasize; but the majority of orders issued in a command, as shown by the record, as issued "for" or "by order" and signed only by the chief of staff. All such orders are binding on subordinates. How far a chief of staff can go in issuing orders without previous authorization or without calling them to the attention of his commander depends upon many factors, including his own qualifications, his rank, the nature of the headquarters, his personal relationship with his commander, and primarily upon the personality of the commander. A chief of staff does not hold a clerical position. In the German army chiefs of staff were not used below an army corps. The rank and care with which staff officers were selected show in itself the wide scope of their responsibilities which could, and in many instances undoubtedly did, result in the chief of staff assuming many command and executive responsibilities which he exercised in the name of his commander.

One of his main duties was to relieve his commander of certain

responsibilities so that such commander could confine himself to those matters considered by him of major importance. It was of course the duty of a chief of staff to keep such commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander. Another well accepted function of chiefs of staff and of all other staff officers is, within the field of their activities, to prepare orders and directives which they consider necessary and appropriate in that field and which are submitted to their superiors for approval.

As stated heretofore, the responsibility allowed a chief of staff to issue orders and directives in the name of his commander varied widely and his independent powers for exercising initiative therefore also varied widely in practice. The field for personal initiative as to other staff officers also varied widely. That such a field did exist however is apparent from the testimony of the various defendants who held staff positions and in their testimony have pointed out various cases in which they modified the specific desires of their superiors in the interests of legality and humanity. If they were able to do this, the same power could be exercised for other ends and purposes and they were not mere transcribers of orders.

Surely the staff officers of the OKW did not hold their high ranks and positions and did not bask in the bright sunlight of official favor of the Third and Thousand Year Reich by merely impeding and annulling the wishes of the Nazi masters whom they served.

It over-taxes the credulity of this Tribunal to believe that Hitler or Keitel or Jodl, or all three of these dead men, in addition to their many activities as to both military matters and matters of state, were responsible for the details of so many orders, words spoken in conferences, and even speeches which were made. We are aware that many of the evil and inhumane acts of the last war may have originated in the minds of these men. But it is equally true that the evil they originated and sponsored did not spread to the far flung troops of the Wehrmacht of itself. Staff officers were indispensable to that end and cannot escape criminal responsibility for their essential contribution to the final execution of such orders on the plea that they were complying with the orders of a superior who was more criminal.

* * * * *

COMMANDO ORDER

Following the Dieppe raid, and after drafts and changes had been prepared largely by Warlimont and Lehmann, Hitler issued the following order on 18 October 1942 [*498—PS, Pros. Ex. 124*]:

"TOP SECRET

"1. For some time our enemies have been using in their warfare methods which are outside the international Geneva Conventions. Especially brutal and treacherous is the behavior of the so-called commandos, who, as is established, are partially recruited even from freed criminals in enemy countries. From captured orders it is divulged, that they are directed not only to shackle prisoners, but also to kill defenseless prisoners on the spot at

the moment in which they believe that the latter as prisoners represent a burden in the further pursuit of their purposes or could otherwise be a hindrance. Finally, orders have been found in which the killing of prisoners has been demanded in principle.

"2. For this reason it was already announced in an addendum to the armed forces report of 7 October 1942 that in the future, Germany, in the face of these sabotage troops of the British and their accomplices, will resort to the same procedure, i.e., that they will be ruthlessly mowed down by the German troops in combat, wherever they may appear.

"3. I therefore order—

From now on all enemies on so-called commando missions in Europe or Africa challenged by German troops, even if they are to all appearance soldiers in uniform or demolition troops, whether armed or unarmed, in battle or in flight, are to be slaughtered to the last man. It does not make any difference whether they are landed from ships and aeroplanes for their actions, or whether they are dropped by parachute. Even if these individuals, when found, should apparently be prepared to give themselves up, no pardon is to be granted them on principle. In each individual case full information is to be sent to the OKW for publication in the report of the military forces.

"4. If individual members of such commandos, such as agents, saboteurs, etc., fall into the hands of the military forces by some other means, through the police in occupied territories for instance, they are to be handed over immediately to the SD. Any imprisonment under military guard, in PW stockades for instance, etc., is strictly prohibited, even if this is only intended for a short time.

"5. This order does not apply to the treatment of any enemy soldiers who, in the course of normal hostilities (large scale offensive actions, landing operations and airborne operations), are captured in open battle or give themselves up. Nor does this order apply to enemy soldiers falling into our hands after battles at sea, or enemy soldiers trying to save their lives by parachute after battles.

"6. I will hold responsible under military law, for failing to carry out this order, all commanders and officers who either have neglected their duty of instructing the troops about this order, or acted against this order where it was to be executed."

This order was criminal on its face. It simply directed the slaughter of these "sabotage" troops.

* * * * *

It would appear . . . that [the International Military] Tribunal accepted as international law the statement of Admiral Canaris to the effect that the Geneva Convention was not binding as between Germany and Russia as a contractual agreement but that the general principles of international law as outlined in those conventions were applicable. In other words, it would appear that the IMT in the case above cited followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in

substance an expression of international law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint.

One serious question that confronts us arises as to the use of prisoners of war for the construction of fortifications. It is pointed out that the Hague Convention specifically prohibited the use of prisoners of war for any work in connection with the operations of war, whereas the later Geneva Conventions provided that there shall be no *direct* connection with the operations of war. This situation is further complicated by the fact that when the proposal was made to definitely specify the exclusion of the building of fortifications, objection was made before the conference to that limitation, and such definite exclusion of the use of prisoners was not adopted. There is also much evidence in this case to the effect that Russia used German prisoners of war for such purposes. It is no defense in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under international law, such evidence is pertinent. At any rate, it appears that the illegality of such use was by no means clear. The use of prisoners of war in the construction of fortifications is a charge directed against the field commanders on trial here. This Tribunal is of the opinion that in view of the uncertainty of international law as to this matter, orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face, but a matter which a field commander had the right to assume was properly determined by the legal authorities upon higher levels.

Another charge against the field commanders in this case is that of sending prisoners of war to the Reich for use in the armament industry. The term "for the armament industry" appears in numerous documents. While there is some question as to the interpretation of this term, it would appear that it was used to cover the manufacture of arms and munitions. It was nevertheless legal for field commanders to transfer prisoners of war to the Reich and thereafter their control of such prisoners terminated. Communications and orders specifying that their use was desired by the armament industry or that prisoners were transmitted for the armament industry are not in fact binding as to their ultimate use. Their use subsequent to transfer was a matter over which the field commander had no control. Russian prisoners of war were in fact used for many purposes outside the armament industry. Mere statements of this kind cannot be said to furnish proof against the defendants for the illegal use of prisoners of war whom they transferred. In any event, if a defendant is to be held accountable for transmitting prisoners of war to the armament industry, the evidence would have to establish that prisoners of war shipped from his area were in fact so used.

Therefore, as to the field commanders in this case, it is our opinion that, upon the evidence, responsibility cannot be fixed upon the field commanders on trial before us for the use of prisoners of war in the armament industry.

In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions

pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement. But since the violation of these provisions is not an issue in this case, we make no comment thereon, other than to state that this judgment is in no way based on the violation of such provisions as to Russian prisoners of war.

Most of the provisions of the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia. These concern (1) the treatment of prisoners of war; (2) the treatment of civilians within occupied territories and spoliation and devastation of property therein; and (3) the treatment of Red Army soldiers who, under the Hague Convention, were lawfully belligerents.

* * * * *

Under these provisions certain accepted principles of international law are clearly stated. Among these applicable in this case are noted those provisions concerning the proper care and maintenance of prisoners of war. Also the provisions prohibiting their use in dangerous localities and employment, and in this connection it should be pointed out that we consider their use by combat troops in combat areas for the construction of field fortifications and otherwise, to constitute dangerous employment under the conditions of modern war. Under those provisions it is also apparent that the execution of prisoners of war for attempt to escape was illegal and criminal.

Also, it is the opinion of this Tribunal that orders which provided for the turning over of prisoners of war to the SD, a civilian organization, wherein all accountability for them is shown by the evidence to have been lost, constituted a criminal act, particularly when from the surrounding circumstances and published orders, it must have been suspected or known that the ultimate fate of such prisoners of war was elimination by this murderous organization.

The contention of the defense as to the condition of many of the Russian prisoners when captured is considered a defense as far as it goes. No doubt many were in a deplorable condition due to lack of food, poor clothing, wounds, sickness, and exhaustion when captured. There is no question that for temporary periods these conditions would bring about much hardship and many deaths regardless of the efforts of their captors. However, the evidence in this case shows that hundreds of thousands of Russian prisoners of war died from hunger, cold, lack of medical care, and ill-treatment that were not a result of these conditions. It is true that later on in the war Germany realized that she had lost for herself a tremendous source of manpower which had become one of the major problems of the German nation. Therefore to some extent her treatment of prisoners of war was based on the sounder economic principle that it was better to work them to death than to merely let them die. The great mass of Russian prisoners of war did not die because of their condition at the time of their capture. The argument that the winter of 1941-42 was the coldest winter in years in that area can hardly be alleged as an

excuse for the deaths of prisoners of war from cold. Cold winters have certainly not been unknown in those parts of Europe where these prisoners were kept in captivity. In fact, cold winters in those parts are the rule and not the exception. Nor can it be said that the German Army did not have food with which to maintain them. In their progress through Russia they had seized the food supplies of the people and there is no evidence in the record to show that German soldiers at that time were dying from starvation. There is evidence in some cases there were epidemics of typhus in the German Army but nothing to parallel the various epidemics which broke out in the Russian camps. No doubt soldiers in the German Army died in isolated cases from lack of medical supplies and medical attention but the evidence in this case shows that thousands of Russian prisoners of war died from lack of attention while the German Army which held them was not materially suffering from lack of either.

As regards the humanity of their treatment, the evidence in this case discloses not only that humane treatment was not generally required of German soldiers in dealing with Russian prisoners of war, but that the directly opposite procedure was imposed upon them by superior orders. The treatment of Russian prisoners of war by the German Wehrmacht was a crime under international law, and it is so found by this Tribunal.

DOCUMENT NO. 101

UNITED STATES AND OTHERS v. SADAO ARAKI AND OTHERS (International Military Tribunal for the Far East (IMTFE), (4-12 November 1948)

SOURCE

Judgment of the International Tribunal for the Far East (IMTFE) (mimeo., 1948) (microfilm)

NOTE

This trial of the major Japanese personalities charged with the commission of war crimes prior to and during the World War II hostilities in the Far East (1941-1945), conducted pursuant to the Special Proclamation and Charter, as amended, of 19 January 1946 (DOCUMENT NO. 75), began on 3 May 1946 and ended on 16 April 1948. The Tribunal reconvened on 4 November 1948 for the reading of its opinion and the announcement of sentences. Unlike the decision in the case involving the major German war criminals, heard by the International Military Tribunal at Nuremberg (DOCUMENT NO. 85), there were several dissents registered here on various aspects of the law applicable. As will be seen, the IMTFE deemed it appropriate to elaborate at considerable length upon the manner in which both the Japanese Government and the Imperial Japanese Army had violated the laws and customs of war relative to the treatment of prisoners of war. Reference will be found in the opinion to the various sets of regulations promulgated by the Japanese in purported compliance with these laws and customs but to which little or no attention was in fact paid (see DOCUMENT NO. 56, DOCUMENT NO. 57, DOCUMENT NO. 58, and DOCUMENT NO. 59). As was the case in Europe, many high ranking officers, as well as many lower ranking officers and enlisted men, were tried by national war crimes tribunals for individual acts constituting war crimes in which prisoners of war were the victims. (See, for example, DOCUMENT NO. 72, DOCUMENT NO. 76, and DOCUMENT NO. 93.)

EXTRACTS

THE LAW

* * * * *

(b) *RESPONSIBILITY FOR WAR CRIMES AGAINST PRISONERS*

Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognised and the customary law to this effect was formally embodied in the Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as "prisoners") rests therefore with the Government

having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibiility for the prisoners.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the Government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general the responsibility for prisoners held by Japan may be stated to have rested upon:

(1) Members of the Government;
(2) Military or Naval Officers in command of formations having prisoners in their possession;
(3) Officials in those departments which were concerned with the well-being of prisoners;
(4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

(1) They fail to establish such a system.
(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They had knowledge that such crimes were being committed, and

having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and of Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

Departmental Officials having knowledge of ill-treatment of prisoners are not responsible by reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they had or should have knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future then they are responsible for such future crimes.

CONVENTIONAL WAR CRIMES

(Atrocities)

* * * * *

At the beginning of the Pacific War in December 1941 the Japanese

Government did institute a system and an organization for dealing with prisoners of war and civilian internees. Superficially, the system would appear to have been appropriate; however, from beginning to end the customary and conventional rules of war designed to prevent inhumanity were flagrantly disregarded.

Ruthless killing of prisoners by shooting, decapitation, drowning, and other methods; death marches in which prisoners including the sick were forced to march long distances under conditions which not even well-conditioned troops could stand, many of those dropping out being shot or bayonetted by the guards; forced labor in tropical heat without protection from the sun; complete lack of housing and medical supplies in many cases resulting in thousands of death from disease; beatings and torture of all kinds to extract information or confessions or for minor offences; killing without trial of recaptured prisoners after escape and for attempt to escape; killing without trial of captured aviators; and even cannibalism: these are some of the atrocities of which proof was made before the Tribunal.

The extent of the atrocities and the result of the lack of food and medical supplies is exemplified by a comparison of the number of deaths of prisoners of war in the European Theater with the number of deaths in the Pacific Theater. Of United States and United Kingdom forces 235,473 were taken prisoners by the German and Italian Armies; of these 9,348 or 4 per cent died in captivity. In the Pacific Theater 132,134 prisoners were taken by the Japanese from the United States and United Kingdom forces alone of whom 35,756 or 27 per cent died in captivity.

* * * * *

THE RAPE OF NANKING

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Large parties of Chinese soldiers laid down their arms and surrendered outside Nanking; within 72 hours after their surrender they were killed in groups by machine gun fire along the bank of the Yangtze River. Over 30,000 such prisoners of war were so killed. There was not even a pretence of trial of these prisoners so massacred.

Estimates made at a later date indicate that the total number of civilians and prisoners of war murdered in Nanking and its vicinity during the first six weeks of Japanese occupation was over 200,000. That these estimates are not exaggerated is borne out by the fact that burial societies and other organizations counted more than 155,000 bodies which they buried. They also reported that most of those were bound with their hands tied behind their backs. These figures do not take into account those persons whose bodies were destroyed by burning or by throwing them into the Yangtze River or otherwise disposed of by Japanese.

THE WAR WAS EXTENDED TO CANTON AND HANKOW

* * * * *

HATA's troops entered Hankow and occupied the city on 25 October 1938. The next morning a massacre of prisoners occurred. At the customs wharf, the Japanese soldiers collected several hundred prisoners. They then

selected small groups of three of four at a time, marched them to the end of the gangplanks reaching out to deep water; pushed them into the river and shot them. When the Japanese saw that they were being observed from the American gunboats anchored in the river off Hankow, they stopped and adopted a different method. They continued to select small groups, put them into motor launches and took them out in the stream where they threw them into the water and shot them.

MURDER OF CAPTURED AVIATORS

Japanese leaders feared that aerial warfare might be waged against the cities and towns of Japan. One of the reasons given by the Japanese Military for opposing ratification of the Geneva Prisoner of War Convention of 1929 was that such ratification would double the range of enemy planes making raids on Japan in that the crews could land on Japanese territory after completing their mission and be secure in the knowledge that they would be treated as prisoners of war.

The fear that Japan would be bombed was realized on 18 April 1942 when American planes under the command of Colonel Doolittle bombed Tokyo and other cities in Japan. This was the first time Japan had been subjected to a bombing raid; and in the words of TOJO, it was an awful "shock" to the Japanese. Sugiyama, the Chief of the Japanese General Staff, demanded the death penalty for all aviators who bombed Japan. Although there had been no law or regulation of the Japanese Government prior to this raid under which the death penalty could be administered, Prime Minister TOJO ordered regulations issued to be retroactive to the time of the raid which would permit the death penalty to be imposed upon the Doolittle fliers. TOJO later admitted that he took this action as a deterrent to prevent future raids.

These regulations which were dated 13 August 1942 were made applicable to "enemy fliers who have raided" Japan, Manchukuo or Japanese operational areas "and have come within the jurisdiction of the Japanese Expeditionary Forces in China". Thus they were directly and retrospectively aimed at the United States airmen already in the hands of the Japanese in China.

The offences were air attacks

(1) upon ordinary people,
(2) upon private property of a non-military nature
(3) against other than military objectives, and
(4) "Violations of war time international law".

The punishment prescribed was death or imprisonment for ten years or more.

Conduct defined as offences 1, 2 and 3 were such as the Japanese themselves had regularly practiced in China. It will be remembered that in July 1939 the Chief-of-Staff of the Central China Expeditionary Force reported to War Minister ITAGAKI that a policy of indiscriminate bombing in order to terrorize the Chinese had been adopted. The fourth, violations of the laws of war, required no such regulations. Their breach was punishable in any event, but, of course, only upon proper trial and within the limits of punishment permitted by international law.

The crews of two of the Doolittle planes which had been forced to land in

China were taken prisoner by the Japanese occupation forces under the command of HATA. These eight fliers composing the crews were treated as common criminals, being handcuffed and bound. The members of one crew were taken to Shanghai and the members of the other crew were taken to Nanking; at each place they were interrogated under torture. On 25 April 1942 the fliers were taken to Tokyo and were kept blindfolded and handcuffed until they were inside the Military Police Headquarters in Tokyo. They were then placed in solitary confinement, from which they were taken out and questioned again under torture for eighteen days. At the end of this period the fliers to avoid further torture signed statements written in Japanese, the contents of which were unknown to them.

The fliers were returned to Shanghai on 17 June 1942 where they were incarcerated, starved, and otherwise ill-treated. On 28 July 1942 Vice-Minister of War KIMURA transmitted TOJO's orders to HATA who was the Supreme Commander of all Japanese Forces in China at that time. TOJO's orders were to the effect that the fliers were to be punished under the new regulations. On orders from the Chief of the General Staff, HATA instructed that the fliers be put on trial. At this "trial" some of the airmen were too ill to take part in the proceedings, there was no translation of the matters charged, and they were given no opportunity to defend themselves. The trial was a mere mockery. This trial was held on 20 August 1942 when all of the fliers were sentenced to death. Upon review in Tokyo, and on the recommendation of TOJO, five of the sentences were reduced to life imprisonment and the remaining three death sentences were approved. On 10 October 1942 HATA ordered the sentences to be executed and reported his action to the Army Chief of Staff. The death sentences were carried out as ordered.

In this manner was begun the policy of killing Allied fliers who fell into the hands of the Japanese. This was done not only in Japan, but in occupied territories during the remainder of the Pacific War. The usual practice was to starve and torture captured aviators before their murder. Even the formality of a trial was often omitted. Where a court-martial was held prior to their being killed it appears that the court-martial was a mere formality.

As an illustration we cite the case of two American B-29 fliers at Osaka on 18 July 1945, who were charged with violation of the regulations. Prior to the trial, their case was investigated by an officer appointed to perform that duty, who recommended the death penalty. The recommendation was approved by the Commander of the Central Military District and by General HATA, who was at that time the Commander of the Second Army Corps at Hiroshima. The recommendation of the Investigating Officer, with the approval of the Military Commanders, was sent to the War Ministry for final approval; and that approval was obtained. At the trial, the report and recommendation of the Investigating Officer and the approval of General HATA and others were read to the court-martial by the prosecutor, who demanded the death penalty based upon those documents. The accused were asked a few routine questions and the death penalty was imposed. They were executed the same day.

In the Tokai Military District, prior to May 1945, eleven Allied airmen

were subjected to trials in which their interests were not safeguarded, sentenced to death and executed. However, the Commandant of Military Police for Japan considered this procedure imposed an unnecessary delay in the killing of captured Allied fliers; consequently in June 1945, he sent a letter to each of the Military Police Headquarters Commandants of the several military districts in Japan complaining of the delay in the disposition of captured Allied airmen, stating that it was impossible to dispose of them immediately by courts-martial, and recommending that the Military Police in the military districts dispense with courts-martial after securing the approval of the Commander of the Military District. In the Tokai Military District 27 Allied fliers were killed without trial after this letter was received. In the Central Military District over which HATA exercised administrative command, 43 Allied airmen were killed without having been tried by courts-martial or otherwise. At Fukuoka eight Allied airmen were killed without trial on 20 June 1945, eight more in the same manner on 12 August 1945, and three days later on 15 August 1945 the third group of eight, making a total of 24 Allied airmen killed at Fukuoka without being given a trial after the above-mentioned letter recommending this procedure was sent out from Tokyo by the Commandant of Military Police.

The killing of Allied airmen in the Tokai, Central and Western Districts of Japan was done by firing squads; in the Eastern District, which embraced Tokyo, more inhumane methods were used. Allied airmen captured in that district were detained in the Military Police Headquarters Guard House, pending a so-called investigation to determine whether they had violated the Regulations. This investigation consisted of interrogation under torture in an effort to coerce the victim into confessing to facts which would subject him to the death penalty under the regulations. No less than 17 airmen died in this guard house as a result of torture, starvation and lack of medical care. Those who survived this torture were victims of a more dreadful death. The Tokyo Army Prison was located on the edge of the Yoyogi Military Parade Ground. This prison was a disciplinary barracks in which were confined Japanese soldiers serving sentences. The prison grounds were small and surrounded by a brick wall approximately 12 feet high. The prison buildings were of wood and were constructed so close together as to occupy all of the ground available within the brick wall except for necessary alley-ways and courts. One of the cell blocks was set apart by a wooden wall seven feet high. On 25 April 1945, five Allied fliers were placed in that cell block; on 9 May, 29 more were added; and on 10 May, 28 others were confined there. On the night of 25 May 1945 Tokyo was heavily bombed. On that night there were 62 Allied fliers confined in this cell block. There were 464 Japanese Army prisoners confined in other buildings within the prison. The wooden buildings of the prison, as well as the highly inflammable dwellings surrounding it, were hit and set on fire by incendiary bombs. The prison was completely demolished; and after the fire, it was found that all of the 62 Allied fliers had perished. It is significant that none of the 464 Japanese or any of their jailors suffered a similar fate. The evidence shows that the fate of the Allied airmen was deliberately planned.

In the occupied territories, one of the methods of killing captured airmen was by decapitation with a sword, and at the hands of a Japanese officer. . .

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Another method of murdering Allied fliers was used at Hankow, China, in December 1944. Three American fliers, who had been forced down and captured sometime before, were paraded through the streets and subjected to ridicule, beating and torture by the populace. When they had been weakened by the beatings and torture, they were saturated with gasoline and burned alive. Permission for this atrocity was granted by the Commander of the 34th Japanese Army.

The cruelty of the Japanese is further illustrated by the treatment of an Allied airman, who was captured at Rabaul on the Island of New Britain. He was bound with a rope on which fish-hooks had been attached so that when he moved the hooks dug into his flesh. He ultimately died of malnutrition and dysentery.

MASSACRES

Massacres of prisoners of war, civilian internees, sick and wounded, patients and medical staffs of hospitals and civilian population were common throughout the Pacific War. Prisoners of war and civilian internees were massacred in some instances shortly after capture.

At a prisoner of war camp above Puerto Princesa Bay on the Philippine Island of Palawan there occurred a particularly cruel and premeditated massacre of American prisoners. There were some 150 prisoners in this camp. They had been told previously by their captors that if Japan won the war they would be returned to America but that they would be killed if Japan were defeated. Before the massacre there had been some raiding of the island by American aircraft. In the camp a number of shallow and lightly covered air raid shelters had been dug. At about 2 p.m. on 14 December 1944, the prisoners were ordered to go to these shelters. Japanese soldiers armed with rifles and machine guns were posted around the camp. When the prisoners were all in the shelters, gasoline was thrown into them from buckets and then this was followed by lighted torches. Explosions followed and those prisoners who were not too badly burnt struggled to escape. These were killed by fire from the rifles and machine guns placed in position for the purpose. In some cases they were killed by bayonet thrusts. Five only of the 150 survived this dreadful experience. They did so by swimming out into the bay whence after nightfall they escaped into the jungle and eventually joined up with Philippines guerillas.

Mass drowning was used at Port Blair, Andaman Islands (August 1945), where the civilian internees were placed aboard ship, taken to sea, and forced into the water. A combination of drowning and shooting, similar to that employed at Hankow, was used at Kota Radja (March 1942), where Dutch prisoners of war were placed in sloops, towed to sea, shot and thrown into the sea. At Tarakan, Borneo (January 1942), Dutch prisoners of war were taken aboard of Japanese light cruiser, taken to the spot where a Japanese destroyer had been fired upon by them. decapitated and thrown into the sea.

MASSACRES WERE ORDERED

The evidence shows that most of these massacres were ordered by commissioned officers, that some of them were ordered by high-ranking generals and admirals, that in many cases commissioned officers were actually present during their commission, observing, directing or actually doing the killing. . . . Prisoners of war from many camps in Japan and the occupied areas have testified that they were informed by their Japanese, Formosan and Korean guards that they would be killed in case the Allies invaded the locality or if Japan should lose the war. We have referred to cases where these threats were carried out. In one camp, at least, written evidence of an order from higher authority to kill the prisoners of war was found. The captured journal from a camp in Formosa contained an entry showing that a reply had been sent to an inquiry from the Chief-of-Staff of the 11th Military Police Unit of the Kiirun Fortified Area Headquarters regarding "extreme measures" for prisoners of war. The method to be employed in carrying out these "extreme measures" was detailed as follows: "Whether they are destroyed individually or in groups, or however it is done, with mass bombing, poisonous smoke, poisons, drowning, decapitation, or what, dispose of them as the situation dictates. In any case, it is the aim not to allow the escape of a single one, to annihilate them all, and not to leave any traces." This annihilation was, *inter alia*, prescribed in all cases "where escapes from the camp may turn into a hostile fighting force."

A general order was issued by Vice-Minister of War Shibayama on 11 March 1945. The order stated: "The handling of prisoners of war in these times when the state of things is becoming more and more pressing and the evils of war extended to the Imperial Domain, Manchuria and other places, is in the enclosed summary. We hope you follow it, making no mistakes." The enclosed summary to which reference was made began: "The Policy: With the greatest efforts prevent the prisoners of war falling into the hands of the enemy. Further for this purpose carry out a transfer of the place of confinement for those prisoners of war for whom it is necessary." The Ranau Death Marches, which began at about this time between Sandakan and Ranau in Borneo to which we will refer presently, conformed to the policy indicated by the order just quoted.

DEATH MARCHES

The Japanese Army did not observe the laws of war in the movement of prisoners of war from one place to another. Prisoners were forced to march long distances without sufficient food and water and without rest. Sick and wounded were forced to march in the same manner as the able. Prisoners, who fell behind on such marches were beaten, tortured and murdered. We have been furnished evidence of many such marches.

The Bataan March is a conspicuous example. When General King surrendered his forces on Bataan on 9 April 1942, he was assured by Japanese General Homma's Chief-of-Staff that his soldiers would be treated humanely. General King had saved sufficient trucks from demolition to move his men from Bataan to the prisoner of war camp. The American and Filipino soldiers

on Bataan had been on short rations and the sick and wounded were numerous. However, when General King suggested the use of the trucks, he was forbidden to do so. The prisoners were marched in intense heat along the highway to San Fernando, Pampanga, which is a distance of 120 kilometers or 75 miles. The sick and wounded were forced to march. Those who fell by the roadside and were unable to continue were shot or bayoneted. Others were taken from the ranks, beaten, tortured and killed. The march continued for nine days, with the Japanese guards being relieved at five kilometer intervals by fresh guards who had been transported in the American trucks. During the first five days the prisoners received little or no food or water. Thereafter, the only water available was that from an occasional artesian well or caribou wallow. When the prisoners grouped around a well in an attempt to get water the Japanese fired upon them. Shooting and bayoneting of prisoners were commonplace. Dead bodies littered the side of the road. Murata, who had been sent to the Philippines in February 1942 by War Minister TOJO as a civilian advisor to General Homma, drove along this highway and saw the dead bodies along the highway in such great numbers that he was prompted to ask General Homma about the situation. Murata testified that, "I merely saw it; I did not complain about it; I just asked questions". At San Fernando, the prisoners were crowded into railway freight cars to be transported to Camp O'Donnell. They were forced to stand through lack of space and many died in the cars from exhaustion and lack of ventilation. It is not clear how many died in this movement from Bataan to Camp O'Donnell. The evidence indicates that there were approximately 8,000 deaths of American and Filipino prisoners. At Camp O'Donnell, the evidence shows that from April to December 1942 no less than 27,500 Americans and Filipinos died.

TOJO admitted that he heard of this march in 1942 from many different sources. He said that his information was to the effect that the prisoners had been forced to march long distances in the heat and that many deaths had occurred. TOJO also admitted that the United States Government's protest against the unlawful treatment of these prisoners had been received and discussed at the bi-weekly meetings of the Bureau Chiefs in the War Ministry soon after the death march occurred, but that he left the matter to the discretion of the Bureau Chiefs. TOJO said that the Japanese forces in the Philippines were not called upon for a report on the incident and that he did not even discuss the matter with General Homma when that General visited Japan in early 1943. TOJO said that he first inquired into this subject when he visited the Philippines in May 1943; and at that time he discussed it with General Homma's Chief-of-Staff, who informed him of the details. TOJO explained his failure to take action to prevent a repetition of similar atrocities as follows: "It is Japanese custom for a commander of an expeditionary army in the field to be given a mission in the performance of which he is not subject to specific orders from Tokyo, but has considerable autonomy." This can mean only that under the Japanese method of warfare such atrocities were expected to occur, or were at least permitted, and that the Government was not concerned to prevent them.

Such atrocities were repeated during the Pacific War which it is reasonable to assume resulted from the condonation of General Homma's conduct at Bataan.

OTHER FORCED MARCHES

On the march from the port to Koepang prisoner of war camp on Dutch Timor in February 1942 the prisoners suffering from wounds, hunger, malaria and dysentery were marched for five days with their hands tied behind their backs, and were driven and beaten along by their Japanese and Korean guards like a herd of cattle. Similar marches were imposed upon Indian prisoners between Wewak, But and Aitape in British New Guinea during 1943 and 1944. On those marches the prisoners who became ill and were unable to keep up with the main body were shot. There was evidence of other similar happenings. Those mentioned show the accepted and common practice followed by the Japanese Army and Prisoner of War Administration when moving prisoners of war from one place to another under harsh conditions enforced by the beating and murdering of stragglers.

The Ranau marches are in a different category. They began early in 1945, when the Japanese feared that the Allies were preparing a landing at Kuching; the purpose of these marches was to remove the prisoners to prevent their liberation. The village of Ranau is in a jungle over 100 miles west of Sandakan in Borneo on the eastern slope of Mt. Kinabalu. The trail from Sandakan to Ranau lies through dense jungle and is too narrow for vehicles. The first 30 miles are marshy and heavy with mud and slush. The next 40 miles are in higher country over short, steep hills. The next 20 miles are over a mountain. The last 26 miles are all uphill and mountainous. Australian prisoners of war were moved along this jungle trail in a series of marches. The prisoners were suffering from malaria, dysentery, beri-beri and malnutrition before they were taken from the camp at Sandakan. The test to determine whether a prisoner was fit to make the march was to beat and torture him to make him stand; if he did stand, he was considered fit for the march. The prisoners were forced to carry food and ammunition for their guards as well as their own scanty rations. One party of 40 prisoners was forced to subsist for three days on this march upon six cucumbers divided among them. Those who fell out of the marching column were shot or bayoneted to death. The marches continued until the first part of April 1945. The trail was littered with the corpses of those who perished along the way. Less than one-third of the prisoners of war who began these marches at Sandakan ever reached Ranau. Those who did reach Ranau were starved and tortured to death or died of disease or were murdered. Only six out of more than two thousand who were prisoners at Sandakan are known to have survived. These did so by escaping from the camp at Ranau. Those who were too sick to begin the marches at Sandakan died of disease or were murdered by their guards.

BURMA-SIAM RAILWAY

A flagrant example of atrocities over an extended period in one area is found in the treatment of prisoners of war and native workmen employed in

the construction of the Burma-Siam Railway. Prior to and during the work prisoners were constantly subjected to ill-treatment, torture and privation of all kinds, commencing with a forced march of 200 miles to the area under almost indescribable hardships. As a result, in eighteen months 16,000 prisoners out of 46,000 died.

To further their strategic plans in Burma and India, Japanese Imperial General Headquarters early in 1942 considered the question of communications. The shortest convenient line of communications at that time was through Thailand. It was decided to link the railroad running from Bangkok in Siam with that from Moulmein in Burma, the distance of the gap being about 250 miles (400 kil.). Thus communications with the Japanese armies in Burma would be facilitated.

For that purpose, on the advice of TOJO, it was decided to use prisoners of war and orders were issued to the Southern Army then stationed in Malaya to proceed with the work with all possible speed, November 1943 being fixed as the completion date. Pursuant to these orders two groups of prisoners were sent from the Singapore area commencing in August 1942; one group known as "A" Force being sent by sea and the second group, composed of "F" and "H" Forces by rail to Bangpong. From Bangpong they were made to march to the various camps along the line of the projected construction.

Before "F" and "H" Forces left Singapore, the Japanese general in charge of the prisoner of war administration informed the prisoners that they were being sent to rest camps in the mountains where the food situation was better because so many of them were sick and suffering from malnutrition, caused by lack of food and sanitary conditions in the Singapore camps. He therefore insisted that the sick be included in those to be sent to the labor camps. The prisoners were crowded into railway freight cars with the men sitting cross-legged on the floor without sufficient space to lie down. They had been told that it would not be necessary to carry along their cooking utensils as they would be replaced. However, they were not replaced. Furthermore, the only food furnished the prisoners was thin vegetable stew, and for the last twenty-four hours of the trip by rail no food or water was available.

After four days and four nights the prisoners were detrained and required to surrender their baggage and what cooking gear they had brought, as well as all drugs and medical equipment. They were then required to march 200 miles on foot in two and one-half weeks. The march would have taxed fit soldiers, as the route lay over rough jungle tracks in mountainous country. The march was accomplished in fifteen night stages in the rain and mud of the monsoon. The weakened condition of the prisoners, together with the necessity of carrying some 2,000 non-walking sick, made this march almost beyond human endurance. Some of those who became sick or too weak to march were beaten and driven by their guards.

In the camps established along the projected railway, which lay in virgin jungle, no cover was provided; sanitary facilities were almost non-existent, medical care and drugs were not provided, clothing was not furnished, rations were completely inadequate, while the constant driving and daily

beating of the prisoners added to the ever-mounting toll of dead and disabled. Those who tried to escape were killed. Other groups of prisoners of war from Singapore followed "F" and "H" Forces and were accorded similar treatment.

TOJO told the Tribunal that he had received reports of the poor condition of the prisoners employed on this project and that he sent the Chief of the Prisoner of War Information Bureau to investigate in May 1943. He admits that the only action which he took as a result of that investigation was to court-martial a certain company commander who had dealt unfairly with the prisoners of war, and to relieve from duty the Commanding General of Railway Construction. However, we find from other evidence that the Commanding General was not removed because of the ill-treatment of prisoners of war. The first Commanding General of Railway Construction, who was in charge of this project, was killed by an Allied air raid. The second Commanding General in charge of the project was transferred because he was too sick to attend to his duties, and because the work was not progressing fast enough for the Imperial General Headquarters. The inspector, who recommended the removal of the second Commanding General was not, as stated by TOJO, the Chief of the Prisoner of War Information Bureau, but Wakamatsu, the Director of the Third Division of the Army General Staff in charge of transportation and communication. He reported to the Chief of the Army General Staff that the work was not making sufficient progress and recommended that the General in command of the railroad units in Malaya be placed in charge of the construction and that he be allowed a two-months extension of the date set for the completion of the road.

The court-martial of one company commander was so insignificant and inadequate as a corrective measure in view of the general disregard of the laws of war by those in charge of prisoners of war on this project and the inhumane treatment to which they were subjecting the prisoners as to amount to condonation of their conduct. One of the principal concerns of the Government and the Japanese Imperial General Staff in 1943 was that the railway should be completed in time to use it in resisting the advance of the Allied forces which was making progress in Burma. No concern appears to have been shown for the cost in sick, wounded and dead Allied prisoners of war caused by the constant driving, beating torturing and murdering at the hands of their Japanese and Korean guards and the insanitary conditions in which the prisoners were required to live and work and the failure of the Japanese Government to furnish the barest necessities of life and medical care.

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We shall deal later in some detail with protests made by the Allies against ill-treatment of prisoners and shall refer to knowledge of atrocities on the part of the General Staff and the Government. It is, however, pertinent at this stage to refer to the evidence establishing that before the railway project was begun the Army was advised of the terrible conditions under which the work would be done; that the Government had knowledge of the casualties and failed to remedy these conditions.

In 1942 before the work began the Southern Army Headquarters was advised of the danger of prisoners contacting the various tropical diseases, and from time to time the death rate was reported. Confirmation of the knowledge of the danger to the health of the prisoners and the insufficiency of food, shelter and medical supplies is found in a report dated 6 October 1944 from the Chief-of-Staff of the Southern Army to the Chief of the Prisoner of War Information Bureau, reading in part: "For strategic reasons the completion of the railway was most urgent. Since the proposed site of this railway line was a virgin jungle, shelter, food, provisions and medical supplies were far from adequate and much different from normal conditions for prisoners of war."

In July 1943, when thousands of prisoners had died or were incapacitated by disease, Foreign Minister SHIGEMITSU in reply to a protest said that the prisoners were equitably treated and that all sick received medical attention. Yet, even according to Japanese figures, within a month of the sending of SHIGEMITSU's message the total of prisoners who had died in Thailand alone was 2,909. According to the same source the death rate had increased enormously month by month from 54 in November 1942 to 800 in August 1943.

In the summer of 1943 Wakamatsu on his return to Tokyo from his inspection of the area, previously referred to, reported personally to Sugiyama, Chief of the General Staff, that he had seen many cases of beri-beri and dysentery and that the quality of the food was not of the required standard.

It is claimed that many of the deaths occurred because the Allied Forces interfered with the regular supply of food and drugs. However, for the very reason of this interference with shipping the order was given in February 1943 to shorten the terms by which the work had to be finished, by four months. POW were told: Men are of no importance, the railroad has to be built irrespective of any suffering of death, or, "the construction of the railway for operational purposes, and had to be finished within a certain time at all costs, irrespective of the loss of lives of British and Australian prisoners".

Finally we refer to one of the monthly reports, dated 3 September 1943, received by the Prisoner of War Information Bureau from the Prisoner of War Commandant in Thailand, which stated that of a total of 40,314 Prisoners 15,064 were sick. In view of the practice of forcing beri-beri and dysentery cases to continue to work the number of sick, if these had been included, would have been much greater.

TORTURE AND OTHER INHUMANE TREATMENT

The practice of torturing prisoners of war and civilian internees prevailed at practically all places occupied by Japanese troops, both in the occupied territories and in Japan. The Japanese indulged in this practice during the entire period of the Pacific War. Methods of torture were employed in all areas so uniformly as to indicate policy both in training and execution. Among these tortures were the water treatment, burning, electric shocks, the knee

spread, suspension, kneeling on sharp instruments and flogging.

The Japanese Military Police, the Kempeitai, was most active in inflicting these tortures. Other Army and Navy units, however, used the same methods as the Kempeitai. Camp guards also employed similar methods. Local police forces organized by the Kempeitai in the occupied territories also applied the same methods of torture.

We will show how the Chiefs of Camps were instructed in Tokyo before assuming their duties. We will also show that these Chiefs of Camps were under the administrative control and supervision of the Prisoner of War Administration Section of the Military Affairs Bureau of the War Ministry to which they rendered monthly reports. The Kempeitai were administered by the War Ministry. A Kempeitai training school was maintained and operated by the War Ministry in Japan. It is a reasonable inference that the conduct of the Kempeitai and the camp guards reflected the policy of the War Ministry.

To indicate the prevalence of torture and the uniformity of the methods employed we give a brief summary of these methods.

The so-called "water treatment" was commonly applied. The victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process. . . .

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Torture by burning was practiced extensively. This torture was generally inflicted by burning the body of the victim with lighted cigarettes, but in some instances burning candles, hot irons, burning oil and scalding water were used. In many of these cases, the heat was applied to sensitive parts of the body, such as the nostrils, ears, abdomen, sexual organs, and in the case of women, to the breasts. . . .

The electric shock method was also common. Electric current was applied to a part of the victim's body so as to produce a shock. The point of application was generally a sensitive part of the body such as the nose, ears, sexual organs or breasts. . . .

The so-called knee spread was a frequent method of torture. The victim, with his hands tied behind his back, was forced to kneel with a pole, sometimes as much as three inches in diameter, inserted behind both knee joints, so as to spread these joints as pressure was applied to his thighs, at times by jumping on his thighs. The result of this torture was to separate the knee joints and so to cause intense pain. . . .

Suspension was another common form of torture. The body of the victim was suspended by the wrists, arms, legs or neck, and at times in such manner as to strangle the victim or pull joints from their sockets. This method was at times combined with flogging during suspension. . . .

Kneeling on sharp instruments was another form or torture. The edges of square blocks were mostly used as the sharp instruments. The victim was forced to kneel on these sharp edges for hours without relief; if he moved he

was flogged. . . .

Removal of the nails of the fingers and toes also occurred. . .

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Flogging was the most common of the cruelties of the Japanese. It was commonly used at all prisoner of war and internee camps, prisons, Kempeitai headquarters and at all work camps and on all work projects as well as aboard prison ships. It was indulged in freely by the guards with the approval and often at the direction of the Camp Commandant or some other officer. Special instruments were issued for use in flogging at camps; some of these were billets of wood the size of a baseball bat. On occasions prisoners were forced to beat their fellow prisoners under the supervision of the guards. Prisoners suffered internal injuries, broken bones, and lacerations from these beatings. In many instances they were beaten into unconsciousness only to be revived in order to suffer a further beating. The evidence shows that on occasions prisoners were beaten to death.

Mental torture was commonly employed. An illustration of this form of torture is to be found in the treatment to which the Doolittle fliers were subjected. After having been subjected to the various other forms of torture, they were taken one at a time and marched blindfolded a considerable distance. The victim could hear voices and marching feet, then the noise of a squad halting and lowering their rifles as if being formed to act as a firing squad. A Japanese officer then came up to the victim and said: "We are Knights of the Bushido of the Order of the Rising Sun; We do not execute at sundown; we execute at sunrise." The victim was then taken back to his cell and informed that unless he talked before sunrise, he would be executed.

On 5 December 1944, the Swiss Legation in Tokyo delivered to Foreign Minister SHIGEMITSU a Note of Protest from the British Government. In that note SHIGEMITSU was informed that a copy of a book entitled, "Notes for the Interrogation of Prisoners of War", and issued by the Japanese Hayashi Division in Burma on 6 August 1943, had been captured. The note gave SHIGEMITSU direct quotations from that book as follows: "Care must be exercised when making use of rebukes, invectives or torture as it will result in his telling falsehoods and making a fool of you. The following are the methods normally to be adopted: (1) Torture which includes kicking, beating and anything connected with physical suffering. This method to be used only when everything else fails as it is the most clumsy one." (This passage was specially marked in the copy captured.) "Change the interrogating officer when using violent torture, and good results can be had if the new officer questions in a sympathetic manner. (b) Threats. (1) Hints of future physical discomforts, for instance: torture, murder, starving, solitary-confinement, deprivation of sleep. (2) Hints of future mental discomforts, for instance: he will not be allowed to send letters, he will not be given the same treatment as the other prisoners of war, he will be kept till the last in the event of an exchange of prisoners, etc." The note then continued: "The Government of the United Kingdom has requested that the attention of the Japanese Government be drawn to the foregoing. It recalls that the Japanese

Government has recently strongly denied that Imperial Japanese authorities make use of torture. See the letter from SHIGEMITSU to the Swiss Minister of 1 July 1944." We have no evidence that any action was taken to stop this practice of torturing Allied prisoners of war; on the other hand, the practice continued to the time of the surrender of Japan, and when the surrender came, orders were issued to assist the criminals in avoiding just punishment for their crimes. In addition to ordering all incriminating evidence in the form of documents to be destroyed, the following order was issued by the Chief of Prisoner of War Camps of the Prisoner of War Administration Section of the Military Affairs Bureau on 20 August 1945: "Personnel who mistreated prisoners of war and internees or are held in extremely bad sentiment by them are permitted to take care of it by immediately transferring or by fleeing without trace." This order was sent to various prisoner of war camps, including those in Formosa, Korea, Manchuria, North China, Hong Kong, Borneo, Thailand, and Malaya and Java.

VIVISECTION AND CANNIBALISM

Vivisection was practiced by Japanese Medical Officers upon prisoners in their hands. There were also cases of dismemberment of prisoners by Japanese who were not Medial Officers. In addition to the incidents stated below other dismembered bodies of dead captives were found in circumstances indicating that the mutilation had occurred before death.

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ILLEGAL EMPLOYMENT, STARVATION AND NEGLECT OF PRISONERS [OF WAR] AND INTERNEES

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On 6 May 1942, the Vice-Minister of War informed the Chief-of-Staff of the Army in Formosa of the policy governing employment of prisoners of war. He said that it had been decided that: "Prisoners of war can be used for the enlargement of our production and as military labor, white prisoners of war will be confined successively in Korea, Formosa and Manchuria. Superior technicians and high ranking officers — Colonels and above — will be included among the prisoners of war confined in Formosa. Those who are not suitable for use in enlargement of our production will be confined in prisoner of war camps which will be built immediately on the spot." General Uemura on 5 June 1942 directed the Chief-of-Staff of the Army in Formosa as follows: "Although the working of prisoner of war officers and warrant officers is forbidden by the Regulations of 1903, the policy of the control authorities is that under the situation of our country where not one person now eats without working they want them set to work. It is desired that you give proper orders on this." These instructions were also sent to all other Army units concerned. This directive originated within the Cabinet for on 30 May 1942, Prime Minister TOJO issued instructions to the Commander of a Division, which had a prisoner of war camp under its jurisdiction in which he said: "The present situation of affairs in this country does not permit anyone to lie idle doing nothing but eating freely. With that in view, in dealing with prisoners of war, I hope you will see that they may be usefully employed." On

25 June 1942, TOJO issued his instructions to newly appointed Chiefs of Prisoner of War camps. He said: "In Japan, we have our own ideology concerning prisoners of war, which should naturally make their treatment more or less different from that in Europe and America. In dealing with them, you should, of course, observe the various Regulations concerned, aim at an adequate application of them . . . At the same time, you must not allow them to lie idle doing nothing but eating freely for even a single day. Their labor and technical skill should be fully utilized for the replenishment of production, and contribution rendered toward the prosecution of the Greater East Asiatic War for which no effort ought to be spared." The application of these instructions account at least in part for the constant driving, beating and prodding of the sick and wounded prisoners and those suffering from malnutrition to force them to labor upon military works until they died from disease, malnutrition and exhaustion. These instructions were repeated on 26 June 1942 by TOJO to another group of newly appointed prisoner of war camp chiefs and again to another such group on 7 July 1942.

That the Cabinet supported TOJO in his program to employ prisoners of war to aid in the prosecution of the war is shown by the "Foreign Affairs Monthly Report" of the Foreign Section of the Police Bureau of the Home Ministry issued for the month of September 1942. The report showed that due to the labor shortage in Japan, the Cabinet Planning Board with the concurrence of the Prisoner of War Administration Section of the Military Affairs Bureau of the War Ministry held a conference on 15 August 1942 at which it was decided to transfer prisoners of war to Japan and employ them to mitigate the labor shortage in the industries in the National Mobilization Plan. According to the report, it had been decided to employ the prisoners of war in mining, stevedoring, and on engineering and construction works for national defense. . . .

CONSIDERATION FOR RACIAL NEEDS

Food and Clothing

The Japanese Government promised early in 1942 to take into consideration the national customs and racial habits of the prisoners of war and civilian internees in supplying them with food and clothing. This was never done. Regulations in force at the time this promise was made required that camp commandants in supplying prisoners of war and internees with food and clothing should be guided by the Table of Basic Allowances governing the supply of the Army. The commandants were authorized to determine the amount of the allowance to be made to the inmates of the camps but were directed to make such determination within the limits prescribed in the Table of Allowances. These Regulations, insofar as they affected diet, were interpreted as forbidding the prisoners and internees sufficient food, even when other food existed in the vicinity of the camps. This rule was followed even when the inmates of the camps were dying in large numbers from malnutrition. The amount and kind of food prescribed by the Table of Allowances was not materially changed during the war, except to reduce the amount prescribed, although it soon became apparent to those in command

that due to different national dietary customs and habits, the prisoners and internees could not subsist on the food supplied. On 29 October 1942, orders were issued to all camp commandants that "in view of the consumption of rice and barley by workers in heavy industries in Japan, the ration for prisoners of war and civilian internees who were officers or civil officials should be cut so as not to exceed 420 grams per day. In January 1944, this ration of rice was further cut to a maximum of 390 grams per day. As the inmates of the camps began to suffer from malnutrition, they fell easy prey to disease and were quickly exhausted by the heavy labor forced upon them. Regardless of this, the commandants of the camps enforced TOJO's instructions that those who did not labor should not eat and still further reduced the ration and in some cases withdrew it entirely from those who were unable to labor because of illness or injury.

The Regulations provided that the prisoners of war and civilian internees should wear the clothing formerly worn by them, that is to say the clothing they were wearing when captured or interned. This Regulation was enforced by the camp commandants with the result that in many of the camps the inmates were in rags before the war ended. It is true that the Regulation allowed the camp commandants to lend certain items of clothing in cases where the clothing formerly worn by the prisoners or internees was unfit, but this appears to have been used only in rare cases.

Medical Supplies

The Japanese Army and Navy were required by their regulations to keep on hand and in storage a supply of medicine and medical equipment sufficient for one year's use. This was done in many instances by confiscating Red Cross drugs and medical supplies, but the supplies were kept in storage or used mostly for the benefit of Japanese troops and camp guards. The prisoners of war and civilian internees were rarely furnished medicines and equipment from these warehouses. At the time of surrender, large quantities of these supplies were found stored in and around prisoner of war and civilian internee camps in which prisoners and internees had been dying at an alarming rate for lack of such supplies.

Suzuki, Kunji, who served as a staff officer of the Eastern Military District, on Honshu Island under DOHIHARA and other Commanders, testified before this Tribunal. Suzuki admitted that he authorized chiefs of camps and guards at the detention camps in his district to confiscate Red Cross parcels intended for prisoners of war. The evidence shows that this was common practice at the camps located in Japan as well as in Japan's overseas possessions and in the occupied territories. Incidentally Suzuki also admitted that he knew that his guards were beating and otherwise ill-treating the prisoners.

Failure to afford adequate or any medical supplies to prisoners of war and civilian internees was common in all theatres of war and contributed to the deaths of thousands of prisoners and internees.

Housing

The regulations provided that Army buildings, temples and other existing

buildings should be used as prisoner of war and internee camps. The regulations also provided that employers using prisoner of war and civilian internees in war production should furnish necessary shelter for them. Nevertheless the housing provided was in many instances inadequate as cover or insanitary or both. The Japanese adjutant at the Kanburi camp in Siam opened a hospital for the sick prisoners of war in a group of approximately 20 empty huts, which had been evacuated shortly before by a Japanese cavalry regiment which had been using the huts as stables. Atap huts with dirt floors furnished the only shelter available in most of the camps located on islands in the Pacific and along the Burma-Siam Railway. It was common practice to build these camps with the labor of the prisoners of war who were to occupy them, and to force the prisoners to live in the open, exposed to the weather until the huts were completed. However, in some instances, the prisoners were spared the labor of construction by moving them into atap hut camps, which had been depopulated by epidemics: this was the case at the 60 kilometer camp on the Burma-Siam railway project where approximately 800 Australian prisoners of war were quartered in the huts recently occupied by Burmese laborers who had died of cholera. A former Javanese labor camp at Lahat, Molucca Islands, was converted into a prisoner of war camp in August 1944. When the Dutch and British prisoners of war arrived at the camp, they found it filled with dead bodies of Javanese. KIMURA as Vice-Minister of War when informed that ITAGAKI was planning to quarter 1,000 British and 1,000 American prisoners of war in three theological schools in Korea inquired if the buildings scheduled for accommodation of the prisoners of war were not too good for them.

Work

The policy of the Japanese Government was to use prisoners of war and civilian internees to do work directly related to war operations. In the theater of operations they were used to construct military air fields, roads, railroads, docks, and other military works and as stevedores to load and unload military supplies. In the overseas possessions and in Japan they were forced in addition to the foregoing work to labor in mines, in munitions and aircraft factories, and in other projects bearing a direct relation to war operations. As a general rule, the camps in which the prisoners of war and civilian internees were detained were located near the place of employment without regard to their safety, in consequence they were subjected to unnecessary danger from air raids both on and off their work. There is evidence that in some instances the camps were so located deliberately with the intention of deterring the Allies from raiding the military works or factories concerned.

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PRISONERS AND INTERNEES FORCED TO SIGN PAROLE

To reduce the number of guards necessary for prisoners of war and civilian internees, regulations in defiance of the Rules of War were issued by the War Ministry early in 1943 providing, "As soon as prisoners of war have been imprisoned, they shall be administered an oath forbidding them from making an ecape. Prisoners of war who refuse to take the oath mentioned in this

paragraph shall be deemed to have intentions of escaping and shall be placed under strict surveillance." This "strict surveillance" in practice meant solitary confinement on reduced rations or subjection to torture until they took the oath required. At Singapore in August 1942, 16,000 prisoners, who had refused to give the parole demanded, were herded into a barrack square and kept there without food or latrine facilities for four days to force them to sign the parole. The resulting conditions are too disgusting to describe. Some of the prisoners of war at Hong Kong, who refused to sign the parole, were confined in a prison without food and forced to kneel all day. If they moved they were beaten. The senior prisoner of war at the camp at Sandakan, who, with his men, refused to sign was immediately seized and beaten. A firing squad paraded. He was saved from death only when his men agreed to sign. Prisoners of war in camps in Batavia and Java were beaten and deprived of food until they signed the parole. At Zentsuji Camp on Shikoku Island, 41 prisoners were kept in confinement from 14 June 1942 until 23 September 1942 for refusing to take oath and were finally threatened with death if they persisted in their refusal. As already stated, the Prisoner of War Regulation also applied to civilian internees by virtue of another regulation which we have quoted. To enforce this parole, which was obtained by coercion, the regulations further provided, "Persons on parole, who break the parole, shall be subject to either the death penalty, or hard labor, or imprisonment for life or for a minimum of seven years. When the persons mentioned offer armed resistance, they sall be subject to the death penalty". The regulations also provided: "Those persons, who violate any other oath, shall be subject to a maximum of ten years imprisonment." This latter provision is explained by still another article in the regulations as follows, "Before a commandant of a prisoner of war camp dispatches prisoners of war (i.e. sends prisoners of war to work details or to work camps from the prisoner of war camp), he shall endeavor to prevent escapes and unexpected disturbances, investigating thoroughly the characters, mental attitudes, past histories, as well as the abilities of the prisoners of war, and in addition he shall administer a solemn oath on other matters of importance." ITAGAKI, as Commander of the Korean Army, informed War Minister TOJO by a message dated 4 September 1942, that he intended to force all prisoners of war, including officers and warrant officers under his jurisdiction to work; as he put it, "Not one prisoner of war must be left to time in idleness". He stated that one of the regulations he had issued was that "It is important to guard against destruction by the prisoners of war; if necessary, make them give an oath and establish severe penalties." On 1 September 1942, TOJO received a message from the Commander of the Formosa Army that "399 prisoners of war, including "Lt. General Percival, 6 Major-Generals, or Rear Admirals 27 Brigadier-Generals, or Commodores, 25 Colonels, or Navy Captains, 130 officers of the rank of Lt. Colonel, or Commander or below, and 210 non-commissioned officer together with 6 civil officials, who had been transferred from the Tomi group, were interned on 31 August 1942 in the Formosa Prisoner of War Camp. At first Lt. General Percival and others refused to

make an oath, but finally all but three (1 Brigadier-General, 1 Navy Captain and 1 Engineering Lieutenant) signed their names."

This system of regulations issued and enforced by the Japanese Government to compel prisoners of war and civilian internees by duress to give an oath not to escape and not to violate other regulations and orders of the Japanese Government violated the general laws of war. The system was devised, instituted and maintained as part of the policy of the Japanese Government in disregard and violation of the laws of war.

EXCESSIVE AND UNLAWFUL PUNISHMENT WAS IMPOSED

TOJO, in his instructions to chiefs of prisoner of war and civilian internee camps told those officials to tighten their control over their subordinates and to supervise the prisoners rigidly: he said, "It is necessary to put them under strict discipline." He repeated this charge in his instructions to the Commander of the Zentsuji Division on 30 May 1942, when he said: "Prisoners of war must be placed under strict discipline as far as it does not contravene the law of humanity. It is necessary to take care not to be obsessed with the mistaken idea of humanitarianism or swayed by personal feelings towards those prisoners of war which may grow in the long time of their imprisonment."

The Geneva Prisoner of War Convention of 1929 provided with respect to punishment of prisoners of war for offenses committed while they were prisoners: "Any corporal punishment, any imprisonment in quarters without daylight, and, in general any form whatever of cruelty is forbidden", and "Collective punishment for individual acts is also forbidden." Other important limitations upon punishments that might be inflicted upon prisoners of war were included. All of them were designed to insure humane treatment of the prisoners. One of these limitations was contained in a provision of the Convention which dealt with escapes and attempts to escape; that provision reads: "Escaped prisoners of war who are retaken before being able to rejoin their own army or to leave the territory occupied by the army which captured them shall be liable only to disciplinary punishment. After an attempt or accomplished escape, the comrades of the person escaping who assisted in the escape may incur only disciplinary punishment on this account. Arrest is the most severe summary punishment which may be imposed on a prisoner of war. The duration of a single punishment may not exceed 30 days." In this connection disciplinary punishment and summary punishment were used as synonymous terms. It was also provided that "Attempted escape, even if it is not a first offense, shall not be considered as an aggravating circumstance in case the prisoner of war should be given over to the courts on account of crimes or offenses against persons or property committed in the course of that attempt".

That the Japanese truly understood the Convention is shown by their objection in 1934 to its ratification. They said that under the Convention "Prisoners of war could not be so severely punished as Japanese soldiers and this would involve a revision of Japanese Military and Naval Disciplinary Codes to put them on an equal footing, a revision which was undesirable in the

interests of discipline". The real objection to the ratification of the Convention was that the Military desired to avoid any express commitments which would hinder their policy of ill-treatment of prisoners of war.

Early in the Pacific War and after the Japanese Government had given its promise to apply the provisions of the Convention to Allied prisoners of war and civilian internees, ordinances and regulations were made contrary to that promise. In 1943, this regulation was published: "In case a prisoner of war is guilty of an act of insubordination, he shall be subject to imprisonment or arrest; and any other measures deemed necessary for the purpose of discipline may be added". Under this regulation, corporal punishment as well as torture and mass punishment was administered. It was common practice in all areas in which prisoner of war and civilian internee camps were located to inflict corporal punishment for the slightest offence or for no offence. This punishment in its mildest forms was beating and kicking the victim. The victim if he became unconscious was often revived with cold water or by other means, only to have the process repeated. Thousands died as a result of this punishment. In some cases death was hastened by weakness due to starvation and disease. Other forms of cruel punishments frequently employed were: exposing the victim to the hot tropical sun for long hours without headdress or other protection; suspension of the victim by his arms in such a manner as at times to force the arms from their sockets; binding the victim where he would be attacked by insects; confining the victim in a cramped cage for days without food; confining the victim in an underground cell without food, light or fresh air for weeks; and forcing the victim to kneel on sharp objects in a cramped position for long periods of time.

In direct defiance of the rules of war mass punishments were commonly employed as punishment for individual acts, especially when the Japanese were unable to discover the offender. The usual form of mass punishment was to force all members of the group involved to assume a strained position such as sitting with the legs folded under the body and the hands on the knees with the palm turned upward, or kneeling, and to remain in that position during daylight hours for days. Other forms of mass punishment were also employed such as that used at Havelock Road Camp in Malaya where the prisoners were forced to run in a circle without shoes over broken glass while being spurred on by Japanese soldiers who beat them with rifle butts. On 9 March 1943 an ordinance was issued providing the death penalty, or life imprisonment, or confinement for ten years or more for a number of offences; the novel feature of this ordinance was that in the case of each offence it provided for the death penalty or other severe penalty to be imposed upon the so-called "leader" of any group action resulting in the commission of the offence named and the same punishment, or a slightly less severe penalty, for all others who might be involved. Under this ordinance, mass punishment was often inflicted upon groups of prisoners of war or civilian internees for what at the most amounted to no more than an individual act. This ordinance also provided the death penalty for "prisoners of war who defy or disobey the orders of persons supervising, guarding, or escorting them"; it also provided

imprisonment for five years for "prisoners of war who privately or publicly insult persons supervising, guarding or escorting them." This is an example, of which there are a number, where the Japanese Government departed from its undertaking in respect of the Geneva Convention by altering its laws concerning prisoners of war.

During the Pacific War, contrary to its undertaking already referred to, the Japanese Prisoner of War regulations were amended to permit an escaping prisoner to be punished in the same way as a deserter from the Japanese Army. The ordinance of 9 March 1943 contained the following provision: "The leader of a group of persons, who have acted together in effecting an escape, shall be subject to either death or to hard labor or to imprisonment for life or for a minimum of ten years. The other persons involved shall be subject to either the death penalty, or to hard labor or to imprisonment for life or for a minimum of one year." This provision taken together with the regulations governing paroles not to escape, which prisoners of war were forced to give, constituted the regulations governing escapes which were enforced in all camps. These regulations were in direct violation of international law and, as we have just pointed out, were contrary to the Convention which Japan had promised to apply. Under these regulations, the death penalty was imposed almost without exception upon all prisoners who attempted to escape or escaped and were recaptured. Also, under these regulations, those comrades who assisted a prisoner to escape were also punished, frequently by the death penalty. In some camps, the prisoners were divided into groups and the practice was to kill all members of the group if one member attempted to escape or was successful in escaping. Even the formality of a trial was dispensed with in many instances. The death penalty is proved to have been imposed for attempt to escape. . . .

PRISONERS OF WAR HUMILIATED

The Japanese maintained a policy of submitting allied prisoners of war to violence, insults and public humiliation to impress other peoples of Asia with the superiority of the Japanese race.

On 4 March 1942, Vice-Minister of War KIMURA received a telegram from the Chief-of-Staff of the Korean Army, of which ITAGAKI was Commander, stating that: "As it would be very effective in stamping out the respect and admiration of the Korean people for Britain and America, and also in establishing in them a strong faith in victory, and as the Governor-General and the Army are both strongly desirous of it, we wish you would intern 1,000 British and 1,000 American prisoners of war in Korea. We wish you would give us special consideration regarding this matter." The Governor-General of Korea at that time was MINAMI. On 5 March 1942, KIMURA replied that about 1,000 white prisoners of war were to be sent to Fusan, Korea. On 23 March 1942, ITAGAKI sent a message to War Minister TOJO informing him of the plans to use the prisoners of war for psychological purposes; he said: "It is our purpose by interning American and British prisoners of war in Korea to make the Koreans realize positively the true might of our Empire as well as to contribute to psychological propaganda work for stamping out any ideas of

worship of Europe and America which the greater part of Korea still retains at bottom". ITAGAKI went on to say that the first camp would be located at Seoul, Korea, in the abandoned Iwamura Silk Reeling Warehouse; his former plan to confine the prisoners in the theological school in Fusan having been abandoned when KIMURA objected that those buildings were too good for prisoners of war. Among the main points of his plan, ITAGAKI stated that the prisoners of war would be used on various works in the principal cities of Korea, especially where psychological conditions were not good, in order to achieve his purpose stated at the beginning of his message; and that the equipment of the camps would be cut to a minimum and that the internment, supervision and guarding of the prisoners would be carried out so as to leave nothing to be desired in the accomplishment of the purpose for which the prisoners of war were being transported to Korea.

On 2 April 1942, the Chief-of-Staff of the Army in Formosa informed the Prisoners of War Information Bureau that he planned to use prisoners of war not only for labor to increase production for war but also "as material for education and guidance."

Thus was applied the plan to use prisoners in violation of the laws of war as pro-Japanese propaganda. On 6 May 1942, the Vice-Minister of War informed the Chief-of-Staff of the Formosa Army that "white prisoners of war will be confined successively in Korea, Formosa, and Manchuria". He added, "for the purpose of control and security it is planned to assign special units organized of Koreans and Formosans". The psychological effect was to be attained by allowing Koreans and Formosans to take part in the plan to submit Allied prisoners of war to insult and public curiosity!

On 16 May 1942, Vice Minister of War KIMURA notified the Commander-in-Chief of the Southern Area Army, whose headquarters were at Singapore, that between May and August the white prisoners of war at Singapore should be handed over to the Formosan and Korean Armies.

. The white prisoners of war were handed over and sent to Korea. About 1,000 prisoners captured in the fighting in Malaya arrived in Korea and were marched through the streets of Seoul, Fusan, and Jinsen where they were paraded before 120,000 Koreans and 57,000 Japanese. These prisoners had previously been subjected to malnutrition, ill-treatment and neglect so that their physical condition would elicit contempt from those who saw them. ITAGAKI's Chief-of-Staff in reporting to KIMURA on what he considered the great success of this demonstration of Japanese superiority quoted a Korean bystander who had remarked: "When we look at their frail and unsteady appearance, it is no wonder that they lost to the Japanese forces"; he also quoted another Korean bystander who remarked: "When I saw young Korean soldiers, members of the Imperial Army, guarding the prisoners, I shed tears of joy!" ITAGAKI's Chief-of-Staff concluded his message with the observation that, "As a whole, it seems that the idea was very successful in driving all admiration for the British out of the Koreans' minds and in driving into them an understanding of the situation."

As far away as in Moulmein, in Burma, this practice of parading prisoners

of war was followed. In February 1944, 25 Allied prisoners of war were paraded through the streets of that city. They were in an emaciated condition and were forced to carry notices in Burmese, falsely stating that they had been recently captured on the Arakan front. They were ridiculed and held up to contempt by a Japanese officer who accompanied the parade.

THE SYSTEM

Certain changes made regarding the enforcement of the laws of war and the administration of prisoners of war and civilian internees by Japan after the outbreak of the Pacific War were nominal only; they did not secure the enforcement of the laws of war. The attitude of the Japanese Government toward the enforcement of the laws of war, as demonstrated in its prosecution of the China War, did not really change with the commencement of the Pacific War. Certain changes in governmental organizations and methods of procedure were made, but no real effort was made to secure the enforcement of the laws of war. In fact, as has been shown in the Regulations affecting attempts to escape, changes were made which enjoined the commission of grave breaches of the laws of war. During the China War no special agency had been created by the Japanese Government for the administration of prisoners of war and civilian internees and no Prisoner of War Information Bureau was maintained as required by The Hague and Geneva Conventions. MUTO said that "the question of whether Chinese captives would be treated as prisoners of war or not was quite a problem, and it was finally decided in 1938 that because the Chinese conflict was officially known as an 'incident' although it was really a war that Chinese captives would not be regarded as prisoners of war." TOJO said that this was true; and that after the commencement of hostilities in the Pacific War, he considered that Japan was bound to abide by The Hague and Geneva Conventions; and for that reason, he caused a Prisoner of War Information Bureau to be created. This statement by TOJO that he considered that Japan was bound to abide by The Hague and Geneva Conventions in the prosecution of the Pacific War must be interpreted in the light of his statement made during a meeting of the Investigation Committee of the Privy Council on 18 August 1943. He then said: "International Law should be interpreted from the view point of executing the war according to our own opinions." This idea was the basis upon which the policy of the Japanese Government for its treatment of prisoners of war and civilian internees was developed.

JAPAN AGREED TO APPLY THE GENEVA CONVENTION, 1929

The Secretary of the State of the United States directed the American Legation in Switzerland, on 18 December 1941, to request the Government of Switzerland to inform the Japanese Government that the Government of the United States intended to abide by the Geneva Prisoner of War Convention and the Geneva Red Cross Convention, both of which had been signed on 27 July 1929, that it further intended to extend and apply the provisions of the Geneva Prisoner of War Convention to any civilian enemy aliens that it might intern, that it hoped that the Japanese Government would apply the

provisions of these conventions reciprocally as indicated, and that the Government of the United States would appreciate an expression of intention by the Japanese Government in that respect. The inquiry was delivered to the Japanese Foreign Minister TOGO on 27 December 1941 by the Minister for Switzerland.

The Governments of Great Britain and the Dominions of Canada, Australia and New Zealand also inquired through the Argentine Ambassador in Tokyo on 3 January 1942. In that inquiry, those Governments said that they would observe the terms of the Geneva Prisoner of War Convention of 1929 towards Japan and asked if the Japanese Government was prepared to make a similar declaration.

On 5 January 1942, the Argentine Ambassador delivered another note on behalf of Great Britain, Canada, Australia and New Zealand, proposing that in the application of Articles 11 and 12 of the Convention relative to the provision of food and clothing to prisoners, both parties take into consideration the national and racial customs of the prisoners.

Upon receipt of these inquiries, TOGO called upon the War Ministry, Navy Ministry, Ministry for Home Affairs and Ministry of Overseas Affairs for their opinion. At that time TOJO was concurrently Prime Minister and War Minister; MUTO was Chief of the Military Affairs Bureau of the War Ministry; SATO was MUTO's assistant in the Military Affairs Bureau, KIMURA was Vice-Minister of War; SHIMADA was Navy Minister; OKA was Chief of the Naval Affairs Bureau in the Naval Ministry; and KOSHINO was Chief Secretary of the Cabinet.

TOGO was concerned for the safety of the Japanese living in Allied countries and for that reason desired to give a favourable answer to the inquiries and so instructed the Bureau of Treaties, pointing out that the fate of Japanese residents, amounting to several hundred thousands, in the enemy countries would be affected by the treatment by Japan of the prisoners of war and civilian internees who might be in her power. The War Ministry agreed with TOGO. On 23 January 1942, KIMURA told TOGO: "In view of the fact that the Geneva Convention relating to prisoners of war was not ratified by His Majesty, we can hardly announce our observance of the same. But it would be safe to notify the world that we have no objection to acting in accordance with the Convention in the treatment of prisoners of war. As regards providing prisoners of war with food and clothing, we have no objection to giving due consideration to the national or racial habits and customs of the prisoners."

TOGO answered the America and British inquiries on 29 January 1942. His note to the Government of the United States reads as follows: "Japan strictly observes the Geneva Convention of July 27, 1929, relative to the Red Cross, as a signatory of that Convention. The Imperial Government has not yet ratified the Convention relating to treatment of prisoners of war of 27 July 1929. It is therefore not bound by the said Convention. Nevertheless it will apply 'mutatis mutandis' the provisions of that Convention to American prisoners of war in its power." The note addressed to the Governments of

Great Britain, Canada, Australia and New Zealand on the same date was as follows: "The Imperial Government has not ratified the agreement concerning the treatment of prisoners of war dated 27 July 1929, and therefore, it would not be bound to any extent by the said agreement, but would apply 'mutatis mutandis' the provisions of the said agreement toward the British, Canadian, Australian and New Zealand prisoners of war under Japanese control. The Imperial Government would consider the national and racial manners and customs under reciprocal conditions when supplying clothing and provisions to prisoners of war." The same assurances were given to the other allied powers.

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Taking note of the assurance TOGO had addressed the British countries on 29 January 1942 that Japan would take into consideration the national and racial customs of the prisoners of war in supplying them with clothing and provisions, the United States addressed another inquiry on that subject. That inquiry was dated 20 February 1942 and stated that the Government of the United States would be bound by the same provisions for prisoners of war as for civilian internees in conformity with Articles 11 and 12 of the Geneva Convention and expected in consequence that the Japanese Government would equally conform to those provisions in the treatment of prisoners of war and civilian internees. TOGO answered this inquiry on 2 March 1942 in the following manner: "The Imperial Government intends to take into consideration, with regard to provisions and clothing to be distributed, the racial and national customs of American prisoners of war and civilian internees placed under Japanese power."

This exchange of assurances constituted a solemn agreement binding the Government of Japan as well as the Governments of the other combatants to apply the provisions of the Geneva Prisoner of War Convention of 27 July 1929 to prisoners of war and civilian internees alike, to take into consideration the national and racial customs of those prisoners and internees when supplying them with food and clothing as required by that Convention and not to force internees to work. The agreement provided that the Convention was to be applied in a spirit of reciprocity, that is to say equally by both sides, each performing in kind and in return for that done by the other. The only exceptions to this rule established by the agreement were such as might be justified under the reservation "*mutatis mutandis*". That the agreement did not allow an exception to be made by reason of conflict with the municipal law of Japan is plain upon construction and is shown by TOGO's testimony as follows: "The inquiries from the United States and Britain were therefore referred in the normal course by the Foreign Ministry Treaty Bureau, which managed such matters, to the War Ministry, as the ministry empowered to decide the question. The answer which came back was that we should undertake to apply the terms of the Geneva Convention '*mutatis mutandis*', and it was therefore so replied to the Governments inquiring.

"Athough the prosecution seems to consider that by the giving of this answer Japan became bound by the Convention to the same extent as if she

had ratified it, I assumed (and still assume) that we were binding ourselves only to apply the Convention so far as *circumstances permitted. 'Mutatis mutandis'*, then, I supposed to imply that in the absence of serious hindrances the Convention would be applied; I assumed also (although this was only assumption on my part) that where the requirements of the Convention came into conflict with the provisions of domestic law the former would prevail." The Director of the Bureau of Treaties, who conducted the conferences with the other Ministries regarding the answer to be given the Allied inquiries, further confirmed this.

Although when it was made the members of the TOJO Cabinet intended that the Allied Powers should understand the agreement as we have interpreted it, they did not abide by the agreement. Instead it was used as a means to secure good treatment for Japanese who might become prisoners of war or be interned by the Allied Powers. When Vice-Minister KIMURA answered TOGO's request for his opinion regarding the answer to be made to the Allied inquiries, he said that "it would be safe to notify the world" that Japan would observe the Convention, but he prefaced that statement with the remark that the Government could hardly afford to announce an intention to observe the Convention in view of the fact that the Emperor had not ratified it. The successive Japanese governments did not enforce the Convention, for although the Ministers of State considered these assurances to the Allies to be a promise to perform new and additional duties for the benefit of prisoners of war and internees, they never issued any new orders or instructions to their officers in charge of prisoners of war and internees to carry this new promise into execution and never set up any system which secured performance of the promise. Instead of making an effort to perform this agreement they made efforts to conceal from the Allies their guilty non-performance by denying access to the prisoners of war and internee camps; by limiting the length, contents and number of letters which a prisoner or internee might mail; by suppressing all news regarding such prisoners and internees; and by neglecting to answer or by making false answers to protests and inquiries addressed to them regarding the treatment of prisoners and internees.

Reference has been made in an earlier part of this judgment to the effect of the various conventions in relation to the treatment of prisoner of war and civilian internees and to the obligations of belligerents in that respect. Whatever view may be taken of the assurance or undertaking of the Japanese Government to comply with the Geneva Prisoner of War Convention "*mutatis mutandis*" the fact remains that under the customary rules of war, acknowledged by all civilized nations, all prisoners of war and civilian internees must be given humane treatment. It is the grossly inhumane treatment by the Japanese military forces as referred to in this part of the judgment that is particularly reprehensible and criminal. A person guilty of such inhumanities cannot escape punishment on the plea that he or his government is not bound by any particular convention. The general principles of the law exist independently of the said conventions. The

conventions merely reaffirm the pre-existing law and prescribe detailed provisions for its application.

As to the effect of the undertaking by the Japanese Government to observe the convention *"mutatis mutandis"*, counsel for the Defence submitted *inter alia* that the insufficiency of food and medical supplies in many of the instances established was due to disorganization and lack of transport facilities resulting from the Allied offensives. Whatever merit that argument has in its narrow application it loses effect in face of the proof that the Allied Powers proposed to the Japanese Government that they should send, for distribution among prisoners of war and internees, the necessary supplies; which offer was refused by the Japanese Government.

It is not necessary to enter into a precise definition of the condition *"mutatis mutandis"* for at no stage in the defence was anything said or even suggested to the effect that these words justified the atrocities and other grossly inhumane acts of Japanese forces nor was it argued that these words could justify the looting, pillaging and arson which has been clearly established. On those points the accused who gave evidence, for the most part, did no more than plead complete ignorance of the happenings deposed to.

Any interpretation placed on the condition which attempted to justify the atrocities would amount to nothing more than a submission that by the insertion of the words *"mutatis mutandis"* the Japanese military forces would be permitted with impunity to behave with gross barbarity under the guise of complying with a convention which prescribed humane treatment as its cardinal principle. Such a submission could not be accepted.

ILL-TREATMENT OF PRISONERS OF WAR A POLICY

The Japanese Government signed and ratified the Fourth Hague Convention of 1907 Respecting the Laws and Customs of War on Land, which provided for humane treatment of prisoners of war and condemned treacherous and inhumane conduct of war. The reason for the failure of the Japanese Government to ratify and enforce the Geneva Prisoner of War Convention which it signed at Geneva in 1929 is to be found in the fundamental training of the Japanese Soldier. Long before the beginning of the period covered by the Indictment, the young men of Japan had been taught that "The greatest honor is to die for the Emperor," a precept which we find ARAKI repeating in his speeches and propaganda motion pictures. An additional precept was taught that it is an ignominy to surrender to the enemy.

The combined effect of these two precepts was to inculcate in the Japanese soldier a spirit of contempt for Allied soldiers who surrendered, which, in defiance of the rules of war, was demonstrated in their ill-treatment of prisoners. In this spirit they made no distinction between the soldier who fought honorably and courageously up to an inevitable surrender and the soldier who surrendered without a fight. All enemy soldiers who surrendered under any circumstance were to be regarded as being disgraced and entitled to live only by the tolerance of their captors.

Ratification and enforcement of the Geneva Convention of 1929 it was thought would involve abandonment of this view of the Military. The Convention had been signed by the Japanese Plenipotentiaries at Geneva in 1929; but when the Convention came up for ratification in 1934, both the Japanese Army and Navy petitioned against ratification, and by that time they had sufficient political power to prevent ratification. They gave as some of their reasons for resisting ratification, that the obligations imposed by the Convention were unilateral, that the Convention imposed new and additional burdens on Japan, but that Japan could not gain anything by ratifying it, for no Japanese soldier would ever surrender to the enemy.

In this connection it is interesting to note that TOJO giving instructions to chiefs of prisoner of war camps said: "In Japan we have our own ideology concerning prisoners of war, which should naturally make their treatment more or less different from that in Europe and America."

JAPANESE PURPOSE WAS TO PROTECT JAPANESE NATIONALS

The decision to create a Prisoner of War Information Bureau was prompted by an inquiry from the International Red Cross in Geneva, which was forwarded to the War Ministry from the Foreign Ministry on 12 December 1941. The International Red Cross had telegraphed the Japanese Foreign Ministry that in view of the fact that the war had extended to the Pacific its Committee had placed the services of the Central Prisoner of War Bureau at the disposal of the belligerent States and inquiring whether the Japanese Government was disposed to exchange by the intermediary of the Central Bureau of Geneva lists of information on prisoners of war and in so far as possible on civilian internees. Conferences were held by the officials in the War Ministry; and on 28 December 1941, Vice-Minister of War KIMURA informed Foreign Minister TOGO that the War Ministry was ready to exchange information, but that "it is not that we 'declare that we are prepared to apply in practice' the provisions of the Prisoner of War Convention of 1929, but that we 'utilize them for the convenience of transmission of information.'" By 12 January 1942, the International Red Cross had received replies from Japan and the United States declaring that they were ready to proceed with the transmission of information.

* * * * *

ALLIED PROTESTS

Formal and informal protests and warnings against violations of the laws of war lodged by the Allied Powers and the Protecting Power during the Pacific War were ignored; or when they were answered, the commission of the offenses was denied, or untruthful explanations were given.

The procedure followed in Tokyo was described to us as follows: Formal protests from the Allied Powers and the Protecting Power were regularly delivered to the Foreign Ministry. The Foreign Ministry then circulated copies of these protests to the Ministries and Bureaux of the Japanese Government concerned. All protests concerning matters under the jurisdiction of the War Ministry and the Prisoner of War Information Bureau were first delivered to the Secretariat of the War Ministry. The Secretariat

forwarded the protests to the Military Affairs Section of the Military Affairs Bureau. MUTO was Chief of this bureau from 30 September 1939 to 20 April 1942. SATO was Chief of this Section from 15 July 1938 until he replaced MUTO as Chief as the Military Affairs Bureau in 1942. SATO served as Chief of the Military Affairs Bureau until 14 December 1944. The Military Affairs Section discussed the protest with the various sections of the Military Affairs Bureau concerned, such as the Prisoner of War Administration Section or the Prisoner of War Information Bureau. The protest was then taken up and discussed at the bi-weekly meetings of the Bureaux Chiefs of the War Ministry which were usually attended by the War Minister and Vice-Minister of War. At these meetings, it was decided whether a reply would be made to the protest and the nature of the reply to be made. The Director of the Prisoner of War Administration Section, who was also the Director of the Prisoner of War Information Bureau, attended these discussions and received orders on important matters direct from the War Minister and the Vice-Minister; he furnished copies of the protests and the replies to be made thereto to the Prisoner of War Information Bureau for filing. This was the practice even when the copies of the protests were addressed to the War Minister or the Prisoner of War Information Bureau.

In addition to formal protests, radio broadcasts were regularly made over Allied stations detailing the atrocities and other violations of the laws of war being committed by the Japanese armed forces and warning the Japanese Government that it would be held responsible for these offenses. These broadcasts were monitored by the Japanese Foreign Ministry and distributed to all ministries, bureaux and officials concerned. Lord Keeper of the Privy Seal KIDO recorded in his diary on 19 March 1942 that: "The Imperial Household Minister came to the office and told me about Eden's address in Parliament concerning our soldiers' atrocities at Hong Kong, and we exchanged opinions."

The formal protests delivered were too numerous for detailed mention here. In general, it may be said that these protests related to the violations of the laws of war which we have mentioned as well as to many others. In each case, specific and detailed facts were stated which permitted complete investigation. The same thing may be said of the protests and warnings delivered over the radio.

We will mention here, by way of illustration only, some of those protests and warnings. As early as 14 February 1942, the United States Government delivered a note through the Swiss Government stating that it had received reports that the Japanese authorities in the occupied areas of the Philippines were subjecting American civilians to an extremely rigid and harsh regime involving abuse and humiliation and that the American Government desired assurances that immediate steps had been taken to remedy the situation and to accord to Americans in the Philippines moderate treatment similar to that being extended to Japanese nationals in the territories of the United States. Foreign Minister TOGO replied on 24 February 1942 that, "conditions applied to American Nationals in the Philippines by the Japanese authorities

are more favorable than contemplated by the Geneva Convention of 1929." This statement was false. He denied that American nationals were being subjected to unfavorable treatment and said that the "Apprehensions of the American Government were based on unknown sources and cited no exact facts and therefore were without foundation."

On 12 December 1942, the United States Government delivered another formal protest. It stated that it had learned of gross ill-treatment suffered by American civilians and prisoners of war in violation of the commitment of the Japanese Government to apply the provisions of the Geneva Prisoner of War Convention of 1929 to American prisoners of war and, in so far as they might be applicable, to civilian internees. The United States stated that it was evident that Japan had failed to fulfill its undertaking and that some Japanese officers and agencies had violated the principles of the Convention not only by positive ill-treatment but by failure to provide for those American nationals the necessities of life. The United States then lodged an emphatic protest and stated that it expected this inhumane and uncivilized treatment of American prisoners of war and civilian internees to be made a matter of immediate investigation, that it expected those responsible to be disciplined immediately, and that it expected an assurance that ill-treatment of prisoners of war and civilian internees would be discontinued. Specific instances were cited, giving dates and other facts to support this protest. No reply was made to this protest until 28 May 1943, when Foreign Minister SHIGEMITSU replied that an investigation was being made and that he would communicate "in due course" when the results of the investigation were known.

In the meantime, on 5 April 1943, the United States had filed another protest against the ill-treatment of the Doolittle fliers. The United States Government warned: "The American Government also solemnly warns the Japanese Government that for any other violations of its undertaking as regards American prisoners of war or for any other acts of criminal barbarity inflicted upon American prisoners in violation of the laws of warfare, accepted and practiced by civilized nations, as military operations now in progress draw to their inexorable and inevitable conclusion, the American Government will visit upon the officers of the Japanese Government responsible for such uncivilized and inhumane acts the punishment they deserve."

A large number of specific protests was lodged by the United States with Foreign Minister SHIGEMITSU before he finally answered, on 24 April 1944, the protest of the United States which had been made on 12 December 1942. In that reply, he indicated that the investigation, which he had mentioned in his Note of 28 May 1943, had been completed, and that he had a report thereon. He accused the Government of the United States of "distorting and exaggerating the facts" and rejected the protests; he went to great length to set out what he claimed to be the facts as disclosed by the so-called investigation. The United States replied to this accusation on 1 March 1945 by a note reading: "The United States Government cannot accept a statement by the Japanese Government impugning its veracity. The United

States Government's protest concerning treatment accorded by Japanese authorities to American nationals in Japan and Japanese occupied territory is based on documentary evidence, which cannot be refuted in such an arbitrary fashion by the Japanese Government. The statements contained in the Japanese Government's reply of 24 April 1944 are so far removed from the facts as known to the United States Government that it can only conclude that the Japanese Government has permitted itself to be misled by fabricated reports of local officials and had not made an independent investigation of the matters protested in the United States Government's Note of 12 December 1942. The United States Government therefore considers the reply unsatisfactory and will continue to hold the Japanese Government answerable."

British protests were treated in the same fashion as those from the Government of the United States. An illustration is afforded by the protests and answer regarding the treatment of prisoners of war in Rangoon Gaol. On 8 July 1942, the British Government caused a protest to be delivered to Foreign Minister TOGO in which it was stated that a photograph had appeared in the Japan Times and Advertiser, a newspaper published in Tokyo, which showed British prisoners of war cleaning the streets of Rangoon under the amused eyes of the public. The protest was renewed on 1 August 1942. On 15 September 1942, the British Government further protested that the prisoners in Rangoon Gaol were furnished insufficient rations, that they were forced to sleep on the bare floors of the prison and that their boots had been confiscated. TOJO acted as Foreign Minister from 1 September 1942 to 17 September 1942; and while occupying that office received a Note calling his attention to the foregoing protests. On 9 February 1943, Foreign Minister Tani, who had replaced TOJO as Foreign Minister replied, "the competent authorities have stated after having made a full inquiry that the facts stated in said letters never happened."

The protests of the British Government against the treatment of British prisoners of war in Burma and Siam received similar treatment. The British Government protested on 4 July 1944 in a Note delivered to SHIGEMITSU that it had learned from postcards printed by the Japanese authorities that about twenty thousand British prisoners of war had been transferred to the vicinity of Moulmein without notification. It also protested against the unfavorable conditions and ill-treatment to which these prisoners were subjected. SHIGEMITSU replied on 26 August 1944 that the "majority of British and Allied prisoners of war, who were in Burma on July 1944 were prisoners who had been attached to camps in Thailand and Malaya and had been provisionally transferred to Burma." SHIGEMITSU replied on 3 October 1944 to further protests from the British Government relative to the health of prisoners laboring in Burma and Siam. In that reply he said: "The Imperial Government, by exercising great vigilance as to the health and hygiene of prisoners of war, takes added measures, such as monthly medical examination of each prisoner of war camp, to enable sickness to be treated in the first stage." He then detailed the medical aid which he claimed had been

given to the prisoners on the Burma-Siam Railway. The facts stated were entirely false as the prisoners had not received medical attention and had been dying by thousands from beri-beri, cholera, malaria and other tropical diseases. The true facts were learned when the Rakuyo Maru was torpedoed and sunk in the South China Sea on 12 September 1944. There had been 1300 prisoners of war aboard that unmarked Japanese prison ship. The Japanese picked up the Japanese survivors, but deliberately left the prisoners to their fate. Approximately 100 Australian and United Kingdom survivors were later rescued and taken to Australia and Great Britain. From these prisoners it was learned that all available prisoners of war in Singapore and Java were moved early in 1942 to Burma and Thailand to work on the Burma-Siam Railway project. We have already described the conditions under which they traveled and the terrible conditions during the construction of the railway. SHIGEMITSU was informed of the facts learned from these rescued prisoners of war in a Note from the British Government dated 4 December 1944, renewing the British protests. Forced at last to reply, TOGO, who had succeeded SHIGEMITSU as Foreign Minister, made a belated reply to these protests on 15 May 1945. He said that it was regretted that the situation was such that "the concerted efforts of all the sanitary services of the Japanese troops cannot prevent the spread of diseases of the digestive system, etc." He denied that atrocities had been committed by Japanese troops in Burma and as to the protest against the parading of British prisoners of war in Moulmein, which we have mentioned, he gave the conventional Japanese answer that it "never happened".

In addition to the disregard shown these formal protests, the many protests and warnings given over the radio were completely ignored although these had been regularly recorded in the Japanese Foreign Office and distributed to the various ministries. On 24 January 1944, a report from the United States Government giving the details and results of the Bataan March was broadcast over the British Broadcasting Corporation's network and recorded in the Japanese Foreign Office. Again on 29 Janaury 1944 radio station KWID at San Francisco, California, broadcast White House Secretary Stephen Early's disclosure that the Japanese would not permit the United States Government to send food and supplies to United States and Filipino prisoners. Early said, "The time has come for releasing the factual reports which have been carefully investigated and authenticated because we cannot expect to get further relief to our prisoners now in the hands of the Japansese." This broadcast was recorded in the Japanese Foreign Office. KWID again broadcast on 29 January 1944 statements by United States Secretary of State Cordell Hull and British Foreign Secretary Anthony Eden. Mr. Hull in speaking of the treatment of prisoners of war in Japanese hands stated: "According to the reports of cruelty and inhumanity, it would be necessary to summon the representatives of all the demons available anywhere and combine their fiendishness with all that is bloody in order to describe the conduct of those who inflicted those unthinkable atrocities on the Americans and Filipinos."

The vigor of this language was fully justified by the evidence given before the Tribunal. Mr. Eden had stated before the House of Commons that British protests had drawn unsatisfactory results from Japan. He said that the Japanese were violating not only international law but all human, decent civilized conduct. He warned the Japanese Government that in times to come the record of their military atrocities in the war would not be forgotten. Mr. Hull had closed his statement with the remark that the United States Government was assembling all possible facts concerning Japanese treatment of prisoners of war and that it intended to seek full punishment of the responsible Japanese authorities. General MacArthur's General Headquarters issued a warning on 22 October 1944 to the Japanese Commander of the 7th Area Army at Singapore, who had jurisdiction over the Philippine Islands as well as a large segment of the Pacific Area. General MacArthur warned that he would hold the enemy leaders immediately responsible for any failure to accord prisoners of war and civilian internees proper treatment. He said that although the Americans and Filipinos who surrendered in the Philippines believed they would be treated with the dignity, honor and protection to which prisoners of war were entitled under the laws of war, unimpeachable evidence had been received of the degradation and even brutality to which they had been subjected in violation of the most sacred code of martial honor. All of these broadcasts were recorded in the Japanese Foreign Office and given a wide circulation among the Japanese Ministries.

ILL-TREATMENT OF PRISONERS OF WAR AND CIVILIAN INTERNEES AS CONDONED AND CONCEALED

The Japanese Government condoned ill-treatment of prisoners of war and civilian internees by failing and neglecting to punish those guilty of ill-treating them or by prescribing trifling and inadequate penalties for the offence. That Government also attempted to conceal the ill-treatment and murder of prisoners and internees by prohibiting the representatives of the Protecting Power from visiting camps, by restricting such visits as were allowed, by refusing to forward to the Protecting Power complete lists of prisoners taken and civilians interned, by censoring news relating to prisoners and internees, and ordering the destruction of all incriminating documents at the time of the surrender of Japan.

The following are examples of inadequate sentences imposed for ill-treatment of prisoners. For flogging, the punishment imposed was admonition or a few days confinement in quarters or a few days extra duty. A guard guilty of torturing prisoners of war was admonished. A guard who was guilty of frequently lynching prisoners of war was admonished. Several guards were found guilty of lynching prisoners of war; the most severe punishment imposed was discharge. The penalty imposed on the officer responsible for the burning alive of 62 Allied fliers during an air raid on the Tokyo Army Prison was an admonition. These cases are evidence that the War Ministry knew there was ill-treatment of prisoners. The trifling nature of the punishments imposed implies condonation.

The Government actively concealed the ill-treatment to which prisoners of war and civilian internees were being subjected by refusing visits by representatives of the Protecting Power designated by the Allies. The Swiss Minister in Toyko, as early as 12 February 1942, delivered a note to Foreign Minister TOGO in which he said: "I have the honor to bring to the knowledge of Your Excellency that the Government of the United States is prepared to facilitate, at the request of the representative of the Protecting Power, their visits to Japanese subjects who are temporarily detained, interned, or at liberty on parole. I would be greatly obliged to Your Excellency if you would facilitate in part the task of my Legation as far as it concerns visits to internees." He delivered another note to Foreign Minister TOGO on 17 February 1942 in which he said: "The Government of the United States of America has already informed the Spanish Ambassador, protecting Japanese interests in the United States, that he is at liberty to visit prisoner of war camps as well as places where civilian internees are detained. The Government of the United States requests, in conformity with the Geneva Prisoner of War Convention, that the Swiss representatives in Japan and in the territories occupied by Japanese forces be authorized as soon as possible to commence their visits of inspection to places where American citizens, who are prisoners of war or civilian internees, are located." He delivered other notes to TOGO in March and June 1942 repeating those requests. During June 1942 he requested the same permission to visit the subjects of Great Britain and the Dominions, who were detained as prisoners or internees. TOGO at last replied to these requests on 30 July 1942 by a note in which he said: "I desire to inform Your Excellency that the Imperial Government having in principle refused to recognize the representation of any interests in the occupied territories comprising the Philippine Islands, Hong Kong, Malaya and the Netherlands East Indies, it follows that permission cannot be given to your delegates to visit American prisoners of war and civilian internees in the above-mentioned territories; but that in respect of Shanghai only, in occupied China, the competent authorities can give this permission." The Governments of the United States and Great Britain protested immediately and renewed their requests. The correspondence between the Swiss Minister and Foreign Minister Tani, who succeeded TOGO, reflects that this policy of refusing permission to visit prisoners and internees detained in the occupied territories and in Japan's overseas possessions was continued. The Swiss Minister continued to press for permission, however; and on 22 April 1943, SHIGEMITSU, who had become Foreign Minister, delivered a Note Verbal to the Swiss Minister in which he said: "As the Foreign Minister has communicated to the Swiss Minister by Note dated 20 July 1942, the Imperial Government shall not permit visits to prisoners of war and civilian internee camps in occupied territories." Although the Swiss Minister had been informed by Foreign Minister TOGO that representatives of the Protecting Power would be allowed to visit camps at Shanghai, the visits were not made because the so-called "competent authorities", to which TOGO referred the Swiss Minister, refused to give permission for the visits

and the permission was not forthcoming from the TOJO Cabinet in Tokyo. SHIGEMITSU was informed of this in a note from the Swiss Minister dated 12 May 1943. In response to these persistent and repeated requests from the Swiss Government for permission to visit prisoners of war and civilian internees, a few selected camps, which had been prepared for the occasion, were allowed to be visited in Japan. The Swiss Minister, on 2 June 1943 requested permission for SHIGEMITSU to visit the remaining camps in Japan as well as the camps in the occupied territories, and inquired when a second visit might be made to the camps which had been visited in Japan. Foreign Minister SHIGEMITSU replied on 23 July 1943 and said: "As regards prisoners of war camps in the occupied areas, a notification will be made to Your Excellency if the time comes when permission can be granted; and as regards prisoners of war camps in Japan proper, which have not yet been visited, permission will be granted gradually at a favorable opportunity. Permission for periodic visits to those camps, that have already been visited, shall not be granted in advance; but in case a visit is desired, consideration will be given to applications made on all such occasions." However, consideration was not given to these applications; and on 12 February 1944, the Swiss Minister complained to SHIGEMITSU that no reply had been made to requests to visit detention camps between August 1943 and February 1944. This complaint was repeated in a note to SHIGEMITSU on 30 March 1944, in which the Swiss Minister said: "You know that I am not satisfied with my activities as representative of foreign interests in Japan. The results do not correspond to the efforts. I can see this in a concrete fashion as shown by the statistics of my services and requests which have been made by my Government at the request of the Governments who have confided their interests in us. I desire to confine myself for the moment to my requests to visit prisoner of war camps. Reviewing my requests made over more than two years, I find that from 1 February 1942 to 15 March 1944, I have intervened 134 times in writing. These 134 notes have brought exactly 24 replies from the Foreign Ministry.' Most of these replies are either negative or forward to me decisions made by competent authorities. I have received three replies in nine months." It was not until 13 November 1944 that he was notified by SHIGEMITSU's Foreign Ministry that the time had come when permission could be granted to visit prisoners of war and internees in the occupied territories; and then the visits were limited to Manila, Shonan and Bangkok. In a note addressed to the Swiss Minister in Tokyo on 17 November 1944, SHIGEMITSU informed the Swiss Minister that visits would be allowed to prisoner of war camps in the occupied territories on condition of reciprocity if they did not interfere with military operations. The Swiss Minister in a note dated 13 January 1945, asked SHIGEMITSU when these visits could be commenced. It was not until 7 April 1945, that TOGO, who had succeeded SHIGEMITSU as Foreign Minister, replied to the many urgent requests to visit detention camps in the occupied territories. In that reply, TOGO stated that Japan "would lose no time" in making preparations for visits in Thailand. By the use of one excuse

or another, visits were never freely allowed throughout the war.

In the few cases where the representatives of the Protecting Power were allowed to visit detention camps, the camps were prepared for the visit, and the visits were strictly supervised. Regulations issued by the TOJO Cabinet early in the Pacific War provided that when an interview with a prisoner of war was authorized restrictions regarding the time and place of the interview and the range within which the conversation was to be conducted would be imposed and that a guard would be present during the interview. These regulations were enforced notwithstanding the repeated objections of the Protecting Power. In a note to the Swiss Minister, dated 22 April 1943, SHIGEMITSU said: "The Imperial Government shall not allow delegates of the Protecting Power to interview prisoners of war without the presence of a guard." The Swiss Minister protested and SHIGEMITSU replied on 24 June 1943: "The Ministry hastens to inform the Legation that Article 13 of our country's detailed regulations stipulates that a guard shall be present when prisoners of war are interviewed, and that it is not possible to modify our treatment of prisoners of war practiced in conformity with the said Article." After a visit to the prisoner of war camp at Motoyama in Japan in the spring of 1943, the senior prisoner at the camp, who had dared to complain of the working conditions to which the prisoners had been subjected, was tortured. He was forced to kneel for five hours before a Japanese guard. The next time this camp was visited, this senior prisoner was placed in confinement and was not allowed to speak to the representative although that representative demanded to interview him.

The fate of prisoners of war and civilian internees was further concealed by refusal to forward to the Protecting Power a list of the names of prisoners of war and civilian internees detained. An example of the refusal to supply such lists is the case of the prisoners of war and civilian internees detained after the capture of Wake Island. The Swiss Minister on 27 May 1942 requested of TOGO the names of the prisoners of war and civilian internees captured on Wake Island and their present whereabouts. On 6 October 1942, the Swiss Minister informed the Foreign Minister, then Tani, that the United States Government was still without report on approximately 400 American civilians who were on Wake Island at the time of its capture. On 8 April 1943, the list not having been furnished, the Swiss Minister informed Foreign Minister Tani that the United States Government was insisting upon being furnished the names and location of the remaining 400. Foreign Minister Tani replied on 19 April 1943 that all information to be furnished had already been given. On 21 August 1943, the Swiss Minister furnished the new Foreign Minister SHIGEMITSU a list of 432 American civilians who should have been on Wake Island at the time of its occupation by the Japanese forces, but whose names were not found on the lists furnished to the International Red Cross Bureau by the Japanese, and requested information regarding those civilians. On 15 May 1945, the Swiss Minister informed Foreign Minister, now TOGO, that no answer had been received to the request for information regarding the remaining 432 civilians from Wake Island. The information was

not obtained until after the surrender of Japan. In truth, all these unfortunate people were murdered by the Japanese Navy in October 1943.

News reports and mail were specially censored, no doubt to prevent disclosure of the ill-treatment to which prisoners of war were being subjected. Censorship regulations issued by the Information Bureau of the War Ministry on 20 December 1943, while TOJO was War Minister, provided among other things the following: "Care should be taken to avoid issuing twisted reports of our fair attitude which might give the enemy food for evil propaganda and bring harm to our interned brothers. For this reason, any reports including photographs, pictures, etc., which come under the following categories are prohibited: Anything that gives the impression that prisoners of war are too well treated or are cruelly treated; any concrete information concerning facilities, supplies, sanitary conditions, or other matters pertaining to living conditions within prisoner of war camps; any information giving the names of any location of prisoner of war camps other than the following:" Then followed twelve general names such as Tokyo, Korea, Borneo, etc. The mail which prisoners of war were allowed to send was restricted almost to the point of prohibition. Prisoners in some camps, such as those at Singapore, were told by their guards that unless they reported favorably on conditions at the camp their cards would not be sent. This appears to have been the general rule.

When it became apparent that Japan would be forced to surrender, an organized effort was made to burn or otherwise destroy all documents and other evidence of ill-treatment of prisoners of war and civilian internees. The Japanese Minister of War issued an order on 14 August 1945 to all Army headquarters that confidential documents should be destroyed by fire immediately. On the same day, the Commandant of the Kempeitai sent out instructions to the various Kempeitai Headquarters detailing the methods of burning large quantities of documents efficiently. The Chief of the Prisoner of War Camps under the Prisoner of War Administration Section of the Military Affairs Bureau sent a circular telegram to the Chief-of-Staff of the Formosan Army on 20 August 1945 in which he said: "Documents which would be unfavorable for us in the hands of the enemy are to be treated in the same way as secret documents and destroyed when finished with." . . . .

. . . . It was in this telegram that the Chief of Prisoner of War Camps made this statement: "Personnel who ill-treated prisoners of war and internees or who are held in extremely bad sentiment by them are permitted to take care of it by immediately transferring or by fleeing without trace."

DOCUMENT NO. 102

AGREEMENT FOR THE EXCHANGE OF PRISONERS OF WAR BETWEEN THE COMMANDER-IN-CHIEF, PAKISTAN ARMY, AND THE COMMANDER-IN-CHIEF, INDIAN ARMY (15 January 1949)

SOURCE

U.N. Doc. S/1430/Add. 1, Annex 47

NOTE

This was the military implementation of the agreement on a cease fire which ended the earliest hostilities between Indian and Pakistan. These hostilities, which began immediately after partition, had numerous causes, one of which was the dispute with respect to sovereignty over Jammu and Kashmir, a dispute which still remains unsettled. The agreement between the two commanders-in-chief was reached at a meeting of the Inter-Dominion Commanders-in-Chief Conference held in India on 15 January 1949. It is particularly interesting, and rather unusual, for two reasons: (1) because of the step-by-step procedure in the exchange of prisoners of war, first man for man, then all who remain; and (2) because of the specific designation of the different categories of military status to be included in the exchange. (For agreements with respect to prisoners of war reached by these two countries after subsequent hostilities between them, see DOCUMENT NO. 164, DOCUMENT NO. 167, and DOCUMENT NO. 172.)

EXTRACT

5. EXCHANGE OF PRISONERS

It was decided that all prisoners of war should be exchanged as soon as it was possible. Commander-in-Chief, Pakistan Army, will exchange regular and State Force troops man for man for similar Pakistan troops and *Azad* forces in Indian Army hands. When all raiders and Pathans who were at present in civil custody in India were ready to be exchanged the remainder of the Indian Regular and State Force troops in Attock camp will be exchanged for them. *There will be no question of man for man in this last exchange.* DMO Pakistan pointed out that owing to climatic conditions it would not be possible at this juncture to repatriate prisoners of war at present in *Gilgit* and at *Skardu*. Pakistan Army, however, undertook to make the best arrangements it could to make these prisoners comfortable until it was possible to repatriate them to India.

DOCUMENT NO. 103

GENERAL ARMISTICE AGREEMENTS BETWEEN ISRAEL AND EGYPT, LEBANON, JORDAN, AND SYRIA, RESPECTIVELY (1949)

SOURCES

EGYPT: U.N. Doc. S/1264, Corr. 1, 11 March 1949
LEBANON: U.N. Doc. S/1296, Rev. 1, 8 April 1949
JORDAN: U.N. Doc. S/1302/Rev. 1, 20 June 1949
SYRIA: U.N. Doc. S/1353/Rev. 1, 20 July 1949
1 American Foreign Policy, 1950-1953 at 698, 707, 712, and 719

NOTE

This was the series of general armistice agreements which ended the first armed conflict (1947-1949) between the new State of Israel and its Arab neighbors, a conflict which really began even before the British had announced their intention to terminate their mandate over, and to withdraw from, Palestine in April 1948. Although there were many charges and countercharges of maltreatment of prisoners of war made by each of the belligerents in each of their armed conflicts (1947-1949; 1956; 1967; and 1973), there was an immediate major exchange of prisoners of war shortly after the cessation of hostilities on each occasion.

EXTRACTS

EGYPT (signed at Rhodes, 24 February 1949):

Article IX

All prisoners of war detained by either Party to this Agreement and belonging to the armed forces, regular or irregular, of the other Party shall be exchanged as follows:

1. The exchange of prisoners of war shall be under United Nations supervision and control throughout. The exchange shall begin within ten days after the signing of this Agreement and shall be completed not later than twenty-one days following. Upon the signing of this Agreement, the Chairman of the Mixed Armistice Commission established in Article X of this Agreement, in consultation with the appropriate military authorities of the Parties, shall formulate a plan for the exchange of prisoners of war within the above period, defining the date and places of exchange and all other relevant details.

2. Prisoners of war against whom a penal prosecution may be pending, as well as those sentenced for crime or other offense, shall be included in this exchange of prisoners.

3. All articles of personal use, valuables, letters, documents, identification marks, and other personal effects of whatever nature, belonging to prisoners of war who are being exchanged, shall be returned to them, or, if they have escaped or died, to the Party to whose armed forces they belonged.

4. All matters not specifically regulated in this Agreement shall be decided

in accordance with the principles laid down in the International Convention relating to the Treatment of Prisoners of War, signed at Geneva on 27 July 1929.

5. The Mixed Armistice Commission established in Article X of this Agreement shall assume responsibility for locating missing persons, whether military or civilian, within the areas controlled by each Party, to facilitate their expeditious exchange. Each Party undertakes to extend to the Commission full co-operation and assistance in the discharge of this function.

LEBANON (signed at Ras En Naqoura, 23 March 1949):

Article VI

All prisoners of war detained by either Party to this Agreement and belonging to the armed forces, regular or irregular, of the other Party, shall be exchanged as follows:

1. The exchange of prisoners of war shall be under United Nations supervision and control throughout. The exchange shall take place at Ras En Naqoura within twenty-four hours of the signing of this Agreement.

2. Prisoners of war against whom a penal prosecution may be pending, as well as those sentenced for crime or other offence, shall be included in this exchange of prisoners.

3. All articles of personal use, valuables, letters, documents, identification marks, and other personal effects of whatever nature, belonging to prisoners of war who are being exchanged, shall be returned to them, or, if they have escaped or died, to the Party to whose armed forces they belonged.

4. All matters not specifically regulated in this Agreement shall be decided in accordance with the principles laid down in the International Convention relating to the Treatment of Prisoners of War, signed at Geneva on 27 July 1929.

5. The Mixed Armistice Commission established in Article X of this Agreement shall assume responsibility for locating missing persons, whether military or civilian, within the areas controlled by each Party, to facilitate their expeditious exchange. Each Party undertakes to extend to the Commission full co-operation and assistance in the discharge of this function.

JORDAN (signed at Rhodes, 3 April 1959):

Article X

An exchange of prisoners of war having been effected by special arrangement between the Parties prior to the signing of this Agreement, no further arrangements on this matter are required except that the Mixed Armistice Commission shall undertake to re-examine whether there may be any prisoners of war belonging to either Party which were not included in the previous exchange. In the event that prisoners of war shall be found to exist, the Mixed Armistice Commission shall arrange for an early exchange of such prisoners. The Parties to this Agreement undertake to afford full co-operation to the Mixed Armistice Commission in its discharge of this responsibility.

SYRIA (signed at Hill 232, 20 July 1949):

Article VI

All prisoners of war detained by either Party to this Agreement and belonging to the armed forces, regular or irregular, of the other Party, shall be exchanged as follows:

1. The exchange of prisoners of war shall be under United Nations supervision and control throughout. The exchange shall take place at the site of the Armistice Conference within twenty-four hours of the signing of this Agreement.

2. Prisoners of war against whom a penal prosecution may be pending, as well as those sentenced for crime or other offence, shall be included in this exchange of prisoners.

3. All articles of personal use, valuables, letters, documents, identification marks, and other personal effects of whatever nature, belonging to prisoners of war who are being exchanged, shall be returned to them, or, if they have escaped or died, to the Party to whose armed forces they belonged.

4. All matters not specifically regulated in this Agreement shall be decided in accordance with the principles laid down in the International Convention relating to the Treatment of Prisoners of War, signed at Geneva on 27 July 1929.

5. The Mixed Armistice Commission established in article VII of this Agreement shall assume responsibility for locating missing persons, whether military or civilian, within the areas controlled by each Party, to facilitate their expeditious exchange. Each Party undertakes to extend to the Commission full co-operation and assistance in the discharge of this function.

DOCUMENT NO. 104

U.S. v. ERNST von WEIZSAECKER ET AL (THE MINISTRIES CASE) (Case No. 11, U.S. Military Tribunal, Nuremberg, 11-13 April 1949)

SOURCE
14 TWC 308

NOTE

This case is probably unique in that although the indictment charged that the accused had "participated . . . [in] the commission of war crimes, particularly in atrocities and offenses against prisoners of war," their participation actually consisted for the most part of attempting to conceal violations of the law of war committed by various agencies of the Nazi government, primarily by misstating the facts to the Protecting Powers. (Concerning the use of this same technique by the Japanese, see DOCUMENT NO. 101 under the rubric "Allied Protests.") In effect, the Tribunal held that the accused were guilty of war crimes where "through diplomatic distortion, denial, and fabricated justification, the offenses and atrocities were concealed from the Protecting Powers."

EXTRACTS

COUNT THREE — WAR CRIMES, MURDER, AND ILL-TREATMENT OF BELLIGERENTS AND PRISONERS OF WAR

Count three charges the defendants von Weizsaecker, Steengracht von Mayland, Ritter, Woermann, Lammers, Dietrich, and Berger with the commission of war crimes, in that they participated, were principals in, accessories to, ordered, abetted, and took a consenting part, and were connected with plans and enterprises involving, and were members of organizations and groups connected with the commission of war crimes, particularly in atrocities and offenses against prisoners of war and members of the armed forces then at war with the Third Reich, or which were under belligerent control of or military occupation by Germany, including, murder, ill-treatment, enslavement, brutalities, cruelties, and other inhumane acts; that prisoners of war and belligerents were starved, lynched, branded, shackled, tortured, and murdered in flagrant violation of the laws and customs of war, and through diplomatic distortion, denial, and fabricated justification, the offenses and atrocities were concealed from the Protecting Powers; that included in the crimes thus mentioned were the following incidents:

a. A policy whereby the civilian population of Germany was urged to lynch English, American, and other Allied fliers who had been forced by military operations to land in Germany, and that those not so lynched were upon capture to be classified as criminals and turned over to the SD for "special treatment," which meant execution, thus circumventing the intervention of

Protecting Powers, and as a result of this policy American, English, and other Allied fliers were lynched by the German civilian population, or murdered by the SD;

b. The murder of Allied commando units, even though they had surrendered, and informing the Protective [*sic*] Powers through diplomatic channels that these troops had been killed "in combat";

c. The murder of 50 fliers of the British Royal Air Force who had been captured after escaping from a prisoner-of-war camp;

d. The murder of the French General, Mesny, who was a prisoner of war;

e. Forced marches of American and Allied prisoners of war in severe weather without adequate rest, shelter, food, clothing, and medical supplies, resulting in great privation and death to many thousands of prisoners.

* * * * *

DIETRICH

The indictment charges that Dietrich issued a directive that all newspapers were to withhold from publication any mention of the lynching of Allied fliers who bailed out over Germany. The only evidence offered against him is a Tagesparole (daily press directive) issued by him as the Reich press chief on 28 December 1943 which reads as follows (*NG — 3327, Pros. Ex. 1225*):

> "(2) The further material on hand regarding the cynical utterances of our enemies on the air war is to be emphasized with full force, thus underlining once again England's responsibility for terror methods in the conduct of war. In so doing, the case of the American Murder Corporation is to be brought up once again as proof.
>
> "Explanation to (2) * * *. In connection with the material already on hand on this subject — among other things a new congratulatory message of Churchill's for the Anglo-American terror fliers has been published — it must be established that the war criminal Churchill will one day receive his punishment for his historical guilt. *In commenting, it must furthermore be observed that nothing must be mentioned on the subject of reprisals on our part, or of retaliation.*" [Emphasis supplied.]

Whether or not the portion underlined [*italicized*] was a part of the Daily Parole, as ordered, suggested, or approved by Dietrich, or was appended by someone else is, in our opinion, immaterial. The phrase is open to several constructions.

(1) That public clamor was not to be aroused to demanding such reprisals and retaliations, or

(2) That although acts of reprisal and retaliation had occurred or were to be indulged in, the press should keep silent on the subject, or

(3) That a final decision had not been made whether or not such acts should be encouraged.

It is significant that although Himmler on 10 August 1943 ordered that the chiefs of the regular and security police and the Gauleiter be informed that "it is not the task of the police to interfere in clashes between Germans and English and American terror fliers who have bailed out," the program of lynching does not appear at that time to have been clearly defined, or to have

received official encouragement, and that the latter did not occur until the early months of 1944. There is no evidence either that Dietrich had knowledge of Himmler's secret order, knowledge of any previous or prospective lynching of Allied fliers, or that the comment in the Daily Parole had any connection with it.

The evidence against Dietrich is insufficient and inconclusive, and he must be acquitted on count three.

RITTER

The defendant Ritter's alleged participation in the murder of bailed-out Allied fliers arises from his position as Foreign Office liaison representative with the Wehrmacht. He received Keitel's top secret letter of 15 June 1944, in which the latter stated that for the publication of those cases of capture by the armed forces or the police for special treatment, that is murder by the SD, it was necessary to clearly determine what facts should be regarded as evidence of the criminal action, and established the following, which was to serve also as an instruction to the commander of the reception camp for aviators at Oberursel, namely (*730—PS. Pros. Ex. 1233*)—

"* * * where an investigation disclosed that it would be indicated to separate the offender, * * * or to hand him over to the SD:

"(1) Strafing civilians, either individuals or crowds;

"(2) Firing on German air crews while suspended in parachutes after having been shot down;

"(3) Strafing regular passenger trains;

"(4) Strafing military hospitals, hospitals, and hospital trains which are clearly marked with the Red Cross."

Keitel stated that inasmuch as in drafting publications of such actions, protests on the part of the enemy were to be expected, and it was intended that in agreement with the Secret Police, the SD, and the Ob. d. L. (commander in chief, Luftwaffe) until further notice, prior to each publication, agreement should be reached between the OKL West, the Foreign Office, and the SD as to the facts, time, and form of announcement.

The Foreign Office was requested to confirm, before 18 June, its agreement with the definition and with the intended procedure.

On 18 June Ritter telephoned the office of the Supreme Command, stating that the opinion of the Foreign Office could not be made known before the night of the 19th, as Ritter would have to check with Berlin. On 25 June he submitted to the Supreme Command of the Armed Forces a draft of reply which had been submitted to but not yet approved by von Ribbentrop who would be absent for several days.

The draft stated that in spite of obvious objections founded on international law and foreign politics, the Foreign Office was in basic agreement with the proposed measure; that in the examination of the individual cases, a distinction must be made between cases of lynching and "special treatment" by the SD; that "in cases of lynch law" no Germany agency could be directly responible, because death would have occurred before the agency was concerned in the matter, and the circumstances would be of such a general nature that it

would not be difficult to present the case in a suitable manner when published; that as to "special treatment" by the SD, subsequent publications would be tenable if Germany took this opportunity to declare itself free from the obligations imposed by international agreement which it there still recognized; that when an enemy airman had been captured by the armed forces, or the police, and delivered to a prisoner-of-war camp, he thereby acquired the legal status of a prisoner of war, and the Geneva Prisoner-of-War Convention of 27 July 1929 applied; that any attempt to disguise an individual case by clever wording of publication would be hopeless; that the Foreign Office was unable to recommend a formal repudiation of the Geneva Convention; that an emergency solution would be to prevent the suspected fliers from ever attaining the status of prisoners of war by informing them immediately that they were not regarded as prisoners of war, but as criminals, and delivering them, not to the prisoner-of-war camp, but to authorities competent for the prosecution of criminal acts to be tried by special summary procedure established *ad hoc;* that if, during these proceedings, special circumstances are revealed disclosing that this procedure was not applicable to the particular airman, individual cases might be subsequently transferred to the legal status of prisoners of war and sent to the reception camp.

The memorandum further stated that naturally, even this expedient would not prevent Germany from being accused of violating treaties, nor constitute a safeguard against reprisals upon German prisoners of war, but the proposal would relieve Germany of openly renouncing international agreements or, in individual cases, making excuses which no one would believe; that the alleged offenses under items 2 and 3 of the proposed definition were not legally objectionable, but the Foreign Office would be willing to disregard the fact. Finally, the memorandum stated, that the main weight would have to be placed on lynchings and should the campaign be carried out to such an extent that the purpose of deterring enemy fliers was actually achieved, then the strafing attacks by enemy fliers must be exploited for propaganda purposes in a more definite manner than heretofore, if not for home publicity, then certainly for the propaganda effect abroad.

On 29 June Ritter advised General Warlimont of the OKW Operations Staff that the Minister of Foreign Affairs had approved the draft but ordered his liaison officer assigned to the Fuehrer headquarters to present to Hitler the Foreign Office's attitude before the letter was sent to the chief of the Supreme Command of the Armed Forces, and that Hitler's approval of the principles established by the Foreign Office must be obtained.

On 4 July Hitler issued a directive that notice be served by radio and the press that every enemy agent shot down while participating in attacks against small localities without war economic or military value was not entitled to treatment as a prisoner of war, but would be killed as soon as he falls into German hands, but that nothing was to be done at the moment, and the measures of this sort were only to be discussed with the legal section of the OKW and with the Foreign Office.

Tribunal V in Case 12 [DOCUMENT NO. 100], based on contemporaneous

captured documents, found that this program was actually carried out and that the chief of the OKW issued an order stating that it had recently happened that soldiers had protected English and American terror fliers from the civilian population, thus causing justified resentment, and directing that soldiers should not counteract the civilian population in such cases by claiming that enemy fliers be handed over to them as prisoners of war and by protecting them; thus ostensibly siding with the enemy terror fliers.

We have considered Ritter's explanation that the letter from the OKW of 15 June should not have been channeled through him but should have been sent directly to the Foreign Office, and that he did not prepare the Foreign Office reply of 25 June which he transmitted to the chief of the OKW, and that his typewritten signature thereto was due to a mistake of his stenographer's which he corrected by striking a line through it and writing at the head of it the word, "draft." An examination of the document reveals that the typewritten signature is so erased and that the word "draft" is so inserted in longhand. The draft, however, discloses that it was prepared in his office, and bears one of his file numbers. The absence of any of the usual Foreign Office symbols indicating the section or Referat which prepared the draft is significant.

Members of the armed forces of any nation who violate the rules of war are subject to trial and punishment by enemy military authorities either during or after hostilities. Here, however, both the procedures and methods proposed by the Wehrmacht and the Foreign Office were contrary to and in violation of the Hague Rules of Land Warfare. It was the duty of Germany to protect captured soldiers and airmen of the enemy against lynch law. Where a captured enemy is suspected or charged with violation of the rules of war, he has the right to be tried in accordance with those rules. The proposals of the Wehrmacht and of the Foreign Office violated these rights.

We do not regard Ritter as a mere messenger boy. He was selected to occupy a position of considerable delicacy, requiring knowledge and experience. While he did not originate this policy of murder, he implemented it, and although he played a comparatively minor part, it is one which involves criminal responsibility on his part.

We therefore find him guilty under count three with respect to this incident.

Having learned of the execution, near Egersund, Norway, of British fliers who had crash-landed in Norway, the British Government, through the Protecting Power, Switzerland, inquired as to whether or not the reports regarding the matter were true, and if so, whether such action on the part of the German armed forces was based on some order or instruction of the German High Command, calling attention to the fact that such an act would be in violation of the rights of prisoners of war under international law. Before the receipt of the Swiss inquiry, the Foreign Office learned that a protest was about to be made, having monitored a message from the British Government to its Embassy in Switzerland. Ritter testifies that he was informed by von Ribbentrop that a representative of the OKW would visit

him and give him written information with respect to the incident, discuss it with him, and that thereafter Ritter should report to von Ribbentrop.

Apparently, before Ritter discussed the matter with the OKW it had been submitted to Hitler. The memorandum of 10 May 1943 issued by the OKW Operations Staff, states (*NG—2572, Pros. Ex. 1221*):

> "In the event that a protest should be received by the German Government from the Protecting Power, the Fuehrer wishes the reply to be in the following sense."

It was handed to Ritter personally on 11 May by Major Kipp, who had instructions to submit the document, together with certain secret orders of 18 and 19 October 1942 and a summary of the Egersund incident.

This proposed reply was a clear evasion of the inquiry. It states: first, that enemy soldiers in uniform carrying out tasks of an obviously military nature would be treated in accordance with the Geneva Convention, and second, that enemy soldiers dropped behind German lines for "treacherous sabotage purposes" and who, judging from their appearance are not in regular uniform. or wear civilian clothing, or are equipped with treacherous weapons, will, as publicly announced, be slaughtered in combat without pardon.

Ritter made several suggested changes in the draft, the most important of which is as follows (*NG—2572, Pros. Ex. 1221*):

> "However, members of the enemy powers who infiltrate behind the fighting front in order to commit insidious sabotage acts and carry out such acts by using treacherously concealed weapons, or are in civilian clothes, or in any other unsoldierly manner, are not to be treated as soldiers, but slaughtered without pardon."

Thus, the words "in combat" were deleted. He submitted this to the OKW on 17 May 1943, and General Warlimont suggested that the words "camouflage clothing" be used instead of "civilian clothing," and noted that the words "in combat" were missing. Ritter informed the OKW that in the event of its approval he intended to submit the draft to von Ribbentrop who was not yet informed of the reply planned by Ritter, and who would submit it to Hitler for his approval before dispatch. The OKW on 20 May informed Ritter that the omission of the words "in combat" might cause difficulties, and Ritter agreed to draw von Ribbentrop's special attention to this.

On 24 May Ritter informed the OKW that its request for amendment had been complied with, and furthermore that the words "in combat" had been added; that Hitler, after verbal report by von Ribbentrop, had approved the note as amended. On 25 May Ritter wrote the OKW enclosing a copy of the approved draft, and it was accordingly dispatched by the Foreign Office under teletype instructions given by Ritter in von Ribbentrop's name.

Ritter explains that when Major Kipp called on him with the Commando Order of 18 October 1942 he protested that it (the Commando Order) was a monstrosity and a violation of international law and of humanity, that Kipp agreed with him, stating that this was also the view of the OKW, but that nothing could be done because it was a Fuehrer order; that he, Ritter, deleted

from the draft of the reply the words "in combat" because it was not the truth; that inasmuch as in the Egersund case the British soldiers had surrendered, he assented to its reinsertion because the proposed reply did not answer the British inquiry as to whether the executions had taken place, but merely their second inquiry as to whether it had been an order or instruction of the German High Command. He further insists that when he reported to von Ribbentrop he urged him to endeavor to persuade Hitler to withdraw the Commando Order, and that von Ribbentrop agreed to talk to Hitler about it. He asserts that he did not know of the secret Commando Order itself until he received a copy of it from Major Kipp in May 1943, although he had probably heard the OKW radio announcement of 7 October 1942.

The prosecution does not contend that Ritter had any part in the issuance of the Commando Order or knew of its existence prior to May 1943. It clearly appears that the unfortunate British soldiers had been murdered in cold blood by the military command in Norway months before Ritter had any knowledge. It cannot be said that he had any connection with either the order or the incident. It is likewise clear that he endeavored to have the lying words "in combat" removed from the reply. The facts do not establish guilt, and he is acquitted with respect to this incident.

BERGER

The indictment charges that the defendant Berger received a copy of the Bormann circular of 30 May 1944 regarding Allied fliers heretofore mentioned. It is not alleged and there is no evidence that he took any action with respect to it. Knowledge that a crime is proposed is not sufficient. A defendant may only be convicted because of acts he has committed or his failure to act when it was his duty to have done so. The evidence does not disclose that Berger had any duty to perform with respect to such matters.

The defendant Berger is therefore acquitted as to the charges of being a participant in the murder of Allied fliers who had bailed out over Germany.

The indictment charges that between September 1944 and May 1945, hundreds of thousands of American and Allied prisoners of war were compelled to undertake forced marches in severe weather without adequate rest, shelter, food, clothing, and medical supplies; that such forced marches, conducted under the authority of the defendant Berger, chief of Prisoner-of-War Affairs, resulted in great privation and deaths to many thousands of prisoners.

The preamble of the Geneva Prisoner-of-War Convention of 27 July 1929 recites:

> "* * * recognizing that in extreme case of war it will be the duty of every power to diminish as far as possible the inevitable rigors thereof and to mitigate the state of prisoners of war * * * have decided to conclude a Convention to that end * * *."

Article 2 of the Convention provides:

> "They [prisoners of war] must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity. Measures of reprisal against them are prohibited."

Article 7.

"Prisoners of war shall be evacuated within the shortest possible period after their capture, to depots located in a region far enough from the zone of combat for them to be out of danger. Only prisoners who, because of wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept in a dangerous zone.

* * * * *

"Evacuation of prisoners on foot may normally be effected only by stages of 20 kilometers daily unless the necessity of reaching water or food depots require longer stages."

The right of a belligerent to evacuate prisoners to avoid their release by enemy troops is unquestioned; the duty to remove them from combat and dangerous zones is clear. The first involves the right of the capturing power, and the second its obligation and responsibility toward the prisoners in order to mitigate their fate and to provide for their safety. However, the right to evacuate can only be exercised when it can be accomplished without subjecting evacuees to dangers and hardships substantially greater than would result if they were permitted to remain at the place of imprisonment, even if thus they might be rescued by the approaching enemy.

A belligerent may no more subject evacuees to mistreatment or hunger, or otherwise endanger their lives by means of forced marches, than he may rightfully do so under other circumstances. When such a situation is in prospect the right to evacuate ceases.

The duty to evacuate does not exist when dangers from evacuation are greater than those to be apprehended if the evacuation does not take place. The Geneva Convention requires evacuation in order to insure the safety of the prisoners. Where this objective is not attainable the duty to evacuate ceases.

The only affidavit submitted with respect to the northern evacuations by any prisoner involved in the forced marches is an affidavit by Thurston Hunter, an English prisoner of war, who deposes that he, with 800 British prisoners of war, was marched from Stalag XX—A, evidently near Thorn [Torun], Poland, to Lehrte, near Hannover, in northwestern Germany. The privation suffered and the mistreatment inflicted, as described in this affidavit, were extreme. However, the affidavit was received on the condition that the affiant be produced for cross-examination. This was not done, and no reason or excuse has been offered for the prosecution's failure so to do. There is no corroboration of the affiant from any other source, and under these circumstances the Tribunal does not feel justified in finding guilt upon this unsupported affidavit.

The evidence with regard to the marches from Silesia through Bohemia and Moravia into Bavaria, involving some 100,000 men, rests upon the testimony of Meurer, von Steuben, and Detmering. From the testimony it appears these prisoners had been previously held in Silesia and were marched from the vicinity of Neisse and from the neighborhood of Ratibor. With minor exceptions the whole mass of men was marched across the mountains of the

Protectorate in January and February, and thence into Bavaria, a distance of several hundred kilometers. The evacuations were occasioned by the rapid advance of the Russian armies. The original plan was to evacuate them in an orderly manner by rail toward the northwest. This became impractical inasmuch as one of the main rail lines was under enemy fire and the others were required for the passage of troops and supplies to the front. Protests against the march were made by General Detmering, prisoner-of-war commander for Military District VIII, because of the lack of means of transportation and accommodations, food, and the insufficiency of clothing in view of the below zero temperature.

Frank, the Governor of the Protectorate, together with the Plenipotentiary of the Wehrmacht in the Protectorate, and von Steuben, joined in this protest because of the fear of disturbances in the Czech population and the dangers of attempts to liberate the prisoners, and because there was not sufficient food supplies in the country through which they were to march. These protests were lodged with Colonel Meurer, Berger's chief of staff, and were communicated to the latter. Berger claims that he protested to Hitler but that he was without power or authority to countermand or avoid the order, and had no facilities, even if he had the power, to attempt any negotiations with the commanders of the Russian Army. He also insists that the large proportion of the Russian prisoners did not desire to be turned back to the Russian armies because of fear that they would be punished as traitors. He cites two instances where it is claimed that injured and sick Russians left in a camp under charge of German medical orderlies were, with the medical orderlies, murdered by the advancing Russians, and that news of this increased the fears of the remainder of the prisoners.

We find it to be true that the prisoners on this march suffered severe privations, both from the cold and from the lack of food and other necessary accommodations. According to the testimony of the witness von Steuben, the death of 200 prisoners was reported at one time, and Meurer admits that he knew and reported to Berger that some of the Russian prisoners had died of exhaustion. There is, however, no satisfactory evidence as to the actual losses thus sustained. No prisoner who was compelled to make the march was called as a witness. The state of the record is, therefore, unsatisfactory. Substantial casualties on protracted marches are not unusual even among well fed troops, and would undoubtedly be larger where the march is undertaken by prisoners of war who have long been in confinement, even though properly cared for during that period.

Berger's actions are not judged by after-acquired knowledge, but by what he then knew or had reason to believe, and the conditions with which he was then faced. That a state of emergency existed is quite clear. German rail communications at that period of the war, and particularly in the East, were greatly disrupted. That the Russian advance was extraordinarily rapid, and that the German front in the East was rapidly dissolving is likewise well known. We find that he had a choice of two alternatives: either to leave the prisoners to the Russian Army, or to evacuate them by the march in question.

If he left them, for a time at least, they were bound to be in a zone of active military operations and subjected to extreme danger.

We do not hold that they would have suffered if they fell in the hands of the Russian armed forces, although the prosecution has offered no evidence to the contrary. It is sufficient if Berger honestly believed, even though it may have been unfounded, that the prisoners were in as great, if not greater danger, if left in their camps as those to be encountered by marching. There is no evidence to contradict his testimony in this respect. The uncontradicted evidence is that, to the best of his ability, food, clothing, medical care were furnished the prisoners, inadequate though this was. We may have justified suspicion as to parts of his story, but suspicion does not take the place of evidence, and certainly does not constitute proof of guilt beyond reasonable doubt.

For the foregoing reasons we find that the charge against Berger in this respect is not proved, and he must, therefore be acquitted.

* * * * *

STEENGRACHT VON MOYLAND

* * * * *

Sagan murders. — The International Military Tribunal found:

> "In March 1944 fifty officers of the British Royal Air Force who escaped from the camp at Sagan where they were confined as prisonars, were shot on recapture on direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It is not contended by the defendants that this was other than plain murder, in complete violation of international law."

Switzerland, the Protective [*sic*] Power, on 26 May 1944, made inquiry of the German Foreign Office in regard to the escape of these British officers from Stalag Luft III. On 6 June the defendant Steengracht von Moyland, for the Foreign Office, answered that a preliminary note was submitted to the Swiss Legation on 17 April concerning the escape which took place on 25 March, stating that according to the investigation nineteen of the eighty prisoners of war who had escaped were taken back to the camp; that the hunt still continued and investigations had not been concluded; that there were preliminary reports that thirty-seven British prisoners of war were shot down when they were brought to bay by the pursuing detachment and when they offered resistance or attempted escape anew after recapture; and thirteen other prisoners of war of non-British nationality were shot after having escaped from the same camp; that the Foreign Office reserved the right to make a definite detailed statement after the conclusion of the investigation, and as soon as details were known, but that the following could be said: that mass escapes of prisoners of war occurred in March, amounting to several thousands; that they in part were systematically prepared by the general staffs in conjunction with agents abroad and pursued political and military aims; were an attack on the public security of Germany; were intended to paralyze its administration, and in order to nip in the bud such ventures, especially severe orders were issued to the pursuit detachments

not only for recapture but also for protection of the detachments themselves; and accordingly, pursuit detachments launched a relentless pursuit of escaped prisoners of war who disregarded a challenge while in flight or offered resistance, or attempted to re-escape after having been captured, and made use of their arms until the fugitives were deprived of the possibility of resistance or further flight; that arms had to be used against some prisoners of war, including the fifty prisoners of war from Stalag Luft III; that the ashes of twenty-nine British prisoners of war have been brought to camp so far.

Apparently on 23 June the British Foreign Secretary made a declaration with respect to these murders. On 26 June the Swiss again made inquiry of the Foreign Office and received a reply dated 21 July that Germany emphatically rejected the British Foreign Secretary's declaration; that because of alleged bombings of civilian population and other alleged acts, Great Britain must be denied the moral right to take a stand in the matter of the escapees or to raise complaints against others, and the German Government declined to make further communications in the matter.

On 25 May Vogel on instructions from Ritter informed Legation Councillor Sethe that the Foreign Office had not yet received a copy of the communication of the OKW dated 29 April. On 4 June, Ritter informed the Foreign Office that the day before Keitel had agreed to the draft of the note to the Swiss Legation regarding British prisoners of war, and inquired why the Foreign Office wanted to inform the Protective [*sic*] Power of the funeral beforehand, as this information had not been requested. He also discussed the chaining of British officers who were being transported from one prison camp to another.

On 22 June von Thadden submitted a memorandum to the chief of Inland II that Anthony Eden had made a statement in the House of Commons that a decision would be made with respect to the shooting of British prisoners who escaped from prison camps, and that Albrecht, chief of the Foreign Office legal division, had advised him that the British had been informed via Switzerland that it had been found necessary to shoot several British and other officers in the course of such activities because of refusal to submit to orders when captured; that nineteen other officers who did not offer resistance were taken back to the camp, and that further details of the fifty cases of prisoners being shot would be submitted to the British.

On 17 July Brenner of the Foreign Office informed Ritter that Hitler agreed to the note to the Swiss delegation regarding the escapes from Stalag Luft III, and approved the drafting of a warning against attempts to escape and the publication of Germany's note to the Swiss Legation, and that this warning should be made public; that von Ribbentrop had ordered Ritter to transmit Germany's second reply to the Swiss envoy, and directed Ritter to cooperate with the OKW in composing the warning which was to be posted in the prisoner-of-war camps and to submit the same to von Ribbentrop for approval; that the warning could perhaps state that there were certain death zones where very special weapons were tested, and any person found in one of these zones would be shot on sight, and, as there are numerous such zones in Germany, escaping prisoners would expose themselves not only to the

danger of being mistaken for spies, but of unwittingly entering one of the zones and being shot.

Dr. Erich Albrecht, Ministerialdirigent in the Foreign Office, and head of its legal department, gave an affidavit relating to this matter, viz, deposing that around 25 May 1944 at von Ribbentrop's order he went to Salzburg and discussed the Sagan murders with von Ribbentrop and Ritter, at the conclusion of which he and Ritter were instructed to draft a reply note to the Swiss delegation on the basis of the material which had been made available by the RSHA; that later two officials of the criminal police appeared and submitted photostatic copies of teletype messages and reports from various police offices throughout Germany reporting that individuals or groups of prisoners of war from the Sagan camp had been shot while resisting recapture, or in renewed attempts to escape.

It was apparent to both Ritter and Albrecht that these teletype reports were fictitious — a fact which the police officials did not seriously dispute. Thereupn, according to Albrecht, after conference with Ritter he drafted a reply on the basis of this fictitious and false information, and Ritter submitted it to von Ribbentrop with the urgent advice, in which Albrecht concurred, that it be not sent.

Ritter confirmed this affidavit of Albrecht except to deny that he had anything to do with drafting or submitting the reply. However, Albrecht is Ritter's witness, for whom he vouches. Doubtless the affidavit was not prepared without thought or without conference with Ritter or his counsel before it was submitted to the Court, and the presence of this statement in the affidavit must represent Albrecht's recollection of the incident concerning the interview with the police officers and the conclusion that they had presented false reports, von Ribbentrop's instructions, and the action which Ritter took with respect thereto. The drafting of the reply and the conference with von Ribbentrop were important and dramatic incidents which would necessarily impress themselves upon one's memory, unless the Tribunal is to assume that the murder of prisoners of war was so commonplace an incident in the lives of both Albrecht and Ritter that no particular attention was paid to a single occurrence. This we do not believe to be the fact, and we accept and find the fact to be as the Albrecht affidavit deposes, viz, that after discussion with Ritter he composed the reply note, and they jointly submitted it to von Ribbentrop.

While it may be true that at an early stage Keitel had given orders not to inform the Foreign Office of the Sagan murders, and that the OKW's "provisional communication" of 29 April 1944 was not contemporaneously delivered to the Foreign Office, the fact remains that by 25 May 1944 Legation Councillor Sethe had examined and made a copy of it in the office of the High Command, so that when the note was drafted Ritter had full knowledge of the fact that escaped prisoners of war had been deliberately murdered by officers of the German Reich, in clear violation of international law and of the Geneva Convention.

Ritter joins in with Steengracht von Moyland in his statement that no

answer was made to the Swiss Government. This is not the fact. It clearly appears that not one but two answers were made to the Swiss, and that the first (6 June 1944) at least was delivered to the Swiss Minister in Berlin by Steengracht von Moyland himself. It was this note which Albrecht drafted and Ritter presented to von Ribbentrop.

Ritter further claims that he had no recollection of taking part in drafting and never saw the warning against the consequences of escape and the description of the so-called "death zone" where every unauthorized person would be shot on sight, which was to be posted in prisoner-of-war camps. This testimony of Ritter is obviously untrue.

Brenner's memorandum of 17 July relates to the second note and the warning, and states that Ritter had been directed by von Ribbentrop to cooperate with the OKW in composing the warning, and to submit it to the Foreign Minister for approval, and had made suggestions with respect to the wording of the "death zone" clause. It bears the notation, "Submitted, Ambassador Ritter,"

On 5 August 1944 Ritter wrote to Albrecht that the "enclosed version of a warning has now been approved by the Reich Minister for Foreign Affairs and the OKW;" that the OKW was then engaged in translating it, and when completed it would be given to the prisoner-of-war sections of the OKW for distribution to the camps; that "the Foreign Office has not yet communicated the warning to the Swiss Government, which must coincide with the time of the posting of the warning in the camps; the draft of the note to the Swiss was to be submitted to Ribbentrop for approval in advance, so that it could be dispatched as soon as possible after the warning has been posted."

On 21 July 1944 the Foreign Office delivered to the Swiss Government a second note stating that the Foreign Office refused to further communicate about the matter on the pretense of Eden's speech of 23 June in the House of Commons. This was an infantile proceeding which, of course, deceived no one.

It does not appear, however, that the proposed note mentioned in Ritter's memo to Albrecht of 5 August was ever sent, and there is no evidence that the warnings were ever posted. It is a fair inference that the German Government concluded that its ostrich-like note of 21 July had enabled it to withdraw with what it hoped to be some shreds of dignity, from an unspeakable situation which it could not maintain, and which it could not afford to have bared to the civilized world; and therefore, the proposed note was not sent, the warnings remained unposted, and a veil was dropped over the whole matter.

While Steengracht von Moyland was not as close to the situation as Ritter, nevertheless it was he who, as the responsible leading official of the Foreign Office, second only to von Ribbentrop, delivered at least the first note to the Swiss delegation.

It is altogether likely that he delivered the second message, inasmuch as that was one of his admitted official functions. He testified he had had no "clear recollection" of the Foreign Office directors' meeting of 22 June 1944 at

which was discussed both Eden's speech and Albrecht's statement that the British had been informed, through Switzerland, that several British and other fliers had been shot, and that further details respecting the fifty cases of shooting would be submitted to the British.

We note that the phrase "clear recollection" is used both in the question propounded by Steengracht von Moyland's counsel and in his answer. We believe that this indefinite phrase was used advisedly for the purpose of avoiding discussion of details, and that Steengracht von Moyland, while perhaps not having a mirror-like recollection, in fact remembered it in substantial detail.

In discussing Reinhardt's statement that "such occurrences as in camp Sagan in which fifty officers were shot after having made an attempt to escape are extremely regrettable," Steengracht von Moyland said: "We all regretted this extremely, and it was a terrible crime."

In a matter as important as this, involving the inevitable repercussions in neutral as well as enemy nations, it is unbelievable that a state secretary would deliver a note so patently lame without making some inquiry about the matter, and it is extremely unlikely that Albrecht or Ritter would not have informed him not only that the justifications for the shootings were fictitious, but their misgivings about the terms of the note as well.

A man of ordinary intelligence would recognize that this was an attempt to cover up an incident which could not bear the light of day. We are convinced that Steengracht von Moyland delivered the note of 6 June 1944 to the Swiss Government, and that he was informed of the actual facts.

The murder of these unfortunate escapees was due to one of the savage outbursts of Hitler. That it was a crime of insensate horror and brutality, then not a novelty in the operations of the Nazi government, and that it violated every principle of the Geneva Convention, is unquestioned. No defendant does other than condemn it, and each disclaims any guilty connection with it.

Steengracht von Moyland had no part in either the issuance of the order or its execution. The murders were long-accomplished facts before he knew of them.

However, under the Geneva Convention and Hague Regulation (Art. 77, Geneva Convention [Prisoners of War], 1929, and Art. 14, Hague Regulation [Annex to Convention No. IV, Laws and Customs of War on Land], 1907), Germany was under the duty of truthfully reporting to the Protecting Power, the facts surrounding the treatment of prisoners of war, and of the circumstances relating to the deaths of such prisoners. To make a false report was a breach of its international agreement, and a breach of international law. The detaining powers' duty to report the facts was intended to prevent the very kind of savagery upon helpless prisoners which took place in the Sagan incident.

If a belligerent can starve, mistreat, or murder its prisoners of war in secret, or if it can, with impunity, give false information to the Protecting Power, the restraining influence which Protecting Powers can exercise in the

interests of helpless unfortunates would be wholly eliminated. Thus, the duty to give honest and truthful reports in answer to inquiries such as were addressed by the Swiss Government is implicit.

The false reports which Ritter helped draft and which Steengracht von Moyland transmitted, stupid and inept as they were, were intended and calculated to deceive both the Protecting Power and Great Britain, and at least give a color of legality to what was beyond the pale of international law.

The inquiries from the Protecting Power regarding the treatment of and fate of prisoners of war, addressed to the German Government both by necessity and by diplomatic usage, were addressed to the Foreign Office. The reply of the German Government to the Protecting Power of necessity and by diplomatic usage came from the Foreign Office.

Steengracht von Moyland and Ritter must each be held guilty of the crime set forth in paragraph 28c of count three of the indictment.

* * * * *

VON WEIZSAECKER AND WOERMANN

* * * * *

Depriving French prisoners of war of a protecting power. — On 1 November 1940, Ritter transmitted to the Foreign Office a memorandum stating that he had informed General Jodl of Hitler's determination to have the United States removed as the Protecting Power for French prisoners of war. This was initialed by von Weizsaecker.

On 2 November, Albrecht, Chief of the Foreign Office Legal Department, wired the German embassy at Paris that the Fuehrer had issued instructions that in the future the French were themselves to act as the Protecting Power for French prisoners of war, and directed Abetz to take up discussions with Laval with the following objectives:

(1) That the French take over protection of their own prisoners of war, and

(2) That it explicitly state to the United States that its activities as a Protecting Power were finished, and finally,

(3) That Laval be informed that Scapini would suit Germany as Plenipotentiary for prisoner-of-war matters, and that he be directed to visit Berlin for discussion of details.

This teletype was initialed by Ritter, von Weizsaecker, and Woermann.

On 3 November, Abetz wired the Foreign Office that Laval had been so informed and that the Vichy government was immediately informing the United States that it was no longer recognized as a Protecting Power for French prisoners of war, and further that Scapini had been requested to see Marshal Petain on Tuesday to be officially informed of his intended duties and to prepare for the journey to Berlin. This reply was received by von Weizsaecker.

Woermann asserts that "after direct relations have been taken up between Germany and France, a Protecting Power is no longer needed," and that these matters could be regulated between them and Scapini. He asserts that Scapini's appointment instead of leading to a deterioration of the conditions of the French prisoners of war, improved it. We greatly doubt that the Franch

action was voluntary. Hitler had decided what they should do. The Foreign Office told Abetz to see that the French complied, and within 24 hours the matter was consummated.

Matters of such importance are not consummated with that degree of speed between foreign powers who are each free to act and consider. However, the prosecution has offered no evidence that by reason of the change the conditions and treatment of the French prisoners of war deteriorated, and in the absence of such proof, this incident cannot form the basis of a finding of guilt.

Murder of captured British soldiers. — On 14 February 1941 the United States as Protecting Power made inquiries as to the circumstances under which six British soldiers were captured and then shot in the forest of Dieppe.

A memo from the office of von Ribbentrop, initialed by von Weizsaecker, directs Legation Councillor Albrecht to ascertain the facts, stating that he was of the opinion that the note should be "rejected in the sharpest terms."

Albrecht made written inquiry of the Wehrmacht prisoner-of-war department. Here the record ends. Whether the Wehrmacht replied, and what response the Foreign Office made to the United States Government, whether the Foreign Office ever even acted on the facts, or rejected the note, are all wholly unknown.

Conviction cannot be based on such a record.

DOCUMENT NO. 105

RESOLUTIONS 2, 3, and 9 ADOPTED BY THE 1949 GENEVA DIPLOMATIC CONFERENCE (8-9 August 1949)

SOURCE

1 Final Record 361

NOTE

A Diplomatic Conference convened by the Swiss Government met in Geneva in April 1949 to consider the four conventions for the protection of war victims which had evolved from the work of the XVIIth International Conference of the Red Cross which had been held in Stockholm in August 1948 (see DOCUMENT NO. 98). The Diplomatic Conference revised and eventually approved the four conventions. (See DOCUMENT NO. 106, DOCUMENT NO. 107, and DOCUMENT NO. 108. There is a fourth convention, concerned with civilians, which is not reproduced herein.) A number of matters not solved in the conventions were made the subjects of resolutions adopted by the Diplomatic Conference. Three of those resolutions were relevant to prisoner-of-war problems: Resolution 2 is concerned with substitutes for Protecting Powers (see DOCUMENT NO. 175); Resolution 3 is concerned with medical personnel retained to render care to prisoners of war (see DOCUMENT NO. 135); and Resolution 9 is concerned with a system of specimen messages for use by prisoners of war in order to reduce the cost of sending telegrams (see DOCUMENT NO. 159).

TEXTS

RESOLUTION 2

Whereas circumstances may arise in the event of the outbreak of a future international conflict in which there will be no Protecting Power with whose cooperation and under whose scrutiny the Conventions for the Protection of Victims of War can be applied; and

whereas Article 10 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, Article 10 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, Article 10 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, and Article 11 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, provide that the High Contracting Parties may at any time agree to entrust to a body which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the aforesaid Conventions,

the Conference recommends that consideration be given as soon as possible to the advisability of setting up an international body, the functions of which

shall be, in the absence of a Protecting Power, to fulfil the duties performed by Protecting Powers in regard to the application of the Conventions for the Protection of War Victims.

RESOLUTION 3

Whereas agreements may only with difficulty be concluded during hostilities;

whereas Article 28 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, provides that the Parties to the conflict shall, during hostilities, make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief;

whereas Article 31 of the same Convention provides that, as from the outbreak of hostilities, Parties to the conflict may determine by special arrangement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps,

the Conference requests the International Committee of the Red Cross to prepare a model agreement on the two questions referred to in the two Articles mentioned above and to submit it to the High Contracting Parties for their approval.

RESOLUTION 9

Whereas Article 71 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, provides that prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are a great distance from their home, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the Detaining Power or paid in the currency at their disposal, and that prisoners of war shall likewise benefit by these facilities in cases of urgency; and

whereas to reduce the cost, often prohibitive, of such telegrams or cables, it appears necessary that some method of grouping messages should be introduced whereby a series of short specimen messages concerning personal health, health of relatives at home, schooling, financing, etc., could be drawn up and numbered, for use by prisoners of war in the aforesaid circumstances,

the Conference, therefore, requests the International Committee of the Red Cross to prepare a series of specimen messages covering these requirements and to submit them to the High Contracting Parties for their approval.

DOCUMENT NO. 106

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD
(12 August 1949)

SOURCES
75 UNTS 31
6 UST 3114
157 BFSP 234
1 Final Record 205

NOTE

Four proposed conventions for the protection of victims of war had been drafted by the International Committee of the Red Cross (ICRC) by 1948 and they were then presented to the XVIIth International Conference of the Red Cross which met in Stockholm in August 1948. That conference made a number of revisions in the texts of the draft conventions and then adopted a resolution recommending their transmittal to the governments for consideration at a diplomatic conference (DOCUMENT NO. 98). The Swiss Government convened such a conference in Geneva in April 1949 and on 12 August 1949 the conference gave final approval to four conventions which were then signed by some 60 nations. (They have since been ratified or acceded to by more than 140 nations.) Given below are provisions of the so-called "First" Convention (Wounded and Sick in Armed Forces in the Field) that are of particular relevance to prisoner-of war matters. This convention is the current revision of the series of "Red Cross" conventions which have attained the status of effective international law over the past century: 1864 (DOCUMENT NO. 24); 1906 (DOCUMENT NO. 32); and 1929 (DOCUMENT NO. 48). The relevant provisions of the "Second" Convention (Wounded, Sick and Shipwrecked Members of Armed Forces at Sea) may be found at DOCUMENT NO. 107; and the "Third" Convention (Relative to the Treatment of Prisoners of War) may be found in its entirety at DOCUMENT NO. 108. (The "Fourth" Convention (Civilians) has no relevance to the subject matter of this volume except to the extent that very often a person not entitled to the benefits of the Third Convention will be entitled to the benefits of the Fourth Convention.) The provisions set forth below have been considerably enlarged by the 1977 Geneva Protocol I (DOCUMENT NO. 175).

EXTRACTS

ARTICLE 13

The present Convention shall apply to the wounded and sick belonging to the following categories:

(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 civil 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.

(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 in 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.

ARTICLE 14

Subject to the provisions of Article 12, the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.

ARTICLE 24

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

ARTICLE 25

Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded or sick shall likewise be respected and protected if they are carrying out these duties

at the time they come into contact with the enemy or fall into his hands.

ARTICLE 26

The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations.

Each High Contracting Party shall notify to the other, either in time of peace, or at the commencement of or during hostilities, but in any case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

ARTICLE 28

Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.

Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, thay shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong. They shall further enjoy the following facilities for carrying out their medical or spiritual duties;

(a) They shall be authorized to visit periodically the prisoners of war in labour units or hospitals outside the camp. The Detaining Power shall put at their disposal the means of transport required.

(b) In each camp the senior medical officer of the highest rank shall be responsible to the military authorities of the camp for the professional activity of the retained medical personnel. For this purpose, from the outbreak of hostilities, the Parties to the conflict shall agree regarding the corresponding seniority of the ranks of their medical personnel, including those of the societies designated in Article 26. In all questions arising out of their duties, this medical officer, and the chaplains, shall have direct access to the military and medical authorities of the camp who shall grant them the facilities they may require for correspondence relating to these questions.

(c) Although retained personnel in a camp shall be subject to its internal discipline, they shall not, however, be required to perform any work outside their medical or religious duties.

During hostilities the Parties to the conflict shall make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief.

None of the preceding provisions shall relieve the Detaining Power of the

obligations imposed upon it with regard to the medical and spiritual welfare of the prisoners of war.

ARTICLE 29

Members of the personnel designated in Article 25 who have fallen into the hands of the enemy, shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises.

ARTICLE 30

Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.

Pending their return, they shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. They shall continue to fulfil their duties under the orders of the adverse Party and shall preferably be engaged in the care of the wounded and sick of the Party to the conflict to which they themselves belong.

On their departure, they shall take with them the effects, personal belongings, valuables and instruments belonging to them.

ARTICLE 31

The selection of personnel for return under Article 30 shall be made irrespective of any consideration of race, religion or political opinion, but preferably according to the chronological order of their capture and their state of health.

As from the outbreak of hostilities, Parties to the conflict may determine by special agreement the percentage of personnel to be retained, in proportion to the number of prisoners and the distribution of the said personnel in the camps.

ARTICLE 36

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned.

They shall bear, clearly marked, the distinctive emblem prescribed in Article 38, together with their national colours, on the lower, upper and lateral surfaces. They shall be provided with any other markings or means of identification that may be agreed upon between the belligerents upon the outbreak or during the course of hostilities.

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick, as well as the crew of the aircraft shall be

prisoners of war. The medical personnel shall be treated according to Article 24 and the Articles following.

ARTICLE 37

Subject to the provisions of the second paragraph, medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land on it in case of necessity, or use it as a port of call. They shall give the neutral Powers previous notice of their passage over the said territory and obey all summons to alight, on land or water. They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned.

The neutral Powers may, however, place conditions or restrictions on the passage or landing of medical aircraft on their territory. Such possible conditions or restrictions shall be applied equally to all Parties to the conflict.

Unless agreed otherwise between the neutral Power and the Parties to the conflict, the wounded and sick who are disembarked, with the consent of the local authorities, on neutral territory by medical aircraft, shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war. The cost of their accommodation shall be borne by the Power on which they depend.

DOCUMENT NO. 107

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA
(12 August 1949)

SOURCES
75 UNTS 85
6 UST 3217
157 BFSP 262
1 Final Record 225

NOTE

For the background of the four 1949 Conventions for the Protection of War Victims, see DOCUMENT NO. 106. This is the so-called "Second" Convention and is the current revision of the 1868 Additional Articles (DOCUMENT NO. 26) which probably never became effective, and of the 1907 Hague Convention X (DOCUMENT NO. 35). Given below are the provisions of the Second Convention which are relevant to prisoners of war.

EXTRACTS

ARTICLE 13

The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories;

(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.

(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.

ARTICLE 15

If wounded, sick or shipwrecked persons are taken on board a neutral warship or a neutral military aircraft, it shall be ensured, where so required by international law, that they can take no further part in operations of war.

ARTICLE 16

Subject to the provisions of Article 12, the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them. The captor may decide, according to circumstances, whether it is expedient to hold them, or to convey them to a port in the captor's own country, to a neutral port or even to a port in enemy territory. In the last case, prisoners of war thus returned to their home country may not serve for the duration of the war.

ARTICLE 17

Wounded, sick or shipwrecked persons who are landed in neutral ports with the consent of the local authorities, shall, failing arrangements to the contrary between the neutral and the belligerent Powers, be so guarded by the neutral Power, where so required by international law, that the said persons cannot again take part in operations of war.

The costs of hospital accomodation and internment shall be borne by the Power on whom the wounded, sick and shipwrecked persons depend.

DOCUMENT NO. 108

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (12 August 1949)

SOURCES

75 UNTS 135
6 UST 3217
157 BFSP 284
47 AJIL Supp. 119 (1953)
1 Final Record 243

NOTE

For the background of the four 1949 Conventions for the Protection of War Victims, see DOCUMENT NO. 106. This is the so-called "Third" Convention and it is the current revision of the articles concerning prisoners of war of the 1899 Hague Convention II and its Annexed Regulations (DOCUMENT NO. 28); the articles concerning prisoners of war of the 1907 Hague Convention IV and its Annexed Regulations (DOCUMENT NO. 33); and the 1929 Geneva Prisoner-of War Convention (DOCUMENT NO. 49). It will be amended, to some extent, by the 1977 Geneva Protocol I (DOCUMENT NO. 175) when the latter receives the necessary ratifications and accessions.

TEXT

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

PART I

General Provisions

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, includng 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 6

In addition to the agreements expressly provided for in Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122, and 132, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them.

Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

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 8

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

ARTICLE 9

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent

of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their reflief.

ARTICLE 10

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility towards the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.

ARTICLE 11

In cases where they deem it advisable in the interest of protected persons particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

PART II
GENERAL PROTECTION OF PRISONERS OF WAR

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.

PART III
CAPTIVITY
SECTION I
BEGINNING OF CAPTIVITY

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.

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning the persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

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.

Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

The questioning of prisoners of war shall be carried out in a language which they understand.

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.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone.

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

ARTICLE 20

The evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.

The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention. The Detaining Power shall take all suitable precautions to ensure their safety during evacuation, and shall establish as soon as possible a list of the prisoners of war who are evacuated.

If prisoners of war must, during evacuation, pass through transit camps, their stay in such camps shall be as brief as possible.

SECTION II
INTERNMENT OF PRISONERS OF WAR
CHAPTER I
GENERAL OBSERVATIONS

ARTICLE 21

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only

during the continuation of the circumstances which make such confinement necessary.

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contibute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise.

Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity with the laws and regulations so notified, are bound on their personal honour scrupulously to fulfill, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.

ARTICLE 22

Prisoners of war may be interned only in premises located on land and affordng every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

ARTICLE 23

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them.

Detaining Powers shall give the Powers concerned, through the intermediary of the Protecting Powers, all useful information regarding the geographical location of prisoner of war camps.

Whenever military considerations permit, prisoner of war camps shall be indicated in the day-time by the letters PW or PG, placed so as to be clearly visible from the air. The Powers concerned may, however, agree upon any other system of marking. Only prisoner of war camps shall be marked as such.

ARTICLE 24

Transit or screening camps of a permanent kind shall be fitted out under conditions similar to those described in the present Section, and the prisoners therein shall have the same treatment as in other camps.

CHAPTER II

QUARTERS, FOOD AND CLOTHING OF PRISONERS OF WAR

ARTICLE 25

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.

The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.

The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular beween dusk and lights out. All precautions must be taken against the danger of fire.

In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.

ARTICLE 26

The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners.

The Detaining Power shall supply prisoners of war who work with such additional rations as are necessary for the labour on which they are employed.

Sufficient drinking water shall be supplied to prisoners of war. The use of tobacco shall be permitted.

Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.

Adequate premises shall be provided for messing.

Collective disciplinary measures affecting food are prohibited.

ARTICLE 27

Clothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained. Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war.

The regular replacement and repair of the above articles shall be assured by the Detaining Power. In addition, prisoners of war who work shall receive appropriate clothing, wherever the nature of the work demands.

ARTICLE 28

Canteens shall be installed in all camps, where prisoners of war may

procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices.

The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representatives shall have the right to collaborate in the management of the canteen and of this fund.

When a camp is closed down, the credit balance of the special fund shall be handed to an international welfare organization, to be employed for the benefit of prisoners of war of the same nationality as those who have contributed to the fund. In case of a general repatriation, such profits shall be kept by the Detaining Power, subject to any agreement to the contrary between the Powers concerned.

CHAPTER III
HYGIENE AND MEDICAL ATTENTION

ARTICLE 29

The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.

ARTICLE 30

Every camp shall have an adequate infirmary where prisoners of war may have the attention they require, as well as appropriate diet. Isolation wards shall, if necessary, be set aside for cases of contagious or mental disease.

Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future. Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.

Prisoners of war shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.

Prisoners of war may not be prevented from presenting themselves to the medical authorities for examination. The detaining authorities shall, upon request, issue to every prisoner who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received. A duplicate of this certificate shall be forwarded to the Central Prisoners of War Agency.

The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and

other artificial appliances, and spectacles, shall be borne by the Detaining Power.

ARTICLE 31

Medical inspections of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war. Their purpose shall be, in particular, to supervise the general state of health, nutrition and cleanliness of prisoners and to detect contagious diseases, especially tuberculosis, malaria and venereal disease. For this purpose the most efficient methods available shall be employed, e.g. periodic mass miniature radiography for the early detection of tuberculosis.

ARTICLE 32

Prisoners of war who, though not attached to the medical service of their armed forces, are physicians, surgeons, dentists, nurses or medical orderlies, may be required by the Detaining Power to exercise their medical functions in the interests of prisoners of war dependent on the same Power. In that case they shall continue to be prisoners of war, but shall receive the same treatment as corresponding medical personnel retained by the Detaining Power. They shall be exempted from any work under Article 49.

CHAPTER IV

MEDICAL PERSONNEL AND CHAPLAINS RETAINED TO ASSIST PRISONERS OF WAR

ARTICLE 33

Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war, shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide for the medical care of, and religious ministration to prisoners of war.

They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under control of its competent services, in accordance with their professional etiquette. They shall also benefit by the following facilities in the exercise of their medical or spiritual functions:

(a) They shall be authorized to visit periodically prisoners of war situated in working detachments or in hospitals outside the camp. For this purpose, the Detaining Power shall place at their disposal the necessary means of transport.

(b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. For this purpose, Parties to the conflict shall agree at the outbreak of hostilities on the subject of the corresponding ranks of the medical personnel, including that of societies mentioned in Article 26 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949. This senior medical officer, as

well as chaplains, shall have the right to deal with the competent authorities of the camp on all questions relating to their duties. Such authorities shall afford them all necessary facilities for correspondence relating to these questions.

(c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.

During hostilities, the Parties to the conflict shall agree concerning the possible relief of retained personnel and shall settle the procedure to be followed.

None of the preceding provisions shall relieve the Detaining Power of its obligations with regard to prisoners of war from the medical or spiritual point of view.

CHAPTER V

RELIGIOUS, INTELLECTUAL AND PHYSICAL ACTIVITIES

ARTICLE 34

Prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities.

Adequate premises shall be provided where religious services may be held.

ARTICLE 35

Chaplains who fall into the hands of the enemy Power and who remain or are retained with a view to assisting prisoners of war, shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion, in accordance with their religious conscience. They shall be allocated among the various camps and labour detachments containing prisoners of war belonging to the same forces, speaking the same language or practising the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp. They shall be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Letters and cards which they may send for this purpose shall be in addition to the quota provided for in Article 71.

ARTICLE 36

Prisoners of war who are ministers of religion, without having officiated as chaplains to their own forces, shall be at liberty, whatever their denomination, to minister freely to the members of their community. For this purpose, they shall receive the same treatment as the chaplains retained by the Detaining Power. They shall not be obligated to do any other work.

ARTICLE 37

When prisoners of war have not the assistance of a retained chaplain or of a prisoner of war minister of their faith, a minister belonging to the prisoners' or a similar denomination, or in his absence a qualified layman, if such a course

is feasible from a confessional point of view, shall be appointed, at the request of the prisoners concerned, to fill this office. This appointment, subject to the approval of the Detaining Power, shall take place with the agreement of the community of prisoners concerned and wherever necessary, with the approval of the local religious authorities of the same faith. The person thus appointed shall comply with all regulations established by the Detaining Power in the interests of discipline and military security.

ARTICLE 38

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

CHAPTER VI
DISCIPLINE

ARTICLE 39

Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power. Such officer shall have in his possession a copy of the present Convention; he shall ensure that its provisions are known to the camp staff and the guard and shall be responsible, under the direction of his government, for its application.

Prisoners of war, with the exception of officers, must salute and show to all officers of the Detaining Power the external marks of respect provided for by the regulations applying in their own forces.

Officer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power; they must, however, salute the camp commander regardless of his rank.

ARTICLE 40

The wearing of badges of rank and nationality, as well as of decorations, shall be permitted.

ARTICLE 41

In every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners' own language, in places where all may read them. Copies shall be supplied, on request, to the prisoners who cannot have access to the copy which has been posted.

Regulations, orders, notices and publications of every kind relating to the conduct of prisoners of war shall be issued to them in a language which they understand. Such regulations, orders and publications shall be posted in the manner described above and copies shall be handed to the prisoners' representative. Every order and command addressed to prisoners of war individually must likewise be given in a language which they understand.

ARTICLE 42

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

CHAPTER VII
RANK OF PRISONERS OF WAR

ARTICLE 43

Upon the outbreak of hostilities, the Parties to the conflict shall communicate to one another the titles and ranks of all the persons mentioned in Article 4 of the present Convention, in order to ensure equality of treatment between prisoners of equivalent rank. Titles and ranks which are subsequently created shall form the subject of similar communications.

The Detaining Power shall recognize promotions in rank which have been accorded to prisoners of war and which have been duly notified by the Power on which these prisoners depend.

ARTICLE 44

Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

In order to ensure service in officers' camps, other ranks of the same armed forces who, as far as possible, speak the same language, shall be assigned in sufficient numbers, account being taken of the rank of officers and prisoners of equivalent status. Such orderlies shall not be required to perform any other work.

Supervision of the mess by the officers themselves shall be facilitated in every way.

ARTICLE 45

Prisoners of war other than officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.

Supervision of the mess by the prisoners themselves shall be facilitated in every way.

CHAPTER VIII
TRANSFER OF PRISONERS OF WAR AFTER THEIR ARRIVAL IN CAMP

ARTICLE 46

The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation.

The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

The Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention. The Detaining Power

shall take adequate precautions especially in case of transport by sea or by air, to ensure their safety during transfer, and shall draw up a complete list of all transferred prisoners before their departure.

ARTICLE 47

Sick or wounded prisoners of war shall not be transferred as long as their recovery may be endangered by the journey, unless their safety imperatively demands it.

If the combat zone draws closer to a camp, the prisoners of war in the said camp shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or unless they are exposed to greater risks by remaining on the spot than by being transferred.

ARTICLE 48

In the event of transfer, prisoners of war shall be officially advised of their departure and of their new postal address. Such notifications shall be given in time for them to pack their luggage and inform their next of kin.

They shall be allowed to take with them their personal effects, and the correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of transfer so require, to what each prisoner can reasonably carry, which shall in no case be more than twenty-five kilograms per head.

Mail and parcels addressed to their former camp shall be forwarded to them without delay. The camp commander shall take, in agreement with the prisoners' representative, any measures needed to ensure the transport of the prisoners' community property and of the luggage they are unable to take with them in consequence of restrictions imposed by virtue of the second paragraph of this Article.

The costs of transfers shall be borne by the Detaining Power.

SECTION III

LABOUR OF PRISONERS OF WAR

ARTICLE 49

The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health.

Non-commissioned officers who are prisoners of war shall only be required to do supervisory work. Those not so required may ask for other suitable work which shall, so far as possible, be found for them.

If officers or persons of equivalent status ask for suitable work, it shall be found for them, so far as possible, but they may in no circumstances be compelled to work.

ARTICLE 50

Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

(a) agriculture;

(b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;

(c) transport and handling of stores which are not military in character or purpose;

(d) commercial business, and arts and crafts;

(e) domestic service;

(f) public utility services having no military character or purpose.

Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint in conformity with Article 78.

ARTICLE 51

Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

The Detaining Power, in utilizing the labour of prisoners of war, shall ensure that in areas in which such prisoners are employed, the national legislation concerning the protection of labour, and, more particularly, the regulations for the safety of workers, are duly applied.

Prisoners of war shall receive training and be provided with the means of protection suitable to the work they will have to do and similar to those accorded to the nationals of the Detaining Power. Subject to the provisions of Article 52, prisoners may be submitted to the normal risks run by these civilian workers.

Conditions of labour shall in no case be rendered more arduous by disciplinary measures.

ARTICLE 52

Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

The removal of mines or similar devices shall be considered as dangerous labour.

ARTICLE 53

The duration of the daily labour of prisoners of war, including the time of the journey to and fro, shall not be excessive, and must in no case exceed that permitted for civilian workers in the district, who are nationals of the Detaining Power and employed on the same work.

Prisoners of war must be allowed, in the middle of the day's work, a rest of not less than one hour. This rest will be the same as that to which workers of the Detaining Power are entitled, if the latter is of longer duration. They shall be allowed in addition a rest of twenty-four consecutive hours every week, preferably on Sunday or the day of rest in their country of origin. Furthermore, every prisoner who has worked for one year shall be granted a rest of eight consecutive days, during which his working pay shall be paid

him.

If methods of labour such as piece work are employed, the length of the working period shall not be rendered excessive thereby.

ARTICLE 54

The working pay due to prisoners of war shall be fixed in accordance with the provisions of Article 62 of the present Convention.

Prisoners of war who sustain accidents in connection with work, or who contract a disease in the course, or in consequence of their work, shall receive all the care their condition may require. The Detaining Power shall furthermore deliver to such prisoners of war a medical certificate enabling them to submit their claims to the Power on which they depend, and shall send a duplicate to the Central Prisoners of War Agency provided for in Article 123.

ARTICLE 55

The fitness of prisoners of war for work shall be periodically verified by medial examinations at least once a month. The examinations shall have particular regard to the nature of the work which prisoners of war are required to do.

If any prisoner of war considers himself incapable of working, he shall be permitted to appear before the medical authorities of his camp. Physicians or surgeons may recommend that the prisoners who are, in their opinon, unfit for work, be exempted therefrom.

ARTICLE 56

The organization and administration of labour detachments shall be similar to those of prisoner of war camps.

Every labour detachment shall remain under the control of and administratively part of a prisoner of war camp. The military authorities and the commander of the said camp shall be responsible, under the direction of their government, for the observance of the provisions of the present Convention in labour detachments.

The camp commander shall keep an up-to-date record of the labour detachments dependent on his camp, and shall communicate it to the delegates of the Protecting Power, of the International Committee of the Red Cross, or of other agencies giving relief to prisoners of war, who may visit the camp.

ARTICLE 57

The treatment of prisoners of war who work for private persons, even if the latter are responsible for guarding and protecting them, shall not be inferior to that which is provided for by the present Convention. The Detaining Power, the military authorities and the commander of the camp to which such prisoners belong shall be entirely responsible for the maintenance, care, treatment, and payment of the working pay of such prisoners of war.

Such prisoners of war shall have the right to remain in communication with the prisoners' representatives in the camps on which they depend.

SECTION IV
FINANCIAL RESOURCES OF PRISONERS OF WAR

ARTICLE 58

Upon the outbreak of hostilities, and pending an arrangement on this matter with the Protecting Power, the Detaining Power may determine the maximum amount of money in cash or in any similar form, that prisoners may have in their possession. Any amount in excess, which was properly in their possession and which has been taken or withheld from them, shall be placed in their account, together with any monies deposited by them, and shall not be converted into any other currency without their consent.

If prisoners of war are permitted to purchase services or commodities outside the camp against payment in cash, such payments shall be made by the prisoner himself or by the camp administration who will charge them to the accounts of the prisoners concerned. The Detaining Power will establish the necessary rules in this respect.

ARTICLE 59

Cash which was taken from prisoners of war, in accordance with Article 18, at the time of their capture, and which is in the currency of the Detaining Power, shall be placed to their separate accounts, in accordance with the provisions of Article 64 of the present Section.

The amounts, in the currency of the Detaining Power, due to the conversion of sums in other currencies that are taken from the prisoners of war at the same time, shall also be credited to their separate accounts.

ARTICLE 60

The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power, of the following amounts:

Category I: Prisoners ranking below sergeants: eight Swiss francs.

Category II: Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.

Category III: Warrant officers and commissioned officers below the rank of major or prisoners of equivalent rank: fifty Swiss francs.

Category IV: Majors, lieutenant-colonels, colonels or prisoners of equivalent rank: sixty Swiss francs.

Category V: General officers or prisoners of war of equivalent rank: seventy-five Swiss francs.

However, the Parties to the conflict concerned may by special agreement modify the amount of advances to pay due to prisoners of the preceding categories.

Furthermore, if the amounts indicated in the first paragraph above would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any reason, seriously embarrass the Detaining Power, then, pending the conclusion of a special agreement with the Power on which the prisoners depend to vary the amounts indicated above, the Detaining Power:

(a) shall continue to credit the accounts of the prisoners with the amounts indicated in the first paragraph above;

(b) may temporarily limit the amount made available from these advances of pay to prisoners of war for their own use, to sums which are reasonable, but which, for Category I, shall never be inferior to the amount that the Detaining Power gives to the members of its own armed forces.

The reasons for any limitations will be given without delay to the Protecting Power.

ARTICLE 61

The Detaining Power shall accept for distribution as supplementary pay to prisoners of war sums which the Power on which the prisoners depend may forward to them, on condition that the sums to be paid shall be the same for each prisoner of the same category, shall be payable to all prisoners of that category depending on that Power, and shall be placed in their separate accounts, at the earliest opportunity, in accordance with the provisions of Article 64. Such supplementary pay shall not relieve the Detaining Power of any obligation under this Convention.

ARTICLE 62

Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day. The Detaining Power shall inform prisoners of war, as well as the Power on which they depend, through the intermediary of the Protecting Power, of the rate of daily working pay that it has fixed.

Working pay shall likewise be paid by the detaining authorities to prisoners of war permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps, and to the prisoners who are required to carry out spiritual or medical duties on behalf of their comrades.

The working pay of the prisoners' representatives, of his advisers, if any, and of his assistants, shall be paid out of the fund maintained by canteen profits. The scale of this working pay shall be fixed by the prisoners' representative and approved by the camp commander. If there is no such fund, the detaining authorities shall pay these prisoners a fair working rate of pay.

ARTICLE 63

Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively.

Every prisoner of war shall have at his disposal the credit balance of his account as provided for in the following Article, within the limits fixed by the Detaining Power, which shall make such payments as are requested. Subject to financial or monetary restrictions which the Detaining Power regards as essential, prisoners of war may also have payments made abroad. In this case payments addressed by prisoners of war to dependents shall be given priority.

In any event, and subject to the consent of the Power on which they depend, prisoners may have payments made in their own country, as follows:

the Detaining Power shall send to the aforesaid Power through the Protecting Power, a notification giving all the necessary particulars concerning the prisoners of war, the beneficiaries of the payments, and the amount of the sums to be paid, expressed in the Detaining Power's currency. The said notification shall be signed by the prisoners and countersigned by the camp commander. The Detaining Power shall debit the prisoners' account by a corresponding amount; the sums thus debited shall be placed by it to the credit of the Power on which the prisoners depend.

To apply the foregoing provisions, the Detaining Power may usefully consult the Model Regulations in Annex V of the present Convention.

ARTICLE 64

The Detaining Power shall hold an account for each prisoner of war, showing at least the following:

(1) The amounts due to the prisoner or received by him as advances of pay, as working pay or derived from any other source; the sums in the currency of the Detaining Power which were taken from him; the sums taken from him and converted at his request into the currency of the said Power.

(2) The payments made to the prisoner in cash, or in any other similar form; the payments made on his behalf and at his request; the sums transferred under Article 63, third paragraph.

ARTICLE 65

Every item entered in the account of a prisoner of war shall be countersigned or initialled by him, or by the prisoners' representative acting on his behalf.

Prisoners of war shall at all times be afforded reasonable facilities for consulting and obtaining copies of their accounts, which may likewise be inspected by the representatives of the Protecting Powers at the time of visits to the camp.

When prisoners of war are transferred from one camp to another, their personal accounts will follow them. In case of transfer from one Detaining Power to another, the monies which are their property and are not in the currency of the Detaining Power will follow them. They shall be given certificates for any other monies standing to the credit of their accounts.

The Parties to the conflict concerned may agree to notify to each other at specific intervals through the Protecting Power, the amount of the accounts of the prisoners of war.

ARTICLE 66

On the termination of captivity, through the release of a prisoner of war or his repatriation, the Detaining Power shall give him a statement, signed by an authorized officer of that Power, showing the credit balance then due to him. The Detaining Power shall also send through the Protecting Power to the government upon which the prisoner of war depends, lists of all appropriate particulars of all prisoners of war whose captivity has been terminated by repatriation, release, escape, death or any other means, and showing the amount of their credit balances. Such lists shall be certified on

each sheet by an authorized representative of the Detaining Power.

Any of the above provisions of this Article may be varied by mutual agreement between any two Parties to the conflict.

The Power on which the prisoner of war depends shall be responsible for settling with him any credit balance due to him from the Detaining Power on the termination of his captivity.

ARTICLE 67

Advances of pay, issued to prisoners of war in conformity with Article 60, shall be considered as made on behalf of the Power on which they depend. Such advances of pay, as well as all payments made by the said Power under Article 63, third paragraph, and Article 68, shall form the subject of arrangements between the Powers concerned, at the close of hostilities.

ARTICLE 68

Any claim by a prisoner of war for compensation in respect of any injury or other disaiblity arising out of work shall be referred to the Power on which he depends, through the Protecting Power. In accordance with Article 54, the Detaining Power will, in all cases, provide the prisoner of war concerned with a statement showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment given for it. This statement will be signed by a responsible officer of the Detaining Power and the medical particulars certified by a medical officer.

Any claim by a prisoner of war for compensation in respect of personal effects, monies or valuables impounded by the Detaining Power under Article 18 and not forthcoming on his repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or any of its servants, shall likewise be referred to the Power on which he depends. Nevertheless, any such personal effects required for use by the prisoners of war whilst in captivity shall be replaced at the expense of the Detaining Power. The Detaining Power will, in all cases, provide the prisoner of war with a statement, signed by a responsible officer, showing all available information regarding the reasons why such effects, monies or valuables have not been restored to him. A copy of this statement will be forwarded to the Power on which he depends through the Central Prisoners of War Agency provided for in Article 123.

SECTION V

RELATIONS OF PRISONERS OF WAR WITH THE EXTERIOR

ARTICLE 69

Immediately upon prisoners of war falling into its power, the Detaining Power shall inform them and the Powers on which they depend, through the Protecting Power, of the measures taken to carry out the provisions of the present Section. They shall likewise inform the parties concerned of any subsequent modifications of such measures.

ARTICLE 70

Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or to another camp, every prisoner of war shall be enabled to write

direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.

ARTICLE 71

Prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly, exclusive of the capture cards provided for in Article 70, and conforming as closely as possible to the models annexed to the present Convention. Further limitations may be imposed only if the Protecting Power is satisfied that it would be in the interests of the prisoners of war concerned to do so owing to difficulties of translation caused by the Detaining Power's inability to find sufficient qualified linguists to carry out the necessary censorship. If limitations must be placed on the correspondence addressed to prisoners of war, they may be ordered only by the Power on which the prisoners depend, possibly at the request of the Detaining Power. Such letters and cards must be conveyed by the most rapid method at the disposal of the Detaining Power; they may not be delayed or retained for disciplinary reasons.

Prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin or to give them news by the ordinary postal route, as well as those who are at a great distance from their homes, shall be permitted to send telegrams, the fees being charged against the prisoners of war's accounts with the Detaining Power or paid in the currency at their disposal. They shall likewise benefit by this measure in cases of urgency.

As a general rule, the correspondence of prisoners of war shall be written in their native language. The Parties to the conflict may allow correspondence in other languages.

Sacks containing prisoner of war mail must be securely sealed and labelled so as clearly to indicate their contents, and must be addressed to offices of destination.

ARTICLE 72

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners them-

selves, or by the International Committee of the Red Cross or any other organization giving assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies. Books may not be included in parcels of clothing and foodstuffs. Medical supplies shall, as a rule, be sent in collective parcels.

ARTICLE 73

In the absence of special agreements between the Powers concerned on the conditions for the receipt and distribution of collective relief shipments, the rules and regulations concerning collective shipments, which are annexed to the present Convention, shall be applied.

The special agreements referred to above shall in no case restrict the right of prisoners' representatives to take possession of collective relief shipments intended for prisoners of war, to proceed to their distribution or to dispose of them in the interest of the prisoners.

Nor shall such agreements restrict the right of representatives of the Protecting Power, the International Committee of the Red Cross or any other organization giving assistance to prisoners of war and responsible for the forwarding of collective shipments, to supervise their distribution to the recipients.

ARTICLE 74

All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

Correspondence, relief shipments and authorized remittances of money addressed to prisoners of war or despatched by them through the post office, either direct or through the Information Bureaux provided for in Article 122 and the Central Prisoners of War Agency provided for in Article 123, shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.

If relief shipments intended for prisoners of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories.

In the absence of special agreements between the Parties concerned, the costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders.

The High Contracting Parties shall endeavour to reduce, so far as possible, the rates charged for telegrams sent by prisoners of war, or addressed to them.

ARTICLE 75

Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in

Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

Such transport may also be used to convey:

(a) correspondence, lists and reports exchanged between the Central Information Agency referred to in Article 123 and the National Bureaux referred to in Article 122;

(b) correspondence and reports relating to prisoners of war which the Protecting Powers, the International Committee of the Red Cross or any other body assisting the prisoners, exchange either with their own delegates or with the Parties to the conflict.

These provisions in no way detract from the right of any Party to the conflict to arrange other means of transport, if it should so prefer, nor preclude the granting of safe-conducts, under mutually agreed conditions, to such means of transport.

In the absence of special agreements, the costs occasioned by the use of such means of transport shall be borne proportionally by the Parties to the conflict whose nationals are benefited thereby.

ARTICLE 76

The censoring of correspondence addressed to prisoners of war or despatched by them shall be done as quickly as possible. Mail shall be censored only by the despatching State and the receiving State, and once only by each.

The examination of consignments intended for prisoners of war shall not be carried out under conditions that will expose the goods contained in them to deterioration; except in the case of written or printed matter, it shall be done in the presence of the addressee, or of a fellow-prisoners duly delegated by him. The delivery to prisoners of individual or collective consignments shall not be delayed under the pretext of difficulties of censorship.

Any prohibition of correspondence ordered by Parties to the conflict, either for military or political reasons, shall be only temporary and its duration shall be as short as possible.

ARTICLE 77

The Detaining Powers shall provide all facilities for the transmission, through the Protecting Power or the Central Prisoners of War Agency provided for in Article 123, of instruments, papers or documents intended for prisoners of war or despatched by them, especially powers of attorney and wills.

In all cases they shall facilitate the preparation and execution of such documents on behalf of prisoners of war; in particular, they shall allow them to consult a lawyer and shall take what measures are necessary for the authentication of their signatures.

SECTION VI
RELATIONS BETWEEN PRISONERS OF WAR AND THE AUTHORITIES

CHAPTER I
COMPLAINTS OF PRISONERS OF WAR RESPECTING THE CONDITIONS OF CAPTIVITY

ARTICLE 78

Prisoners of war shall have the right to make known to the military authorities in whose power they are, their request regarding the conditions of captivity to which they are subjected.

They shall also have the unrestricted right to apply to the representatives of the Protecting Powers either through their prisoners' representative or, if they consider it necessary, direct, in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity.

These requests and complaints shall not be limited nor considered to be a part of the correspondence quota referred to in Article 71. They must be transmitted immediately. Even if they are recognized to be unfounded, they may not give rise to any punishment.

Prisoners' representatives may send periodic reports on the situation in the camps and the needs of the prisoners of war to the representatives of the Protecting Powers.

CHAPTER II
PRISONER OF WAR REPRESENTATIVES

ARTICLE 79

In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them. These prisoners' representatives shall be eligible for re-election.

In camps for officers and persons of equivalent status or in mixed camps, the senior officer among the prisoners of war shall be recognized as the camp prisoners' representative. In camps for officers, he shall be assisted by one or more advisers chosen by the officers; in mixed camps, his assistants shall be chosen from among the prisoners of war who are not officers and shall be elected by them.

Officer prisoners of war of the same nationality shall be stationed in labour camps for prisoners of war, for the purpose of carrying out the camp administration duties for which the prisoners of war are responsible. These officers may be elected as prisoners' representatives under the first paragraph of this Article. In such a case the assistants to the prisoners' representatives shall be chosen from among those prisoners of war who are not officers.

Every representative elected must be approved by the Detaining Power before he has the right to commence his duties. Where the Detaining Power refuses to approve a prisoner of war elected by his fellow prisoners of war, it must inform the Protecting Power of the reason for such refusal.

In all cases the prisoners' representative must have the same nationality, language and customs as the prisoners of war whom he represents. Thus, prisoners of war distributed in different sections of a camp, according to their nationality, language or customs, shall have for each section their own prisoners' representative, in accordance with the foregoing paragraphs.

ARTICLE 80

Prisoners' representatives shall further the physical, spiritual and intellectual well-being of prisoners of war.

In particular, where the prisoners decide to organize amongst themselves a system of mutual assistance, this organization will be within the province of the prisoners' representative, in addition to the special duties entrusted to him by other provisions of the present Convention.

Prisoners' representatives shall not be held responsible, simply by reason of their duties, for any offences committed by prisoners of war.

ARTICLE 81

Prisoners' representatives shall not be required to perform any other work, if the accomplishment of their duties is thereby made more difficult.

Prisoners' representatives may appoint from amongst the prisoners such assistants as they may require. All material facilities shall be granted them, particularly a certain freedom of movement necessary for the accomplishment of their duties (inspection of labour detachments, receipt of supplies, etc.).

Prisoners' representatives shall be permitted to visit premises where prisoners of war are detained, and every prisoner of war shall have the right to consult freely his prisoners' representative.

All facilities shall likewise be accorded to the prisoners' representatives for communications by post and telegraph with the detaining authorities, the Protecting Powers, the International Committee of the Red Cross and their delegates, the Mixed Medical Commissions and the bodies which give assistance to prisoners of war. Prisoners' representatives of labour detachments shall enjoy the same facilities for communication with the prisoners' representatives of the principal camp. Such communications shall not be restricted, nor considered as forming a part of the quota mentioned in Article 71.

Prisoners' representatives who are transferred shall be allowed a reasonable time to acquaint their successors with current affairs.

In case of dismissal, the reasons therefore shall be communicated to the Protecting Power.

CHAPTER III

PENAL AND DISCIPLINARY SANCTIONS

I. General Provisions

ARTICLE 82

A prisoner of war shall be subject to the laws, regulations and orders in

force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

ARTICLE 83

In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures.

ARTICLE 84

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

ARTICLE 85

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

ARTICLE 86

No prisoner of war may be punished more than once for the same act or on the same charge.

ARTICLE 87

Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts.

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.

Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.

No prisoner of war may be deprived of his rank by the Detaining Power, or prevented from wearing his badges.

ARTICLE 88

Officers, non-commissioned officers and men who are prisoners of war undergoing a disciplinary or judicial punishment, shall not be subjected to more severe treatment than that applied in respect of the same punishment to members of the armed forces of the Detaining Power of equivalent rank.

A woman prisoner of war shall not be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a woman member of the armed forces of the Detaining Power dealt with for a similar offence.

In no case may a woman prisoner of war be awarded or sentenced to a punishment more severe, or treated whilst undergoing punishment more severely, than a male member of the armed forces of the Detaining Power dealt with for a similar offence.

Prisoners of war who have served disciplinary or judicial sentences may not be treated differently from other prisoners of war.

II. Disciplinary Sanctions

ARTICLE 89

The disciplinary punishments applicable to prisoners of war are the following:

(1) A fine which shall not exceed 50 per cent of the advances of pay and working pay which the prisoner of war would otherwise receive under the provisions of Articles 60 and 62 during a period of not more than thirty days.
(2) Discontinuance of privileges granted over and above the treatment provided for by the present Convention.
(3) Fatigue duties not exceeding two hours daily.
(4) Confinement.

The punishment referred to under (3) shall not be applied to officers.

In no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war.

ARTICLE 90

The duration of any single punishment shall in no case exceed thirty days. Any period of confinement awaiting the hearing of a disciplinary offence or the award of disciplinary punishment shall be deducted from an award pronounced against a prisoner of war.

The maximum of thirty days provided above may not be exceeded, even if the prisoner of war is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not.

The period between the pronouncing of an award of disciplinary punishment and its execution shall not exceed one month.

When a prisoner of war is awarded a further disciplinary punishment, a

period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

ARTICLE 91

The escape of a prisoner of war shall be deemed to have succeeded when:

(1) he has joined the armed forces of the Power on which he depends, or those of an allied Power;
(2) he has left the territory under the control of the Detaining Power, or of an ally of the said Power;
(3) he has joined a ship flying the flag of the Power on which he depends, or of an allied Power, in the territorial waters of the Detaining Power, the said ship not being under the control of the last named Power.

Prisoners of war who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.

ARTICLE 92

A prisoner of war who attempts to escape and is recaptured before having made good his escape in the sense of Article 91 shall be liable only to a disciplinary punishment in respect of this act, even if it is a repeated offence.

A prisoner of war who is recaptured shall be handed over without delay to the competent military authority.

Article 88, fourth paragraph, notwithstanding, prisoners of war punished as a result of an unsuccessful escape may be subjected to special surveillance. Such surveillance must not affect the state of their health, must be undergone in a prisoner of war camp, and must not entail the suppression of any of the safeguards granted them by the present Convention.

ARTICLE 93

Escape or attempt to escape, even if it a repeated offence, shall not be deemed an aggravating circumstance if the prisoner of war is subjected to trial by judicial proceedings in respect of an offence committed during his escape or attempt to escape.

In conformity with the principle stated in Article 83, offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, or the wearing of civilian clothing, shall occasion disciplinary punishment only.

Prisoners of war who aid or abet an escape or an attempt to escape shall be liable on this count to disciplinary punishment only.

ARTICLE 94

If an escaped prisoner of war is recaptured, the Power on which he depends shall be notified thereof in the manner defined in Article 122, provided notification of his escape has been made.

ARTICLE 95

A prisoner of war accused of an offence against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence,

or if it is essential in the interests of camp order and discipline.

Any period spent by a prisoner of war in confinement awaiting the disposal of an offence against discipline shall be reduced to an absolute minimum and shall not exceed fourteen days.

The provisions of Articles 97 and 98 of this Chapter shall apply to prisoners of war who are in confinement awaiting the disposal of offences against discipline.

ARTICLE 96

Acts which constitute offences against discipline shall be investigated immediately.

Without prejudice to the competence of courts and superior military authorities, disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers.

In no case may such powers be delegated to a prisoner of war or be exercised by a prisoner of war.

Before any disciplinary award is pronounced, the accused shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced to the accused prisoner of war and to the prisoner's representative.

A record of disciplinary punishments shall be maintained by the camp commander and shall be open to inspection by representatives of the Protecting Power.

ARTICLE 97

Prisoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.

All premises in which disciplinary punishments are undergone shall conform to the sanitary requirements set forth in Article 25. A prisoner of war undergoing punishment shall be enabled to keep himself in a state of cleanliness, in conformity with Article 29.

Officers and persons of equivalent status shall not be lodged in the same quarters as non-commissioned officers or men.

Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.

ARTICLE 98

A prisoner of war undergoing confinement as a disciplinary punishment, shall continue to enjoy the benefits of the provisions of this Convention except in so far as these are necessarily rendered inapplicable by the mere fact that he is confined. In no case may he be deprived of the benefits of the provisions of Articles 78 and 126.

A prisoner of war awarded disciplinary punishment may not be deprived of the prerogatives attached to his rank.

Prisoners of war awarded disciplinary punishment shall be allowed to exercise and to stay in the open air at least two hours daily.

They shall be allowed, on their request, to be present at the daily medical inspections. They shall receive the attention which their state of health requires and, if necessary, shall be removed to the camp infirmary or to a hospital.

They shall have permission to read and write, likewise to send and receive letters. Parcels and remittances of money however, may be withheld from them until the completion of the punishment; they shall meanwhile be entrusted to the prisoners' representative, who will hand over to the infirmary the perishable goods contained in such parcels.

III. Judicial Proceedings

ARTICLE 99

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

ARTICLE 100

Prisoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power.

Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power on which the prisoners of war depend.

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.

ARTICLE 101

If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives, at an indicated address, the detailed communication provided for in Article 107.

ARTICLE 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

ARTICLE 103

Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a

member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.

The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

ARTICLE 104

In any case in which the Detaining Power has decided to institute judicial proceedings against a prisoner of war, it shall notify the Protecting Power as soon as possible and at least three weeks before the opening of the trial. This period of three weeks shall run as from the day on which such notification reaches the Protecting Power at the address previously indicated by the latter to the Detaining Power.

The said notification shall contain the following information:

(1) Surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any;
(2) Place of internment or confinement;
(3) Specification of the charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;
(4) Designation of the court which will try the case, likewise the date and place fixed for the opening of the trial.

The same communication shall be made by the Detaining Power to the prisoners' representative.

If no evidence is submitted, at the opening of a trial, that the notification referred to above was received by the Protecting Power, by the prisoner of war and by the prisoners' representative concerned, at least three weeks before the opening of the trial, then the latter cannot take place and must be adjourned.

ARTICLE 105

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening

of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held *in camera* in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

ARTICLE 106

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his rights to appeal or petition and of the time limit within which he may do so.

ARTICLE 107

Any judgment and sentence pronounced upon a prisoner of war shall be immediately reported to the Protecting Power in the form of a summary communication, which shall also indicate whether he has the right of appeal with a view to the quashing of the sentence or the reopening of the trial. This communication shall likewise be sent to the prisoners' representatives concerned. It shall also be sent to the accused prisoner of war in a language he understands, if the sentence was not pronounced in his presence. The Detaining Power shall also immediately communicate to the Protecting Power the decision of the prisoner of war to use or to waive his right of appeal.

Furthermore, if a prisoner of war is finally convicted or if a sentence pronounced on a prisoner of war in the first instance is a death sentence, the Detaining Power shall as soon as possible address to the Protecting Power a detailed communication containing:

(1) the precise wording of the finding and sentence;
(2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and the defence;
(3) notification, where applicable, of the establishment where the sentence will be served.

The communications provided for in the foregoing sub-paragraphs shall be sent to the Protecting Power at the address previously made known to the Detaining Power.

ARTICLE 108

Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishment and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.

In any case, prisoners of war sentenced to a penalty depriving them of their liberty shall retain the benefit of the provisions of Articles 78 and 126 of the present Convention. Furthermore, they shall be entitled to receive and despatch correspondence, to receive at least one relief parcel monthly, to take regular exercise in the open air, to have the medical care required by their state of health, and the spiritual assistance they may desire. Penalties to which they may be subjected shall be in accordance with the provisions of Article 87, third paragraph.

PART IV
TERMINATION OF CAPTIVITY
SECTION I
DIRECT REPATRIATION AND ACCOMMODATION IN NEUTRAL COUNTRIES

ARTICLE 109

Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article. They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities.

ARTICLE 110

The following shall be repatriated direct:

(1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.

(2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.

(3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The following may be accommodated in a neutral country:

(1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.

(2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

The conditions which prisoners of war accommodated in a neutral country must fulfil in order to permit their repatriation shall be fixed, as shall likewise their status, by agreement between the Powers concerned. In general, prisoners of war who have been accommodated in a neutral country, and who belong to the following categories, should be repatriated:

(1) Those whose state of health has deteriorated so as to fulfil the conditions laid down for direct repatriation;

(2) Those whose mental or physical powers remain, even after treatment, considerably impaired.

If no special agreements are concluded between the Parties to the conflict concerned, to determine the cases of disablement or sickness entailing direct repatriation or accommodation in a neutral country, such cases shall be settled in accordance with the principles laid down in the Model Agreement concerning direct repatriation and accommodation in neutral countries of wounded and sick prisoners of war and in the Regulations concerning Mixed Medical Commissions annexed to the present Convention.

ARTICLE 111

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power until the close of hostilities.

ARTICLE 112

Upon the outbreak of hostilities, Mixed Medical Commissions shall be apointed to examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them. The appointment, duties and functioning of these Commissions shall be in conformity with the provisions of the Regulations annexed to the present Convention.

However, prisoners of war who, in the opinion of the medical authorities of the Detaining Power, are manifestly seriously injured or seriously sick, may be repatriated without having to be examined by a Mixed Medical Commission.

ARTICLE 113

Besides those who are designated by the medical authorities of the Detaining Power, wounded or sick prisoners of war belonging to the categories listed below shall be entitled to present themselves for examination by the Mixed Medical Commissions provided for in the foregoing

Article:

(1) Wounded and sick proposed by a physician or surgeon who is of the same nationality, or a national of a Party to the conflict allied with the Power on which the said prisoners depend, and who exercises his functions in the camp.
(2) Wounded and sick proposed by their prisoners' representative.
(3) Wounded and sick proposed by the Power on which they depend, or by an organization duly recognized by the said Power and giving assistance to the prisoners.

Prisoners of war who do not belong to one of the three foregoing categories may nevertheless present themselves for examination by Mixed Medical Commissions, but shall be examined only after those belonging to the said categories.

The physician or surgeon of the same nationality as the prisoners who present themselves for examination by the Mixed Medical Commission, likewise the prisoners' representative of the said prisoners, shall have permission to be present at the examination.

ARTICLE 114

Prisoners of war who meet with accidents shall, unless the injury is self-inflicted, have the benefit of the provisions of this Convention as regards repatriation or accommodation in a neutral country.

ARTICLE 115

No prisoner of war on whom a disciplinary punishment has been imposed and who is eligible for repatriation or for accommodation in a neutral country, may be kept back on the plea that he has not undergone his punishment.

Prisoners of war detained in connection with a judicial prosecution or conviction and who are designated for repatriation or accommodation in a neutral country, may benefit by such measures before the end of the proceedings or the completion of the punishment, if the Detaining Power consents.

Parties to the conflict shall communicate to each other the names of those who will be detained until the end of the proceedings or the completion of the punishment.

ARTICLE 116

The cost of repatriating prisoners of war or of transporting them to a neutral country shall be borne, from the frontiers of the Detaining Power, by the Power on which the said prisoners depend.

ARTICLE 117

No repatriated person may be employed on active military service.

SECTION II

RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE CLOSE OF HOSTILITIES

ARTICLE 118

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement

concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

ARTICLE 119

Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.

On repatriation any articles of value impounded from prisoners of war under Article 18, and any foreign currency which has not been converted into the currency of the Detaining Power, shall be restored to them. Articles of value and foreign currency which, for any reason whatever, are not restored to prisoners of war on repatriation, shall be despatched to the Information Bureau set up under Article 122.

Prisoners of war shall be allowed to take with them their personal effects, and any correspondence and parcels which have arrived for them. The weight of such baggage may be limited, if the conditions of repatriation so require, to what each prisoner can reasonably carry. Each prisoner shall in all cases be authorized to carry at least twenty-five kilograms.

The other personal effects of the repatriated prisoner shall be left in charge of the Detaining Power which shall have them forwarded to him as soon as it has concluded an agreement to this effect, regulating the conditions of transport and the payment of the costs involved, with the Power on which the prisoner depends.

Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

Parties to the conflict shall communicate to each other the names of any prisoners of war who are detained until the end of the proceedings or until punishment has been completed.

By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay.

SECTION III
DEATH OF PRISONERS OF WAR
ARTICLE 120

Wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases, after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates, in the form annexed to the present Convention, or lists certified by a responsible officer, of all persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordnace with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.

In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves

Registration Service until proper disposal thereof in accordance with the wishes of the home country.

ARTICLE 121

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

PART V
INFORMATION BUREAUX AND RELIEF SOCIETIES FOR PRISONERS OF WAR

ARTICLE 122

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power. Neutral or non-belligerent Powers who may have received within their territory persons belonging to one of the categories referred to in Article 4, shall take the same action with respect to such persons. The Power concerned shall ensure that the Prisoners of War Information Bureau is provided with the necessary accommodation, equipment and staff to ensure its efficient working. It shall be at liberty to employ prisoners of war in such a Bureau under the conditions laid down in the Section of the present Convention dealing with work by prisoners of war.

Within the shortest possible period, each of the Parties to the conflict shall give its Bureau the information referred to in the fourth, fifth and sixth paragraphs of this Article regarding any enemy person belonging to one of the categories referred to in Article 4, who has fallen into its power. Neutral or non-belligerent Powers shall take the same action with regard to persons belonging to such categories whom they have received within their territory.

The Bureau shall immediately forward such information by the most rapid means to the Powers concerned, through the intermediary of the Protecting Powers and likewise of the Central Agency provided for in Article 123.

This information shall make it possible quickly to advise the next of kin concerned. Subject to the provisions of Article 17, the information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent.

The Information Bureau shall receive from the various departments

concerned information regarding transfer, releases, repatriations, escapes, admissions to hospital, and deaths, and shall transmit such information in the manner described in the third paragraph above.

Likewise, information regarding the state of health of prisoners of war who are seriously ill or seriously wounded shall be supplied regularly, every week if possible.

The Information Bureau shall also be responsible for replying to all enquiries sent to it concerning prisoners of war, including those who have died in captivity; it will make any enquiries necessary to obtain the information which is asked for if this is not in its possession.

All written communications made by the Bureau shall be authenticated by a signature or a seal.

The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have been repatriated or released, or who have escaped or died, and shall forward the said valuables to the Powers concerned. Such articles shall be sent by the Bureau in sealed packets which shall be accompanied by statements giving clear and full particulars of the identity of the person to whom the articles belonged, and by a complete list of the contents of the parcel. Other personal effects of such prisoners of war shall be transmitted under arrangements agreed upon between the Parties to the conflict concerned.

ARTICLE 123

A Central Prisoners of War Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency.

The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend. It shall receive from the Parties to the conflict all facilities for effecting such transmissions.

The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require.

The foregoing provisons shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross, or of the relief societies provided for in Article 125.

ARTICLE 124

The national Information Bureaux and the Central Information Agency shall enjoy free postage for mail, likewise all the exemptions provided for in Article 74, and further, so far as possible, exemption from telegraphic charges or, at least, greatly reduced rates.

ARTICLE 125

Subject to the measures which the Detaining Powers may consider

essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, for distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

As soon as relief supplies or material intended for the above-mentioned purposes are handed over to prisoners of war, or very shortly afterwards, receipts for each consignment, signed by the prisoners' representative, shall be forwarded to the relief society or organization making the shipment. At the same time, receipts for these consignments shall be supplied by the administrative authorities responsible for guarding the prisoners.

PART VI
EXECUTION OF THE CONVENTION
SECTION I
GENERAL PROVISIONS
ARTICLE 126

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

ARTICLE 127

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

ARTICLE 128

The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.

ARTICLE 129

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

ARTICLE 130

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

ARTICLE 131

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

ARTICLE 132

At the request of a Party to the conflict, an inquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the inquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

SECTION II
FINAL PROVISIONS

ARTICLE 133

The present Convention is established in English and in French. Both texts are equally authentic.

The Swiss Federal Council shall arrange for official translations of the Convention to be made in the Russian and Spanish languages.

ARTICLE 134

The present Convention replaces the Convention of July 27, 1929, in relations between the High Contracting Parties.

ARTICLE 135

In the relations between the Powers which are bound by the Hague Convention respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and which are parties to the present Convention, this last Convention shall be complementary to Chapter II of the Regulations annexed to the above-mentioned Convention of the Hague.

ARTICLE 136

The present Convention, which bears the date of this day, is open to signature until February 12, 1950, in the name of the Powers represented at the Conference which opened at Geneva on April 21, 1949; furthermore, by Powers not represented at that Conference, but which are parties to the Convention of July 27, 1929.

ARTICLE 137

The present Convention shall be ratified as soon as possible and the ratifications shall be deposited at Berne.

A record shall be drawn up of the deposit of each instrument of ratification and certified copies of this record shall be transmitted by the Swiss Federal Council to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 138

The present Convention shall come into force six months after not less than two instruments of ratification have been deposited.

Thereafter, it shall come into force for each High Contracting Party six months after the deposit of the instrument of ratification.

ARTICLE 139

From the date of its coming into force, it shall be open to any Power in

whose name the present Convention has not been signed, to accede to this Convention.

ARTICLE 140

Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.

The Swiss Federal Council shall communicate the accessions to all the Powers in whose name the Convention has been signed, or whose accession has been notified.

ARTICLE 141

The situations provided for in Articles 2 and 3 shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. The Swiss Federal Council shall communicate by the quickest method any ratifications or accessions received from Parties to the conflict.

ARTICLE 142

Each of the High Contracting Parties shall be at liberty to denounce the present Convention.

The denunciation shall be notified in writing to the Swiss Federal Council, which shall tranmit it to the Governments of all the High Contracting Parties.

The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated.

The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

ARTICLE 143

The Swiss Federal Council shall register the present Convention with the Secretariat of the United Nations. The Swiss Federal Council shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Convention.

IN WITNESS WHEREOF the undersigned, having deposited their respective full powers, have signed the present Convention.

DONE at Geneva this twelfth day of August 1949, in the English and French languages. The original shall be deposited in the Archives of the Swiss Confederation. The Swiss Federal Council shall transmit certified copies thereof to each of the signatory and acceding States.

DOCUMENT NO. 109

RESERVATIONS TO THE 1949 GENEVA PRISONER-OF-WAR CONVENTION MADE BY THE SOVIET UNION AT THE TIME OF SIGNING (12 August 1949) AND ADHERED TO UPON RATIFICATION (10 May 1954), WITH AN EXPLANATION (26 May 1955)

SOURCES

RESERVATIONS:

75 UNTS 135, 458 (ratification, 191 UNTS 367)
6 UST 3317, 3506
157 BFSP 284
47 AJIL Supp. 119, 177
1 Final Record 355

EXPLANATION:

Pictet, Commentary 424

NOTE

The Soviet Union made reservations to three of the articles (10, 12, and 85) of the Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). These reservations are typical of, although not always identical with, those made by all of the Communist countries which signed and ratified the Convention, as well as those made by Communist, or Communist-leaning, countries which have since acceded to the Convention. (But see DOCUMENT NO. 170, which goes even further than the Soviet reservations.) At the request of the Governments of Great Britain and the United States, the Swiss Government, as the depository of the Convention, requested the Soviet Government to explain its reservations to Article 85 of the Convention which, it was feared, made it possible for a reserving state to remove any prisoner of war from the protection of the Convention merely by unilaterally labeling him a "war criminal." (This was substantially the procedure followed by the North Koreans and Chinese Communists during the hostilities in Korea. See DOCUMENT NO. 134, at Chapters I and VII. It was also apparently the position taken by the North Vietnamese towards all American prisoners of war during the hostilities in Vietnam.) The Soviet explanation of its reservation, given below, does not justify such an interpretation of the reservation. However, after World War II (1939-1945) the Soviet Union is known to have at least tried some prisoners of war for the "war crime" of "supporting capitalism." By following this procedure much the same result as was feared with respect to the reservation could be attained.

TEXT

RESERVATIONS:

(3) "On signing the Convention relative to the Treatment of Prisoners of War, the Government of the Union of Soviet Socialist Republics makes the

following reservations:

Article 10: "The Union of Soviet Socialist Republics will not recognize the validity of requests by the Detaining Power to a neutral State or to a humanitarian organization, to undertake the functions performed by a Protecting Power, unless the consent of the Government of the country of which the prisoners of war are nationals has been obtained.

Article 12: "The Union of Soviet Socialist Republics does not consider as valid the freeing of a Detaining Power, which has transferred prisoners of war to another Power, from responsibility for the application of the Convention to such prisoners of war while the latter are in the custody of the Power accepting them.

Article 85: "The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.

EXPLANATION:

As may be seen from the text, the reservation entered by the Soviet Union with regard to Article 85 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War signifies that prisoners of war who, under the law of the USSR, have been convicted of war crimes or crimes against humanity must be subject to the conditions obtaining in the USSR for all other persons undergoing punishment in execution of judgments by the courts. Once the sentence has become legally enforceable, persons in this category consequently do not enjoy the protection which the Convention affords.

With regard to persons sentenced to be deprived of their liberty, the protection afforded by the Convention becomes applicable again only after the sentence has been served; thereafter, the persons concerned are entitled to repatriation in accordance with the conditions set forth in the Convention.

Furthermore, account should be taken of the fact that the conditions applicable to all persons serving sentence under the legislation of the USSR correspond to all the requirements of humanity and hygiene and that corporal punishment is strictly forbidden by law. Moreover, in accordance with the regulations in force, the prison authorities are required to transmit immediately to the competent Soviet authorities, for further investigation, any complaints by convicted persons concerning their conviction and sentence or requests for a review of their case, as well as all other complaints.

Moscow, May 26, 1955

DOCUMENT NO. 110

UNIFORM CODE OF MILITARY JUSTICE OF THE UNITED STATES (5 May, 1950, as amended)

SOURCES

10 U.S.C. 800 *et seq.*
Manual for Courts-Martial, United States, 1969 (rev. ed.), Appendix 2

NOTE

Inasmuch as Article 82(1) of the 1949 Geneva Prisoners-of-War Convention (DOCUMENT NO. 108) provides that prisoners of war shall be subject to the "laws, regulations and orders in force in the armed forces of the Detaining Power," any prisoner of war held by the United States during the course of an international armed conflict in which it is a belligerent would be subject to its Uniform Code of Military Justice, the code to which all of the members of its armed forces are subject, both in peace and in war. While this code contains both a complete code of substantive offenses and a complete code of criminal procedure, only those provisions of particular relevence to prisoners of war are given below. The entire Article 15, which is concerned with "non-judicial punishment" (titled "disciplinary sanctions" and "disciplinary punishment" in the 1949 Convention), is given. (Concerning "non-judicial punishment" see DOCUMENT NO. 119.) It should be noted that Article 105 below ("Misconduct as a prisoner [of war]") applies to members of the armed forces of the United States who are prisoners of war in enemy hands. (See DOCUMENT NO. 130, DOCUMENT NO. 133 and DOCUMENT NO. 139.) This raises, once again, the problem of the extent to which the national military law of a prisoner of war is effective while he is in that status. (See DOCUMENT NO. 87.)

EXTRACTS

§ 802. ART. 2. PERSONS SUBJECT TO THE CODE.

The following persons are subject to this code:

(9) Prisoners of war in custody of the armed forces.

§ 805. ART. 5. TERRITORIAL APPLICABILITY OF THE CODE.

This code shall be applicable in all places.

* * * * *

§ 815. ART. 15. COMMANDING OFFICER'S NONJUDICIAL PUNISHMENT.

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a

member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more tha one-half of one month's pay per month for three months;

(2) upon other personnel of his command—

(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

(B) correctional custody for not more than seven consecutive days;

(C) forfeiture of not more than seven days' pay;

(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(G) detention of not more than 14 days' pay;

(H) if imposed by an officer of the grade of major or lieutenant commander, or above—

(i) the punishment authorized under subsection (b) (2) (A);

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of one month's pay per month for two months;

(iv) reduction to the lowest or any intermediate pay grade, if the

grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade E—4 may not be reduced more than two pay grades;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purpose of this subsection, 'correctional custody' is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b) (2) (A)-(G) as the Secretary concerned may specifically prescribe by regulation.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges, and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating—

(1) arrest in quarters to restriction;

(2) confinement on bread and water or diminished rations to correctional custody;

(3) correctional custody or confinement on bread and water or diminished rations to extra duties or retrictions, or both; or

(4) extra duties to restriction;

the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay,

the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of—

(1) arrest in quarters for more than seven days;
(2) correctional custody for more than seven days;
(3) forfeiture of more than seven days' pay;
(4) reduction of one or more pay grades from the fourth or a higher pay grade;
(5) extra duties for more than 14 days;
(6) restriction for more than 14 days; or
(7) detention of more than 14 days' pay;

the authority who is to act on the appeal shall refer the case to a judge advocate of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Marine Corps, Coast Guard, or Treasury Department for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article and may also prescribe that certain categories of those proceedings shall be in writing.

§ 816. ART. 16. COURTS-MARTIAL CLASSIFIED.

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—
  (A) a military judge and not less than five members; or
  (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves;
(2) special courts-martial, consisting of—
  (A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

§ 817. ART. 17. JURISDICTION OF COURTS-MARTIAL IN GENERAL.

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise or jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member.

§ 818. ART. 18. JURISDICTION OF GENERAL COURTS-MARTIAL.

Subject to section 817 of this title, general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title, shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 819. ART. 19. JURISDICTION OF SPECIAL COURTS-MARTIAL.

Subject to section 817 of this title, special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (Article 27b) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

§ 820 ART. 20. JURISDICTION OF SUMMARY COURTS-MARTIAL.

Subject to section 817 of this title, summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 821. ART. 21. JURISDICTION OF COURTS-MARTIAL NOT EXCLUSIVE.

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

§ 905. ART. 105. MISCONDUCT AS PRISONER [OF WAR].

Any person subject to this chapter who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, customs, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct.

DOCUMENT NO. 111

FORMULATION OF THE NÜRNBERG PRINCIPLES BY THE INTERNATIONAL LAW COMMISSION (July 1950)

SOURCE

1950 Yearbook of the International Law Commission, Vol. II, at 374

NOTE

On 11 December 1946 the General Assembly of the United Nations adopted Resolution 95(1) (DOCUMENT NO. 88) in which it unanimously "affirm[ed] the principles of international law recognized by the Charter of the Nürnberg Tribunal [DOCUMENT NO. 68] and the judgment of the Tribunal [DOCUMENT NO. 85]" and directed its Committee on codification of international law to "formulate" these principles. On 21 November 1947 the General Assembly adopted Resolution 177(II) (DOCUMENT NO. 96) directing the International Law Commission to perform this function. The International Law Commission did so. The Principles so formulated which have an impact on prisoners of war are given below together with the comment of the Commission where relevant. The quoted Principles and Comment demonstrate the impact of rules relating to war crimes on prisoners of war, both as victims and as accused. (The "fair trial" provisions set forth in the Comment on Principle V would, of course, be superseded, in the case of prisoner-of-war accused, by those contained in Article 82-88 and 99-108 of the 1949 Geneva Prisoner of War Convention. (DOCUMENT NO. 108) See also Article 75 of the 1977 Protocol I (DOCUMENT NO. 175).)

EXTRACTS

PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NÜRENBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL

PRINCIPLE I

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

* * * * *

99. The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the Tribunal were very definite on the question whether rules of international law may apply to individuals. "That international law imposes duties and liabilities upon individuals as well as upon States", said the judgment of the Tribunal, "has long been recognized". It added: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

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.

100. This principle is a corollary to Principle I. Once it is admitted that indivduals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country.

* * * * *

102. The principle that a person who has committed an international crime is responsible therefore and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the "supremacy" of international law over national law. The Tribunal considered that international law can bind individuals even if national law does not direct them to observe the rules of international law, as shown by the following statement of the judgment: ". . . the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State".

* * * * *

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.

105. This text is based on the principle contained in article 8 of the Charter of the Nürnberg Tribunal as interpreted in the judgment. The idea expressed in Principle IV is that superior orders are not a defence provided a moral choice was possible to the accused. In conformity with this conception, the Tribunal rejected the argument of the defence that there could not be any responsibility since most of the defendants acted under the orders of Hitler. The Tribunal declared: "The provisions of this article [article 8] 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 defence 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."

106. The last phrase of article 8 of the Charter "but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires", has not been retained for the reason [that the Commission considers that the question of mitigating punishment is a matter for the competent Court to decide.]

PRINCIPLE V

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

107. The principle that a defendant charged with a crime under in-

ternational law must have the right to a fair trial was expressly recognized and carefully developed by the Charter of the Nürnberg Tribunal. The Charter contained a chapter entitled: "Fair Trial for Defendants", which for the purpose of ensuring such fair trial provided the following procedure:

"*a*. The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the trial.

"*b*. During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.

"*c*. A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.

"*d*. A defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.

"*e*. A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution."

108. The right to a fair trial was also referred to in the judgment itself. The Tribunal said in this respect: "With regard to the constitution of the Court all that the defendants are entitled to ask is to receive a fair trial on the facts and law."

109. In the view of the Commission, the expression "fair trial" should be understood in the light of the above-quoted provisions of the Charter of the Nürnberg Tribunal.

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).

110. Both categories of crimes are characterized by the fact that they are connected with "war of aggression or war in violation of international treaties, agreements or assurances".

* * * * *

116. The terms "planning" and "preparation" of a war of aggression were considered by the Tribunal as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. As stated in the judgment, "planning and preparation are essential to the making of war".

117. The meaning of the expression "waging of a war of aggression" was discussed in the Commission during the consideration of the definition of "crimes against peace." Some members of the Commission feared that everyone in uniform might be charged with the "waging" of such a war. The Commission understands the expression to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the Tribunal.

* * * * *

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, of 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.

119. The Tribunal emphasized that before the last war the crimes defined by article 6 *(b)* of its Charter were already recognized as crimes under international law. The Tribunal stated that such crimes were covered by specific provisions of the Regulations annexed to The Hague Convention of 1907 respecting the Laws and Customs of War on Land and of the Geneva Convention of 1929 on the Treatment of Prisoners of War. After enumerating the said provisions, the Tribunal stated: "That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit or [sic] argument."

* * * * *

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.

125. The only provision in the Charter of the Nürnberg Tribunal regarding responsibility for complicity was that of the last paragraph of article 6 which reads as follows: "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 a plan."

126. The Tribunal, commenting on this provision in connection with its discussion of count one of the indictment, which charged certain defendants with conspiracy to commit aggressive war, war crimes and crimes against humanity, said that, in its opinion, the provision did not "add a new and separate crime to those already listed". In the view of the Tribunal, the provision was designed to "establish the responsibility of persons participating in a common plan" to prepare, initiate and wage aggressive war. Interpreted literally, this statement would seem to imply that the complicty rule did not apply to crimes perpetrated by individual action.

127. On the other hand, the Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting

in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity. This view is corroborated by expressions used by the Tribunal in assessing the guilt of particular defendants.

DOCUMENT NO. 112

TRIALS OF ACCUSED WAR CRIMINALS: RULES OF CRIMINAL PROCEDURE FOR MILITARY COMMISSIONS OF THE UNITED NATIONS COMAMND (22 October 1950)

SOURCE

National Archives of the United States
Library of the Judge Advocate General's School, United States Army

NOTE

The Supreme Command of a military alliance such as SHAEF during World War II (1939-1945), or NATO or the Warsaw Pact today, is merely a military headquarters created by agreement by allies, each of which normally retains complete autonomy over its own armed forces except for their deployment and employment. Thus, if the troops of one country in such an alliance capture prisoners of war, that country is the Detaining Power and the prisoners of war are subjected to its national laws. The United Nations Command (UNC), the supreme command in Korea during the hostilities in that country (1950-1953), perhaps because it came into being by resolution of the Security Council of the United Nations, and not by the usual agreement between allies, made the decision to consider itself to be the Detaining Power for all prisoners of war captured by the troops of the various national elements which had been made available to the UNC; and there then being no national laws available to regulate the conduct and punishment of prisoners of war, it was necessary to promulgate a series of "Rules" to govern the disciplinary and penal problems which were inevitable. The Rules here reproduced were the first of a series of "laws" (see also DOCUMENT NO. 118, DOCUMENT NO. 119, DOCUMENT NO. 120, and DOCUMENT NO. 121) promulgated to fill what would otherwise have been a legal vacuum. They established the procedure for the trials of prisoners of war by military commissions of the UNC for precapture offenses (war crimes). When the armistice agreement which ended the hostilities in Korea (DOCUMENT NO. 128) was signed, the UNC held more than 200 North Korean and Chinese prisoners of war against whom it believed that specific war crimes of major import could be proven. All of these individuals were released and repatriated without trial pursuant to the provisions of the armistice agreement. (As none of these various "laws" was ever applied in an actual case, no legal problems concerning their validity ever arose in a form in which adjudication would have been possible. It is interesting to speculate as to how a national court would have viewed these legislative acts of the Commander-in-Chief, UNC.)

TEXT

SECTION I. SCOPE, PURPOSE, AND CONSTRUCTION

RULE 1. SCOPE OF RULES. These rules shall govern all Military

Commissions of the United Nations Command conducting trials of accused war criminals.

RULE 2. PURPOSE AND CONSTRUCTION OF RULES. These rules are intended to provide for the just determination of war crimes proceedings; they shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable delay.

SECTION II. THE COMMISSION

RULE 3. JURISDICTION OVER PERSONS. These Commissions shall have jurisdiction over all prisoners of war who are in the custody of the convening authority at the commencement of the trial and during the arraignment.

RULE 4. JURISDICTION OVER OFFENSES. The Commission shall have jurisdiction over all acts constituting violations of the laws and customs of war of general application, including, but not limited to, such acts as murder or ill-treatment of prisoners of war; murder or ill-treatment of civilians; improper treatment of hostages; plunder of public or private property; unlawful hostilities by individuals who are not regular members of enemy armed forces; and all marauding acts. The Commission shall also have jurisdiction over all attempts to commit, or conspiracies and agreements to commit, as well as inciting, encouraging, aiding, abetting, or permitting violations of the laws and customs of war of general application.

RULE 5. MEMBERSHIP OF COMMISSIONS.

a. *Appointment.* The members of each Military Commission will be appointed by the Commander in Chief, United Nations Command or under authority delegated by him.

b. *Number.*

Each Commission shall consist of not less than five members.

c. *Designation.*

The order appointing the Commission shall designate a President and a Law Member. The same individual may be designated both President and Law Member.

d. *Eligibility.*

(1) Any commissioned officer of the armed forces of the United Nations Command, including any commissioned officer of the armed forces of the Republic of Korea, shall be eligible for membership on the Commission.

(2) The convening authority may, in his discretion, appoint as a member of a Commission any civilian who, by reason of his experience, maturity, and judicial temperment, is deemed competent to perform the duties involved.

e. *Representation.* Where an offense involves victims of more than one nation, each such nation, in the discretion of the convening authority, may be represented on the Commission.

f. *Vacancies.* Any vacancy occurring among the members may be filled, or any addition to a Commission may be made, by the convening authority, but the substance of all proceedings had and evidence taken in the case then on trial shall be made known to the new member. The fact that the substance of all proceedings had and evidence taken in the case has been made known to

the new member will be announced by the President of a Commission in open court.

RULE 6. QUALIFICATIONS OF MEMBERS OF COMMISSIONS.

a. *General.* The convening authority shall appoint to the Commission only persons competent to perform the duties involved and not disqualified by personal interest or prejudice; provided that no person shall sit as a member of a Commission in any case in which he is the accuser or investigator or in which he may be required as a witness for the prosecution.

b. *President.* The President shall be especially selected by reason of his experience, maturity, and judicial temperament.

c. *Law Member.* The Law Member shall be a member of the Judge Advocate General's Corps, or its equivalent, or an individual certified by The Judge Advocate General, or his equivalent, of any of the United Nations armed forces to be qualified under applicable law to sit as Law Member or Law Officer on general courts-martial, or their equivalent, or a commissioned officer, or civilian, of the United Nations Command who has been certified by the convening authority to be a member of the Bar in good standing of any nation, or territorial division thereof, of the United Nations.

RULE 7. DUTIES OF MEMBERS OF COMMISSIONS IN GENERAL. The members of the Commisison shall hear the evidence, determine the guilt or innocence of the accused fairly, without partiality, favor, or affection, and, if the accused is found guilty, adjudge a proper sentence.

RULE 8. DUTIES OF THE PRESIDENT.

a. *General.* The President shall perform all duties of a member of the Commission as defined in Rule 7, above.

b. *Control of Proceedings.* The President shall maintain order and give the necessary directions for the regular and proper conduct of the proceedings. The President shall deal summarily with any contempt committed in the presence of the Commission, imposing appropriate punishment therefor within the limits specified in Rule 13b, below.

c. *Expedition of Trial.*

(1) The President shall take proper steps, consistent with the protection of the substantial rights of the accused, to expedite the trial.

(2) The President shall arrange for pre-trial conferences with a view towards the possibility of reaching agreements between counsel which will narrow the issues to be tried or to the end that stipulations may be entered into concerning undisputed questions of fact.

d. *Notice to Accused of Right of Appeal.* After sentence has been announced, the President shall fully inform each convicted accused, in open court, of his right of appeal or petition, and the time limit within which he may do so.

e. *Authentication.* The President shall authenticate by his signature all acts, orders, and proceedings of the Commission.

RULE 9. DUTIES OF THE LAW MEMBER.

a. *General.* The Law Member shall perform all duties of a member of the Commission as defined in Rule 7, above.

b. *Rulings.* The Law Member shall rule on all interlocutory questions other than challenge for cause arising during the trial.

c. *Advice to the Commission.*

(1) The Law Member shall advise the Commission on all questions of law and procedure which arise during the course of the trial.

(2) The Law Member shall advise the Commission, in open court, before a vote is taken on the findings, concerning the presumption of innocence and the nature and quantum of evidence required to sustain findings.

d. *Advice to Accused.*

(1) The Law Member shall advise the accused, in open court, of his rights as a witness.

(2) The Law Member shall, where the accused pleads guilty to any offense, explain to him, in open court, the meaning and effect of such plea.

RULE 10. COUNSEL.

a. *Designation of Prosecutors.* The convening authority shall designate in the order appointing a Commission one or more persons to conduct the prosecution before the Commission. Such personnel shall be designated as Prosecutor and Assistant Prosecutor(s). Where an offense involves victims of more than one nation, each such nation, in the discretion of the convening authority, may be represented on the prosecuting staff.

b. *Designation of Defense Counsel.* The convening authority shall designate in the order appointing a Commission one or more persons to conduct the defense of the accused. Such personnel shall be designated as Defense Counsel and Assistant Defense Counsel.

c. *Qualifications.*

The convening authority shall designate as Counsel only persons competent to perform the duties involved; qualifications of Prosecutor and appointed Defense Counsel shall include membership in the Bar, in good standing, of any nation, or territorial division thereof, of the United Nations.

RULE 11. DUTIES OF PROSECUTOR.

a. *Special Duties Prior to Trial.*

(1) The Prosecutor shall, immediately upon reference for trial, advise the accused in a language which he understands of the rights and privileges afforded him by these Rules.

(2) The Prosecutor shall, immediately upon reference for trial, provide the accused with a copy of the charges and specifications in the case, together with such other documents as may be ordered by a Commission. If these documents, or a part of them, are in a language other than one which the accused understands, they shall be made known to him in a language understood by him.

(3) The Prosecutor shall, immediately upon reference for trial, provide Counsel conducting the defense on behalf of the accused with a copy of the charges and specifications in the case, together with such other documents as may be ordered by a Commission.

b. *Prosecution of Case.* The Prosecutor shall prepare and conduct the prosecution of all cases referred to him for trial.

c. *Errors and Irregularities.* The Prosecutor, acting timely, shall call to the attention of the Commission any apparent error or irregularity in its actions or in the proceedings.

d. *Manner of Performance.* The Prosecutor shall perform all duties in a manner consistent with the purpose of having the whole truth revealed, and shall insure that the Commission has the benefit of all available probative evidence so that the accused may have a fair and impartial trial.

e. *Affidavit of Prosecutor.* The Prosecutor shall execute an affidavit certifying that the duties prescribed in subparagraph a of this Rule have been performed. Such affidavit shall be incorporated into the record as one of the allied papers of the case. He shall also execute the affidavit referred to in Rule 51c.

f. *Appeals.* The Prosecutor, or a duly appointed successor, shall represent the United Nations on any appeal which may be taken by the accused.

RULE 12. DUTIES OF DEFENSE COUNSEL.

a. *Advice to Accused.* Defense Counsel shall, immediately upon receipt of the charges and allied papers in the case, inform the accused that he has been appointed to defend him and explain his general duties.

b. *Representation of Accused.* Defense Counsel shall prepare the defense of the accused and represent the accused before and during the trial.

c. *Manner of Performance.* Defense Counsel shall guard the interests of the accused by all honorable and legitimate means known to the law.

RULE 13. POWERS OF THE COMMISSION.

a. *General.* The Commission shall have power to impound money and property, compel the attendance and detention of witnesses, require witnesses to produce documents and property, punish for contempt, debar from practice before the Commission any Counsel for cause subject to review by the convening authority, administer oaths and affirmations, and issue search warrants and warrants of arrest.

b. *Contempts.* The Commission shall have the power to punish for contempt by imprisonment not exceeding six months or by fine not exceeding $500.00, or by both fine and imprisonment, any disobedience of its mandates or any contempt committed outside of its presence.

c. *Rules and Forms.* The Commission shall have the power to adopt supplementary rules and forms to govern its procedure, not inconsistent with the provisions hereof.

RULE 14. AUTHORIZED PUNISHMENT. The Commission may sentence an accused, upon conviction, to death by hanging or shooting, confinement at hard labor for life or for any lesser term, or such other punishment as the Commission shall determine to be proper, consistent with the practices of civilized nations.

RULE 15. SUBROGATION OF POWERS AND DUTIES.

a. *Member of Commission.* In the absence of the President, the next senior member of a Commission shall exercise the powers and perform the duties devolved by law or these Rules upon the President of the Commission.

b. *Counsel.* An Assistant Prosecutor or Assistant Defense Counsel shall be competent to exercise any of the powers or perform any of the duties devolved by law or these Rules upon the Prosecutor or Defense Counsel, respectively.

SECTION III. TRIAL

RULE 16. CONDUCT OF TRIAL. The Commission shall confine each proceeding strictly to a fair, expeditious trial of the issues raised, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference; hold public sessions except when otherwise required by the dictates of military necessity; hold each session at such time and place as it shall determine, or as may be directed by the convening authority.

RULE 17. TRIAL PROCEDURE. The order of proceedings of trial shall conform generally to that prescribed for general courts-martial, or its equivalent, in the armed forces of the nation of the convening authority. A suggested guide for procedure before Military Commissions is attached as Annex A. [Not printed.]

RULE 18. JOINT AND COMMON TRIALS. Two or more persons may be tried together wherever jointly charged in any specification. Common trials may be held if two or more accused are alleged to have participated in the same act or acts, or in related acts, or in the same series of acts, constituting an offense or offenses.

RULE 19. PRESENCE OF LAW MEMBER. The Commission shall not receive evidence upon any matter, nor shall it vote upon its findings or sentence, in the absence of the Law Member. When the Law Member is absent at any time during the trial, the Commission will adjourn until the Law Member is present or a new Law Member is appointed.

RULE 20. PROSECUTIONS AND PROCESS. All prosecutions before the Commission shall be conducted, and all process returnable to such Commission shall issue, under the authority of the United Nations.

RULE 21. CHARGES AND SPECIFICATIONS.

a. *Nature and Contents.* Charges and specifications shall be based on personal knowledge, or information and belief, and signed under oath by a member of the armed forces of the United Nations Command. Each charge and specification shall consist of a plain, concise, and clear statement of the essential facts constituting the offense charged.

b. *Surplusage.* The Commission may strike surplusage from the charges and specifications, and should do so when such action is plainly indicated.

c. *Amendments.* The Commission may permit the charges and specifications to be amended at any time before the findings, if no additional offense is charged and if the substantial rights of the accused are not prejudiced thereby.

d. *Bill of Particulars.* The Commission may direct in its discretion that the prosecution file a Bill of Particulars. A Bill of Particulars may be amended at any time subject to such conditions as justice requires.

RULE 22. NECESSARY PERSONNEL. The convening authority shall

provide reporters, interpreters, clerks, guards, and bailiffs, as required, for the regular and prompt conduct of the proceedings.

RULE 23. PRESENCE OF THE ACCUSED. The accused shall be present at all times during trial, except during any period of escape from custody after arraignment; provided, however, that during a common trial, when an accused is unable to attend because of illness or other good cause, the Commission may, in its discretion, proceed, where the evidence to be presented is not relevant to the particular accused and the accused expressly consents, through Counsel, to the trial proceeding in his absence; and, upon return of the absent accused to the trial, the President shall ascertain in open court that the accused has had made known to him by his Counsel all proceedings had during his absence.

RULE 24. SPECIFIC RIGHTS OF THE ACCUSED.

a. *Service of Charges.* Upon reference for trial, the accused shall be furnished a copy of the charges and specifications against him. If the charges and specifications are stated in a language other than one which the accused understands, they shall be made known to him in a language understood by him.

b. *As a Witness.*

(1) The accused shall be entitled to remain silent, or, at his own request but not otherwise, to be sworn and to testify as a witness in his own behalf, or to make an oral unsworn statement to the Commission.

(2) The Law Member may, at the request of the accused, permit him to testify as a witness for a limited purpose only, excepting therefrom all testimony relative to the issue of his guilt or innocence.

(3) The accused shall be entitled to testify as a witness in his own behalf with respect to less than all of the offenses charged against him, in which case he may not be questioned about any offenses concerning which he does not testify.

c. *Representatiton by Counsel.*

(1) The accused shall be entitled, if he so desires, to assistance by one of his prisoner comrades in the conduct of his defense, and to be represented prior to and during trial by Counsel appointed by the convening authority, or by available Counsel of his own choice.

(2) The accused shall be entitled to reasonable opportunity to consult with his Counsel before and during the trial.

(3) The accused shall be entitled to representation by Counsel until the term of appeal or petition has expired.

d. *Defense Witnesses.* An accused shall be entitled to call witnesses to testify in his behalf and to have all reasonable facilities in this regard extended to him.

e. *Cross Examination.* The accused shall be entitled to cross examine, personally or through Counsel, each adverse witness who personally appears before the Commisison.

f. *Challenge for Cause.* The accused shall be entitled to challenge any

member of the Commission for cause, and to present evidence relative to such challenge.

g. *Interpretation for Accused.* The accused shall be entitled to have the substance of the proceedings and any documentary evidence translated when he is unable otherwise to understand them, and, in addition, the accused shall be entitled, if he deems it necessary, to the services of a competent interpreter.

RULE 25. PRIVILEGES AND FACILITIES AFFORDED DEFENSE COUNSEL. The Advocate or Counsel conducting the defense on behalf of the accused shall have at his disposal the reasonably necessary facilities to prepare the defense of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defense, including prisoners of war. He shall have the benefit of these facilities until the term of appeal has expired.

RULE 26. TIME OF TRIAL.

a. *Limitation on Commencement of Proceedings.* Trial shall not commence until the expiration of a period of at least three weeks from the date of the receipt by the accredited Delegate of the International Committee of the Red Cross, the prisoners' representative, and the accused of the notice required by Rule 51, below.

b. *Preparation of Defense.* No trial shall commence until the Advocate or Counsel conducting the defense on behalf of the accused shall have had at his disposal a period of at least two weeks to prepare the defense of the accused.

c. *Timely Selection of Individual Defense Counsel.* An accused shall be afforded reasonable opportunity before trial to secure Counsel of his own choice, but no court shall be prevented from proceeding because of the inability of an accused to secure Counsel of his own choosing.

RULE 27. PRELIMINARY MOTIONS. Prior to trial, both prosecution and defense will furnish opposing Counsel copies of any preliminary motions to be made to the Commission.

RULE 28. OATHS.

a. *Members and Counsel.* Before engaging in the performance of their duties, members of the Commission, as well as personnel of the prosecution and defense, shall take and subscribe to an oath or affirmation in a form recognized by them as binding them faithfully and truly to perform their duties.

b. *Reporters, Interpreters, and Translators.* Each reporter, interpreter, and translator, before entering upon his duty, shall take an oath or affirmation, in a form recognized as binding by him, faithfully and truly to perform his duties.

c. *Witnesses.* An oath or affirmation in a form recognized by a witness as binding him to testify to the truth shall be administered to each witness who is to give testimony before the Commission.

RULE 29. CHALLENGES. Members of the Commission shall not be challenged except for cause.

RULE 30. RELIEF FROM PREJUDICIAL JOINDER. For good cause shown, the Commisison may, in its discretion, grant a severance in the case of

a joint or common trial, or provide whatever other relief justice requires.

RULE 31. PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF. The accused shall be presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. If there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted. If there is a reasonable doubt as to the guilt of the accused of the specific offense charged but the evidence supports a finding of guilty of an offense reasonably included therein, then the finding should be as to the latter only. The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the prosecution.

RULE 32. EVIDENCE.

a. *General Rule.* The Law Member shall admit such evidence as in his opinion would be of assistance in proving or disproving the charge, or such as, in the Law Member's opinion, would have probative value to the mind of a reasonable man.

b. *Construction.* The rule of evidence set forth in Rule 32a, above, shall be applied with the greatest liberality consistent with the protection of the substantial rights of the accused. However, the Law Member shall not admit into evidence any statement, oral or written, of any form or nature obtained from a prisoner of war, a witness, or any other person, if it is shown that torture or other illegal or improper compulsion was utilized to secure such statement. In particular, and without limiting in any way the scope of the foregoing, the following evidence may be admitted.

c. *Documents and Reports.*

(1) The Law Member may admit into evidence any document which appears to have been signed or issued by any officer, department, agency, or member of the armed forces of any government without proof of the signature or of the issuance of the document.

(2) The Law Member may admit into evidence any report which appears to have been signed or issued by the International Red Cross, or a member thereof, or by a doctor of medicine, or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the Law Member considers as possessing knowledge of the matters contained in the report.

d. *Signed Statements, Diaries, and Letters.* The Law Member may admit into evidence any affidavit, deposition, or other signed statement, as well as any diary, letter, or other sworn or unsworn statement, appearing to the Law Member to contain information relating to the charge.

e. *Confessions.* No purported confession of an accused shall be admitted into evidence if it is shown that it was not voluntarily made.

f. *Statements of Co-Accused.* Incriminatory statements against another accused, contained in the statement or confession of a co-accused, are admissible in evidence for whatever probative value they may have, after being tested as to the truth thereof by all the circumstances of the case, as in the case of any other evidence. However, no accused shall be convicted solely on the basis of such evidence.

g. *Copies of Documents.* The Law Member may admit into evidence a copy of any document, or other secondary evidence of its contents, if satisfied that the original is not immediately available.

h. *Judicial Notice.* The Commission may take judicial notice of facts of common knowledge, official government documents of any nation, and the findings of military or other agencies of any of the United Nations with representation in the United Nations Command.

i. *Evidence Bearing Upon Sentence.* During the trial the accused, subject to rebuttal by the prosecution, may offer evidence of his prior good character and evidence in mitigation of punishment or extenuation of the offense.

RULE 33. OFFER OF PROOF.

a. *By Prosecution or Defense.* Whenever the Commission refuses to hear certain testimony or refuses to receive certain evidence of any kind, the Counsel offering the testimony or other evidence may make a concise statement of the substance of the expected testimony or other excluded evidence. The statement and any documentary evidence referred to therein will be included in the record of trial if it were made by the defense and may, in the discretion of the Law Member, be included in the record of trial if it were made by the prosecution.

b. Law Member. Whenever it is deemed desirable, the Law Member may inquire of the Prosecutor or Defense Counsel as to the nature of a particular exhibit, the testimony of a witness, or any other type of evidence in order to determine its competency, materiality, and relevancy.

RULE 34. RULINGS OF LAW MEMBER.

a. *Finality.*

(1) Rulings by the Law Member on all interlocutory questions, except challenges for cause, shall be final.

(2) Rulings by the Law Member on a motion for a finding of not guilty and on the question of the sanity of an accused are final unless objected to by a member of the Commission. Upon such objection the Commission will be closed and the motion or the question decided by a majority vote of the Commission.

b. *Form.* Each ruling of the Law Member which is subject to objection should be prefaced by a statement such as, "Subject to objection by any member of the Commission . . ."

RULE 35. VOTING.

a. *Findings and Sentence.* All voting on the findings and sentence shall be by secret, written ballot. The concurrence of at least two-thirds of the members of the Commission present at the time the vote is taken shall be necessary for conviction and for sentence, except that the concurrence of at least three-fourths of the members of the Commission present at the time the vote is taken shall be required to adjudge the death penalty.

b. *Challenges for Cause.*

(1) The vote upon a challenge for cause shall be by secret, written ballot.

(2) A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge. A tie vote on a challenge is a vote in the negative and the challenge shall not be sustained.

(3) A challenged member will withdraw and take no part in the hearings, deliberations, and voting upon a challenge against him.

c. *Insanity.*

(1) The vote upon a motion relating to the insanity of the accused shall be by oral vote, in closed session, beginning with the junior member of the Commission, and the question shall be decided by majority vote of the members present.

(2) A tie vote shall be a determination that the accused is sane. The President announces the decision in open court.

d. *Other Matters.* The vote on any other matter shall be determined by oral vote in closed session, beginning with the junior member of the Commission, and the question shall be decided by a majority vote of the members present. If there is a tie vote on any objection, motion, request, or similar matter, the objection, motion, request, or similar matter is overruled or denied. The President announces the decision in open court.

RULE 36. INSTRUCTIONS BY LAW MEMBER.

a. *Advice to Accused.*

(1) The following instructions shall be given the accused by the Law Member in open court, in all cases:

"_____, as the accused in this case you have these rights:

"First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the Commission just like the testomony of other witnesses, and you can be cross-examined on your testimony by the Prosecutor and the Commission. (The following may be used if there is more than one specification: If your testimony should concern less than all of the offenses charged against you and you should not say anything about the others, then you may be questioned about the whole subject of those offenses concerning which you testify, but you will not be questioned about any offenses concerning which you do not testify.)

"Second, if you do not want to testify under oath you may, without being sworn, say anything you desire to the Commission as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here. Since such a statement is not given under oath and since you cannot be cross-examined upon it, it cannot be given the same weight by the Commission as sworn testimony, but it will be considered by the Commisison and given such weight as it may seem to deserve. However, any admission or confession which you may make in your unsworn statement can be considered by the Commission as evidence against you. Furthermore, even though you may be sworn as a witness,

you may afterwards, if you wish, also make a statement of this kind, not under oath.

"Third, you may remain silent, that is, say nothing at all. You have a right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself, or make any statement, will not count against you in any way with the Commission. It will not be considered as an admission that you are guilty, nor can it be commented on in any way by the Prosecutor in addressing the Commission. You are also advised that if you elect to remain silent, or to make an unsworn statement, this action on your part will not furnish you grounds for an appeal, or a request for a new trial, or other relief.

"Knowing these rights, take time to consult with your Counsel and then state to the Commission which you will do."

(2) The following instructions, with such modifications as to punishment as is required by circumstances, shall be given the accused by the Law Member, in open court, where the accused pleads guilty to any offense:

"_____, you have pleaded guilty to Specification _____, Charge _____. By so doing you have admitted guilt of the offense(s) of _____ and you have admitted each of the following elements which constitute the offense(s): _____. Your plea subjects you to a finding of guilty, without proof, of such specification(s) and charge(s) by the Commission, in which event you may be sentenced by the Commission to death, or such other punishment as the Commission deems proper. Before accepting your plea of guilty the Commission wishes to advise you that you are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt. With this in mind, do you still wish to plead guilty?"

b. *Advice to Commission.* The following instructions shall be given to the Commission by the Law Member, in open court, before a vote is taken on the findings in the case, except where the accused pleads guilty to all charges and specifications:

"The Commission is advised that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted. If there is a reasonable doubt as to the guilt of the accused of the specific offense charged but the evidence supports a finding of guilty of an offense reasonably included therein, then the finding should be as to the latter only. The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the prosecution."

(Where Appropriate)

"The Commission is further advised that the accused, not being a national of any of the nations which were represented by armed forces in the United Nations Command in Korea, was not bound to any of those

nations by any duty of allegiance, and that he is in the power of the convening authority and of this Commission as the result of circumstances independent of his own will."

RULE 37. ANNOUNCEMENT OF FINDINGS AND SENTENCE. The Commission shall announce the findings and sentence in open court as soon as determined by the Commission.

RULE 38. RECORD OF PROCEEDINGS.

a. *Record Required.* The Commission shall maintain an accurate and complete verbatim transcription of the proceedings. No portion of the proceedings will be conducted "off the record."

b. *Contents.* The record shall consist of the orders appointing the Commission, charge sheet, the reference for trial, proceedings of the trial, including the findings and sentence, and the action of the convening authority taken on the sentence. Related notices, petitions, orders, briefs, and other correspondence and allied papers shall be incorporated in the original record.

c. *Form.* The form of the record of proceedings shall conform generally to that prescribed for general courts-martial, or its equivalent, of the nation of the convening authority.

RULE 39. NOTIFICATION OF RESULT OF TRIAL. Where any finding or sentence is pronounced by a Commisison acting pursuant to these Rules, the convening authority shall cause a notification of such finding and sentence to be expeditiously forwarded to both the prisoners' representative, as defined by Article 79, Geneva Prisoner of War Convention of 1949, and to the accredited Delegate for the International Committee of the Red Cross referred to in Rule 51 hereof. Such notification shall indicate that the prisoner has a right to appeal and shall also indicate his decision to use or to waive this right of appeal. Copies of the notification will be appended to the record of trial. Furthermore, if an accused is finally convicted or if a sentence pronounced against him in the first instance is a death sentence, a detailed communication shall as soon as possible be addressed to the above Delegate containing: (1) the precise wording of the finding and sentence; (2) a summarized report of any preliminary investigation and of the trial, emphasizing in particular the elements of the prosecution and defense; (3) notification, where applicable, of the place where the sentence will be served or executed.

SECTION IV. SENTENCE

RULE 40. REVIEW OF SENTENCE.

a. *Reference of Record.* Before acting on a record of trial, the convening authority, or his successor, shall refer it to his staff judge advocate for review and advice.

b. *Effect of Errors.* No proceedings shall be held invalid, nor the findings and sentence disapproved, in any case on the ground of improper admission or rejection of evidence, or for any error as to any matter of pleading or procedure, unless in the opinion of the convening authority, or of his successor, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of the accused.

c. *Approval of Sentence.* No sentence shall be approved by the convening authority, or by his successor, unless upon conviction established beyond reasonable doubt of an offense within the jurisdiction of the Commisison, and unless the record of trial has been found legally sufficient to support the findings.

d. *Powers of Convening Authority Upon Review.* The convening authority, or his successor, shall have authority to approve, disapprove, mitigate, remit in whole or in part, commute, suspend, reduce or otherwise alter the sentence imposed, or, without prejudice to the accused, remand the case for a rehearing before a new Military Commission. However, the convening authority, or his successor, shall not have authority to increase the severity of the sentence, nor to order a rehearing on a charge or specification as to which the Commission has found the accused not guilty. Upon approval of a sentence to imprisonment for a term of years, the convening authority, or his successor, will allow the accused credit for all time theretofore served in confinement as a war crimes suspect.

e. *Finality of Judgment.* Except as otherwise provided in these Rules, the judgment and sentence of a Commission shall be final.

RULE 41. EXECUTION OF SENTENCE.

a. *General Rule.* No sentence shall be carried into execution until it has been approved by the convening authority, or by his successor.

b. *Death Sentences.*

(1) No sentence of death shall be carried into execution until it has been approved by the convening authority, or by his successor, and confirmed by the Commander-in-Chief, United Nations Command.

(2) No sentence of death shall be carried into execution until the expiration of a period of at least six months from the date of the receipt by the accredited Delegate of the International Committee of the Red Cross of the notification of findings and sentence required by Rule 39, above.

SECTION V. APPEAL

RULE 42. RIGHT OF PETITION. At any time within one year after the convening authority has approved the sentence, the accused may petition the convening authority, or his successor, for a new trial or other appropriate relief. The petition may be submitted either by the accused or by his Counsel or representative; however, a petition may not be submitted after the death of an accused. The right of petition contained in this Rule does not require that the execution of a sentence be delayed to permit a petition for a new trial or related remedy, nor will the presentation of a petition operate to stay execution of a sentence.

RULE 43. ACTION ON PETITION. The convening authority, or his successor, is authorized, upon application of the accused under Rule 42, above, to dismiss the petition or, upon good cause shown, in his discretion, to grant a new trial, to vacate the sentence or any part thereof, to mitigate, remit, or suspend the sentence or any part thereof, and to restore rights, privileges, and property affected by such sentence. In the event a petition is filed in a case involving the death penalty and the convening authority has already

taken his action approving the sentence to death and forwarded the case to the confirming authority, the petition will be forwarded promptly to the latter authority for action by him.

SECTION VI. MISCELLANEOUS

RULE 44. DOUBLE JEOPARDY. No accused shall be punished more than once for the same act or on the same charge pursuant to United Nations authority.

RULE 45. EX POST FACTO OFFENSES. No person shall be tried pursuant to these Rules for an act which was not forbidden by recognized law in effect at the time the said act was committed.

RULE 46. OFFICIAL POSITION AND SUPERIOR ORDERS. The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Action pursuant to the order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the Commission determines that justice so requires.

RULE 47. PRINCIPALS AND ACCESSORIES. Anyone who commits any of the offenses defined in Rule 4, or who aids, abets, counsels, commands, permits, induces, or procures its commission, is a principal; and anyone who causes an act to be done, which, if directly performed by him, would be an offense under Rule 4, is also a principal and punishable as such.

RULE 48. RECORD FOR CONTEMPT. In punishing contempts, whether those committed in the presence of a Commission and dealt with summarily by the President under Rule 8b, or those which are dealt with by a Commission under Rule 13b, a complete record shall be made which shall be examined and reviewed as in the case of any other sentence imposed by a Commission.

RULE 49. AUTHORITY TO ADMINISTER OATHS. In addition to the Commission, any member of the armed forces of the United Nations Command, or any civilian of any member of the United Nations, who by competent authority is assigned the duties of administering, investigating, prosecuting, or defending suspected war criminals, while acting under such assignment, may administer oaths with respect to all matters in the execution of such duty.

RULE 50. EXCEPTIONS UNNECESSARY. Exceptions to rulings or orders of the Commission are unnecessary, it being sufficient that Counsel, at the time the rulings of the Commission are made or sought, makes known to the Commission the action which he desires the Commission to take or his objection to the action of the Commission, and the grounds therefor.

RULE 51. NOTICE OF TRIAL.

a. *Persons Upon Whom Served.* Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate shall be notified at the address previously indicated by him to the convening authority, as soon as possible and at least three weeks prior to trial, that judicial proceedings will be instituted against the accused. The prisoner's representative and the accused shall be similarly notified.

b. *Contents of Notice.* The notice required by Rule 51a, above, shall contain the following information: (1) surname and first name of the accused, his rank, his army, regimental, personal, or serial number, his date of birth, and his profession or trade, if any; (2) place of internment or confinement; (3) specification of the charge or charges on which the accused is to be arraigned, giving the legal provisions applicable; (4) designation of the Commission which will try the case, likewise the date and place fixed for the opening of the trial.

c. *Affidavit of Prosecutor.* The Prosecutor shall execute an affidavit certifying that the duties prescribed in subparagraph a of this Rule have been performed. Such affidavit shall be incorporated into the record as one of the allied papers of the case.

RULE 52. PARTICIPATION OF INTERNATIONAL COMMITTEE OF THE RED CROSS.

a. *Presence at Trial.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate, if present, shall be entitled to attend all trials held pursuant to these Rules unless the proceedings are held in camera for purpose of state or military security. (No proceedings in camera will be held, however, without the concurrence of the Commander-in-Chief, United Nations Command, or his successor.)

(2) Where such Delegate has requested permission to attend proceedings to be held in camera, this request will be communicated immediately to Headquarters, United Nations Command, Attention: Command Judge Advocate.

b. *Selection of Counsel.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, the convening authority shall furnish such Delegate, on request, a list of available persons qualified to present the defense.

(2) Failing a choice of Counsel by the accused, the Delegate of the International Committee of the Red Cross, if requested, may select available Counsel for him and shall have at his disposal at least one week for such purpose.

(3) In the event that both the accused and International Committee of the Red Cross Delegate fail to select Counsel, the accused shall be represented by the Defense Counsel designated in the order appointing the Commission.

(4) Where the accused or the International Committee of the Red Cross Delegate retains individual Counsel to represent the accused, the Defense Counsel named in the order appointing the Commission may be excused from the proceedings or retained as advisory, associate, or assistant Defense Counsel, at the option of the accused.

RULE 53. AUTHENTICATION OF THE RECORD OF TRIAL.

a. *Reporter.* Each reporter employed at a trial shall execute an affidavit attesting that the record of trial contains a complete and accurate account of that portion of the proceedings during which he was employed as the reporter. Such affidavit will be incorporated into the record as one of the allied papers in the case.

b. *Defense Counsel.* The Defense Counsel shall examine the record of trial before authentication by the prosecution and President of the Commission in order to verify its accuracy and completeness. The Defense Counsel will note on the record the fact that the record has been submitted to him and checked by him prior to authentication.

c. *Prosecutor.* The Prosecutor, under the direction of the President, shall superintend the completion of the record of trial. He shall examine the record in order to verify that it is accurate and complete, acknowledge such accuracy and completeness by his signature thereon.

d. *President.* The President of the Commission shall be primarily responsible for the completeness and accuracy of the record of trial. He shall not authenticate the record with his signature until also satisfied that both the prosecution and defense accept the record as accurate and complete.

DOCUMENT NO. 113

RESOLUTION 382A(V), "THREATS TO THE POLITICAL INDEPENDENCE AND TERRITORIAL INTEGRITY OF GREECE," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1 December 1950)

SOURCE

3 Djonovich 88

NOTE

After the unsuccessful attempt of the Communists to take over the control of Greece (1944-1949) by armed conflict generated from the surrounding Communist countries, Yugoslavia (which had just broken away from Soviet domination) returned all of the Greek prisoners of war who had been held in her territory. This resolution was an attempt by the General Assembly of the United Nations to secure the same action on the part of Greece's other major Communist neighbor, Bulgaria. It could not be considered as having been particularly successful. (It should be noted that here, too, prior to the dispute on the subject at the Korean armistice negotiations (DOCUMENT NO. 127), the resolution called for "voluntary repatriation.")

TEXT

A

The General Assembly,

Having considered the unanimous conclusions of the United Nations Special Committee on the Balkans concerning those members of the Greek armed forces who were captured by the Greek guerrillas and taken into countries north of Greece,

Having noted that, with the sole exception of Yugoslavia, the other States concerned are still detaining these members of the Greek armed forces without justification under commonly accepted international practice,

1. *Recommends* the repatriation of all those among them who express the wish to be repatriated,

2. *Calls upon* the States concerned to take the necessary measures for the speedy implementation of the present resolution,

3. *Instructs* the Secretary-General to request the International Committee of the Red Cross and the League of Red Cross Societies to ensure liaison with the national Red Cross organizations of the States concerned, with a view to implementing the present resolution.

DOCUMENT NO. 114

RESOLUTION 488(V), "FORMULATION OF THE NÜRNBERG PRINCIPLES," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS (12 December 1950)

SOURCE

3 Djonovich 151

NOTE

In compliance with the directive of the General Assembly of the United Nations contained in Resolution 177 (II) of that body (DOCUMENT NO. 96), the International Law Commission "formulated" the "Nürnberg Principles" (DOCUMENT NO. 111). By this resolution the General Assembly, without specifically affirming the work product of the International Law Commission, requested member States to submit their observations.

TEXT

The General Assembly,

Having considered part III (Formulation of the Nürnberg principles) of the report of the International Law Commission on the work of its second session,

Recollecting that the General Assembly, by its resolution 95 (I) of 11 December 1946, unanimously affirmed the principles of international law recognized by the charter and judgment of the Nürnberg Tribunal,

Considering that, by its resolution 177 (II) of 21 November 1947, the General Assembly directed the International Law Commission to formulate those principles, and also to prepare a draft code of offences against the peace and security of mankind,

Considering that the International Law Commission has formulated certain principles recognized, according to the Commission, in the charter and judgment of the Nürnberg Tribunal, and that many delegations have made observations during the fifth session of the General Assembly on this formulation,

Considering that it is appropriate to give the governments of Member States full opportunity to furnish their observations on this formulation,

1. *Invites* the government of Member States to furnish their observations accordingly;

2. *Requests* the International Law Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by governments.

DOCUMENT NO. 115

RESOLUTION 427(V), "MEASURES FOR THE PEACEFUL SOLUTION OF THE PROBLEM OF PRISONERS OF WAR," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS (14 December 1950)

SOURCE
3 Djonovich 119

NOTE

Although nowhere named in the resolution, this action of the General Assembly of the United Nations was directed at the Soviet Union which alone, in 1950, still held prisoners of war who had been captured during World War II (1939-1945), many of whom had actually surrendered after hostilities had ended. Once again the action of the General Assembly cannot be considered as having been particularly successful (see DOCUMENT NO. 113). The Soviet Union was still holding thousands of German and Japanese prisoners of war, allegedly as convicted war criminals, as late as 1955, 10 years after the end of World War II hostilities. (As some were apparently convicted of the heinous crime of "supporting capitalism," it is easy to understand how the numbers could be so large!) Nine thousand Germans were repatriated to the Federal Republic of Germany in 1955 as a result of a special agreement between the two countries. There are still many thousands of individuals known to have been in the custody of the Soviet Union at one time for whom it has never accounted.

TEXT

The General Assembly,

Mindful that one of the principal Purposes of the United Nations is to achieve international co-operation in solving international problems of a humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all,

Considering that the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations,

Believing that all prisoners having originally come within the control of the Allied Powers as a consequence of the Second World War should either have been repatriated long since or have been otherwise accounted for,

Recalling that this is required both by recognized standards of international conduct and the Geneva Convention of 1949 for the protection of war victims, and by specific agreements between the Allied Powers,

1. *Express its concern* at the information presented to it tending to show that large numbers of prisoners taken in the course of the Second World War have neither been repatriated nor otherwise accounted for;

2. *Calls upon* all governments still having control of such persons to act in conformity with the recognized standards of international conduct and with the above-mentioned international agreements and conventions which require that, upon the cessation of active hostilities, all prisoners should, with the least possible delay, be given an unrestricted opportunity of repatriation and, to that end, to publish and transmit to the Secretary-General before 30 April 1951:

(a) The names of such prisoners still held by them, the reasons for which they are still detained and the places in which they are detained;

(b) The names of prisoners who have died while under their control as well as the date and cause of death, and the manner and place of burial in each case;

3. *Requests* the Secretary-General to establish an *Ad Hoc* Commission composed of three qualified and impartial persons chosen by the International Red Cross or, failing that, by the Secretary-General himself, with a view to settling the question of the prisoners of war in a purely humanitarian spirit and on terms acceptable to all the governments concerned. The Commission shall convene at a suitable date after 30 April 1951 to examine and evaluate, in the light of the information made available to the fifth session of the General Assembly, the information furnished by governments in accordance with the terms of the preceding paragraph. In the event that the Commission considers that this information is inadequate or affords reasonable ground for believing that prisoners coming within the custody or control of any foreign government as a consequence of military operations of the Second World War have not been repatriated or otherwise accounted for, the General Assembly:

(a) Requests the Commission to seek from the governments or authorities concerned full information regarding such prisoners;

(b) Requests the Commission to assist all governments and authorities who so desire in arranging for and facilitating the repatriation of such prisoners;

(c) Authorizes the Commission to use the good offices of any qualified and impartial person or organization whom it considers might contribute to the repatriation or accounting for of such prisoners;

(d) Urges all governments and authorities concerned to co-operate fully with the Commission, to supply all necessary information and to grant right of access to their respective countries and to areas in which such prisoners are detained;

(e) Requests the Secretary-General to furnish the Commission with the staff and facilities necessary for the effective accomplishment of its task;

4. *Urgently requests* all the governments to make the greatest possible efforts, based in particular on the documentation to be provided, to search for prisoners of war whose absence has been reported and who might be in their territories;

5. *Directs* the Commission to report as soon as practicable the results of its work to the Secretary-General for transmission to the Members of the United Nations.

DOCUMENT NO. 116

PENAL CODE OF YUGOSLAVIA (Law of 1 July 1951)

SOURCES

Institute of Comparative Law, Belgrade, XI Collection of Yugoslav Laws, Criminal Code, Article 127 (1964)
[1965] Measures to Repress 185, 186

NOTE

One important commitment made by Parties to the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) in Article 129 is the enactment of "any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" of the Convention enumerated in Article 130. Some countries, such as the United States, have taken the position that legislation already available satisfies the commitment contained in Article 129. (That there is no merit to this contention is illustrated by decisions such as Toth v. Quarles, 350 U.S. 11 (1955).) Others have enacted legislation of varying degrees of coverage and severity, depending to some extent on national traditions. The Yugoslav approach, which is also that of a number of other countries, has the advantage of being simple and, at the same time, all-inclusive. However, it fails to draw any distinction between the various grave breaches listed in Article 130 of the Convention (and in the Yugoslav statute) and it scarcely seems logical that the same range of punishment should be considered as appropriate for the whole gamut of offenses specified; nor should the burden of making the punishment fit the crime be placed entirely upon the trial court.

TEXT

Article 127

Whoever in violation of the rules of international law orders or executes, murders, tortures or inhuman treatment of prisoners of war, including biological experiments, causing of great sufferings or serious injury to body or health, compulsive enlistment into the armed forces of an enemy power, or deprivation of the right to a fair and impartial trial,

shall be punished by strict imprisonment for not less than five years or by death penalty.

DOCUMENT NO. 117

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND, PREPARED BY THE INTERNATIONAL LAW COMMISSION (July 1951)

SOURCE

1951 Yearbook of the International Law Commission, Vol. II, at 133
45 AJIL Supp. 126

NOTE

Resolution 177 (II) of the General Assembly of the United Nations (DOCUMENT NO. 96) had directed the International Law Commission to formulate the "Nürnberg Principles" and also to prepare a draft code of offences against the peace and security of mankind. The Commission completed the formulation of the Nürnberg Principles in 1950 (DOCUMENT NO. 111) and submitted the formulation to the General Assembly (DOCUMENT NO. 114). The following year, at its 1951 session, the Commission performed the directive concerning the draft code of offences against the peace and security of mankind. Those portions of the draft code and of the comments of the Commission which have an impact on prisoners of war are set forth below.

EXTRACTS

Article 2

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

The offence defined in this paragraph can be committed only by the authorities of a State. A criminal responsibility of private individuals under international law may, however, arise under the provisions of paragraph (12) of the present article.

* * * * *

(11) Acts in violation of the laws or customs of war

This paragraph corresponds to article 6, paragraph *(b)*, of the Charter of the Nürnberg Tribunal. Unlike the latter, it does not include an enumeration of acts which are in violation of the law or customs of war, since no exhaustive enumeration has been deemed practicable.

The question was considered whether every violation of the law or customs of war should be regarded as a crime under the code or whether only acts of a certain gravity should be characterized as such crimes. The first alternative was adopted.

This paragraph applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even if the existence of a state of war is recognized by none of them.

* * * * *

The offence defined in this paragraph can be committed both by authorities of a State and by private individuals.

(12) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or

(iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article.

* * * * *

In including "complicity in the commission of any of the offences defined in the preceding paragraphs" among the acts which are offences against the peace and security of mankind, it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries.

Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.

Principle IV of the Commission's formulation of the Nürnberg principles, on the basis of the interpretation given by the Nürnberg Tribunal to article 8 of its Charter, states: "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."

The observations on principle IV, made in the General Assembly during its fifth session, have been carefully studied; no substantial modification, however, has been made in the drafting of this article, which is based on a clear enunciation by the Nürnberg Tribunal. The article lays down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders.

Article 5

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

This article provides for the punishment of the offences defined in the Code. Such a provision is considered desirable in view of the generally accepted principle *nulla poena sine lege*. However, as it is not deemed practicable to perscribe a definite penalty for each offences, it is left to the competent tribunal to determine the penalty, taking into consideration the gravity of the offence committed.

DOCUMENT NO. 118

TRIALS OF PRISONERS OF WAR FOR POST CAPTURE OFFENSES: SUPPLEMENTAL RULES OF CRIMINAL PROCEDURE FOR MILITARY COMMISSIONS OF THE UNITED NATIONS COMMAND (6 October 1951, amended through 17 March 1953)

SOURCE

National Archives of the United States
Library of The Judge Advocate General's School, United States Army

NOTE

In 1950 the United Nations Command (UNC) had issued rules of criminal procedure to govern military commissions engaged in the trials of prisoners of war for precapture offenses (war crimes) (DOCUMENT NO. 112). The present Rules supplement the earlier ones by providing the procedure for the trial of post capture offenses, offenses committed by prisoners of war while in that status. Like the earlier rules concerning trials for precapture offenses, these rules were never actually applied despite the fact that many ideological murders and other major offenses were committed in the UNC prisoner-of-war camps and that in many instances the prisoner-of-war culprits had been identified. However, like their fellow perpetrators of precapture offenses, they were all ultimately released and repatriated without trial pursuant to the provisions of the armistice agreement which brought the hostilities in Korea (1950-1953) to an end (DOCUMENT NO. 128).

TEXTS

SECTION I. SCOPE, PURPOSE, AND CONSTRUCTION

RULE 1. SCOPE OF RULES. These rules shall govern all Military Commissions of the United Nations Command conducting trials of prisoners of war charged with postcapture offenses, all reviews of such trials, and the submission and action upon all petitions for New Trial.

RULE 2. PURPOSE AND CONSTRUCTION OF RULES. These rules are intended to provide for the just determination of all proceedings; they shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable delay.

SECTION II. THE COMMISSIONS

RULE 3. TYPES. There shall be two types of Military Commissions for the trial of prisoners of war for postcapture offenses: Special Military Commissions and General Military Commissions.

RULE 4. JURISDICTION OVER PERSONS. These Commissions shall have jurisdiction over all prisoners of war who are in the custody of the convening authority at the commencement of the trial and during the arraignment.

RULE 5. JURISDICTION OVER OFFENSES. These Commissions shall have jurisdiction over all postcapture offenses, including but not limited to, all violations of the laws and customs of war, all violations of the laws of the

Republic of Korea, all violations of rules, regulations, or orders, applicable to prisoners of war, promulgated by the Commander-in-Chief, United Nations Command, or his authorized representatives, all violations of rules, regulations, or orders of prisoner of war camp commanders or their authorized representatives, and all other acts to the prejudice of good order and discipline among prisoners of war.

RULE 6. MEMBERSHIP OF COMMISSIONS.

a. *Appointment.* The members of each Military Commisison will be appointed by the Commander-in-Chief, United Nations Command, or under authority delegated by him. Unless specifically provided in the delegation of authority, a commander to whom the authority to convene such commissions is delegated will not further delegate such authority.

b. *Number.*

(1) Each General Military Commission shall consist of not less than five members.

(2) Each Special Military Commission shall consist of one or more members but not more than three members.

c. *Designation.*

(1) The order appointing a General Military Commission shall designate a President and Law Member. The same individual may be designated both President and Law Member.

(2) The order appointing a Special Military Commission shall designate a President.

d. *Eligibility.*

(1) Any commissioned officer of the armed forces of the United Nations Command, including any commissioned officer of the armed forces of the Republic of Korea, shall be eligible for membership on a Commission.

(2) The convening authority may, in his discretion, appoint as a member of a Commission any civilian who is a citizen of any nation of the United Nations, including any citizen of the Republic of Korea.

e. *Representation.* Where an offense involves victims of more than one nation, each such nation, in the discretion of the convening authority, may be represented on the Commissions.

f. *Vacancies.* Any vacancy occurring among the members may be filled, or any additions to a Commission may be made, by the convening authority, but the substance of all proceedings had and evidence taken in the case then on trial shall be made known to the new member. The fact that the substance of all proceedings had and evidence taken in the case has been made known to the new member will be announced by the President of a Commission in open court.

RULE 7. QUALIFICATIONS OF MEMBERS OF COMMISSION.

a. *General.* The convening authority shall appoint to a Commission only persons competent to perform the duties involved and not disqualified by personal interest or prejudice; provided that no person shall sit as a member of a Commission in any case in which he is the accuser or investigator or in which he may be required as a witness for the prosecution.

b. *President.* The President shall be especially selected by reason of his experience, maturity, and judicial temperment.

c. *Law Member.* The Law Member of a General Military Commission shall be a member of the Judge Advocate General's Corps, or its equivalent, or an individual certified by The Judge Advocate General, or his equivalent, of any of the United Nations armed forces to be qualified under applicable law to sit as Law Member or Law Officer on general courts-martial, or their equivalent, or a commissioned officer, or civilian, of the United Nations Command who has been certified by the convening authority to be a member of the Bar in good standing of any nation, or territorial division thereof, of the United Nations.

RULE 8. DUTIES OF MEMBERS OF COMMISSIONS IN GENERAL. The members of a Commission shall hear the evidence, determine the guilt or innocence of the accused fairly, without partiality, favor, or affection, and, if the accused is found guilty, adjudge a proper sentence.

RULE 9. DUTIES OF THE PRESIDENT.

a. *General.* The President shall perform all duties of a member of a Commission as defined in Rule 8, above, and in addition, the President of a Special Military Commission shall issue the instructions required by Rule 38 infra, and shall rule on all interlocutory questions other than challenges for cause, arising during the trial.

b. *Control of Proceedings.* The President shall maintain order and give the necessary directions for the regular and proper conduct of the proceedings. The President shall deal summarily with any contempt committed in the presence of a Commission, imposing appropriate punishment therefor within the limits specified in Rule 14b, below.

c. *Expedition of Trial.*

(1) The President shall take proper steps, consistent with the protection of the substantial rights of the accused, to expedite the trial.

(2) The President shall arrange for pre-trial conferences with a view towards the possibility of reaching agreements between counsel which will narrow the issues to be tried or to the end that stipulations may be entered into concerning undisputed questions of fact.

d. *Notice to Accused of Appellate Review and of Right to Petition for New Trial.* After sentence has been announced, the President shall fully inform each convicted accused, in open court, of the nature of the appellate review of his case, of his right to petition for new trial, the grounds for such petition and the time limit within which such petition must be filed.

e. *Authentication.* The President shall authenticate by his signature all acts, orders, and proceedings of the Commission.

RULE 10. DUTIES OF THE LAW MEMBER.

a. *General.* The Law Member shall perform all duties of a member of the Commission as defined in Rule 8, above.

b. *Rulings.* The Law Member shall rule on all interlocutory questions other than challenge for cause arising during the trial.

c. *Advice to the Commission.*

(1) The Law Member shall advise the Commission on all questions of law and procedure which arise during the course of the trial.

(2) The Law Member shall advise the Commission, in open court, before a vote is taken on the findings, concerning the presumption of innocence and the nature and quantum of evidence required to sustain findings.

d. *Advice to Accused.*

(1) The Law Member shall advise the accused, in open court, of his rights as a witness.

(2) The Law Member shall, where the accused pleads guilty to any offense, explain to him, in open court, the meaning and effect of such plea.

RULE 11. COUNSEL.

a. *Designation of Prosecutors.* The convening authority shall designate in the order appointing a Commission one or more persons to conduct the prosecution of cases before the Commission. Such personnel shall be designated as Prosecutor and Assistant Prosecutor(s).

b. *Designation of Defense Counsel.* The convening authority shall designate in the order appointing a Commission one or more persons to conduct the defense. Such personnel shall be designated as Defense Counsel and Assistant Defense Counsel.

c. *Qualifications.*

(1) The convening authority shall designate as Counsel only persons competent to perform the duties involved.

(2) Qualifications of Prosecutor and appointed Defense Counsel for a General Military Commission shall include membership in the Bar, in good standing, of any nation, or territorial division thereof, of the United Nations.

(3) In the case of trial by Special Military Commission, where the qualifications of any member of the prosecution include membership in the Bar as defined herein, the appointed defense Counsel shall be similarly qualified.

RULE 12. DUTIES OF PROSECUTOR.

a. *Special Duties Prior to Trial.*

(1) The Prosecutor shall, immediately upon reference for trial, advise the accused in a language which he understands of the rights and privileges afforded him by these Rules.

(2) The Prosecutor shall, immediately upon reference for trial, provide the accused with a copy of the charges and specifications in the case, together with such other documents as may be ordered by a Commission. If these documents, or a part of them, are in a language other than one which the accused understands, they shall be made known to him in a language understood by him.

(3) The Prosecutor shall, immediately upon reference for trial, provide Counsel conducting the defense on behalf of the accused with a copy of the charges and specifications in the case, together with such other documents as may be ordered by a Commission.

b. *Prosecution of Case.* The Prosecutor shall prepare and conduct the prosecution of all cases referred to him for trial.

c. *Errors and Irregularities.* The Prosecutor, acting timely, shall call to the attention of the Commission any apparent error or irregularity in its actions or in the proceedings.

d. *Manner of Performance.* The Prosecutor shall perform all duties in a manner consistent with the purpose of having the whole truth revealed, and shall insure that a Commission has the benefit of all available probative evidence so that the accused may have a fair and impartial trial.

e. *Affidavit of Prosecutor.* The Prosecutor shall execute an affidavit certifying that the duties prescribed in subparagraph a of this Rule have been performed. Such affidavit shall be incorporated into the record as one of the allied papers of the case. He shall also execute the affidavit referred to in Rule 53c.

RULE 13. DUTIES OF DEFENSE COUNSEL.

a. *Advice to Accused.* Defense Counsel shall, immediately upon receipt of the charges and allied papers in the case, inform the accused that he has been appointed to defend him and explain his general duties.

b. *Representation of Accused.* Defense Counsel shall prepare the defense of the accused and represent the accused before and during the trial.

c. *Manner of Performance.* Defense Counsel shall guard the interests of the accused by all honorable and legitimate means known to the law.

RULE 14. POWERS OF THE COMMISSIONS.

a. *General.* The Commissions shall have power to impound money and property, compel the attendance and detention of witnesses, require witnesses to produce documents and property, punish for contempt, debar from practice before the Commission any Counsel for cause subject to review by the convening authority, administer oaths and affirmations, and issue search warrants and warrants of arrest.

b. *Contempts.*

(1) A General Military Commission shall have the power to punish for contempt by imprisonment not exceeding six months, or by fine not exceeding $500.00, or by both fine and imprisonment, any disobedience of its mandates or any contempt.

(2) A Special Military Commission shall have the power to punish for contempt by imprisonment for one month or by fine not exceeding $50.00, or by both fine and imprisonment, any disobedience of its mandates or any contempt.

c. *Rules and Forms.* A Commission shall have the power to adopt supplementary rules and forms to govern its procedure, not inconsistent with the provisions hereof.

RULE 15. AUTHORIZED PUNISHMENT.

a. *General Military Commission.* A General Military Commission may sentence an accused, upon conviction, to death, confinement at hard labor for life or for any lesser term, or such other punishment as the Commission shall

determine to be proper, consistent with the customs of war in like cases in the armed forces of the nation of the convening authority.

b. *Special Military Commission.* A Special Military Commission may not sentence an accused, upon conviction, to confinement at hard labor, for more than six months, but may sentence the accused to confinement at hard labor for six months or for any lesser term, as the Commission shall determine to be proper, consistent with the customs of war in like cases in the armed forces of the nation of the convening authority.

c. *General.* The Table of Maximum Punishments or its equivalent, in effect in the armed forces of the nation of the convening authority, shall be used as a guide in determining proper punishment.

RULE 16. SUBROGATION OF POWERS AND DUTIES.

a. *Member of Commission.* In the absence of the President, the next senior member of a Commission shall exercise the powers and perform the duties devolved by law or these Rules upon the President of a Commission, however, in any case where the absent President is also the Law Member, the next senior member will not exercise the powers and perform the duties of the Law Member.

b. *Counsel.* An Assistant Prosecutor or Assistant Defense Counsel shall be competent to exercise any of the powers or perform any of the duties devolved by law or these Rules upon the Prosecutor or Defense Counsel, respectively.

SECTION III. TRIAL

RULE 17. CONDUCT OF TRIAL. The Commissions shall confine each proceeding strictly to a fair, expeditious trial of the issues raised, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference; hold public sessions except when otherwise required by the dictates of military necessity; hold each session at such time and place as it shall determine, or as may be directed by the convening authority.

RULE 18. TRIAL PROCEDURE. The order of proceedings of trial shall conform generally to that prescribed for general courts-martial, or its equivalent, in the armed forces of the nation of the convening authority. A suggested guide for procedure before Military Commissions is attached as Annex A. [Not printed.]

RULE 19. JOINT AND COMMON TRIALS. Two or more persons may be tried together wherever jointly charged in any specifications. Common trials may be held if two or more accused are alleged to have participated in the same act or acts, or in related acts, or in the same series of acts, constituting an offense or offenses.

RULE 20. PRESENCE OF LAW MEMBER. A General Military Commission shall not receive evidence upon any matter, nor shall it vote upon its findings or sentence, in the absence of the Law Member. When the Law Member is absent at any time during the trial, the Commission will adjourn until the Law Member is present or a New Law Member is appointed.

RULE 21. PROSECUTIONS AND PROCESS. All prosecutions before the

Commissions shall be conducted, and all process returnable to such Commissions shall issue, under the authority of the United Nations.

RULE 22. CHARGES AND SPECIFICATIONS.

a. *Nature and Contents.* Charges and specifications shall be based on personal knowledge, or information and belief, and signed under oath by a member of the armed forces of the United Nations Command. Each charge and specification shall consist of a plain, concise, and clear statement of the essential facts constituting the offense charged.

b. *Surplusage.* A Commission may strike surplusage from the charges and specifications, and should do so when such action is plainly indicated.

c. *Amendments.* A Commission may permit the charges and specifications to be amended at any time before the findings, if no additional offense is charged and if the substantial rights of the accused are not prejudiced thereby.

d. *Bill of Particulars.* A Commission may direct in its discretion that the prosecution file a Bill of Particulars. A Bill of Particulars may be amended at any time subject to such conditions as justice requires.

RULE 23. NECESSARY PERSONNEL. The Convening authority shall provide reporters, interpreters, clerks, guards, and bailiffs, as required, for the regular and prompt conduct of the proceedings.

RULE 24. PRESENCE OF THE ACCUSED. The accused shall be present at all times during the trial, except during any period of escape from custody after arraignment. The accused's presence shall not be required upon any review of his case, nor upon consideration of any petition for a New Trial.

RULE 25. SPECIFIC RIGHTS OF THE ACCUSED.

a. *Service of Charges.* Upon reference for trial, the accused shall be furnished a copy of the charges and specifications against him. If the charges and specifications are stated in a language other than one which the accused understands, they shall be made known to him in a language understood by him.

b. *As a Witness.*

(1) The accused shall be entitled to remain silent, or, at his own request but not otherwise, to be sworn to testify as a witness in his own behalf, or to make an oral unsworn statement to the Commission.

(2) The Law Member of a General Military Commission or the President of a Special Military Commission may, at the request of the accused, permit him to testify as a witness for a limited purpose only, excepting therefrom all testimony relative to the issue of his guilt or innocence.

(3) The accused shall be entitled to testify as a witness in his own behalf with respect to less than all the offenses charged against him, in which case he may not be questioned about any offenses concerning which he does not testify.

c. *Representation by Counsel.*

(1) The accused shall be entitled, if he so desires, to assistance by one of his prisoner comrades in the conduct of his defense, and to be represented

prior to and during trial by Counsel appointed by the convening authority, or by available Counsel of his own choice.

(2) The accused shall be entitled to reasonable opportunity to consult with his Counsel before and during the trial.

(3) The accused shall be entitled to representation by Counsel until completion of all appellate reviews on his case or until the expiration of the time during which he may submit a petition for a New Trial, whichever is later.

d. *Defense Witnesses.* An accused shall be entitled to call witnesses to testify in his behalf and to have all reasonable facilities in this regard extended to him.

e. *Cross Examination.* The accused shall be entitled to cross examine, personally or through Counsel, each adverse witness who personally appears before the Commission.

f. *Challenges.*

(1) Each accused shall be entitled, except as otherwise provided herein, to challenge any member of the Commission for cause, and to present evidence relative to such challenge.

(2) Each accused shall, except as otherwise provided herein, be entitled to one peremptory challenge.

g. *Interpretation for Accused.* The accused shall be entitled to have the substance of the proceedings and any documentary evidence translated when he is unable otherwise to understand them, and, in addition, the accused shall be entitled, if he deems it necessary, to the services of a competent interpreter.

RULE 26. PRIVILEGES AND FACILITIES AFFORDED DEFENSE COUNSEL. The Advocate or Counsel conducting the defense on behalf of the accused, upon trial, review, and consideration of a petition for a New Trial, shall have at his disposal the reasonably necessary facilities to prepare the defense of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defense, including prisoners of war.

RULE 27. TIME OF TRIAL.

a. *Limitation on Commencement of Proceedings.* Trial shall not commence until the expiration of a period of at least three weeks from the date of the receipt of the accredited Delegate of the International Committee of the Red Cross, the prisoners' representative, and the accused of the notice required by Rule 53, below.

b. *Preparation of Defense.* No trial shall commence until the Advocate or Counsel conducting the defense on behalf of the accused shall have had at his disposal, a period of at least two weeks to prepare the defense of the accused.

c. *Timely Selection of Individual Defense Counsel.* An accused shall be afforded reasonable opportunity before trial to secure Counsel of his own choice, but no court shall be prevented from proceedings because of the inability of an accused to secure Counsel of his own choosing.

RULE 28. PRELIMINARY MOTIONS. Prior to trial, both prosecution and

defense will furnish opposing Counsel copies of any preliminary motions to be made to the Commisison.

RULE 29. OATHS.

a. *Members and Counsel.* Before engaging in the performance of their duties, members of a Commission as well as personnel of the prosecution and defense, shall take and subscribe to an oath or affirmation in a form recognized by them as binding them faithfully and truly to perform their duties.

b. *Reporters, Interpreters, and Translators.* Each reporter, interpreter, and translator, before entering upon his duty, shall take an oath or affirmation, in a form recognized as binding by him, faithfully and truly to perform his duties.

c. *Witnesses.* An oath or affirmation in a form recognized by a witness as binding him to testify to the truth shall be administered to each witness who is to give testimony before the Commission.

RULE 30. CHALLENGES.

a. *For Cause.* No challenges for cause may be asserted in the case of trial by a Special Military Commission consisting of only one member.

b. *Peremptory.* No peremptory challenge may be asserted against the Law Member of a General Military Commission, nor in the case of trial by a Special Military Commission consisting of only one member.

RULE 31 RELIEF FROM PREJUDICIAL JOINDER. For good cause shown, a Commission may, in its discretion, grant a severance in the case of a joint or common trial, or provide whatever other relief justice requires.

RULE 32. PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF. The accused shall be presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. If there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted. If there is a reasonable doubt as to the guilt of the accused of the specific offense charged but the evidence supports a finding of guilty of an offense reasonably included therein, then the finding should be as to the latter only. The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the prosecution.

RULE 33. EVIDENCE. These commissions will follow the rules of evidence prescribed by the Manual for Courts-Martial, United States, 1951.

RULE 34. OFFER OF PROOF.

a. *By Prosecution or Defense.* Whenever a Commission refuses to hear certain testimony or refuses to receive certain evidence of any kind, the Counsel offering the testimony or other evidence may make a concise statement of the substance of the expected testimony or other excluded evidence. The statement and any documentary evidence referred to therein will be included in the record of trial if it were made by the defense, and may, in the discretion of the Law Member of a General Military Commission or the President of a Special Military Commission, be included in the record of trial if it were made by the prosecution.

b. *By Law Member or President.* Whenever it is deemed desirable, the

Law Member of a General Military Commission or the President of a Special Military Commission may inquire of the Prosecution or Defense Counsel as to the nature of a particular exhibit, the testimony of a witness, or any other type of evidence in order to determine its competency, materiality, and relevancy.

RULE 35. RULINGS OF LAW MEMBER.

a. *Finality.*

(1) Rulings by the Law Member on all interlocutory questions, except challenges for cause, shall be final.

(2) Rulings by the Law Member on a motion for a finding of not guilty and on the question of the sanity of an accused are final unless objected to by a member of the Commission. Upon such objection the Commission will be closed and the motion or the question decided by a majority vote of the Commission.

b. *Form.* Each ruling of the Law Member which is subject to objection should be prefaced by a statement such as, "Subject to objection by any member of the Commission. . ."

RULE 36. RULINGS OF PRESIDENT OF SPECIAL MILITARY COMMISSION.

a. *Finality.* All rulings by the President of a Special Military Commission shall be subject to objection by a member of the Commission. Upon such objection the Commission will be closed and the motion or the question decided by a majority vote of the Commission.

b. *Form.* Each ruling of the President of a Special Military Commission should be prefaced by a statement such as "Subject to objection by any member of the Commission. . . ."

RULE 37. VOTING.

a. *Findings and Sentence.*

(1) All voting on the findings and sentence shall be by secret written ballot.

(2) The concurrence of at least two-thirds of the members of the Commission present at the time the vote is taken shall, except as provided herein, be necessary for conviction and for sentence.

(3) The concurrence of at least three-fourths of the members of the Commission present at the time the vote is taken shall be required for any sentence to life imprisonment or confinement in excess of ten years.

(4) The concurrence of all the members of the Commission present at the time the vote is taken shall be required for any death sentence.

b. *Challenges for Cause.*

(1) The vote upon a challenge for cause shall be by secret, written ballot.

(2) A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge. A tie vote on a challenge is a vote in the negative and the challenge shall not be sustained.

(3) A challenged member will withdraw and take no part in the hearings, deliberations, and voting upon a challenge against him.

c. *Insanity.*

(1) The vote upon a motion relating to the insanity of the accused shall be by oral vote, in closed session, beginning with the junior member of a Commission, and the question shall be decided by majority vote of the members present.

(2) A tie vote shall be a determination that the accused is sane. The President announces the decision in open court.

d. *Other Matters.* The vote on any other matter shall be determined by oral vote in closed session, beginning with the junior member of a Commission, and the question shall be decided by a majority vote of the members present. If there is a tie vote on any objection, motion, request, or similar matter, the objection, motion, request, or similar matter is overruled or denied. The President announces the decision in open court.

RULE 38. INSTRUCTIONS.

a. *Advice to Accused.*

(1) The following instructions shall be given the accused by the Law Member of a General Military Commission or the President of a Special Military Commission in open court, in all cases:

" _____, as the accused in this case you have these rights:

"First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the Commission just like the testimony of other witnesses, and you can be cross-examined on your testimony by the Prosecutor and the Commisison. (The following may be used if there is more than one specification: If your testimony should concern less than all of the offenses charged against you and you should not say anything about the others, then you may be questioned about the whole subject of those offenses concerning which you testify, but you will not be questioned about any offenses concerning which you do not testify.)

"Second, if you do not want to testify under oath you may, without being sworn, say anything you desire to the Commission as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here. Since such a statement is not given under oath and since you cannot be cross-examined upon it, it cannot be given the same weight by the Commission as sworn testimony, but it will be considered by the Commission and given such weight as it may seem to deserve. However, any admission or confession which you may make in your unsworn statement can be considered by the Commission as evidence against you. Furthermore, even though you may be sworn as a witness, you may afterwards, if you wish, also make a statement of this kind, not under oath.

"Third, you may remain silent, that is, say nothing at all. You have a right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself, or make any statement, will not count against you in any way with the Commission. It will not be considered as an

admission that you are guilty, nor can it be commented on in any way by the Prosecutor in addressing the Commission. You are also advised that if you elect to remain silent, or to make an unsworn statement, this action on your part will not furnish you grounds for an appeal, or a request for a new trial, or other relief.

"Knowing these rights, take time to consult with your Counsel and then state to the Commission which you will do."

(2) The following instructions shall be given the accused by the Law Member of a General Military Commission or the President of a Special Military Commission, in open court, where the accused pleads guilty to any offense:

"_____, you have pleaded guilty to Specification _____, Charge _____. By so doing you have admitted guilt of the offense(s) of_____ and you have admitted each of the following elements which constitute the offense(s):_____. Your plea subjects you to a finding of guilty, without proof, of such specification(s) and charge(s) by the Commission, in which event you may be sentenced by the Commission to such punishment as the Commission deems proper. Before accepting your plea of guilty the Commission wishes to advise you that you are legally entitled to plead not guilty and place the burden upon the prosecution of proving your guilt. With this in mind, do you still wish to plead guilty?"

b. *Advice to Commission.* The following instructions shall be given to the Commission by the Law Member of a General Military Commission or the President of a Special Military Commission, in open court, before a vote is taken on the findings in the case, except where the accused pleads guilty to all charges and specifications:

"The Commission is advised that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt; if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted. If there is a reasonable doubt as to the guilt of the accused of the specific offense charged but the evidence supports a finding of guilty of an offense reasonably included therein, then the finding should be as to the latter only. The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the prosecution."

(Where Appropriate)

"The Commission is further advised that the accused, not being a national of any of the Nations which were represented by armed forces in the United Nations Command in Korea, was not bound to any of those nations by any duty of allegiance, and that he is in the power of the convening authority and of this Commission as the result of circumstances independent of his own will.

RULE 39. ANNOUNCEMENT OF FINDINGS AND SENTENCE. A Commission shall announce the findings and sentences in open court as soon as determined by the Commission.

RULE 40. RECORD OF PROCEEDINGS. All records of trial will indicate that the proceedings and all reviews thereof are conducted in the name and on behalf of the United Nations Command.

a. *General Military Commissions.*

(1) The Commission shall maintain an accurate and complete verbatim transcription of the proceedings. No portion of the proceedings will be conducted "off the record."

(2) The record shall consist of the orders appointing the Commission, charge sheet, the reference for trial, proceedings of the trial, including the findings and sentence. Related notices, petitions, orders, briefs, and other correspondence and allied papers shall be incorporated in the original record.

(3) The form of the record of proceedings shall conform generally to that prescribed for general courts-martial, or its equivalent, of the nation of the convening authority.

b. *Special Military Commissions.*

(1) The record of trial by Special Military Commission shall consist of a summarized report of the testimony, objections and other proceedings and shall include the orders appointing the Commission, the charge sheet, reference for trial, and the findings and sentence. Related notices, affidavits, orders, briefs, correspondence and allied papers shall also be incorporated in the record.

(2) The form of the record of proceedings shall conform generally to that prescribed for Special Court-Martial or its equivalent in the nation of the convening authority.

RULE 41. NOTIFICATION OF RESULT OF TRIAL. Where any finding or sentence is pronounced by a Commission acting pursuant to these Rules, the convening authority shall cause a notification of such finding and sentence to be expeditiously forwarded to both the prisoner's representative, as defined by Article 79, Geneva Prisoner of War Convention of 1949, and to the accredited Delegate for the International Committee of the Red Cross referred to in Rule 53 hereof. In all cases in which review by the board of review, or confirmation by the Commander-in-Chief, United Nations Command, is required, the convening authority shall cause notification of the action taken thereon to be made to the above Delegate and prisoners' representative. All notifications required under this Rule shall indicate that the prisoner has a right to submit a petition for a New Trial. Copies of the notification will be appended to the record of trial. Furthermore, if an accused is finally convicted or if a sentence pronounced against him in the first instance is a death sentence, a detailed communication shall as soon as possible be addressed to the above Delegate containing: (1) the precise wording of the finding and sentence; (2) a summarized report of any preliminary investigation and of the trial, emphasizing, in particular, the

elements of the prosecution and defense; (3) notification, where applicable, of the place where the sentence will be served or executed.

SECTION IV. SENTENCE.

RULE 42. REVIEW OF SENTENCE.

a. *Reference of Record.* Before acting on a record of trial, the convening authority, or his successor, shall refer it to his staff judge advocate for review and advice.

b. *Effect of Errors.* No proceedings shall be held invalid nor the findings and sentence disapproved, in any case on the ground of improper admission or rejection of evidence, or for any error as to any matter of pleading or procedure, unless in the opinion of the convening authority, or of his successor, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of the accused.

c. *Approval of Sentence.* No sentence shall be approved by the convening authority, or by his successor, unless upon conviction established beyond reasonable doubt of an offense within the jurisdiction of the Commission, and unless the record of trial has been found legally sufficient to support the findings.

d. *Powers of Convening Authority Upon Review.* In acting on the findings and sentence of a military commission, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence. However, the convening authority, or his successor, shall not have authority to increase the severity of the sentence, nor to order a rehearing on a charge or specification as to which the Commission has found the accused not guilty. Upon approval of a sentence to imprisonment for a term of years, the convening authority, or his successor, will allow the accused credit for all time theretofore served in confinement as a suspect.

e. *Finality of Judgment.* Subject to appellate review and action upon a petition for New Trial, as provided in these Rules, the judgment and sentence of a Commission shall be final.

RULE 43. EXECUTION OF SENTENCE.

a. *General Rule.* No sentence will be carried into execution until it has been approved and ordered executed by the convening authority, or by his successor.

b. *Sentences of General Military Commissions.* No sentence of a General Military Commission shall be executed until affirmed by a board of review.

c. *Death Sentences.* (1) No sentence of death shall be carried into execution until it has been approved by the convening authority, or by his successor, affirmed by a board of review, and confirmed by the Commander-in-Chief, United Nations Command.

(2) No sentence of death shall be carried into execution until the

expiration of a period of at least six months from the date of the receipt by the accredited Delegate of the International Committee of the Red Cross of the notification of findings and sentence required by Rule 41, above.

SECTION V. APPELLATE REVIEW AND PETITION FOR NEW TRIAL

RULE 44. DISPOSITION OF RECORDS AFTER REVIEW BY THE CONVENING AUTHORITY.

When the convening authority has taken action on any case tried by a General Military Commission, he shall forward the entire record, including his action thereon and the opinion or opinions of his Staff Judge Advocate, directly to the Staff Judge Advocate, United Nations Command, who will refer such records of trial to a board of review appointed by the Commander-in-Chief, United Nations Command.

RULE 45. REVIEW BY A BOARD OF REVIEW.

a. *Appointment and Composition.* The Commander-in-Chief, United Nations Command, will appoint one or more boards of review, each composed of not less than three officers or civilians furnished by nations represented in the United Nations Command, each of whom shall be a member of the Bar in good standing of any nation, or territorial division thereof, of the United Nations.

b. *Referral to a Board of Review.* The Staff Judge Advocate, United Nations Command, shall refer to a board of review the record in every case of trial by a General Military Commission. In considering questions of jurisdiction and sanity in any case before it, the board of review shall not be limited to a consideration of matters contained within the record of trial.

c. *Action by Board of Review.* In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by the convening authority. It shall affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. The board of review may commute or mitigate the sentence in any case referred to it for review. In considering the record it shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial commission saw and heard the witnesses.

d. *Rehearings and Finality of Action by Board of Review.* If a board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing before a new Military Commission. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed. Action by the board of review shall be final in any case referred to it for review except in cases in which the board of review affirms a death sentence. No case in which a death sentence is affirmed by the board of review shall be final until it has been confirmed by the Commander-in-Chief, United Nations Command, after receipt of advice and the recommendations thereon of his Staff Judge Advocate.

e. *Instructions to Convening Authority.* The Staff Judge Advocate, United Nations Command, shall, unless there is to be further action by the Commander-in-Chief, United Nations Command, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

f. *Rules of Procedure for Board of Review.* The Staff Judge Advocate, United Nations Command, shall prescribe uniform rules of procedure for proceedings in and before boards of review.

RULE 45(1). RIGHT OF PETITION FOR NEW TRIAL. At any time within one year after the convening authority has approved the sentence, the accused may petition the Staff Judge Advocate, United Nations Command, for a new trial or other appropriate relief on grounds of newly discovered evidence or fraud perpetrated on the Commission. The right of petition contained in this Rule does not require that the execution of a sentence be delayed to permit a petition for a new trial or related remedy, nor will the presentation of a petition operate to stay execution of a sentence. A petition may not be submitted after the death of an accused.

RULE 45(2). ACTION ON PETITION FOR NEW TRIAL. The Staff Judge Advocate, United Nations Command, is authorized, upon application of the accused in any case under Rule 45(1), above, to dismiss the petition or, upon good cause shown, in his discretion, to grant a new trial, to vacate the sentence or any part thereof, and to restore rights, privileges and property affected by such sentence. If the accused's case is pending before the board of review or before the confirming authority, the Staff Judge Advocate shall refer the petition to the board or to the confirming authority, for action. In any case in which the confirming authority has taken action, the Staff Judge Advocate will refer the petition to the confirming authority for action. Otherwise, the Judge Advocate shall act upon the petition.

RULE 45(3) APPELLATE COUNSEL.

a. *Appointment and Qualifications.* The Staff Judge Advocate, United Nations Command, shall appoint in his office one or more officers as appellate United Nations Counsel, and one or more officers as appellate defense counsel who shall be qualified under the provisions of Rule 11c(2).

b. *Duties of Appellate United Nations Counsel.* When deemed necessary by the Staff Judge Advocate, United Nations Command, it shall be the duty of appellate United Nations counsel to represent the United Nations Command before the board of review and upon accused's petition for a New Trial.

c. *Duties of Appellate Defense Counsel.* It shall be the duty of appellate defense counsel to represent the accused before the board of review and upon a petition for a New Trial.

d. *Civilian Appellate Defense Counsel.* The accused shall have the right to be represented before the board of review and upon petition for a New Trial by civilian counsel, if provided by him.

SECTION VI. MISCELLANEOUS

RULE 46. DOUBLE JEOPARDY. No accused shall be punished more than once for the same act or on the same charge pursuant to United Nations authority.

RULE 47. EX POST FACTO OFFENSES. No person shall be tried pursuant to these Rules for an act which was not forbidden by recognized law in effect at the time the said act was committed.

RULE 48. OFFICIAL POSITION AND SUPERIOR ORDERS. The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Action pursuant to the order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if a Commission determines that justice so requires.

RULE 49. PRINCIPALS AND ACCESSORIES. Anyone who commits any of the offenses defined in Rule 5, or who aids, abets, counsels, commands, permits, induces, or procures its commission, is a principal; and anyone who causes an act to be done, which, if directly performed by him, would be an offense under Rule 5, is also a principal and punishable as such.

RULE 50. RECORD FOR CONTEMPT. In punishing contempts, whether those committed in the presence of a Commission and dealt with summarily by the President under Rule 9b, or those which are dealt with by a Commission under Rule 14b, a complete record shall be made which shall be examined and reviewed as in the case of a sentence imposed by a Special Commission.

RULE 51. AUTHORITY TO ADMINISTER OATHS. In addition to a Commission, any member of the armed forces of the United Nations Command, or any civilian of any member of the United Nations, who by competent authority is assigned the duties of administering, investigating, prosecuting, or defending prisoners of war, while acting under such assignment, may administer oaths with respect to all matters in the execution of such duty.

RULE 52. EXCEPTIONS UNNECESSARY. Exceptions to rulings or orders of a Commission are unnecessary, it being sufficient that Counsel, at the time the rulings of a Commission are made or sought, makes known to a Commission the action which he desires a Commission to take or his objection to the action of a Commission, and the grounds therefor.

RULE 53. NOTICE OF TRIAL.

a. *Persons Upon Whom Served.* Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate shall be notified at the address previously indicated by him to the convening authority, as soon as possible and at least three weeks prior to trial, that judicial proceedings will be instituted against the accused. The prisoner's representative and the accused shall be similarly notified.

b. *Contents of Notice.* The notice required by Rule 53a, above, shall contain the following information: (1) surname and first name of the accused,

his rank, his army, regimental, personal, or serial number, his date of birth, and his profession or trade, if any; (2) place of internment or confinement; (3) specification of the charge or charges on which the accused is to be arraigned, giving the legal provisions applicable; (4) designation of the Commission which will try the case, likewise the date and place fixed for the opening of the trial.

c. *Affidavit of Prosecutor.* The Prosecutor shall execute an affidavit certifying that the duties prescribed in subparagraph a of this Rule have been performed. Such affidavit shall be incorporated into the record as one of the allied papers of the case.

RULE 54. PARTICIPATION OF INTERNATIONAL COMMITTEE OF THE RED CROSS.

a. *Presence at Trial.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, such Delegate, if present, shall be entitled to attend all trials held pursuant to these Rules unless the proceedings are held in camera for purposes of state or military security. (No proceedings in camera will be held, however, without the concurrence of the Commander-in-Chief, United Nations Command, or his successor.)

(2) Where such Delegate has requested permission to attend proceedings to be held in camera, this request will be communicated immediately to Headquarters, United Nations Command. Attention: Command Judge Advocate.

b. *Selection of Counsel.*

(1) Where an accredited Delegate of the International Committee of the Red Cross has been accepted by the United Nations Command, the convening authority shall furnish such Delegate, on request, a list of available persons qualified to present the defense.

(2) Failing a choice of Counsel by the accused, the Delegate of the International Committee of the Red Cross, if requested, may select available Counsel for him and shall have at his disposal at least one week for such purpose.

(3) In the event that both the accused and International Committee of the Red Cross Delegate fail to select Counsel, the accused shall be represented by the Defense Counsel designated in the order appointing the Commission.

(4) Where the accused or the International Committee of the Red Cross Delegate retains individual Counsel to represent the accused, the Defense Counsel named in the order appointing the Commission may be excused from the proceedings or retained as advisory, associate, or assistant Defense Counsel, at the option of the accused.

RULE 55. AUTHENTICATION OF THE RECORD OF TRIAL.

a. *Reporter.* Each reporter employed at a trial shall execute an affidavit attesting that the record of trial contains a complete and accurate account of

that portion of the proceedings during which he was employed as the reporter. Such affidavit will be incorporated into the record as one of the allied papers in the case.

b. *Defense Counsel.* The Defense Counsel shall examine the record of trial before authentication by the prosecution and President of a Commission in order to verify its accuracy and completeness. The Defense Counsel will note on the record the fact that the record has been submitted to him and checked by him prior to authentication.

c. *Prosecutor.* The Prosecutor, under the direction of the President, shall superintend the completion of the record of trial. He shall examine the record in order to verify that it is accurate and complete, acknowledging such accuracy and completeness by his signature thereon.

d. *President.* The President of a Commission shall be primarily responsible for the completeness and accuracy of the record of trial. He shall not authenticate the record with his signature until also satisfied that both the prosecution and defense accept the record as accurate and complete.

RULE 56. DISPOSITION OF RECORDS OF TRIAL. Completed records of trials will be filed in the office of the Staff Judge Advocate, United Nations Command, and copies thereof will be filed in the Office of The Judge Advocate General, Department of the Army, United States Army, Washington, D.C.

DOCUMENT NO. 119

PROCEDURE GOVERNING NON-JUDICIAL PUNISHMENT OF PRISONERS OF WAR OF THE UNITED NATIONS COMMAND (19 October 1951)

SOURCE

Library of The Judge Advocate General's School, United States Army

NOTE

Articles 89-98 of the 1949 Geneva Prisoners-of-War Convention (DOCUMENT NO. 108) are concerned solely with "disciplinary sanctions" — punishments for minor offenses which may be imposed without trial by the prisoner-of-war camp commander or by a responsible officer to whom he has delegated his disciplinary powers. The present Rules, promulgated by the United Nations Command (UNC) during the hostilities in Korea (1950-1953), deal with this subject. Rather than using the term "disciplinary sanctions," the draftsmen elected to use "non-judicial punishment," the term used in the Uniform Code of Military Justice of the United States (DOCUMENT NO. 110). While it is believed that, like the other sets of "Rules" promulgated by the UNC (DOCUMENT NO. 112, DOCUMENT NO. 118, DOCUMENT NO. 120, and DOCUMENT NO. 121), these Rules were never applied in actual practice, it is possible that they really were on a few occasions, as their comparative informality would permit their use without widespread knowledge thereof.

TEXT

1. *General*

The non-judicial punishments authorized herein are permitted by the "Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949," and will be observed by all concerned. In cases where punishment is deemed necessary officers exercising disciplinary power will resort to non-judicial punishment only, unless it is clear that non-judicial punishment will not adequately meet the ends of justice or discipline among prisoners of war. In deciding whether to exercise non-judicial or judicial measures, leniency will always be exercised in favor of non-judicial punishment, and officers competent to impose such punishment will, wherever possible, adopt non-judicial rather than judicial measures.

2. *Definitions*

a. The term "prisoner of war" as employed herein means

(1) any person detained by the United Nations Command who falls within the definition of a prisoner of war contained in Article 4 of the "Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949"; and

(2) all other persons interned by the United Nations Command in a prisoner of war or internment facility.

b. The term "confinement" as employed herein means the physical restraint of a prisoner of war under conditions of close custodial supervision in a prisoner of war stockade separate from the main prisoner of war group and in quarters specially designated by the facility command for that purpose.

c. The term "camp commander" as employed herein means the commanding officer of any prisoner of war camp, enclosure, compound, or other separate prisoner of war facility.

3. *Who May Impose Punishment.*

a. Non-judicial punishment may be imposed only by a commissioned officer having disciplinary powers in his capacity as a prisoner of war camp commander.

b. The power to impose non-judicial punishment may be delegated by the camp commander to compound and enclosure commanders.

c. Under no circumstances may the authority to impose non-judicial punishment be delegated to or exercised by a prisoner of war.

4. *Authorized Punishments*

The following punishments may be imposed on prisoners of war as non-judicial punishment:

a. Discontinuance of privileges granted over and above the treatment provided for by the "Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949."

b. Fatigue duties not exceeding two hours daily.

c. Confinement.

5. *Limitations on Punishment*

The following restrictions upon non-judicial punishments will apply:

a. Fatigue duty will not be imposed upon officer prisoners of war.

b. The duration of any single punishment will in no case exceed thirty days.

c. The maximum of thirty days provided in *b* above will not be exceeded even if the prisoner of war is answerable for several acts at the same time when punishment is imposed, whether such acts are related or not.

d. Any period of confinement awaiting a hearing will be deducted from the confinement imposed.

e. After imposition of non-judicial punishment upon a prisoner of war, further non-judicial punishment will not be imposed upon the same prisoner until a period of at least three days has elapsed if the duration of one of the two punishments is ten days or more.

6. *Procedure*

a. Each prisoner of war, prior to the imposition of non-judicial punishment, will be given a hearing, and in all cases shall:

(1) Be provided, prior to the hearing, precise information regarding the offense or offenses of which he is accused.

(2) Be given an opportunity at the hearing of explaining his conduct and defending himself. This shall include the right to call witnesses on his own behalf.

b. The prisoner of war shall have recourse to the services of a qualified

interpreter.

c. The punishment imposed will be announced to the prisoner of war and also to the prisoner's representative as defined in Article 79 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

d. A record of all non-judicial punishment imposed will be maintained in the office of each commissioned officer authorized to impose non-judicial punishment and such record will be open to inspection by representatives of the protecting power or a delegate of the International Committee of the Red Cross. The record will be in accordance with the form hereunto attached as Annex A. [Not printed.]

7. *Execution of Punishment*

a. The period between the announcement of punishment and the commencement of its execution will not exceed one month.

b. Under no circumstances will a prisoner of war undergoing confinement as non-judicial punishment be deprived of:

(1) The opportunity to exercise and to stay in the open air at least two hours daily;

(2) Permission to read and write;

(3) Permission to send and receive letters.

8. *Confinement Prior to Hearing*

a. No prisoner of war will be placed in confinement prior to a hearing unless the conduct of the prisoner of war renders it essential to the maintenance of camp order and discipline.

b. Pre-hearing confinement will be kept to the absolute minimum and will in no event exceed fourteen days.

9. *Clemency*

Abatement of non-judicial punishment in view of good conduct is a matter of clemency and rests in the discretion of the officer imposing the punishment.

DOCUMENT NO. 120

REGULATIONS GOVERNING THE PENAL CONFINEMENT OF PRISONERS OF WAR OF THE UNITED NATIONS COMMAND (20 October 1951)

SOURCE

Library of The Judge Advocate General's School, United States Army

NOTE

These Regulations were a part of the series of "Rules" promulgated by the United Nations Command (UNC) in its capacity as Detaining Power of the prisoners of war captured during the hostilities in Korea (1950-1953). Like the rest of the series (DOCUMENT NO. 112, DOCUMENT NO. 118, DOCUMENT NO. 119, and DOCUMENT NO. 121), they were never applied as no prisoners of war were tried by the UNC for either precapture or post capture offenses.

TEXT

1. *Purpose.* These regulations prescribe uniform procedures for the treatment and control of prisoners of war confined as prisoners undergoing punishment in prisoner of war stockades.

2. *Definitions.* For the purpose of these regulations, the following definitions apply:

a. *Confinement.* The physical restraint of a prisoner of war, separate from the main body of prisoners of war, in a prisoner of war stockade.

b. *Prisoner.* A prisoner of war who is undergoing confinement. A prisoner still retains his status as a prisoner of war.

c. *Unsentenced Prisoner.* A prisoner who is undergoing confinement while awaiting trial for an offense under the "Articles Governing United Nations Prisoners of War". The term trial as used herein refers to trial either under the "Procedure Governing Non-judicial Punishment of Prisoners of War" or by United Nations Command Military Commissions.

d. *Sentenced Prisoner.* A prisoner who is undergoing confinement as the result of the imposition of a non-judicial punishment or in accordance with an approved sentence of a United Nations Command Military Commission.

e. *Non-judicial Sentenced Prisoners.* A prisoner who is undergoing confinement as the result of the imposition of a non-judicial punishment under "Procedures Governing Non-Judicial Punishment of Prisoners of War".

f. *Judicial Sentenced Prisoners.* A prisoner who is undergoing confinement in accordance with an approved sentence of a United Nations Command Military Commission.

g. *Prisoner of War Stockade.* A confinement facility where prisoners are confined separate from the main body of prisoners of war.

h. *Hospital Prison Ward.* A ward in a prisoner of war hospital where prisoners are confined separate from other prisoner of war hospital patients.

i. *Commanding Officer.* The Commanding Officer of a Prisoner of War Camp or Enclosure who has been duly designated to exercise command over one or more prisoner of war stockades OR the Commanding Officer of a separate prisoner of war stockade which is not an element of a prisoner of war camp.

j. *Confinement Officer.* A commissioned officer of the Armed Forces of the United Nations Command assigned to a prisoner of war stockade and charged with the security, administration, treatment and custody of the prisoners confined therein.

3. *Applicability of Prisoner of War Convention.* a. A prisoner shall continue to enjoy the benefits of the provisions of the Prisoner of War Convention except insofar as under the terms of the Convention itself these are necessarily rendered inapplicable by the mere fact that he is confined.

b. The provisions of the following Articles of the Prisoner of War Convention shall govern the confinement of all prisoners even though certain paragraphs of these Articles do not apply, so far as the Convention is concerned, to prisoners of war confined as the result of judicial procedures: Articles 78, 87, 88, 89, 97, 98, 103, 105, 108 and 126. Where it is specified in these Articles that standards of confinement or treatment of prisoners will be the same as in the case of prisoners of members of the armed forces of the detaining power, the standards of the armed forces of the United Nations shall be the standards prescribed in these regulations.

4. *Confinement Provisions.* a. *Who may be confined.* Any prisoner of war accused of an offense under the "Articles Governing United Nations Prisoners of War" may be confined.

b. *Ordering into confinement.* Any commissioned officer of the Armed Forces of the United Nations Command including any commissioned officer of the Armed Forces of the Republic of Korea may order a prisoner of war into confinement for an offense under the "Articles Governing United Nations Prisoners of War".

c. *Confinement Order.* A written confinement order, signed by the officer ordering confinement, will be presented to the confinement officer or his representative, at the time of confinement, showing prisoner's name, rank (if known), internment serial number, compound and Battalion to which assigned (if applicable) the offense of which he is accused and the date.

d. *Report of Confinement.* The confinement officer to whose charge a prisoner of war has been committed shall report such fact, together with the information in par 4c above, to the appropriate Commanding Officer, in writing, within 24 hours.

e. *Procedure upon confinement.* (1) All prisoners will be minutely searched prior to confinement. Only necessary articles of clothing and other authorized articles will remain in prisoner's possession. All other articles of clothing, money or personal property will be taken from prisoners and accounted for in accordance with par 14 below.

(2) At the time of confinement, these regulations and the prisoner of war stockade regulations will be carefully explained to a prisoner in a

language which he can understand.

5. *Women Prisoners.* Women prisoners will not be confined in the same stockade with male prisoners. They will be under the immediate supervision of women. Normally they will be confined in a prison ward of a prisoner of war hospital.

6. *Policy Reference Confinement.* Normally prisoners will be placed in individual cells. They may, however, be confined in quarters with other prisoners and under less close custodial supervision, either due to administrative necessity or in cases where the conduct of a prisoner justifies this type of confinement.

7. *Notification to Accused.* Immediate steps will be taken to inform a prisoner of war placed in confinement prior to trial, of the specific offense of which he is accused and to try him or to dismiss the charges and release him.

8. *Prisoner Status.* a. A prisoner's status will change from unsentenced to sentenced when his non-judicial punishment is announced to him or when his sentence to confinement by a United Nations Military Commission has been ordered into execution.

b. The sentence of a prisoner by a United Nations Military Commission will be read to him in a language he understands when the orders promulgating same are received at the prisoner of war stockade.

9. *Standards of Prisoner's Quarters.* a. Precautions will be taken in the preparation, equipping, inspection and supervision of confinement quarters to prevent escapes, self-injury, fire hazards or unhealthy conditions.

b. Confinement quarters will be adequately ventilated, heated if necessary to maintain prisoners in good health and provided with adequate sanitary facilities. No quarters will be without daylight.

c. Sufficient bed covering will be provided during sleeping hours to maintain prisoners in good health.

d. Minimum space to be provided in confinement quarters will be prescribed by CG, Eighth Army or by a general officer to whom he delegates this authority.

10. *Privileges.* Prisoners may be deprived of any or all privileges granted other prisoners of war which are over and above the rights and privileges set forth in the Prisoner of War Convention.

11. *Meals.* Except in the case of administrative disciplinary punishments as prescribed in par 18 below, prisoners will receive the same rations as other prisoners of war.

12. *Correspondence and Visits.* Prisoners will be permitted to send and receive mail, under the same conditions as other prisoners of war and will be provided with necessary means to do so. Under such restrictions for security reasons as may be prescribed by CG, Eighth Army or by subordinate commanders to whom he delegates this authority, prisoners will be permitted to see visitors on such basis as may be permitted for other prisoners of war.

13. *Clothing.* Prisoners will be clothed in the same manner as all other prisoners of war. CG, Eighth Army or subordinate commanders to whom he delegates this authority will prescribe a list of clothing and other articles

which prisoners may retain in their possession while in confinement.

14. *Money, Valuables and Other Personal Property.* CG, Eighth Army or subordinate commanders to whom he delegates this authority will prescribe procedures for accounting for money, valuables or other personal property taken away from prisoners while undergoing confinement.

15. *Sanitation and Hygiene.* Prisoners will be provided with adequate facilities for washing and bathing and with necessary cleaning materials and toilet articles. Adequate provision will be made for cutting their hair at regular intervals.

16. *Exercise.* Prisoners will be allowed to exercise and stay in the open air at least two hours daily, except as prescribed in par 18a (3).

17. *Medical Attention.* a. At each prisoner of war stockade, a medical officer will be designated by the appropriate Commanding Officer to be in charge of the medical care of the prisoners. The medical officer and the responsible prison officer will inspect all quarters at least once a week, to determine the adequacy of sanitation, ventilation, heat and other conditions which might adversely affect the health of the prisoners. The medical officer will keep the Commanding Officer advised regarding the state of health and conditions of confinement of all prisoners.

b. Prisoners will be examined by a medical officer when they are first placed in confinement to determine their state of health. Prisoners requiring hospitalization will be confined in a prison ward in a prisoner of war hospital.

c. Prisoners individually confined will be visited daily by a medical officer. Other prisoners will be permitted to attend daily sick call on the same basis as other prisoners of war.

d. Prisoners will receive the same medical care as other prisoners of war. Prisoners requiring hospitalization will be transferred to a prison ward in a prisoner of war hospital.

18. *Administrative Disciplinary Measures.* a. Commanding Officers are authorized to impose one or more of the following administrative disciplinary measures upon prisoners for misconduct or action prejudicial to good order and discipline or violations of prison rules and regulations.

(1) Reprimand or warning.

(2) Imposition of a restricted diet. Such restricted diet will not be imposed for more than 14 days at any one period and shall not be repeated until an interval of 14 days have elapsed. Such restricted diet will conform to minimum standards designed to ensure that the health of the prisoner is not endangered, said standards to be prescribed by CG, Eighth Army or by a general officer to whom he delegates this authority.

(3) Deprivation of the privilege of exercising and staying in the open air, in the case of judicial sentenced prisoners only.

(4) Withholding of the privilege of smoking.

b. While prisoners are on a restricted diet or deprived of the privilege of exercising and staying in the open air, as the result of the imposition of administrative disciplinary measures, they will be individually confined, if not already so quartered, and they will not be assigned any work other than

cleaning their own quarters.

c. A punishment book will be maintained in each prisoner of war stockade in which a record will be maintained of all administrative measures imposed, in accordance with instructions issued by the Commanding General, Eighth Army or by an officer to whom he may delegate this authority.

19. *Religious Services.* Spiritual assistance will be provided on the request of any prisoner.

20. *Employment.* a. Unsentenced prisoners will not be assigned any work other than necesssary policing of their quarters and premises.

b. Non-judicial sentenced prisoners will not be assigned any work other than necessary police of their quarters and premises, unless fatigue duties, not exceeding two hours daily, have been imposed upon them as disciplinary punishment.

c. Judicial sentenced prisoners will not be assigned any work other than necessary police of their quarters and premises unless their sentences include confinement at hard labor.

21. *Execution of Death Sentence.* Death sentences shall be executed in compliance with orders of the competent judiciary authority and in accordance with instructions as to time, place and method of execution issued by the CG, Eighth Army or by a general officer to whom he delegates this authority.

22. *Duration and Termination of Confinement.* A prisoner placed in confinement must remain in such confinement until released by proper authority. The Commanding Officer releasing a prisoner from confinement will furnish the prison officer with a written release order.

DOCUMENT NO. 121

ARTICLES GOVERNING UNITED NATIONS [COMMAND] PRISONERS OF WAR (23 October 1951)

SOURCES

National Archives of the United States
Library of The Judge Advocate General's School, United States Army

NOTE

Early during the course of the hostilities in Korea (1950-1953), the United Nations Command (UNC) had made the decision to consider itself to be the Detaining Power of all prisoners of war captured by its armed forces during those hostilities. It had, at that time, promulgated procedural rules governing the trials of prisoners of war for precapture offenses (war crimes) (DOCUMENT NO. 112). A year later it promulgated procedural rules governing the trials of prisoners of war for post capture offenses (DOCUMENT NO. 118); procedural rules governing "non-judicial punishment" (DOCUMENT NO. 119); and regulations governing the conditions of the penal confinement of prisoners of war held by it who were convicted of any offense (DOCUMENT NO. 120). Now, perhaps belatedly, it promulgated the rules containing the substantive offenses for which the trials could be conducted and confinement imposed. The substantive offenses were modeled on those of the Uniform Code of Military Justice of the United States (DOCUMENT NO. 110), to which reference is specifically made in Article 2(c) below. It should be noted that apart from restrictions on the imposition of the death sentence contained in Article 5, that article provides that the authorized punishment for all offenses is "as a military commission may direct." (It should be noted once again (see NOTE to DOCUMENT NO. 112) that these "Articles" were never applied in an actual case and their validity was never adjudicated.)

EXTRACTS

I. PRELIMINARY PROVISIONS

ARTICLE 1. *Application of articles.*

These articles shall govern all prisoners of war detained by the United Nations Command and will be referred to and cited as "Articles Governing United Nations Prisoners of War" (ARTUN POW).

ARTICLE 2. *Construction of articles.*

(a) Unless a contrary meaning is clear from the context—

(1) The term "member" or "members of the United Nations Command" shall be construed to mean any and all persons under this command who are members of any force of any nation belonging to or joining with the United Nations in a common conflict.

(2) The term "property of the United Nations Command" shall be construed to mean any and all property belonging to any force under this

command furnished or contibuted by any nation which is a member of or joins with the United Nations in a common conflict.

(b) The term "prisoner of war" shall be construed to mean—

(1) any person detained by the United Nations Command who falls within the definition of a prisoner of war contained in Article IV of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, and

(2) all other persons interned by the United Nations Command in a prisoner-of-war facility.

(c) Any question of construction of these articles shall be resolved by reference to the comparable article of the Uniform Code of Military Justice contained in the Manual for Courts-Martial, United States, 1951.

II. PUNITIVE ARTICLES

A. General

ARTICLE 3. *Principals.*

Any prisoner of war who—

(1) commits an offense punishable by these articles, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which, if directly performed by him, would be punishable by these articles;

is a principal and shall be subject to trial and punishment as such.

ARTICLE 4. *Conviction of lesser included offense.*

A prisoner of war may be found guilty of, and punished for, an offense necessarily included in the offense charged.

B. Offenses

ARTICLE 5. *Punishment.*

A prisoner of war who is convicted of any offense denounced in the following articles shall be punished as a military commission may direct. However, the death sentence may be imposed only in the case of a conviction of violation of one or more of the following articles: 8 [mutiny], 17 [murder], 20 [rape], 31 [assault on a member of the United Nations Command], and 39(1) [soliciting or advising to mutiny, if the offense is attempted or committed].

* * * * *

ARTICLE 37. *Laws of war.*

Violating the laws and customs of war.

* * * * *

ARTICLE 40. *General article.*

Committing any crime or offense not specifically mentioned in these articles, or aiding, abetting, counseling, commanding, or procuring the commission of any disorder or neglect not specifically mentioned in these articles, to the prjudice of good order and discipline among prisoners of war.

DOCUMENT NO. 122

INTERPRETATION OF THE GENEVA CONVENTIONS OF 1949: SOME STATEMENTS ADOPTED BY EXPERTS FROM THE NORDIC COUNTRIES
(November 1951)

SOURCE
57 RGDIP 165 (1953)

NOTE

As a result of a decision of the Foreign Ministers of Denmark, Norway, and Sweden, experts from those three countries held several meetings during 1951 in order to discuss a number of questions concerning the interpretation of various provisions of the 1949 Geneva Convention. Where the experts agreed, joint statements were prepared. Those relevant to the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) appear below.

EXTRACTS

INTERPRETATION OF THE GENEVA CONVENTIONS OF 1949

Some statements adopted by experts from the Nordic Countries

According to a decision made at the Nordic Meeting of Ministers for Foreign Affairs at Oslo in March 1951, meetings of experts from the Nordic countries have been held at *Copenhagen* in June 1951, at *Stockholm* in August 1951, and at *Oslo* in November 1951 in order to discuss various questions concerning the interpretation of the Conventions for the Protection of the Victims of War adopted at Geneva on August 12th, 1949.

* * * * *

Minutes were made of the meetings, from which it appears that those present agreed on a number of questions discussed, whereas differences of opinion existed between them at other points. For a limited number of questions where agreement existed, joint statements were adopted. These statements are listed below.

* * * * *

4. *Treatment of Prisoners of War who are sentenced for actual War Crimes committed prior to Capture:*

"Art. 4,A,3, of the Convention relative to the Treatment of Prisoners of War cannot be interpreted so that criminal proceedings against a person who has fought against his own country should be prohibited under international law simply because this person professes allegiance to a government that has actually been installed by the adversary of his native country in the war."

. *5. Limitations of the Category of Persons designated in Art. 4,B,2, of the Convention relative to the Treatment of Prisoners of War:*

"The provisions of the Convention relative to the Treatment of Prisoners of War apply to persons whom the powers concerned are obliged to intern according to the rules of international law; to other persons the ordinary rules

of international law apply."

* * * * *

10. *Issue of Identity Cards under Art. 17, par. 3, of the Convention relative to the Treatment of Prisoners of War:*

"The provision of Art. 17, par. 3, of the Convention relative to the Treatment of Prisoners of War on the furnishing of identity cards, is to be regarded as a precept of order, which, of course, is to be discharged to the greatest possible extent; measures must be taken in good time to furnish, among others, the personnel of the merchant marine with such cards; the treatment of a person as a prisoner of war, however, does not depend on his possession of an identity card."

* * * * *

16. *To what extent should Infringements of the Provisions of the Convention be considered as Crimes?*

"Without formulating any conclusion, the meeting agreed that the special category of violations of international law described as war crimes is liable for punishment; this category comprises primarily, and perhaps exclusively, the breaking of the rules of humanitarian conduct of war; but in other cases military personnel, belonging to a belligerent or neutral country, cannot be punished in another belligerent or neutral country in so far as they have acted while accomplishing state authority."

* * * * *

21. *The Right of Prisoners of War to have restored Sums of Money they have had to give up on being Captured:*

"It was agreed that it appeared from the minutes that the 3rd Geneva Convention had introduced the new rule that prisoners of war had no longer any direct claim on the Detaining Power for repayment in the currency of this Power of sums of money which had been taken from the prisoners on being captured."

DOCUMENT NO. 123

RESOLUTION 21, "PRISONERS OF WAR — KOREA," ADOPTED BY THE XVIIIth INTERNATIONAL CONFERENCE OF THE RED CROSS (Toronto, August 1952)

SOURCE

Report of the XVIIIth International Conference of the Red Cross, Toronto, 1952, at 151

NOTE

No Protecting Power has been specifically designated as such during any international armed conflict which has occurred since World War II hostilities came to an end in 1945. This is so despite (or, perhaps, because of) the elaborate provisions with respect to Protecting Powers which were, included for the first time in the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). As a result, the International Committee of the Red Cross (ICRC) has frequently been called upon to perform many of the humanitarian functions of the Protecting Power such as the inspection of the facilities in which prisoners of war are confined and investigations of the treatment which they receive. (This is in accordance with the provisions of Articles 10(3) and 126(4) of the Convention.) In all of the international armed conflicts involving a Communist country the ICRC has been denied the right to perform these functions on its territory. The resolution reproduced below is one of the very few cases in which an international organization such as the International Conference of the Red Cross specifically named the sovereign entity at which one of its resolutions was aimed — North Korea. (For the more usual *modus operandi*, see DOCUMENT NO. 115.) Rather inexplicably, no one spoke against this resolution, which was adopted 61-16-0.

TEXT

21

PRISONERS OF WAR — KOREA

The XVIIIth International Red Cross Conference,

considering that charges have been made that prisoners of war held by the parties to the Korean conflict have been mistreated, and that these charges have been categorically denied by the authorities concerned, and

noting that the International Committee of the Red Cross has been enabled to perform its traditional role with respect to prisoners of war held by the United Nations Command in Korea, but has been prevented from performing that function with respect to prisoners of war held in North Korea,

recommends to the parties engaged in hostilities in Korea who have not done so that they permit the International Committee of the Red Cross to perform its traditional role with respect to prisoners of war,

urges the International Committee of the Red Cross to invite them to

designate representatives to accompany the International Committee of the Red Cross in a free and full inspection of all prisoner of war facilities, provided that both sides permit such an investigation on an equal basis..

requests the International Committee of the Red Cross promptly to communicate the results of inspection to all parties concerned.

DOCUMENT NO. 124

RESOLUTION 23, "TELEGRAPHIC COMMUNICATIONS (WAR VICTIMS)," ADOPTED BY THE XVIIIth INTERNATIONAL CONFERENCE OF THE RED CROSS
(Toronto, August 1952)

SOURCE

Report of the XVIIIth International Conference of the Red Cross, Toronto, 1952, at 151

NOTE

In Articles 71(2) and 74(5) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) the 1949 Diplomatic Conference which drafted the Convention in its final form indicated its desire to increase the speed and decrease the cost of telegraphic messages which prisoners of war were to be permitted to send and to receive under certain circumstances. Anticipating the drafting of a new convention by the International Telecommunications Union at a meeting scheduled to be held in Buenos Aires later in 1952, the XVIIIth International Conference of the Red Cross adopted the present resolution in Toronto in August 1952. The Telegraph Regulations (Geneva Revision, 1958) annexed to the International Telecommunications Convention (Buenos Aires, 1952) did, in fact, contain provisions for rate reductions of 75% on prisoner of war telegrams. These matters are now dealt with in Recommendation F.1 of the International Telegraph and Telephone Consultative Committee (DOCUMENT NO. 165).

TEXT

23

TELEGRAPHIC COMMUNICATIONS (WAR VICTIMS)

The XVIIIth International Red Cross Conference,

considering that information concerning war victims should be speedily transmitted and that the telegraph appears to be the most suitable channel to effect this,

bearing in mind the sympathetic understanding already manifested by the competent authorities of the various countries,

emphasizes the importance of the giving to this matter an international solution,

expresses the wish that the next conference of the International Telecommunications Union, which is to meet in Buenos Aires, take all necessary steps in order to harmonize the regulations on telegraph communication with the provisions of the 1949 Geneva Convention providing for full exemption, or at least a considerable reduction in the cost of the telegrams concerning war victims.

DOCUMENT NO. 125

RESOLUTION 610(VII), "KOREA: REPORTS OF THE UNITED NATIONS COMMISSION FOR THE UNIFICATION AND REHABILITATION OF KOREA," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS
(3 December 1952)

SOURCE
4 Djonovich 92

NOTE

The negotiations for an armistice in Korea began in July 1951. By the late spring of 1952 agreement had been reached on substantially all issues except those relating to prisoners of war and, specifically, on the question of "voluntary" versus "forced" repatriation — the question of whether individual prisoners of war should be repatriated even though they did not desire repatriation, and in fact were willing to use physical force to oppose any attempts at repatriation. By June 1952 the negotiations had completely bogged down on this issue and regular meetings of the two military delgations ceased. This resolution was an attempt by the General Assembly of the United Nations to encourage negotiations on the issue by placing an affirmative proposal, emanating from the General Assembly itself, rather than from the United Nations Command, before the negotiators. It was the "voluntary" repatriation proposal, but with a number of provisions to make it more palatable, or, at least, face-saving, to the North Koreans and Chinese Communists, both of whom had been adamant in demanding "forced" repatriation. They argued that Article 118 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) provided for complete "release and repatriation" and that Article 7 thereof prohibited the belligerents from entering into any agreement derogating from the rights guaranteed to prisoners of war — which, it was claimed, an armistice agreement providing for voluntary repatriation would do. (For the final outcome of this dispute, see the Agreement on Prisoners of War of 8 June 1953 (DOCUMENT NO. 127) and the Korean Armistice Agreement of 23 July 1953 (DOCUMENT NO. 128).)

TEXT

The General Assembly,

Having received the special report of the United Nations Command of 18 October 1952 on "the present status of the military action and the armistice negotiations in Korea" and other relevant reports relating to Korea,

Noting with approval the considerable progress towards an armistice made by negotiation at Panmunjom and the tentative agreements to end the

fighting in Korea and to reach a settlement of the Korean question,

Noting further that disagreement between the parties on one remaining issue, alone, prevents the conclusion of an armistice and that a considerable measure of agreement already exists on the principles on which this remaining issue can be resolved,

Mindful of the continuing and vast loss of life, devastation and suffering resulting from and accompanying the continuance of the fighting,

Deeply conscious of the need to bring hostilities to a speedy end and of the need for a peaceful settlement of the Korean question,

Anxious to expedite and facilitate the convening of the political conference as provided in article 60 of the draft armistice agreement,

1. *Affirms* that the release and repatriation of prisoners of war shall be effected in accordance with the Geneva Convention relative to the Treatment of Prisoners of War, dated 12 August 1949, the well-established principles and practice of international law and the relevant provisions of the draft armistice agreement;

2. *Affirms* that force shall not be used against prisoners of war to prevent or effect their return to their homelands, and that they shall at all time be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of the Convention;

3. *Accordingly requests* the President of the General Assembly to communicate the following proposals to the Central People's Government of the People's Republic of China and to the North Korean authorities as forming a just and reasonable basis for an agreement so that an immediate cease-fire would result and be effected; to invite their acceptance of these proposals and to make a report to the General Assembly during its present session and as soon as appropriate:

PROPOSALS

1. In order to facilitate the return to their homelands of all prisoners of war, there shall be established a Repatriation Commission consisting of representatives of Czechoslovakia, Poland, Sweden and Switzerland, that is, the four States agreed to for the constitution of the Neutral Nations Supervisory Commission and referred to in paragraph 37 of the draft armistice agreement, or constituted, alternatively, of representatives of four States not participating in hostilities, two nominated by each side, but excluding representatives of States that are permanent members of the Security Council.

II. The release and repatriation of prisoners of war shall be effected in accordance with the Geneva Convention relative to the Treatment of Prisoners of War, dated 12 August 1949, the well-established principles and practice of International Law and the relevant provisions of the draft armistice agreement.

III. Force shall not be used against the prisoners of war to prevent or effect their return to their homelands and no violence to their persons or affront to their dignity or self-respect shall be permitted in any manner or for any purpose whatsoever. This duty is enjoined on and entrusted to the

Repatriation Commission and each of its members. Prisoners of war shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of that Convention.

IV. All prisoners of war shall be released to the Repatriation Commission from military control and from the custody of the detaining side in agreed numbers and at agreed exchange points in agreed demilitarized zones.

V. Classification of prisoners of war according to nationality and domicile as proposed in the letter of 16 October 1952 from General Kim Il Sung, Supreme Commander of the Korean People's Army, and General Peng Teh-huai, Commander of the Chinese People's Volunteers, to General Mark W. Clark, Commander-in-Chief, United Nations Command, shall then be carried out immediately.

VI. After classification, prisoners of war shall be free to return to their homelands forthwith, and their speedy return shall be facilitated by all parties concerned.

VII. In accordance with arrangements prescribed for the purpose by the Repatriation Commission, each party to the conflict shall have freedom and facilities to explain to the prisoners of war "depending upon them" their rights and to inform the prisoners of war on any matter relating to their return to their homelands and particularly their full freedom to return.

VIII. Red Cross teams of both sides shall assist the Repatriation Commission in its work and shall have access, in accordance with the terms of the draft armistice agreement, to prisoners of war while they are under the temporary jurisdiction of the Repatriation Commission.

IX. Prisoners of war shall have freedom and facilities to make representations and communications to the Repatriation Commission and to bodies and agencies working under the Repatriation Commission, and to inform any or all such bodies of their desires on any matter concerning themselves, in accordance with arrangements made for the purpose by the Commission.

X. Notwithstanding the provisions of paragraph III above, nothing in this Repatriation Agreement shall be construed as derogating from the authority of the Repatriation Commission (or its authorized representatives) to exercise its legitimate functions and responsibilities for the control of the prisoners under its temporary jurisdiction.

XI. The terms of this Repatriation Agreement and the arrangements arising therefrom shall be made known to all prisoners of war.

XII. The Repatriation Commisison is entitled to call upon parties to the conflict, its own member governments, or the Member States of the United Nations for such legitimate assistance as it may require in the carrying out of its duties and tasks and in accordance with the decisions of the Commission in this respect.

XIII. When the two sides have made an agreement for repatriation based on these proposals, the interpretation of that agreement shall rest with the Repatriation Commission. In the event of disagreement in the Commission, majority decisions shall prevail. When no majority decision is possible, an umpire agreed upon in accordance with the succeeding paragraph and with

article 132 of the Geneva Convention of 1949 shall have the deciding vote.

XIV. The Repatriation Commission shall at its first meeting and prior to an armistice proceed to agree upon and appoint the umpire who shall at all times be available to the Commission and shall act as its Chairman unless otherwise agreed. If agreement on the appointment of the umpire cannot be reached by the Commission within the period of three weeks after the date of the first meeting this matter should be referred to the General Assembly.

XV. The Repatriation Commission shall also arrange after the armistice for officials to function as umpires with inspecting teams or other bodies to which functions are delegated or assigned by the Commission or under the provisions of the draft armistice agreement, so that the completion of the return of prisoners of war to their homelands shall be expedited.

XVI. When the Repatriation Agreement is acceded to by the parties concerned and when an umpire has been appointed under paragraph 14 above, the draft armistice agreement, unless otherwise altered by agreement between the parties, shall be deemed to have been accepted by them. The provisions of the draft armistice agreement shall apply except in so far as they are modified by the Repatriation Agreement. Arrangements for repatriation under this agreement will begin when the armistice agreement is thus concluded.

XVII. At the end of ninety days, after the Armistice Agreement has been signed, the disposition of any prisoners of war whose return to their homelands may not have been effected in accordance with the procedure set out in these proposals or as otherwise agreed, shall be referred with recommendations for their disposition, including a target date for the termination of their detention to the political conference to be called as provided under article 60 of the draft armistice agreement. If at the end of a further thirty days there are any prisoners of war whose return to their homelands has not been effected under the above procedures or whose future has not been provided for by the political conference, the responsibility for their care and maintenance and for their subsequent disposition shall be transferred to the United Nations, which in all matters relating to them shall act strictly in accordance with international law.

DOCUMENT NO. 126

AGREEMENT BETWEEN THE UNITED NATIONS COMMAND, ON THE ONE HAND, AND THE KOREAN PEOPLE'S ARMY AND CHINESE PEOPLE'S VOLUNTEERS, ON THE OTHER HAND, CONCERNING THE EXCHANGE OF SICK AND INJURED PRISONERS OF WAR

(Panmunjom, Korea 11 April 1953)

SOURCES

28 D/S Bull. 576 (1953)
47 AJIL Supp. 178

NOTE

This agreement (known as "Little Switch," to distinguish it from the agreement for the full and final exchange of prisoners of war in Korea signed on 8 June 1953 (DOCUMENT NO. 127), which was known as "Big Switch") was the method employed as a first step for breaking the impasse which had arisen on the issue of "voluntary" versus "forced" repatriation of prisoners of war (see DOCUMENT NO. 125) during the course of the negotiation of the armistice agreement which ultimately brought the hostilities in Korea (1950-1953) to an end (DOCUMENT NO. 128). This agreement was the usual agreement for the exchange and repatriation of seriously sick and injured prisoners of war pursuant to the usage then and now embodied in Article 109 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108).

TEXT

The senior member of the United Nations Command liaison group and the senior member of the Korean People's Army and the Chinese People's Volunteers liaison group, in order to effect the repatriation of sick and injured captured personnel in accordance with provisions of article 109 of the 1949 Geneva Convention relative to the treatment of prisoners of war, agree to the following:

Repatriation shall be accomplished at Panmunjom.

Repatriation shall commence at Panmunjom not later than 10 days after the signing of this agreement.

a. The Korean People's Army and the Chinese People's Volunteers shall deliver sick and injured captured personnel at the rate of approximately 100 per day until delivery of all sick and injured captured personnel to be repatriated by the Korean People's Army and the Chinese People's Volunteers is completed. The number of persons actually delivered each day shall be contingent upon the ability of the United Nations Command to receive them, but delivery shall in any case be completed prior to the termination date of this agreement.

*b.*The United Nations Command shall deliver sick and injured captured personnel at the rate of approximately 500 per day until delivery of all sick

and injured captured personnel to be repatriated by the United Nations Command is completed.

The number of persons actually delivered each day shall be contingent upon the ability of the Korean People's Army and Chinese People's Volunteers to receive them, but delivery shall in any case be completed prior to the termination of this agreement.

The United Nations Command shall deliver sick and injured captured personnel in groups of approximately twenty-five. Each group shall be accompanied by rosters, prepared by nationality, to include: *(a)* Name, *(b)* rank, *(c)* internment or military serial number.

After each group of sick and injured captured personnel is delivered and received, a representative of the receiving side shall sign the roster of the captured personnel delivered as a receipt and shall return this to the delivering side.

In order to insure that the sick and injured captured personnel of both sides are given maximum protection during the full period of repatriation, both sides agree to guarantee immunity from all attacks to all rail and motor movements carrying sick and injured captured personnel to Kaesong and Munsan-Ni, respectively, and thence through presently established immunity routes to Panmunjom, subject to the following conditions:

a. Movement of motor convoys to Kaesong and Munsan-Ni, respectively, shall be restricted to daylight hours, and each convoy shall consist of not less than five vehicles in close formation: except that north of Panmunjom, because of actual conditions, the latter provisions shall apply only to the route from Pyongyang to Kaesong.

b. Each car in rail movements and each vehicle in motor convoys shall display clearly visible identification markings.

c. Each side, prior to the initial movement, shall provide the liaison group of the other side with a detailed description of the markings utilized to identify motor convoys and rail movements. This shall include color, size, and manner in which the markings will be displayed.

Each side, prior to the initial movement, shall provide the liaison group of the other side with the sites and markings of the bivouac areas and night stop-over locations for motor convoys.

Each side shall inform the liaison group of the other side, twenty-four hours in advance of each movement, of the selected route, number of cars in rail movement or number of vehicles in motor movement, and the estimated time of arrival at Kaesong or Munsan-Ni.

Each side shall notify the liaison group of the other side, by the most expeditious means of communication available, of the location of emergency stop-overs.

During the period while sick and injured captured personnel are being repatriated through the Panmunjom conference site area, the Oct. 22, 1951, agreement between liaison officers, with the exception of the part therein provided for in Paragraph 8 of this agreement, shall continue in effect. Liaison groups of both sides and their parties shall have free access to, and

free movement within, the Panmunjom conference site area. The composition of each liaison group and its party shall be as determined by the senior member thereof: however, in order to avoid congestion in the conference site area, the number of personnel of each side in the area, including captured personnel under its control, shall not exceed 300 persons at any one time. Each side shall transfer repatriated personnel out of the Panmunjom conference site area as expeditiously as possible.

During the period while sick and injured captured personnel are being repatriated through the Panmunjom conference site area, the armed military police of each side, who undertake to maintain order within the conference site area, shall be increased from the maximum number of fifteen, as provided in the Oct. 22, 1951, agreement between liaison officers, to thirty.

Other administrative details shall be mutually arranged by officers designated by the senior member of the liaison group of each side.

This agreement is effective when signed and will terminate twenty days after the commencement of repatriation of sick and injured captured personnel at Panmunjom.

DOCUMENT NO. 127

AGREEMENT BETWEEN THE UNITED NATIONS COMMAND, ON THE ONE HAND, AND THE KOREAN PEOPLE'S ARMY AND THE CHINESE PEOPLE'S VOLUNTEERS, ON THE OTHER HAND, CONCERNING PRISONERS OF WAR: INCLUDING THE TERMS OF REFERENCE FOR THE NEUTRAL NATIONS REPATRIATION COMMISSION

(Panmunjom, Korea, 8 June 1953)

SOURCES

4 UST 262
47 AJIL Supp. 180

NOTE

This agreement, less the opening paragraph, is an annex to the armistice agreement which ultimately ended the hostilities in Korea (1950-1953) (DOCUMENT NO. 128). It resolved the issue of "voluntary" versus "forced" repatriation of prisoners of war which had stalemated the armistice negotiations for over a year. Voluntary repatriation, previously approved by resolution of the General Assembly of the United Nations (DOCUMENT NO. 125), was accepted by the Communists with the face-saving provisions for appropriate procedures to ensure that the individual prisoner of war both knew what he was electing and made his election without being subjected to any coercion. (This agreement was known as "Big Switch" to distinguish it from the agreement for the exchange of sick and injured prisoners of war signed at Panmunjom on 11 April 1953 which was known as "Little Switch." See DOCUMENT NO. 126.) The validity of the position taken by the United Nations Command in support of the policy against forced repatriation was established beyond dispute by the thousands upon thousands of North Korean and Chinese prisoners of war who refused repatriation and elected either to stay in South Korea or to go to Taiwan or to some third country which was willing to permit them to immigrate.

TEXT

Within two months after the armistice agreement becomes effective, both sides shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture. Repatriation shall be accomplished in accordance with the related provisions of Article III of the draft armistice agreement. In order to expedite the repatriation process of such personnel, each side shall, prior to the signing of the armistice agreement, exchange the total numbers, by nationalities, of personnel to be repatriated direct. Each group delivered to the other side shall be accompanied by rosters, prepared by nationality, to include name, rank (if any) and internment or military serial number.

Both sides agree to hand over all those remaining prisoners of war who are not directly repatriated to the Neutral Nations Repatriation Commission for disposition in accordance with the following provisions:

TERMS OF REFERENCE FOR NEUTRAL NATIONS REPATRIATION COMMISSION

I. GENERAL

1. In order to ensure that all prisoners of war have the opportunity to exercise their right to be repatriated following an armistice, Sweden, Switzerland, Poland, Czechoslovakia and India shall each be requested by both sides to appoint a member to a Neutral Nations Repatriation Commission which shall be established to take custody in Korea of those prisoners of war who, while in the custody of the detaining powers, have not exercised their right to be repatriated. The Neutral Nations Repatriation Commission shall establish its headquarters within the Demilitarized Zone in the vicinity of Panmunjom, and shall station subordinate bodies of the same composition as the Neutral Nations Repatriation Commission at those locations at which the Repatriation Commission assumes custody of prisoners of war. Representatives of both sides shall be permitted to observe the operations of the Repatriation Commission and its subordinate bodies to include explanations and interviews.

2. Sufficient armed forces and any other operating personnel required to assist the Neutral Nations Repatriation Commission in carrying out its functions and responsibilities shall be provided exclusively by India, whose representative shall be the umpire in accordance with the provisions of Article 132 of the Geneva Convention, and shall also be chairman and executive agent of the Neutral Nations Repatriation Commission. Representatives from each of the other four powers shall be allowed staff assistants in equal number not to exceed fifty (50) each. When any of the representatives of the neutral nations is absent for some reason, that representative shall designate an alternate representative of his own nationality to exercise his functions and authority. The arms of all personnel provided for in this Paragraph shall be limited to military police type small arms.

3. No force or threat of force shall be used against the prisoners of war specified in Paragraph 1 above to prevent or effect their repatriation, and no violence to their persons or affront to their dignity or self-respect shall be permitted in any manner for any purpose whatsoever (but see Paragraph 7 below). This duty is enjoined on and entrusted to the Neutral Nations Repatriation Commission. This Commission shall ensure that prisoners of war shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention, and with the general spirit of that convention.

II. CUSTODY OF PRISONERS OF WAR

4. All prisoners of war who have not exercised their right of repatriation following the effective date of the Armistice Agreement shall be released from the military control and from the custody of the detaining side as soon as

practicable, and, in all cases, within sixty (60) days subsequent to the effective date of the Armistice Agreement to the Neutral Nations Repatriation Commission at locations in Korea to be designated by the detaining side.

5. At the time the Neutral Nations Repatriation Commission assumes control of the prisoner of war installations, the military forces of the detaining side shall be withdrawn therefrom, so that the locations specified in the preceding Paragraph shall be taken over completely by the armed forces of India.

6. Notwithstanding the provisions of Paragraph 5 above, the detaining side shall have the responsibility for maintaining and ensuring security and order in the areas around the locations where the prisoners of war are in custody and for preventing and restraining any armed forces (including irregular armed forces) in the area under its control from any acts of disturbance and intrusion against the locations where the prisoners of war are in custody.

7. Notwithstanding the provisions of Paragraph 3 above, nothing in this agreement shall be construed as derogating from the authority of the Neutral Nations Repatriation Commission to exercise its legitimate functions and responsibilities for the control of the prisoners of war under its temporary jurisdiction.

III. EXPLANATION

8. The Neutral Nations Repatriation Commission, after having received and taken into custody all those prisoners of war who have not exercised their right to be repatriated, shall immediately make arrangements so that within ninety (90) days after the Neutral Nations Repatriation Commission takes over the custody, the nations to which the prisoners of war belong shall have freedom and facilities to send representatives to the locations where such prisoners of war are in custody to explain to all the prisoners of war depending upon these nations their rights and to inform them of any matters relating to their return to their homelands, particularly of their full freedom to return home to lead a peaceful life, under the following provisions:

a. The number of such explaining representatives shall not exceed seven (7) per thousand prisoners of war held in custody by the Neutral Nations Repatriation Commission; and the minimum authorized shall not be less than a total of five (5);

b. The hours during which the explaining representatives shall have access to the prisoners shall be as determined by the Neutral Nations Repatriation Commission, and generally in accord with Article 53 of the Geneva Convention Relative to the Treatment of Prisoners of War;

c. All explanations and interviews shall be conducted in the presence of a representative of each member nation of the Neutral Nations Repatriation Commission and a representative from the detaining side;

d. Additional provisions governing the explanation work shall be prescribed by the Neutral Nations Repatriation Commission and will be designed to employ the principles enumerated in Paragraph 3 above and in

this Paragraph;

e. The explaining representatives, while engaging in their work, shall be allowed to bring with them necessary facilities and personnel for wireless communications. The number of communications personnel shall be limited to one team per location at which explaining representatives are in residence, except in the event that all prisoners of war are concentrated in one location, in which case, two (2) teams shall be permitted. Each team shall consist of not more than six (6) communications personnel.

9. Prisoners of war in its custody shall have freedom and facilities to make representations and communications to the Neutral Nations Repatriation Commission and to representatives and subordinate bodies of the Neutral Nations Repatriation Commission and to inform them of their desires on any matter concerning the prisoners of war themselves, in accordance with arrangements made for the purpose by the Neutral Nations Repatriation Commission.

IV. DISPOSITION OF PRISONERS OF WAR

10. Any prisoner of war who, while in the custody of the Neutral Nations Repatriation Commission, decides to exercise the right of repatriation, shall make an application requesting repatriation to a body consisting of a representative of each member nation of the Neutral Nations Repatriation Commission. Once such an application is made, it shall be considered immediately by the Neutral Nations Repatriation Commission or one of its subordinates bodies so as to determine immediately by majority vote the validity of such applicaiton. Once such an application is made to and validated by the Commission or one of its subordinate bodies, the prisoner of war concerned shall immediately be transferred to and accommodated in the tents set up for those who are ready to be repatriated. Thereafter, he shall, while still in the custody of the Neutral Nations Repatriation Commission, be delivered forthwith to the prisoner of war exchange point at Panmunjom for repatriation under the procedure prescribed in the Armistice Agreement.

11. At the expiration of ninety (90) days after the transfer of custody of the prisoners of war to the Neutral Nations Repatriation Commission, access of representatives to captured personnel as provided for in Paragraph 8 above, shall terminate, and the question of disposition of the prisoners of war who have not exercised their right to be repatriated shall be submitted to the Political Conference recommended to be convened in Paragraph 60, Draft Armistice Agreement, which shall endeavor to settle this question within thirty (30) days, during which period the Neutral Nations Repatriation Commission shall continue to retain custody of those prisoners of war. The Neutral Nations Repatriation Commission shall declare the relief from the prisoner of war status to civilian status of any prisoners of war who have not exercised their right to be repatriated and for whom no other disposition has been agreed to by the Political Conference within one hundred and twenty (120) days after the Neutral Nations Repatriation Commission has assumed their custody. Thereafter, according to the application of each individual, those who choose to go to neutral nations shall be assisted by the Neutral

Nations Repatriation Commission and the Red Cross Society of India. This operation shall be completed within thirty (30) days, and upon its completion, the Neutral Nations Repatriation Commission shall immediately cease its functions and declare its dissolution. After the dissolution of the Neutral Nations Repatriation Commission, whenever and wherever any of those above-mentioned civilians who have been relieved from the prisoner of war status desire to return to their fatherlands, the authorities of the localities where they are shall be responsible for assisting them in returning to their fatherlands.

V. RED CROSS VISITATION

12. Essential Red Cross service for prisoners of war in custody of the Neutal Nations Repatriation Commission shall be provided by India in accordance with regulations issued by the Neutral Nations Repatriation Commission.

VI. PRESS COVERAGE

13. The Neutral Nations Repatriation Commission shall insure freedom of the press and other news media in observing the entire operation as enumerated herein, in accordance with procedures to be established by the Neutral Nations Repatriation Commission.

VII. LOGISTICAL SUPPORT FOR PRISONERS OF WAR

14. Each side shall provide logistical support for the prisoners of war in the area under its military control, delivering required support to the Neutral Nations Repatriation Commission at an agreed delivery point in the vicinity of each prisoner of war installation.

15. The cost of repatriating prisoners of war to the exchange point at Panmunjom shall be borne by the detaining side and the cost from the exchange point by the side on which said prisoners depend, in accordance with Article 118 of the Geneva Convention.

16. The Red Cross Society of India shall be responsible for providing such general service personnel in the prisoner of war installations as required by the Neutral Nations Repatriation Commission.

17. The Neutral Nations Repatriation Commisison shall provide medical support for the prisoners of war as may be practicable. The detaining side shall provide medical support as practicable upon the request of the Neutral Nations Repatriation Commission and specifically for those cases requiring extensive treatment or hospitalization. The Neutral Nations Repatriation Commission shall maintain custody of prisoners of war during such hospitalization. The detaining side shall facilitate such custody. Upon completion of treatment, prisoners of war shall be returned to a prisoner of war installation as specified in Paragraph 4 above.

VIII. LOGISTICAL SUPPORT FOR THE NEUTRAL NATIONS REPATRIATION COMMISSION

19. Each side shall be responsible for providing logistical support for the personnel of the Neutral Nations Repatriation Commission stationed in the area under its military control, and both sides shall contribute on an equal basis to such support within the Demilitarized Zone. The precise arrange-

ments shall be subject to determination between the Neutral Nations Repatriation Commission and the detaining side in each case.

20. Each of the detaining sides shall be responsible for protecting the explaining representatives from the other side while in transit over lines of communication within its area, as set forth in Paragraph 23 for the Neutral Nations Repatriation Commission, to a place of residence and while in residence in the vicinity of but not within each of the locations where the prisoners of war are in custody. The Neutral Nations Repatriation Commission shall be responsible for the security of such representatives within the actual limits of the locations where the prisoners of war are in custody.

21. Each of the detaining sides shall provide transportation, housing, communication, and other agreed logistical support to the explaining representatives of the other side while they are in the area under its military control. Such services shall be provided on a reimbursable basis.

IX. PUBLICATION

22. After the Armistice Agreement becomes effective, the terms of this agreement shall be made known to all prisoners of war who, while in the custody of the detaining side, have not exercised their right to be repatriated.

X. MOVEMENT

23. The movement of the personnel of the Neutral Nations Repatriation Commission and repatriated prisoners of war shall be over lines of communication as determined by the command(s) of the opposing side and the Neutral Nations Repatriation Commission. A map showing these lines of communication shall be furnished the command of the opposing side and the Neutral Nations Repatriation Commission. Movement of such personnel, except within locations as designated in Paragraph 4 above, shall be under the control of, and escorted by, personnel of the side in whose area the travel is being undertaken; however, such movement shall not be subject to obstruction or coercion.

XI. PROCEDURAL MATTERS

24. The interpretation of this agreement shall rest with the Neutral Nations Repatriation Commission. The Neutral Nations Repatriation Commission, and/or any subordinate bodies to which functions are delegated or assigned by the Neutral Nations Repatriation Commission, shall operate on the basis of majority vote.

25. The Neutral Nations Repatriation Commission shall submit a weekly report to the opposing Commanders on the status of prisoners of war in its custody, indicating the numbers repatriated and remaining at the end of each week.

26. When this agreement has been acceded to by both sides and by the five powers herein, it shall become effective upon the date the Armistice becomes effective.

27. Done at Panmunjom, Korea, at 1400 hours on the 8th day of June 1953, in English, Korean, and Chinese, all texts being equally authentic.

DOCUMENT NO. 128

AGREEMENT BETWEEN THE COMMANDER-IN-CHIEF, UNITED NATIONS COMMAND, ON THE ONE HAND, AND THE SUPREME COMMANDER OF THE KOREAN PEOPLE'S ARMY AND THE COMMANDER OF THE CHINESE PEOPLE'S VOLUNTEERS, ON THE OTHER HAND, CONCERNING A MILITARY ARMISTICE IN KOREA (Panmunjom, Korea, 23 July 1953)

SOURCES

U.N. Doc. A/2431, 7 August 1953
U.N. Doc. S/3079, 7 August 1953
4 UST 234
160 BFSP 433
47 AJIL Supp. 186

NOTE

This armistice agreement terminated the hostilities in Korea (1950-1953). Its acceptance by the two sides became possible once the impasse over "voluntary" versus "forced" repatriation of prisoners of war had been broken by the signing on 11 April 1953 of the agreement on "Little Switch" (DOCUMENT NO. 126), providing for the exchange and repatriation of sick and injured prisoners of war pursuant to Article 109 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), which specifically prohibits the repatriation of a prisoner of war against his will during hostilities; and the signing of the agreement on "Big Switch" (DOCUMENT NO. 127) on 8 June 1953, which established the procedures for releasing and repatriating all of the remaining prisoners of war who elected release and repatriation. The latter agreement, less its opening paragraph, is, pursuant to Article 51(b) of the armistice agreement, an annex thereto.

EXTRACTS

PREAMBLE

The undersigned, the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, in the interest of stopping the Korean conflict, with its great toll of suffering and bloodshed on both sides, and with the objective of establishing an armistice which will insure a complete cessation of hostilities and of all acts of armed force in Korea until a final settlement is achieved, do individually, collectively, and mutually agree to accept and to be bound and governed by the conditions and terms of armistice set forth in the following Articles and Paragraphs, which said conditions and terms are intended to be purely military in character and to pertain solely to the belligerents in Korea.

* * * * *

ARRANGEMENTS RELATING TO PRISONERS OF WAR

51. The release and repatriation of all prisoners of war held in the custody of each side at the time this Armistice Agreement becomes effective shall be effected in conformity with the following provisions agreed upon by both sides prior to the signing of this Armistice Agreement.

a. Within sixty (60) days after this Armistice Agreement becomes effective, each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture. Repatriation shall be accomplished in accordance with the related provisions of this Article. In order to expedite the repatriation process of such personnel, each side shall, prior to the signing of the Armistice Agreement, exchange the total numbers, by nationalities, of personnel to be directly repatriated. Each group of prisoners of war delivered to the other side shall be accompanied by rosters, prepared by nationality, to include name, rank (if any) and internment or military serial number.

b. Each side shall release all those remaining prisoners of war, who are not directly repatriated, from its military control and from its custody and hand them over to the Neutral Nations Repatriation Commission for disposition in accordance with the provisions in the Annex hereto: "Terms of Reference for Neutral Nations Repatriation Commission."

c. So that there may be no misunderstanding owing to the equal use of three languages, the act of delivery of a prisoner of war by one side to the other side shall, for the purposes of this Armistice Agreement, be called "repatriation" in English, (SONG HWAN) in Korean, and (CH'IEN FAN) in Chinese, notwithstanding the nationality or place of residence of such prisoner of war.

52. Each side insures that it will not employ in acts of war in the Korean conflict any prisoner of war released and repatriated incident to the coming into effect of this Armistice Agreement.

53. All the sick and injured prisoners of war who insist upon repatriation shall be repatriated with priority. Insofar as possible, there shall be captured medical personnel repatriated concurrently with the sick and injured prisoners of war, so as to provide medical care and attendance en route.

54. The repatriation of all of the prisoners of war required by Subparagraph 51a hereof shall be completed within a time limit of sixty (60) days after this Armistice Agreement becomes effective. Within this time limit each side undertakes to complete the repatriation of the above-mentioned prisoners of war in its custody at the earliest practicable time.

55. PANMUNJOM is designated as the place where prisoners of war will be delivered and received by both sides. Additional place(s) of delivery and reception of prisoners of war in the Demilitarized Zone may be designated, if necessary, by the Committee for Repatriation of Prisoners of War.

56. a. A Committee for Repatriation of Prisoners of War is hereby established. It shall be composed of six (6) officers of field grade, three (3) of whom shall be appointed by the Commander-in-Chief, United Nations

Command, and three (3) of whom shall be appointed jointly by the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers. This Committee shall, under the general supervision and direction of the Military Armistice Commission, be responsible for coordinating the specific plans of both sides for the repatriation of prisoners of war and for supervising the execution by both sides of all of the provisions of this Armistice Agreement relating to the repatriation of prisoners of war. It shall be the duty of this Committee to coordinate the timing of the arrival of prisoners of war at the place(s) of delivery and reception of prisoners of war from the prisoner of war camps of both sides; to make, when necessary, such special arrangements as may be required with regard to the transportation and welfare of sick and injured prisoners of war; to coordinate the work of the joint Red Cross teams, established in Paragraph 57 hereof, in assisting the repatriation of prisoners of war; to supervise the implementation of the arrangements for the actual repatriation of prisoners of war stipulated in Paragraph 53 and 54 hereof; to select, when necessary, additional place(s) of delivery and reception of prisoners of war; to arrange for security at the place(s) of delivery and reception of prisoners of war; and to carry out such other related functions as are required for the repatriation of prisoners of war.

b. When unable to reach agreement on any matter relating to its responsibilities, the Committee for Repatriation of Prisoners of War shall immediately refer such matter to the Military Armistice Commisison for decision. The Committee for Repatriation of Prisoners of War shall maintain its headquarters in proximity to the headquarters of the Military Armistice Commission.

c. The Committee for Repatriation of Prisoners of War shall be dissolved by the Military Armistice Commission upon completion of the program of repatriation of prisoners of war.

57. a. Immediately after this Armistice Agreement becomes effective, joint Red Cross teams composed of representatives of the national Red Cross Societies of the countries contributing forces to the United Nations Command on the one hand, and representatives of the Red Cross Society of the Democratic People's Republic of Korea and representatives of the Red Cross Society of the People's Republic of China on the other hand, shall be established. The joint Red Cross teams shall assist in the execution by both sides of those provisions of this Armistice Agreement relating to the repatriation of all the prisoners of war specified in Sub-paragraph 51a hereof, who insist upon repatriation, by the performance of such humanitarian services as are necessary and desirable for the welfare of the prisoners of war. To accomplish this task, the joint Red Cross teams shall provide assistance in the delivering and receiving of prisoners of war by both sides at the place(s) of delivery and reception of prisoners of war, and shall visit the prisoner of war camps of both sides to comfort the prisoners of war and to bring in and distribute gift articles for the comfort and welfare of the prisoners of war. The joint Red Cross teams may provide services to prisoners of war while en route from prisoner of war camps to the place(s) of

delivery and reception of prisoners of war.

b. The joint Red Cross teams shall be organized as set forth below:

(1) One team shall be composed of twenty (20) members, namely, ten (10) representatives from the national Red Cross Societies of each side, to assist in the delivering and receiving of prisoners of war by both sides at the place(s) of delivery and reception of prisoners of war. The chairmanship of this team shall alternate daily between representatives from the Red Cross Societies of the two sides. The work and services of this team shall be coordinated by the Committee for Repatriation of Prisoners of War.

(2) One team shall be composed of sixty (60) members, namely, thirty (30) representatives from the national Red Cross Societies of each side, to visit the prisoner of war camps under the administration of the Korean People's Army and the Chinese People's Volunteers. This team may provide services to prisoners of war while en route from the prisoner of war camps to the place(s) of delivery and reception of prisoners of war. A representative of the Red Cross Society of the Democratic People's Republic of Korea or of the Red Cross Society of the People's Republic of China shall serve as chairman of this team.

(3) One team shall be composed of sixty (60) members, namely, thirty (30) representatives from the national Red Cross Societies of each side, to visit the prisoner of war camps under the administration of the United Nations Command. This team may provide services to prisoners of war while en route from the prisoner of war camps to the place(s) of delivery and reception of prisoners of war. A representative of a Red Cross Society of a nation contributing forces to the United Nations Command shall serve as chairman of this team.

(4) In order to facilitate the functioning of each joint Red Cross team, sub-teams composed of not less than two (2) members from the team, with an equal number of representatives from each side, may be formed as circumstances require.

(5) Additional personnel such as drivers, clerks, and interpreters, and such equipment as may be required by the joint Red Cross teams to perform their missions, shall be furnished by the Commander of each side to the team operating in the territory under his military control.

(6) Whenever jointly agreed upon by the representatives of both sides on any joint Red Cross team, the size of such teams may be increased or decreased, subject to confirmation by the Committee for Repatriation of Prisoners of War.

c. The Commander of each side shall cooperate fully with the joint Red Cross teams in the performance of their functions, and undertakes to insure the security of the personnel of the joint Red Cross team in the area under his military control. The Commander of each side shall provide such logistic, administrative, and communications facilities as may be required by the team operating in the territory under his military control.

d. The joint Red Cross teams shall be dissolved upon completion of the program of repatriation of all the prisoners of war specified in Sub-paragraph

51a hereof, who insist upon repatriation.

58. a. The Commander of each side shall furnish to the Commander of the other side as soon as practicable, but not later than ten (10) days after this Armistice Agreement becomes effective, the following information concerning prisoners of war:

(1) Complete data pertaining to the prisoners of war who escaped since the effective date of the data last exchanged.

(2) Insofar as practicable, information regarding name, nationality, rank, and other identification data, date and cause of death, and place of burial, of those prisoners of war who died while in his custody.

b. If any prisoners of war escape or die after the effective date of the supplementary information specified above, the detaining side shall furnish to the other side, through the Committee for Repatriation of Prisoners of War, the data pertaining thereto in accordance with the provisions of Subparagraph 58a hereof. Such data shall be furnished at ten-day intervals until the completion of the program of delivery and reception of prisoners of war.

c. Any escaped prisoner of war who returns to the custody of the detaining side after the completion of the program of delivery and reception of prisoners of war shall be delivered to the Military Armistice Commission for disposition.

DOCUMENT NO. 129

GENEVA ACCORD: AGREEMENT ON THE CESSATION OF HOSTILITIES IN VIET NAM (Geneva, 20 July 1954)

SOURCES

161 BFSP 818
Miscellaneous No. 29 (1954) (Cmd. 9239) at 27

NOTE

This is the agreement between France and the Vietnamese Communists, the Viet Minh (1946-1954), which brought an end to those hostilities and resulted in the withdrawal of the French from what had been French Indochina and the division of Vietnam into North and South. The Vietnamese Communists then took over control of North Vietnam and used it as a base for their continued, and eventually successful, attempt to gain control over all of Vietnam. (For a somewhat similar agreement reached between the Vietnamese Communists and the United States in 1973, see DOCUMENT NO. 166.) Despite the provisions of the 1954 Agreement set forth below, thousands of French and indigenous anti-communist prisoners of war were never accounted for.

EXTRACTS

ARTICLE 21

The liberation and repatriation of all prisoners of war and civilian internees detained by each of the two parties at the coming into force of the present Agreement shall be carried out under the following conditions:—

(a) All prisoners of war and civilian internees of Viet Nam, French and other nationalities captured since the beginning of hostilities in Viet Nam during military operations or in any other circumstances of war and in any part of the territory of Viet Nam shall be liberated within a period of thirty (30) days after the date when the cease-fire becomes effective in each theatre.

(b) the term "civilian internees" is understood to mean all persons who, having in any way contributed to the political and armed struggle between the two parties, have been arrested for that reason and have been kept in detention by either party during the period of hostilities.

(c) All prisoners of war and civilian internees held by either party shall be surrendered to the appropriate authorities of the other party, who shall give them all possible assistance in proceeding to their country of origin, place of habitual residence or the zone of their choice.

DOCUMENT NO. 130

UNITED STATES V. FLOYD
(U.S. Army Board of Review, 24 March 1955)

SOURCE

18 CMR 362 (1955); pet. rev. den. 6 USCMA 817, 19 CMR 413 (1955)

NOTE

This case is concerned with an issue which will continue to arise wherever there are prisoners of war; the extent to which they carry with them into captivity their own national military law, including particularly the law governing the relationship between superior and subordinate. (See also, DOCUMENT NO. 137.) That this can be a matter of major importance to a Detaining Power is demonstrated by the extent to which the Communists sought to bring about a breakdown of the leadership relation in the prisoner-of-war camps in North Korea. (See, for example, DOCUMENT NO. 131, under the rubric "Progressives and Reactionaries," and DOCUMENT NO. 134, under the rubric "Methods of Persuasion.") It presents, in a somewhat different setting, the general problem noted in *Rex* v. *Werner* (DOCUMENT NO. 92): the conflict of law arising because the Detaining Power rightly contends that under Article 82(1) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), and its predecessors, the law of the Detaining Power governs the actions of prisoners of war; and the Power of Origin, probably with equal merit, contends that this rule does not prevent it from insisting that in so far as military relationships are concerned, the national military law continues applicable, even in a prisoner-of-war camp (see DOCUMENT NO. 133). The latter position is, at least to some extent, supported by the various provisions of the 1949 Convention recognizing the status of officers and noncommissioned officers. See, for example, Articles 39(2) and (3), 44, 49, 79, thereof. While the two contentions appear to be diametrically opposed, it is believed that, except in rare cases (see NOTE, DOCUMENT NO. 87), there can usually be an accommodation between them. In any event, there appears to be no basis upon which a Power of Origin can be prevented from punishing recovered members of its armed forces who have violated its military law while in a prisoner-of-war status.

EXTRACTS

* * * * *

In Section IV of the assignment, the defense alleges that the evidence of record is insufficient to establish that Colonel Keith was in the execution of his office at the time of the alleged assault upon him by the accused. Let us first make clear that we believe the assault and battery upon Colonel Keith by the accused was adequately proved by legal and competent evidence.

We cannot and do not concur with any view advanced by the defense that an American officer may be deprived of his office by any act of an enemy power

while he is detained by such power as a prisoner of war. It is true that he can be deprived of the means and opportunity to exercise his command or authority and from taking appropriate disciplinary acton in instances where it may be called for. In fact, the detaining power may, as was apparently done here by the Communist captors, subject the officer to indignities, humiliations and degradations, in violation of all the principles and precepts of international law relating to the treatment to be accorded prisoners of war, and ordinarily adhered to by all civilized nations whether parties to prisoner of war treaties and conventions or not. But we know of no principle or precept in international law, or of any treaty or convention provision, which provides that a commissioned officer of one belligerent power may be or is deprived of his office by reason of capture by the forces of another enemy belligerent power.

Appellate defense counsel concedes in his assignment of errors that Colonel Keith was at all pertinent times the superior officer of the accused. "An officer is in the execution of his office when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage." (Para 152, MCM, 1949, p. 205; para 169, MCM, 1951, p 320.) As a commisisoned officer of the United States Army, Colonel Keith, whether the senior American officer present in the particular camp or not, and although deprived of many of the functions and prerogatives of his office by his Communist captors, had the responsibility and duty to take such actions as were available to him (and if the senior officer present to exercise such command as he was able) to assist his fellow prisoners, to help maintain their morale, and to counsel, advise and, where necessary, order them to conduct themselves in keeping with the standards of conduct traditional to American servicemen. It is our opinion that this was what Colonel Keith was endeavoring to do and while so doing he was unquestionably acting in the execution of his office.

DOCUMENT NO. 131

A REPORT BY THE [U.S.] SECRETARY OF DEFENSE'S ADVISORY COMMITTEE ON PRISONERS OF WAR
(29 July 1955)

SOURCE

P O W . . . the fight continues after the battle . . .
(GPO August 1955)
The U.S. Fighting Man's Code, DOD Pamphlet 8-1 (November 1955)

NOTE

Early in the hostilities in Korea (1950-1953) it became evident that the North Koreans, and later the Chinese Communists, had no intention of complying with the humanitarian provisions of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), despite their stated intention so to do. (The bodies of American servicemen were found shot through the head with their hands wired behind their backs. They had obivously been murdered after becoming prisoners of war.) At no time during those hostilities were there any Protecting Powers and, while the International Committee of the Red Cross (ICRC) was permitted to perform its humanitarian functions among the North Korean and Chinese prisoners of war held by the United Nations Command, it was not permitted to function north of the battle line, among the United Nations Command prisoners of war held by the Communists. (See DOCUMENT NO. 123.) Accordingly, although it was known that maltreatment of prisoners of war was the order of the day in the Communist prisoner-of-war camps, the nature and extent of that maltreatment was not fully and publicly known until the prisoners of war had been released, repatriated and debriefed and the results of the debriefing had been identified and evaluated. This latter was done in the United States by an Advisory Committee appointed by the Secretary of Defense, a part of whose report is given below. (A similar activity was performed for and a report was published by the British Ministry of Defence. See DOCUMENT NO. 134.) Because the findings of the Advisory Committee included misconduct on the part of some American servicemen while held as prisoners of war, it recommended, and the Secretary of Defense concurred, that the President of the United States promulgate a so-called "Code of Conduct" to govern the actions of members of the armed forces of the United States. (See DOCUMENT NO. 133.)

EXTRACTS

Imprisonment, North Korea

During the Korean War a total of 7,190 Americans were captured by the enemy. Of these, 6,656 were Army troops; 263 were Air Force men; 231 were Marines; 40 were Navy men. The Army bore the heaviest burden of prisoner losses.

The captives were marched off to various prison camps in the North Korean interior. Altogether there were 20 of these camps.

"Death Marches"

The first ordeal the prisoner had to suffer — and often the worst — was the march to one of these camps. The North Koreans frequently tied a prisoner's hands behind his back or bound his arms with wire. Wounded prisoners were jammed into trucks that jolted, dripping blood, along broken roads. Many of the wounded received no medical attention until they reached the camp. Some were not attended to until days thereafter.

The marching prisoners were liable to be beaten or kicked to their feet if they fell. A number of the North Korean officers were bullwhip barbarians, products of a semi-primitive environment. Probably they had never heard of the Geneva Conventions or any other code of war. The worst of this breed were responsible for the murder of men who staggered out of line or collapsed at roadside. They were particularly brutal to South Korean captives. Evidence indicates that many ROK prisoners were forced to dig their own graves before they were shot (an old Oriental custom applied to the execution of criminals). Some Americans, with hands tied behind back, were shot by the enemy.

So the journeys to the prison camps were "death marches." Especially in the winter of 1950-1951 when the trails were knee-deep in snow and polar winds flogged the toiling column. On one of these marches, 700 men were headed north. Before the camp was reached, 500 men had perished.

Facilities, Food, and Care Were Poor

The camps were what might be expected in a remote corner of Asia. Prisoner rations were scanty - a basic diet of rice occasionally leavened with some foul kind of soup. The Red Chinese and Korean authorities pointed out that this larder conformed with the rules of the Geneva Conventions — the prisoner received the same food as the soldiery holding him captive. Of course, the Chinese were inured to a rice diet. The average American could not stomach such fare. Sickness broke out in the camps. Many of the men suffered long sieges of dysentery.

The men suffered much from the cold in winter and heat in summer. Water was often scarce; bathing became difficult. Barracks were foul and unsanitary.

In the best of the camps the men behind the barbed wire were sometimes given tobacco, a few morsels of candy, occasional mail. As will be noted, such items were usually offered as rewards for "cooperative conduct."

A few Red Cross packages got through. However, the enemy consistently refused to permit the International Red Cross to inspect prisoner of war camps. There was good reason.

Camps Varied from Bad to Worse

In the worst of the camps, the prisoners existed by the skin of their teeth and raw courage. Men in the "bad" camps were known to lose 50 pounds weight in a matter of weeks.

The "bad" camps included the so-called "Bean Camp" near Suan, a camp

known as "Death Valley" near Pukchin, another camp called "The Valley," apparently in the vicinity of Kanggye. Among the worst camps were the "Interrogation Center" near Pukchin and a neighboring disciplinary center called "The Caves." This last was literally composed of caverns in which the men were confined. Here they were forced to sleep without blankets. Their food was thrown at them. There were no latrine facilities. In "The Caves" the prisoners were reduced to a degree of misery and degradation almost unbelievable. Those sent to "The Caves" were prisoners accused of insubordination, breaking camp rules, attempting to escape, or committing some other crime (so-called). The testimony of survivors suggests that the "crime" was seldom fitted by the punishment. Some men who refused to talk to military interrogaters were threatened with, or sent to "The Caves."

"Pak's" Was No Palace

Possibly the worst camp endured by American POWs in Korea was the one known as "Pak's Palace." This was a highly specialized interrogation center located near the city of Pyongyang. The place was a brickyard flanked by Korean houses. It was a North Korean establishment dominated by a chief interrogator, Colonal Pak. Pak was ably assisted by a henchman who came to be called "Dirty Pictures" Wong by the POWs.

The camp was under the administration of a Colonel Lee, and there were several other interrogators on the team. But Pak and Wong were symbolic of the institution. Pak was a sadist, an animal who should have been in a cage. The team employed the usual questionnaires, the carrot-and-prod techniques to induce answers. Failing to induce them, they contrived to compel them. The "Palace" wanted military information. Coercion was used as the ultimate resort. And for Pak, coercion began soon after a prisoner refused to talk. Then Pak would use violence. Abusive language would be followed by threats, kicks, cigarette burns, and promises of further torture.

Several U.S. Army and Navy officers were questioned at "Pak's Palace." A few Army enlisted men went through this brickyard mill. The great majority of POWs held there were Air Force officers. They took a bad beating from Colonel Pak.

But the prisoners found ways to get around the beating. One way was to convince the captors that you were dumb, stupid, the low man in your class. Undergoing interrogation, one officer convinced his inquisitors that he was the stupidest officer in the service. He was awarded a contemptuous slap, and that was about all.

To the surprise of some prisoners at the "Palace," the interrogation team would sometimes open up with a wild political harangue. Then came the word that the enemy had established a system of indoctrination courses. The prisoner might start the hard way — and be punished by restricted rations and other privations. If he began to show the "proper spirit" — to cooperate with his captors — he was lectured and handed Communist literature. A docile prisoner who read the literature and listened politely to the lectures, was graduated to a better class. Finally he might be sent to "Peaceful Valley." In this lenient camp the food was relatively good. Prisoners might even have

tobacco. And here they were given all sorts of Marxian propaganda. The graduates from "Peaceful Valley" and others who accepted Communist schooling were called "Progressives." Prisoners who refused to go along with the program often remained in tougher circumstances. They were considered "Reactionaries."

But the enemy followed no rigid system. Rather, his treatment of prisoners was capricious. Sometimes he showed contempt for the man who readily submitted to bullying. The prisoner who stood up to the bluster, threats and blows of an interrogator might be dismissed with a shrug and sent to quarters as mild as any — if any prison barracks in North Korea could be described as mild.

All in all, the docile prisoner did not gain much by his docility — and sometimes he gained nothing. The prisoner who defied Pak and his breed might take a beating, but again he might not. The ordeal was never easy. But things weren't easy either for the combat troops battling out there in the trenches.

Progressives and Reactionaries

The POW "political" schools in North Korea were, of course, patterned after the Soviet Russian design. They were part of a mass program to spread Marxian ideology and gain converts for International Communism. The Progressives were called upon to deliver lectures, write pamphlets, and make propaganda broadcasts. Progressive leaders were sent among Reactionary groups to harangue the men. They wrote speeches condemning Capitalism and "American aggression in Korea." They organized a group known as "Peace Fighters."

Fortunately, only a few officers were Progressive. However, their influence was unfortunately strong on the enlisted men. If the Captain can do it, why can't I? If the Colonel signs a peace petition and orders the rest of us to do it, we have to follow orders, don't we? Altogether the enlisted men were on a spot. That many of them refused to join the Progressives (and rejected a promise, sometimes unfulfilled, of better food, minor luxuries, and mail call) says something for the spirit of privates and non-coms. The men who gave the Progressive an argument — the active Reactionaries — were a rugged group.

Breakdown of leadership was exactly what the enemy desired. Officers were usually segregated. Then as soon as a natural leader stepped forward in a camp, he was removed. Progressives were usually placed in leadership position. And if they weren't obeyed by the other POWs, punishments were in store for the "insubordinate prisoners."

DOCUMENT NO. 132

PENAL CODE OF ETHIOPIA: PROVISIONS FOR THE REPRESSION OF VIOLATIONS OF INTERNATIONAL LAW (1955)

SOURCE

[1965] Measures to Repress 43, 46

NOTE

This law of Ethiopia is presented as being representative of one of the several approaches which have been adopted by governments in order to meet the commitment made in Article 129 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) requiring the enactment of legislation punishing violations of the grave breaches of the Convention enumerated in Article 130 thereof. (For other approaches, see DOCUMENT NO. 116, DOCUMENT NO. 136, DOCUMENT NO. 140, and DOCUMENT NO. 144.) It should be noted that two of the grave breaches specified in the Convention, the use of prisoners of war for biological experiment and depriving a prisoner of war of a fair and regular trial, are not included in the Ethiopian penal code. While the former offense could undoubtedly be fitted under some other provision of the code, such as "inhuman treatment," it is extremely doubtful that this is true with respect to the latter.

EXTRACTS

Art. 296. *War crimes against prisoners [of war] and internees.*

Whoever, under the same conditions as set forth above [in time of war or of armed conflict in violation of the rules of international law and of the international humanitarian conventions]

a) shall have organized, ordered, or committed towards prisoners of war or internees, either homicide, or acts of torture or of inhuman treatment, or acts causing great suffering or injury,

b) shall have compelled them to serve in the hostile armed forces, or intelligence services, or administration, is punishable by the same penalties as set forth in the preceding articles [imprisonment for 5 years to life or, in the most serious cases, death].

DOCUMENT NO. 133

CODE OF CONDUCT FOR MEMBERS OF THE ARMED FORCES OF THE UNITED STATES (17 August 1955)

SOURCES

Executive Order No. 10631, 17 August 1955, 20 Fed. Reg. 6057, as amended by Executive Order No. 11382, 28 November 1967, 32 Fed. Reg. 16247; and by
Executive Order No. 12017, 3 November 1977, 42 Fed. Reg. 57941
10 U.S.C. 802 (printed after the section)

NOTE

This Code of Conduct, with its explanatory comments, was promulgated as an Executive Order by President Dwight D. Eisenhower on 17 August 1955 upon the recommendation of the Secretary of Defense which was, in turn, based upon the findings and recommendations of the Secretary's Advisory Committee on Prisoners of War (DOCUMENT NO. 131). It was, of course, a reaction to the conduct of a small number of the members of the armed forces of the United States who, while serving in the United Nations Command in Korea (1950-1953), had been captured by the North Koreans or by the Chinese Communists and had accepted indoctrination, usually in order to obtain better treatment from their captors. (See, for example, DOCUMENT NO. 139.) (The "better" treatment was still far below the standard imposed by international law.) The rules included in this Code of Conduct are, of course, only those of one nation intended to govern the conduct of the members of its armed forces who become prisoners of war. It does not purport to, nor could it, establish norms of general application. It is specific in stating that the military law of the United States continues to be applicable to members of the armed forces of the United States while they are prisoners of war. (See DOCUMENT NO. 87, DOCUMENT NO. 92, DOCUMENT NO. 130, DOCUMENT NO. 137, and DOCUMENT NO. 139.)

EXTRACTS

* * * * *

III

IF I AM CAPTURED I WILL CONTINUE TO RESIST BY ALL MEANS AVAILABLE. I WILL MAKE EVERY EFFORT TO ESCAPE AND AID OTHERS TO ESCAPE. I WILL ACCEPT NEITHER PAROLE NOR SPECIAL FAVORS FROM THE ENEMY.

The duty of a member of the Armed Forces to continue resistance by all means at his disposal is not lessened by the misfortune of capture. Article 82 of the Geneva Convention pertains and must be explained. He will escape if able to do so, and will assist others to escape. Parole agreements are promises given the captor by a prisoner of war upon his faith and honor, to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, usually release from captivity or a lessened restraint. He

will never sign or enter into a parole agreement.

IV

IF I BECOME A PRISONER OF WAR, I WILL KEEP FAITH WITH MY FELLOW PRISONERS. I WILL GIVE NO INFORMATION OR TAKE PART IN ANY ACTION WHICH MIGHT BE HARMFUL TO MY COMRADES. IF I AM SENIOR, I WILL TAKE COMMAND. IF NOT I WILL OBEY THE LAWFUL ORDERS OF THOSE APPOINTED OVER ME AND WILL BACK THEM UP IN EVERY WAY.

Informing, or any other action to the detriment of a fellow prisoner, is despicable and is expressly forbidden. Prisoners of war must avoid helping the enemy identify fellow prisoners who may have knowledge of particular value to the enemy, and may therefore be made to suffer coercive interrogation.

Strong leadership is essential to discipline. Without discipline, camp organization, resistance, and even survival may be impossible. Personal hygiene, camp sanitation, and care of sick and wounded are imperative. Officers and noncommissioned officers of the United States will continue to carry out their responsibilities and exercise their authority subsequent to capture. The senior line officer or noncommissioned officer within the prisoner of war camp or group of prisoners will assume command according to rank (or precedence) without regard to Service. If the senior officer or noncommissioned officer is incapacitated or unable to act for any reason, command will be assumed by the next senior. If the foregoing organization cannot be effected, an organization of elected representatives, as provided for in Articles 79-81 Geneva Convention Relative to Treatment of Prisoners of War, or a covert organization, or both, will be formed.

V

WHEN QUESTIONED, SHOULD I BECOME A PRISONER OF WAR, I AM REQUIRED TO GIVE NAME, RANK, SERVICE NUMBER, AND DATE OF BIRTH. I WILL EVADE ANSWERING FURTHER QUESTIONS TO THE UTMOST OF MY ABILITY. I WILL MAKE NO ORAL OR WRITTEN STATEMENTS DISLOYAL TO MY COUNTRY AND ITS ALLIES OR HARMFUL TO THEIR CAUSE.

When questioned, a prisoner of war is required by the Geneva Convention and permitted by this Code to disclose his name, rank, service number, and date of birth. A prisoner of war may also communicate with the enemy regarding his individual health or welfare as a prisoner of war and, when appropriate, on routine matters of camp administration. Oral or written confessions true or false, questionnaires, personal history statements, propaganda recordings and broadcasts, appeals to other prisoners of war, signatures to peace or surrender appeals, self criticisms or any other oral or written communications on behalf of the enemy or critical or harmful to the United States, its allies, the Armed Forces or other prisoners are forbidden.

It is a violation of the Geneva Convention to place a prisoner of war under physical or mental torture or any other form of coercion to secure from him information of any kind. If, however, a prisoner is subjected to such treat-

ment, he will endeavor to avoid by every means the disclosure of any information, or the making of any statement or the performance of any action harmful to the interests of the United States or its allies or which will provide aid or comfort to the enemy. Under Communist Bloc reservations to the Geneva Convention, the signing of a confession or the making of a statement by a prisoner is likely to be used to convict him as a war criminal under the laws of his captors. This conviction has the effect of removing him from the prisoner of war status and according to this Communist Bloc device denying him any protection under terms of the Geneva Convention and repatriation until a prison sentence is served.

VI

I WILL NEVER FORGET THAT I AM AN AMERICAN FIGHTING MAN, RESPONSIBLE FOR MY ACTIONS, AND DEDICATED TO THE PRINCIPLES WHICH MADE MY COUNTRY FREE. I WILL TRUST IN MY GOD AND IN THE UNITED STATES OF AMERICA.

The provisions of the Uniform Code of Military Justice, whenever appropriate, continue to apply to members of the Armed Forces while prisoners of war. Upon repatriation, the conduct of prisoners will be examined as to the circumstances of capture and through the period of detention with due regard for the rights of the individual and consideration for the conditions of captivity. A member of the Armed Forces who becomes a prisoner of war has a continuing obligation to remain loyal to his country, his Service and his unit.

The life of a prisoner of war is hard. He must never give up hope. He must resist enemy indoctrination. Prisoners of war who stand firm and united against the enemy will aid one another in surviving this ordeal.

DOCUMENT NO. 134

TREATMENT OF BRITISH PRISONERS OF WAR IN KOREA (1955)

SOURCE

Ministry of Defence, United Kingdom, Treatment of British Prisoners of War in Korea (HMSO, 1955)

NOTE

After the release and repatriation of the prisoners of war captured by the North Koreans and the Chinese Communists during the hostilities in Korea (1950-1953), both the British Ministry of Defence and the United States Department of Defense made extensive investigations to determine the treatment which the members of their respective armed forces had received as prisoners of war of Communist nations. The objectives of the two investigations were somewhat different: the British were seeking information concerning the treatment of their personnel "because they were the first British troops to be held captive by a Communist country"; while the United States was seeking information in order to ascertain why a number of the members of its armed forces, small though it was, had misbehaved as prisoners of war. The findings of the British investigation, some of which are given below, and those of the United States investigation (DOCUMENT NO. 131) were, perhaps not surprisingly, quite similar.

EXTRACTS

CHAPTER I

The "Lenient Policy"

Armed warfare started in Korea in June, 1950. Four months later the entry of Chinese troops into the war not only made the fighting fiercer but brought to its full pitch the conflict of ideologies. It was the prison camps set up by the Chinese and North Koreans that became the battleground for this war of minds. British troops of the United Nations Forces who fell into enemy hands found that for them the battle with Communism had not ended when they were captured.

The British prisoners were unprepared for this ordeal. They had expected hardship if they were captured; they forsaw rough, even brutal treatment. But they did not think of themselves as students of politics under the tutelage of their, mostly Chinese, Communist guards. In past wars those who have captured British soliders have not concerned themselves with the politics of their prisoners. The United Nations prisoners in Korea soon learned, however, that their treatment as prisoners of war depended upon how far their political convictions pleased their captors.

It gradually became clear that the Chinese aimed to convert at least a minority of prisoners to Communism and then to use this minority to undermine the confidence of the remainder, thus rendering them in turn suscep-

tible to Communist indoctrination. This aim was embodied in what the Chinese called their "Lenient Policy" towards prisoners of war. It was based on the lie that the war in Korea was one of American aggression and part of the conspiracy of the capitalist world against peace. The Chinese claimed that all United Nations prisoners taking part in this unjust war were war criminals, and that if they were captured their captors had the right to kill them. But, the Chinese argument went on, the soldiers of the "aggressors" were, after all, ordinary working men who had been duped and misled by their reactionary rulers. Therefore prisoners would not be summarily executed (hence the "leniency") but would be given the opportunity to reach a state of remorse and repentance for their crimes.

Thus the Chinese allowed themselves to claim that, whether conditions in the prison camps were good or bad by normal standards, they were treating their prisoners generously and well — far better, in fact, than they deserved or were entitled to expect. During the early months of Chinese intervention their claim to treat prisoners well was quite untrue. At first the Chinese, like the North Koreans, had no proper facilities for handling prisoners and the first permanent prisoner-of-war camp — at Pyoktong (Camp 5) — was not established until January, 1951. Between then and August of that year food, shelter and medical attention were so inadequate that more than 1,600 United Nations prisoners were reported to have died in Chinese hands. Even in these conditions, and perhaps as a result of them, the Chinese were able to extort propaganda material from the prisoners for dissemination to the outside world. By the time the peace talks started in June, 1951, the Chinese had taken to expressing concern over the welfare of prisoners. Many of the prisoners made statements praising the generous and almost luxurious treatment which they were receiving, and (according to their Chinese captors) the conditions of prisoners in the camps were at least as good as those enjoyed by the local population and the Chinese troops themselves.

So far as the major camps were concerned this claim was substantially true from late 1951, but supplies of food and medicine and standards of accommodation still depended to a large extent on the degree of co-operation with their captors which the prisoners showed. In addition the Chinese used physical violence, solitary confinement and other "incentives" to persuade prisoners to co-operate with them. This discrimination they justified by arguing that prisoners were only entitled to the full benefits of the "Lenient Policy" if they accepted and observed certain rules and regulations, particularly those dealing with "re-education." Until the end of 1951 "re-education" was compulsory in all camps, but then, after a year's experience in handling Western prisoners, the Chinese gradually abandoned compulsory "re-education" in favor of more subtle techniques. The principle of compulsory study was, however, fundamental to the "Lenient Policy" as originally formulated.

This theory was based on certain assumptions, namely: that the Communists had a monopoly of the truth; that the prisoners accepted that they had been dupes of their capitalist rulers; that they were willing to learn the

"truth;" and that they welcomed their "liberation" by the Chinese.

If a prisoner would not accept these assumptions the Chinese considered that he was not entitled to the benefits of the "Lenient Policy." They argued that any reasonable man will accept the chance of improving his education and, since the "truth" must be obvious once the veils of "capitalist propaganda" have been removed, a refusal to see the light could be due only to malice. If a prisoner refused to be educated and to see the "truth," he was voluntarily aligning himself with the forces of reactionary capitalism and imperialism and with the enemies of ordinary men and women throughout the world. He was therefore a criminal, outside the protection of the "Lenient Policy," and the treatment he received in consequence was his own responsibility. This view was expressed in its crudest form in early 1951 at Pyoktong by a Chinese officer who became famous among the prisoners for his remark that "we will keep you here 10, 20, 30 or even 40 years if necessary, until you learn the truth, and if you still won't learn it, we will bury you so deep that you won't even stink."

By late 1951, however, Communist propaganda was repeatedly claiming that all the Chinese were doing was offering their prisoners the opportunity to learn the truth; there was no obligation to accept it and punishment was not meted out to prisoners for holding opinions which differed from those of their instructors (nor even for expressing those opinions publicly), but only for "reactionary" activity. But since the Chinese continued to regard the expression of anti-Communist opinions as a reactionary *activity*, as an attempt to influence others, as a slander of the Chinese forces, or as evidence of a hostile attitude, it was clear that the opinions of prisoners had to be "progressive" if they were to go unpunished.

It was a natural accompaniment to this policy to classify prisoners according to their political convictions and to treat the "progressives" better than the "reactionaries." The "progressive" prisoner was the one who accepted the political, economic and social gospel of Marx, Engels, Lenin and Stalin — even if he was not quite sure what this was. In order to be fully accepted as a "progressive," however, the prisoner had to do more than passively accept Communism. He must become a Communist propagandist and assist the Chinese, not only by giving them all the military information he had, but also by acting as an informer, revealing the plans and thoughts of his fellow prisoners and helping to spread Communism among them and among his family and friends at home. Thus he would show that he had become "politically conscious." Prisoners who did not co-operate in any of these ways were classed as "reactionaries" and regarded as criminals not entitled to the mercy of the "Lenient Policy."

In order to assist his classification as a "progressive" or "reactionary" the prisoner had, at frequent intervals, to complete questionnaires designed to give his captors a greater insight into his background and character. He was also made to commit himself to paper, usually in the form of "self-criticism" or "cognitions". The "cognitions," as the Chinese called them were written appreciations of political arguments with a Communist bias and were sup-

posed to represent the views of the writer on such subjects as the causes of the Korean war, the peace negotiations and imperialism. Sometimes the "cognition" was in the form of an examination paper; sometimes it was supposed to be a free composition. But in either case the prisoner was not only expected to give the orthodox answer, but also to show how his understanding of the question had developed, thanks to the education he was receiving. In "self-criticism" the Chinese expected the prisoner to go through the catalogue of his past criminal blindness and imperialistic outlook and to compare it with his conversion to the "truth."

CHAPTER II

"Re-educating" the Prisoners

The Chinese technique of "re-education" embraced every phase of daily life in the prison camps. Everything was designed to influence the thoughts of the prisoners and make them more receptive to the Communist way of thinking. The "progressive" view — the Communist view — was the only one allowed. Every activity of the prisoners, whether it was a sing-song or a private language class, had to be censored and sanctioned beforehand if it were not to be branded as illegal and a hostile act calling for punishment.

In such an atmosphere it was inevitable that many prisoners began to say what their Chinese tutors wanted them to say simply to avoid being classed as "reactionaries" (the unpleasant consequences of being classed as a "reactionary" are discussed in a later chapter). Most of them never worked actively for the Chinese, but merely put their names to "peace" petitions and broadcasts, inserted the right Communist jargon into their letters to relatives and friends at home, and did not resist the process of "re-education."

The basic means of indoctrination was originally the compulsory lecture and discussion. All British prisoners who were captured in 1950 and 1951 experienced these though the length of the lectures and the discussions which followed varied from camp to camp. When the campaign was at its height they lasted for as long as six to eight hours a day.

Attendance was compulsory and absenteeism for any reason except medical was punished. This is evident from the disciplinary rules and regulations in operation at Camp I at Chongsong in the summer of 1951, which read in part as follows:

A: *Disciplinary Rules:*

1. All captured officers and men must correctly understand the Lenient Policy of our army, observe the directions, and strictly adhere to the disciplinary rules. . . .
3. All captured officers and men shall continue to abide by the study regulations, attend classes at the fixed times, and pay full attention to study. All squads should systematically read the issued reading materials. These materials must be registered and kept in good form. It is absolutely forbidden to lose or damage any of them without justifiable reasons. . . .

B: *Regulations:*

4. Every Sunday the squad should hold a daily-life criticism meeting to

review in focal points, the carrying out of life and study disciplinary rules and regulations in the past week. . . .

5. Except the seriously sick men who have obtained the certificate of the doctor and permission from the platoon leader (or the instructor), all the rest must attend classes. No pretext should be used for absence.
6. While attending classes everybody must be serious and in orderly manner; should line up to report the number of men present; pay full attention to lectures and taking notes; ask permission from the instructor before leaving for the latrine. The bad behaviours of disobedience, free action, making noises, joking and dozing are strictly forbidden.
7. After lectures the monitors must carefully organise the whole squad for discussion and keep a record of it for reporting to the authority after the meeting.
8. The discussion after lectures should be based upon the main ideas of each lecture. Everybody is allowed to voice his personal opinion frankly and straightforwardly, no matter how it differs from that of others. The illegal acts of interrupting other speeches and disturbing the meeting are forbidden.

From the date of promulgation all captured officers and men must get themselves ideologically prepared to observe self-consciously and enforce to the letter all provisions stipulated above. Violators should be punished according to various cases.

* * * * *

While they lasted, the "peace committees" played a major role in the Communist indoctrination campaign, mainly by acting as a channel through which propaganda was fed to the prisoners. The work of the central committee included the publication of a weekly newspaper, the *Peace Fighters' Chronicle*, pamphlets and articles, and the preparation of surrender appeals, atrocity stories, and broadcasts for Peking or Pyongyang Radio. On a smaller scale the camp committees carried out much the same work. In addition the committees were responsible for passing on Communist propaganda to the outside world. Here, their main task was the production of a series of "spontaneous" and "unanimous" appeals and declarations addressed to the Communist-dominated World Peace Council, the United Nations General Assembly and the United Nations Security Council.

The Chinese were well aware of the effect of such appeals on public opinion in the free world and did not fail to assist the prisoners to sign them. In the end, signature was compulsory. This is a British officer's account of what happened during the preparation of a "peace appeal" in Camp 5:

> "The Chinese were anxious to get the officers to sign a 'peace appeal.' Their timing, as usual, was excellent. Several officers had been returned to the compound who had undergone severe punishment for alleged and actual offences. The moral effect on their comrades was at its peak when a 'petition for the cessation of hostilities' was produced for signature.
>
> "Using the battered condition of those who had just returned to the

compound as an example of what could happen to anyone who showed himself to be 'an enemy of the people,' and having encouraged some of these men to relate the horrors of 'the treatment' they were able to get the signatures of all the officers . . ."

From a British private comes this account of "peace" petition signing: "Prisoners were taken out on parade and ordered to sign the Stockholm Peace Appeal — there was no question of the signing being voluntary. Threats of cutting down food supplies were used to persuade prisoners to sign other petitions."

CHAPTER IV
The Role of "Progressives"

The "re-education" of prisoners through the medium of other prisoners who had seen the "truth" could obviously in certain circumstances be more effective than direct indoctrination. The Chinese recognised this and "progressives" were soon given a major role to play as mouthpieces of Communist propaganda. The "peace committees," which were generally run by co-operative prisoners, are an example of this technique; so are the voluntary study groups. But there are others, such as the camp committees.

In prison camps for officers, says the 1949 Geneva Convention on the treatment of Prisoners of War (Article 79), "the senior officer among the prisoners of war shall be recognized as the camp prisoners' representative." In camps for other prisoners "the prisoners shall freely elect by secret ballot . . . prisoners' representatives entrusted with representing them before the military authorities." The task of these representatives is to "further the physical, spiritual, and intellectual well-being of prisoners of war." On the surface the camp committees set up in the North Korean prison camps appeared to fulfill all these conditions and the Chinese went to some lengths to keep up this appearance. One propaganda pamphlet they produced quoted a prisoner as saying: "In every company of every P.O.W. camp in North Korea there is a club. The club covers every phase of the daily life of the P.O.W.s with the exception of details and discipline. By means of the club the P.O.W.s can very largely administer their own welfare. The club members are given a free hand and encouraged to extend their activities within their own particular sphere." It was also explained that the committees had sections dealing with recreation, sanitation, messing and mail, information and library, and sports and clubroom. To point the moral it was added: "The club is a demonstration of the effectiveness of the Lenient Treatment Policy which the Korean People's Army and the Chinese People's Vounteers extend to P.O.W.'s".

But the gulf between the facade, which suggested a holiday camp, and the reality, was enormous. The Prisoners-of-War Convention presupposes that the detaining Power will listen to, and act upon, the suggestions or complaints put forward by prisoners' representatives; it takes no account of the Chinese concern for "face" which made it almost impossible for them to accept any suggestion which did not emanate from themselves. Requests for improvements in camp conditions were met with the excuse that they were unnecessary because under the "Lenient Policy" prisoners were generously

provided with everything they could possibly need. In fact the Chinese made improvements in the camps as they saw fit and what they did bore little relation to what the camp committees requested.

Although their value to the prisoners was doubtful (they were not often responsible for any noticeable improvement in camp conditions) the camp committees, variously described as "Daily Life Committees" and "Club Committees," were a potent factor in the Chinese indoctrination campaign. Through their activities, committee members were bound to be brought into considerable contact with the Chinese, and could therefore, be indoctrinated on a personal basis; they could then be used for indoctrinating their fellow prisoners. When converted, committee members would put the interests of the Chinese before those of the prisoners; their reward was small privileges and perquisites. .

All this implied careful selection of committee members. This was not difficult, even though in this matter the letter of the Prisoners-of-War Convention was observed and elections were held, for the Chinese soon narrowed the field by rejecting any "reactionary" candidate as "unfit" to represent his fellow prisoners. Sometimes they limited the candidates to squad leaders who had been appointed by themselves. Ballots were at times open; when they were "secret" the ballot papers were scrutinised before they were dropped into the ballot box. Consequently the results of the "elections" were never in doubt. In the club committee of the British company in Camp 5, which comprised 17 members and a Chinese chairman, six were confirmed Communist sympathisers, and five were leading "progressives." Between them they controlled the more important posts in the committee, being in charge of news, mail, library and recreation. The presence on the committee of other prisoners who never co-operated with the Chinese was merely an example of the well-known Communist technique of trying to make "front" organisations look respectable.

The pattern, of course, was not everywhere the same, and in some camps the Chinese were unsuccessful in using camp committees for their own ends. Thus in the officers' compound of Camp 1, where, from June, 1951, British officers were in a majority, the "election" for a camp committee was turned into a pantomime. The committee never met and the officers continued to regard their own senior officers as the source of directives. When Camp 2 (Branch 1) was formed and officers were moved there, the Chinese called for a camp committee which, because they did not recognize ranks, had to be chosen in a "democractic"election. The prisoners responded by electing members previously selected by their senior officers. The committee included a sub-committee on study whose job it was to stimulate and assist the prisoners' education. In practice, it argued the prisoners' point of view to the Chinese. Finally, having achieved nothing, the committee resigned *en masse;* within four months the majority of the members had been sentenced to varying terms of solitary confinement for "reactionary activities." When the Chinese demanded the election of a new committee they were met with a refusal to elect any but the surviving senior officers and were thus forced to

appoint their own nominees. From then on the chairman became the intermediary between the Chinese and the prisoners for the organisation of parades and working parties.

Below the club committees in the Chinese-imposed chain of command were the squad leaders and monitors appointed by their captors with the task of assisting in the control and indoctrination of fellow prisoners. Although Article 44 of the Prisoners-of-War Convention lays down that "Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age," the Chinese argued that all soldiers lost their rank when they became prisoners. It was therefore logical for them to appoint squad leaders without any reference to seniority and in the early days they seem to have gone to some trouble to appoint the youngest and most junior soldiers, in the hope that they would be more malleable, and as the best means of breaking down the discipline of the men in their charge. The Chinese always emphasised that within a squad the authority of the squad leader was supreme, even if some of the members were officers and N.C.Os. When this failed to break down the discipline and the normal chain of command of British soldiers, officers and sergeants were segregated into their own companies and eventually into their own camps.

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CHAPTER V

Methods of "Persuasion"

Even in reasonably good conditions the life of a prisoner of war tends to depress and enervate those who do not stoutly resist its effects. Normally, however, these effects are quickly relieved — even if they cannot be forgotten — after peace and liberty are restored. The Chinese were concerned with more than the immediate objects of maintaining security in the prison camps and deriving military information from interrogations. Their purpose as Communists was to make a much more lasting mark on the personalities and opinions of the men in their hands, and for this "re-education" they knew that the time available was likely to be short. Sooner or later the surviving prisoners would return to their homes, and any ideas which they had consciously or unconsciously absorbed while in the camps would meet the challenge of their own familiar environment.

Everything, therefore, was tried by the Chinese in pursuit of the desired result: simple psychological pressure, manipulation of welfare conditions, corruption, threats, segregation, force and outright torture. The first step was to undermine accepted loyalties and discipline by strictly prohibiting distinctions of rank, punishing any officer or N.C.O. who attempted to give an order and encouraging the humiliation of officers. In place of the normal chain of military command the Chinese tried to establish as described in the previous chapter, a system of control through squad leaders. The second step, after reducing prisoners to a uniform level of inferiority, was to endeavour to impress upon them the superiority of the Chinese. The homesickness and bitterness of prisoners is not difficult to play upon. The Chinese continually harped upon the theme that the men had been duped by their

reactionary rulers, led into an unjust and hopeless conflict, and then abandoned to their fate because the United Nations Command "obviously" did not want the armistice that would bring them release. Repeated day after day to men suffering from starvation, disease and neglect, and accompanied by the deliberate dissemination of bad rather than good news, these arguments in many cases caused prisoners to abandon all hope of victory, release and life. By the time that conditions in the camps improved many had been pushed by one means and another too far along the path of submission and collaboration to go back.

The Informer System

In addition there was the widespread system of informers introduced by the Chinese for the close control of prisoners — a system which inevitably spread fear and distrust of a man's neighbours until will power was paralysed by suspicion. One such system was operated by English-speaking Chinese guards and instructors who specialised in eavesdropping. But the sources of information on which the Chinese mainly relied were found among the prisoners themselves. By no means all of the prisoners who informed on their comrades did so either willingly or, indeed, consciously. There were, it is true, a few of them who went to some trouble to assist the Chinese. The others were induced or forced under various forms of interrogation to implicate their friends. "Who are your friends?" was a frequent opening question, and there were ways of getting details from a weak or talkative prisoner who at the time did not realise that he was giving away his companions.

When once a prisoner had been made to inform by brutality, or guile, or both, he would nearly always be blackmailed into supplying further information by threats of exposure or of more punishment. The effectiveness of such threats is shown by this account, by a British officer, of the treatment of an American officer:

". . . He was kept in solitary confinement for three weeks. During his confinement he was savagely beaten and tortured. When he returned to the compound he was morally and physically broken. He told the other officers never to discuss anything in his presence as he had been sent back to act as an informer and threatened with worse torture if he did not comply. His treatment had left him very weak and he no longer had any will to live . . . and he eventually died about two weeks after his release."

At the other end of the scale were those prisoners who were voluntary informers. It is difficult to place these men in any particular category. Some undoubtedly were "progressives" who drifted into informing because of Chinese insistence on active and positive cooperation from those who had any sympathy with the Communist viewpoint; others were not "progressive" and acted solely from motives of selfishness, personal safety and profit; others, again, were probably informers first and then tried to rationalise their actions by adopting the right sort of political sentiments. As a result of the activities of all these informers a prisoner was liable to be called away to company or camp headquarters at any moment to answer for some "crime." Sometimes he returned in a few hours, sometimes in a few days, sometimes he did not

return at all. The distrust thus sown among the prisoners, the fear of doing or saying anything for which an account might have to be rendered, was a major weapon in the Chinese campaign to undermine morale and personal loyalties and thus to "encourage" acceptance of the Communist viewpoint.

Manœuvring with Mail

As a further inducement to co-operation the Chinese made great use of outgoing and incoming mail. The anxiety of prisoners to let their families know that they were alive was at first entirely frustrated (and the provisions of the Prisoners-of-War Convention on this subject thereby flouted) until, in the middle of 1951, the Chinese first allowed prisoners to write home. On a number of occasions attempts were made to dictate the contents, and even the wording, of these letters; and though this practice was soon dropped it had been impressed on the men that if letters were to reach their destinations they should include phrases praising conditions in the camps and condemning the Americans.

Outgoing mail was, as far as the Chinese were concerned, no more than a vehicle for propaganda. Apart from the injection of suitable sentiments into the letters of men desperately keen to get a word home to their families, special postmarks and forwarding instructions added propaganda slogans. Even so there was no certainty that letters would reach their destinations. Some families in Britain received only three or four letters in two or three years, some received more and some received none at all. Chinese inefficiency and lack of concern were clearly responsible for this; but the lie was invariably spread that any mail which failed to reach its destination had been destroyed by the Americans to prevent the world from knowing the "truth." One British prisoner who became a Communist went so far as to say that "the American destruction of British mail" was a factor in his conversion. But it soon became known in the camps that the Chinese were destroying or neglecting to forward mail, and one prisoner has reported that he saw a pile of torn-up letters outside the barber's shop near his camp.

In dealing with incoming mail the Chinese seem to have been haphazard in their methods, for some prisoners received no letters at all and others — for no obvious reason — as many as 300 during their captivity. However, there were several occasions when prisoners undergoing interrogation were offered letters in return for information; and "reactionary" prisoners were told that their mail was being withheld as a punishment.

Food and Medicine

Two other major weapons of the Chinese in their campaign to "encourage" co-operation were food and medicine. In the early months of 1951 food was grossly inadequate in the prison camps, and if prisoners received a couple of bowls of cracked corn, millet or sorghum a day they considered themselves fortunate. By the end of that year the staple diet consisted of rice with a few vegetables and a little meat, and the incidence of beri-beri and other ailments caused by malnutrition declined. But prisoners who had experienced the early days never forgot the fear of not having enough to eat, and more than one prisoner has said that he co-operated with the Chinese in a comparatively

minor way, such as by signing a petition, because he was threatened with a cut in rations if he refused. Sizes of rations also varied and "progressive" prisoners were sometimes given more and better food. On one occasion prisoners in Camp 2 (Branch 1) who complained about their food were told that the inmates of Camp 5 "are progressive and study well so of course they feed better."

In the same way medical attention was provided — when any was provided at all — on a selective basis. Until the middle of 1951 medical services for prisoners were almost non-existent and men died in hundreds. Doctors who were taken prisoner were forbidden to give any treatment until they had studied and learnt the "truth." One doctor was told that he was a bad one because he did not know whom to save and whom to let die. But even when the Chinese attached their own medical personnel to the camps conditions for many did not improve, and the "progressives" usually received whatever supplies of medicine were available while the "reactionaries" went without. One private who was wounded and taken prisoner on April 24, 1951, was given no attention until June, 1953, and by then it was not really necessary. It was given, he believes, to make his parting impressions of the Chinese favourable; his record in opposing the Chinese was outstanding.

Physical Brutality

When all these methods of inducement had failed — and in some cases before they had been tried — the Chinese had recourse to physical coercion and torture, revolting to the humane mind and expressly forbidden by the Prisoners-of-War Convention. Before the middle of 1951 the Chinese adopted the simple attitude that if a prisoner would not co-operate he was punished. If the punishment resulted in his death it was because he was an obstinate "war criminal." Later the argument was changed, and physical punishment was said to be inflicted for specific offences rather than a general refusal to see "the light." Torture and ill-treatment were carried out quite cold-bloodedly for the purpose of breaking a man's resistance.

For this purpose solitary confinement was sometimes sufficient in itself. This is hardly to be wondered at, for the conditions of this punishment were appalling. According to one of the victims, the "normal" treatment while in solitary confinement at camps was "to be made to stand or sit at attention (legs outstretched) and in complete silence from 04.30 hours to 23.00 hours daily. For the remainder of the day prisoners were allowed to sleep but were continually roused by the guard 'to make sure they were still there.' " There were no beds and no bedding. Shoes and clothing, except for underclothes, were often taken away, even in the middle of winter; washing facilities were often denied, sometimes for months at a time, while visits to the latrine would be permitted only once or twice a day, even when the prisoner had dysentery. At Camp 1 the Chinese built a number of boxes about 5 ft. by 3 ft. by 2 ft. for prisoners undergoing sentences of solitary confinement. In one of these one private of the Gloucesters spent just over six months. The food was appalling and often stopped for several days at a time. Water was inadequate and one prisoner, though he had three meals a day, received no soup, water, or boiled

food. This went on for eleven days and when he complained he was told that fluids were being withheld to help him with his "self-reflections."

If the Chinese wanted results quickly this treatment was intensified, and beating in one form or another was fairly common. A corporal of the Gloucesters who refused to give any information at all to the Chinese was taken out one evening at 9 o'clock at night and beaten by two Chinese until 3 o'clock in the morning with a club similar to a baseball bat. He had to stand to attention, stripped to the waist. At one point another Chinese came and took him down to the river and gave him a personal beating for some reason of his own. Prisoners were often bound with rope or wire for long periods; sometimes handcuffs were used. One British prisoner spent eight months in handcuffs which were frequently tightened.

A favourite trick was to bind a prisoner hand and foot with a rope passed over a beam, fixed as a hangman's noose round his neck. He was then hoisted up on his toes and the other end of the noose rope was tied to his ankles. The prisoner was told that if he slipped or bent his knees he would be committing suicide and that his captors could not be held responsible and his life was in his own hands. Another favourite method was to bind a prisoner's wrists and ankles behind his back and to tie a rope, which passed over a beam to his wrists. He was then hoisted up until his toes just touched the floor and left in that position for several hours.

Yet another form of punishment during solitary confinement was to make a prisoner stand to attention for long periods, either in the snow of the severe Korean winter or in the heat of a Korean summer. One British prisoner, for instance, was made to stand to attention for thirty hours at a time, with a sentry standing by with a fixed bayonet as "encouragement." Another was made to kneel on two small jagged rocks and hold a large rock over his head with his arms extended. It took days for a man who had undergone this treatment to recover the ability to walk. Sometimes the North Korean guards at a jail which, though outside Camp 5, was used for the internment of some "reactionaries," pushed a long pencil-like piece of wood or metal through a small hole in the door and made the prisoner hold the inner end in his teeth. At odd times, without warning, the sentry would knock the outer end sideways. This had the dual effect of removing teeth and splitting the sides of the victim's mouth. A variation of this was for the guard to hit the outer end of the rod and so drive the other end against the back of the prisoner's mouth or down his throat. In winter opportunities for torture increased, and prisoners are known to have been marched barefooted on to the frozen Yalu river where water was poured over their feet. With temperatures well below 20 degrees of frost the water froze immediately, and prisoners were left for hours with their feet frozen into the ice to "reflect" on their crimes.

Many of the guards in charge of prisoners in solitary confinement were adept at this sort of brutality and seem to have been given full rein to stand prisoners to attention, spit on them, kick them, beat them, prod them with bayonets, wake them at odd times throughout the night and humiliate them

at will. Such treatment was not exceptional; it was the normal fate of the prisoner who steadfastly refused to co-operate or who was sufficiently important in Chinese eyes merit intensive "conditioning."

The prisoner who broke down under Chinese torture — and there were many who did not — had to write a "confession" of crimes which he, and the Chinese, knew he had never committed. On the basis of this, he could be tried and sentenced, though usually he was merely told that the trial had been held, and that the sentence had been this or that punishment. If the Chinese went to the trouble of holding a "military tribunal" the accused's share in the proceedings was limited to pleading guilty to the charges and reading his confession. The sentence was then announced from a prepared typescript; there was no defence. Alternatively, the prisoner was made to read his confession to the whole camp; but more often he did not appear at all and his sentence, with or without his confesison, was announced on parade. Frequently no announcement was made and the prisoner just vanished.

The sentence invariably consisted of solitary confinement and, according to the circumstances, the prisoner served all or some or none of it. If he was released at once he was liable to be warned, at frequent intervals, that his sentence had merely been suspended and that he could be made to serve it if he did not show that his "repentance" was "sincere." Sometimes, having served the sentence, the prisoner was sentenced to another term or, more commonly, was kept in solitary confinement, long after his sentence had expired, without a new sentence. It is known, for example, that one British officer who was sentenced to six months, actually served fifteen; another British officer, similarly sentenced to six months, served eighteen. Many such prisoners never returned to their compounds but were sent to one of the penal camps — Camp 2 (Branch 2) or Camp 2 (Branch 3).

Segregation and Penal Camps

When neither incentives nor deterrents were successful in forcing a prisoner's co-operation the Chinese had to adopt a policy of segregation, removing those who were regarded as beyond redemption and as a hindrance to the conversion of their fellows to separate camps and compounds. The first attempts to "re-educate" all ranks together (with officers and N.C.O.s taking orders from Chinese-appointed squad leaders and monitors) were made in Camps 1 and 5, two of the first major permanent camps to be set up in North Korea. They soon proved a failure and officers and sergeants were separated from other ranks in companies which were some distance from those of the O.R.s. In October, 1951, segregation was carried a stage further and the officers from both camps were sent to a camp of their own, Camp 2 (Branch 1) at Pin Chon-ni. Segregation went a stage further in August, 1952, with the removal of the sergeants from both Camp 1 and Camp 5 to a camp of their own — Camp 4 (warrant officers were treated as officers and were held in Camp 2 (Branch 1)).

But the segregation of officers and sergeants by no means removed all the "reactionaries." The Chinese were forced, as early as August 1951, to establish Camp 3 (Branch 1) to which they sent about 160 of the unco-

operative prisoners from Camp 5. Included in this total were 14 British. In the early days of its existence Camp 3 (Branch 1) was a penal camp and no mail was ever received from any of the British who were in it. It was divided into sections; one housing the original prisoners and other the later arrivals. No contact between the two sections was allowed. In August, 1952, as part of a general re-organization of camps, the British prisoners were sent to Camps 1 and 5, with the exception of two sergeants who went to Camp 4, and five of the toughest cases who were sent to another penal camp, Camp 2 (Branch 2).

This camp, established in August, 1952, held 135 prisoners, including 31 British, and was the home of the hard core of Other Rank reactionaries — men who had distinguished themselves by their heroic resistance to all Chinese brutality. Discipline was much stricter here than in any other camp and, in the early days at least, rations were kept to the minimum required for survival. Attached to Camp 2 (Branch 2) were two other groups of prisoners who were permitted no contact with the outside world; one comprised 16 men, including one British sergeant, who had undergone a good deal of interrogation and brutality for their opposition to the Chinese; the other consisted of 18 men, most of whom had suffered appallingly, who were undergoing long sentences of solitary confinement for attempted escapes and "reactionary" activities. The Camp closed in June, 1953, and the inmates returned to Camps 1 and 5.

The officer equivalent of Camp 2 (Branch 2) as a penal camp, was Camp 2 (Branch 3). This contained prisoners who had been sentenced for various "plots" and "reactionary" activities or for having a "hostile attitude"; officers and air-crews captured after January, 1952; and those who because of their former duties were considered by the Chinese as "spies." All were regarded as rather "special criminals." Until the armistice was signed, food and treatment in the camp were consistently bad, and some prisoners remained in solitary confinement throughout their stay there.

So far as is known the relatives of officers and senior N.C.O.s were not personally approached though they did receive propaganda booklets through the post. Almost every officer and senior N.C.O. in captivity was classed by the Chinese as a "reactionary." From this it may have been concluded that their families at home would resist the attention of propagandists and might make trouble if they were harassed.

The effect of these activities on prisoners' families is impossible to assess. When the prisoner returned with anti-Communist or anti-Chinese views he was undoubtedly able to disillusion his family and friends swiftly and effectively; in other cases a prisoner may have come home with "progressive" sentiments to find that, by similar methods, his family had been imbued with a similar outlook. Whatever the result, it is the campaign itself which is significant.

CHAPTER VIII

The Prisoner-of-War Convention

A good deal was heard during the Korean war of the Prisoners-of-War Convention of 1949, drawn up at Geneva by an international conference which

included delegates from the Soviet Union and most of the satellite countries. This convention did not apply *de jure* to the combatants in the Korean war, but it was reasonable to regard it as having set civilised standards which should be recognised by both sides. Both the United Nations Command and the North Koreans declared that they intended to apply the convention *de facto* in their treatment of war prisoners.

The Chinese also claimed from time to time that they were abiding by the provisions of the convention. On the other hand they represented their own "Lenient Policy," described in previous chapters, as much superior to the Prisoners-of-War Convention. The convention was a "product of *bourgeois* capitalist States" (though in fact the Soviet Union and some of the satellite States helped to draw it up and have subsequently ratified it) and "contradicts their actions." The Chinese, prisoners were told, do not hold under Communist leadership "with any oppression of common peoples." Prisoners of war were common people who had been duped by their reactionary governments. Those who did not recognise the "truth" of this assertion and argued that they were entitled to the provisions of the convention were sharply told that they were "war criminals" and entitled to nothing — except shooting. For referring to the convention men were struck, threatened and made to stand to attention for long periods. While they were being so treated they had to listen to accusations of American aggression, American atrocities, and of American contraventions of the very convention to which the prisoners were not allowed to appeal or refer.

With the negotiations for an armistice a new situation developed in which it suited Chinese policy to play up the Prisoners-of-War Convention and to call for its formal acceptance by the United Nations. This propaganda campaign was occasioned by the question of the voluntary repatriation of prisoners, which was proving a major stumbling-block in the negotiations. It moved the Chinese to repeat their pretension to have been observing the principles of the convention, but it also forced them to expose what lay behind that pretension. It was the Chinese Prime Minister, Chou En-lai, who on July 13, 1953, stated publicly that although his government recognised the convention it made a number of exceptions. One of these was to the effect that "prisoners of war who have been convicted as war criminals . . . shall not be entitled to the benefits of the convention."

It must be explained that reservation in similar terms had been made by the Soviet Union and other Communist Governments which signed the convention. But the Chinese in Korea, by simply maintaining that all soldiers fighting for their "*bourgeois*" or "imperialist" opponents were, *ipso facto* "war criminals," succeeded to their own satisfaction in justifying their complete disregard of the convention. One prisoner was told by a Chinese interrogator that the Prisoners-of-War Convention was fully observed by the Chinese, "but only after the prisoner had reached a stage of full repentance for his past crimes." Fighting against the Chinese was the most heinous of these crimes.

In fact the Chinese disregard for the convention, as demonstrated in the

account already given, was both general and specific. Article 16, for instance, prohibits discrimination against prisoners of war on account of their political opinions. The Chinese theory of treatment of prisoners was based entirely on discriminating between "progressives" and "reactionaries." Article 87 provides that "collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of cruelty or torture are forbidden." The facts set out in Chapter V show how the Chinese flouted that provision.

* * * * *

Under the Armistice Agreement a joint team from the International Red Cross and the Chinese and North Korean Red Cross Organisations was finally allowed to visit the camps in North Korea, but the visit was a farce. The prisoners were not permitted to see members of the delegation without a Chinese being present, and both the questions asked by the delegation and the answers given by the prisoners were censored. Furthermore, officers and sergeants were not seen at all because they were moved to Kaisong two weeks ahead of schedule as a preliminary to being exchanged. Although two prisoners were taken to an interview with the delegates to show that this move had not been made to prevent a meeting with the Red Cross party, the two prisoners were told that they would not be repatriated if they did not give the answers supplied to them by the Chinese.

Conclusion

In the two-and-half years during which they fought in Korea the Chinese used every device, from moral pressure to physical torture, to convert the prisoners they captured to the Communist viewpoint and to use them to further Communist aims. These tactics were not hastily devised; they were the result of a generation of experience in dealing with captured soldiers of the Kuomintang. In China their success had been considerable; but it was in North Korea that they were applied for the first time to western prisoners, and the question inevitably arises: How did their success with British soldiers compare with their earlier success inside China? To what extent did British soldiers accept Communist teachings?

Officers and senior N.C.O.s (who made up about 12 per cent of the total of British soldiers captured by the Chinese) remained almost completely unaffected by Communist propaganda and were segregated from the remainder, while among the junior N.C.O.s and Other Ranks some two-thirds remained virtually unaffected. Of the remainder, most absorbed sufficient indoctrination to be classed as Communist sympathisers, but have most likely responded to the influence of normal home life. A small minority — about 40 altogether — returned home convinced Communists. But some had Communist leanings or affiliations before they went to Korea.

Viewed in the light of the resources at their disposal the success of the Chinese may be considered comparativley small. In reality it may be less than is at first apparent, for there were many reasons which had nothing to do with political convictions that made a prisoner appear "progressive."

In the winter of 1950-1951 material conditions in the prison-camps were

such that many prisoners gave politically "correct" answers so that they might enjoy, if not better conditions, at least a sporting chance of staying alive. And that the "right" answer was often vital to life is emphasised by the case of the American officer who, because he described a question as "not worth the paper it is written on," was accused of having a hostile attitude and slandering the Chinese paper-manufacturing industry. The treatment which he received in the resulting period of solitary confinement was the direct cause of his death.

As the war continued opportunities for simulated "progressiveness" increased and a number of prisoners succumbed to the promise of more cigarettes, more and better food, and medical treatment, in exchange for their signature or a "peace petition" of an address to the United Nations. Some posed as "progressives" in the hope that they would recieve more letters; others appeared to co-operate so that they could keep an eye on those who voluntarily assisted the Chinese or as a cover for other activities; still others saw the "truth" after brutal treatment.

But in the pretence of "progressive" sentiments there was danger, and a number of prisoners discovered that, through the continuous repetition of the Communist creed, they unconsciously assimilated Communist thoughts and views, and so gradually became sympathisers to varying degrees. In addition, there were, of course, genuine conversions, which were not based initially on a facade of "progressiveness." But the total was very small.

DOCUMENT NO. 135

MODEL AGREEMENT RELATING TO THE RETENTION OF MEDICAL PERSONNEL AND CHAPLAINS (September 1955)

SOURCES

ICRC Doc. D306/2b (September 1955)
37 RICR 7 (January 1955)

NOTE

Article 28 of the 1949 Geneva Wounded-and-Sick (Red Cross) Convention (DOCUMENT NO. 106) provides that medical and associated personnel may be retained by the Capturing Power but only insofar as the needs of the prisoners of war require; and that personnel so retained "shall not be deemed prisoners of war." Article 4C and Article 33 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) are to the same effect. The cited conventions contemplate the retention of such personnel under specific limitations and the "relief" (repatriation) of such personnel when prisoner-of-war requirements do not necessitate further retention. Resolution 3 of 1949 Geneva Diplomatic Conference (DOCUMENT NO. 105) requested the International Committee of the Red Cross (ICRC) to prepare a model agreement on the retention and relief of medical and associated personnel during the course of hostilities. The ICRC elected to prepare separate model agreements on retention and on relief. The model agreement on retention has provisions directly relating to prisoners of war. (The ICRC is of the opinion, based upon past experience, that "in a future conflict, retention will become the rule.")

EXTRACTS

Article 1

Medical personnel and chaplains designated in Article 24 of the First Geneva Convention of 1949, who had fallen into the hands of the adverse Party, shall only be retained, taking into account the provisions of Article 28, paragraph 1, of that Convention, to carry out their duties on behalf of prisoners of war of the armed forces to which they themselves belong, and only if the Detaining Power is not itself in a position to assume, in their entirety, the obligations imposed upon it under Article 28, paragraph 4, of the First Convention.

The personnel designated in Article 26 of the First Convention may only be retained at their own express wish, and under the same conditions.

Article 2

The retention of medical personnel and chaplains and their posting to the camps shall be carried out in accordance with the following criteria:

(a) One general practicioner, one dentist and one chaplain per 2,000 prisoners, or a lesser number not inferior to 1,000 prisoners;

(b) One surgeon, one medical specialist, one pharmacist and one dental

mechanic per 5,000 prisoners;

(c) One ear, nose and throat specialist, one ophthalmologist, one dermatologist, one neuro-psychiatrist and one lung specialist per 10,000 prisoners;

(d) One male nurse per 250 prisoners, or a lesser number not inferior to 100 prisoners.

For each of these various categories, those persons shall be retained whose date of capture is the most recent and, amongst them, those who are the youngest and whose state of health is the best.

* * * * *

Article 7

Auxiliary medical personnel, that is to say the hospital orderlies and auxiliary stretcher-bearers designated in Article 25 of the First Convention, who fall into the hands of the adverse Party, shall be employed on medical duties on behalf of prisoners belonging to the armed forces to which they themselves belong. The number retained shall reduce by the same amount that of the regular personnel engaged on similar duties who are liable to be retained under Article 2 above.

In the same way, the prisoners of war, mentioned in Article 32 of the Third Geneva Convention of 1949, required by the Detaining Power to exercise their medical functions in the interests of prisoners of war who are members of the same armed forces, shall reduce by the same amount the number of medical personnel to be retained.

Article 8

The transfer of retained medical personnel and chaplains to another Detaining Power shall only be possible where such personnel accompany prisoners of war who have already been in their care and are being transferred under the circumstances provided for in Article 12 of the Third Convention, and only in so far as such care cannot be provided by medical personnel of the new Detaining Power.

The provisions of Article 12 of the Third Convention shall in general apply to medical personnel and chaplains so transferred.

Article 9

The provisions concerning the financial resources of prisoners of war, in Part III, Section IV, of the Third Convention shall apply to retained medical personnel and chaplains.

In particular, such personnel shall receive working pay at the rate of . . . for members of para-medical professions (which shall not be less than one-fourth of one Swiss franc per working day) and . . . for members of the medical profession and chaplains (which shall not be less than one-half of one Swiss franc per working day).

Article 10

Retained medical personnel and chaplains, whose intellectual or physical faculties appear to have diminished considerably, shall be repatriated without delay.

The same applies to retained personnel who are wounded or sick, and who, according to medical opinion, are not likely to recover within a period of three

months from the date of the wound sustained or the beginning of the illness.

The decisions concerning them shall be taken immediately by the responsible medical authorities of the Detaining Power, on the recommendation of the detained physicians of the adverse Power. Appeals against these decisions may be made to the Mixed Medical Commissions provided for under Article 112 of the Third Convention.

The retained personnel shall not be accommodated in hospitals in a neutral country, but shall be repatriated direct.

Article 11

In general, the provisions of the Third Convention, by which retained medical personnel and chaplains should as a minimum benefit, in accordance with Article 28, paragraph 2, of the First Convention, shall always be applied in such a manner as to allow such personnel to carry out their medical duties in all circumstances and under the best possible conditions.

Article 12

The provisions of the present Agreement shall also apply to medical personnel and chaplains who have fallen into the hands of the adverse Party and, not having been retained, are awaiting their return in accordance with Article 30 of the First Convention. They shall be applicable as long as such personnel remain in the territory of the Party into whose hands they have fallen.

These provisions shall also apply, should occasion arise, to the personnel relieving retained personnel in accordance with the Agreement relating to the relief of Medical Personnel and Chaplains, or any other similar agreement.

DOCUMENT NO. 136

THAI ACT FOR THE APPLICATION OF THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (6 October 1955)

SOURCE

[1965] Measures to Repress 179, 182

NOTE

This law of Thailand is presented as being representative of another of the several approaches which have been adopted by governments in order to meet the commitment made in Article 129 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) requiring the enactment of legislation punishing violations of the grave breaches of the convention enumerated in Article 130 thereof. (For other approaches, see DOCUMENT NO. 116, DOCUMENT NO. 132, DOCUMENT NO. 140, and DOCUMENT NO. 144.) For some reason, perhaps because the ordinary statute would be applicable, the Thai Act does not contain any reference to the first-named and most important grave breach listed in Article 130 of the convention: wilful killing; and, unlike the convention, it limits the infliction of torture as a punishable offense to those instances in which it is used to obtain information, thus excluding purely sadistic torture from this provision.

EXTRACTS

PART II

OFFENCES COMMITTED AGAINST PRISONERS OF WAR

Section 12. Whoever shall subject a prisoner of war to medical, biological or scientific experiments of any kind which are not justified by his medical treatment, shall be punished with fine not exceeding three thousand five hundred baht or imprisonment not exceeding one year, or both.

Section 14. Whoever shall inflict on a prisoner of war physical or mental torture or any other form of coercion in order to obtain from him information of any kind whatever, or shall threaten, insult or submit the Prisoners of War who refuse to answer to any unpleasant or disadvantageous treatment of any kind, shall be punished with fine not exceeding one thousand five hundred baht or imprisonment not exceeding three years or both.

Section 15. Whoever shall compel a prisoner of war to serve in the forces of the hostile Power shall be punished with fine not exceeding two thousand five hundred baht or imprisonment not exceeding five years, or both.

Section 16. Whoever wilfully deprive a prisoner of war of the rights of fair and regular trial prescribed in the Convention, shall be punished with fine not exceeding one thousand five hundred baht or imprisonment not exceeding three years, or both.

Section 17. Whoever acts contrary to the provisions of Section 10 of this

Act [prohibiting the execution of a prisoner of war pursuant to a death sentence until six months after notice to the Protecting Power] shall be punished with fine not exceeding three thousand five hundred baht or imprisonment not exceeding seven years, or both.

DOCUMENT NO. 137

RE TASSOLI
(Court of Cassation of Italy, United Chamber, 28 January 1956)

SOURCES

23 ILR 764 (1956)
39 Revista di Diritto internazionale 595 (1956)

NOTE

This case, another involving the general problem of the extent to which the national military law of the prisoner of war accompanies him into the prisoner-of-war camp and governs his actions while he is in that status (see DOCUMENT NO. 87), is again concerned with the specific problem of the relationship between superior and subordinate while they are both prisoners of war. Like the U.S. court in the *Floyd Case* (DOCUMENT NO. 130), the Italian court had no difficulty in sustaining a conviction of insubordination with respect to an incident which had occurred while the accused, a member of the Italian armed forces, was in a prisoner-of-war camp. (The ineptly drawn Article IV of the U.S. Code of Conduct (DOCUMENT NO. 133) was probably intended to eliminate any question in this area concerning the application of national law to members of the armed forces of the United States.)

EXTRACTS

THE FACTS. — The appellant, a member of the Italian armed forces, was convicted of insubordination within the meaning of the Italian Military Penal Code. The offence had been committed against another Italian prisoner of war while the appellant himself was a prisoner of war in the custody of a foreign Power. On appeal, it was contended that the Italian military tribunal which had tried the offence was not competent to do so, on the ground that such exercise of jurisdiction would be tantamount to recognizing the extra-territorial operation of Italian criminal law and would violate an alleged rule of international law that there was no "hierarchy of ranks" between prisoners of war.

Held: That the appeal must be dismissed. Members of the Italian armed forces carried their military law with them and were therefore punishable by Italian military tribunals for offences committed during captivity in violation of Italian military law.

The Court said: "The premise on which the defence of the appellant is based is manifestly wrong. He says that by the standards of the law in force there cannot be any degree of subordination of prisoners of war of one rank to prisoners of war of another rank. He says that to acknowledge a hierarchy of ranks between prisoners of war would be tantamount to recognition of the exercise of authority by the State to which the prisoners belong, whereas, in accordance with the relevant international Conventions governing this

matter, prisoners are subject only to the captor State. He relies in support of this contention on the old jurisprudence of the Supreme Military Tribunal, which goes back to the years 1916 and 1917 and which did not recognize the existence of hierarchical links between prisoners of war, and accordingly denied the existence of the offence of insubordination as between prisoners. The following considerations disprove these arguments: According to the law of war prisoners of war are subject to the penal and other laws of the State which has captured them. These laws apply to all those who are within the territorial boundaries of the State. Indeed, the right to apply criminal sanctions to prisoners of war cannot be doubted because it forms part of the sovereign rights of every State and constitutes a form of application of the general rule of territorial criminal jurisdiction. Article 8 of the Hague Convention of 1899 reflects this concept and provides as follows:

> 'Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in the power of which they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.'

Another rule is closely connected with the above-mentioned rule of international law concerning the territorial character of criminal law applicable to prisoners of war belonging to the army of the enemy and which is expressly laid down in the military penal code. That rule is also a rule of international law. It recognizes the personal character of military penal law (a concept laid down in specific terms in Article I of the Military Penal Code and designed to ensure the performance of duties inherent in military status) and provides that the armed forces of the State take their laws with them. This rule justifies the application of national criminal law to Italian prisoners of war in the custody of enemy forces. Such application was already contained in the old Codes (Article 3 of the Army Code and Article 2 of the Naval Code) by way of interpretation, and it is now expressly provided for in the Military Penal Code. This Code lays down the basic principle of the extra-territorial application of military penal law and reaffirms, by means of a general provision, that members of the Italian armed forces are subject to the penalites laid down in the Military Penal Code in respect of offences committed during captivity.

DOCUMENT NO. 138

THE LAW OF LAND WARFARE
(U.S., July 1956)

SOURCE

U.S. Army Field Manual 27-10, The Law of Land Warfare (July, 1956)

NOTE

This is the United States Army's military manual updating its views as to the law of war governing operations on land. It is based upon events which occurred during and subsequent to World War II (1939-1945) and the ratification by the United States of the 1949 Geneva Conventions, including the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). (If and when the United States ratifies the 1977 Geneva Protocal I (DOCUMENT NO. 175), a considerable change to this manual will be required.) In many areas of possible controversy the positions set forth below will be found to coincide with those enunciated in the British Army's military manual, *The Law of War on Land* (DOCUMENT NO. 141). This is understandable inasmuch as representatives of the two armies met at Cambridge to discuss the drafts of the two manuals and attempted, with considerable success, to eliminate a number of divergences of opinion.

EXTRACTS

60. General Divison of Enemy Population

The enemy population is divided in war into two general classes:

a. Persons entitled to treatment as prisoners of war upon capture, as defined in Article 4, *GPW*.

b. The civilian population (exclusive of those civilian persons listed in *GPW, art 4*), who benefit to varying degrees from the provisions of GC.

Persons in each of the foregoing categories have distinct rights, duties, and disabilities. Persons who are not members of the armed forces, as defined in Article 4, *GPW*, who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population.

63. Commandos and Airborne Troops

Commando forces and airborne troops, although operating by highly trained methods of surprise and violent combat, are entitled, as long as they are members of the organized armed forces of the enemy and wear uniform, to be treated as prisoners of war upon capture, even if they operate singly.

64. Qualifications of Members of Militias and Volunteer Corps

The requirements specified in Article 4, paragraphs A (2) (*a*) to (*d*), *GPW* are satisfied in the following fashion:

a. Command by a Responsible Person. This condition is fulfilled if the commander of the corps is a commissioned officer of the armed forces or is a person of position and authority or if the members of the militia or volunteer

corps are provided with documents, badges, or other means of identification to show that they are officers, non-commissioned officers, or soldiers so that there may be no doubt that they are not persons acting on their own responsibility. State recognition, however, is not essential, and an organization may be formed spontaneously and elect its own officers.

b. Fixed Distinctive Sign. The second condition, relative to the possession of a fixed distinctive sign recognizable at a distance is satisfied by the wearing of military uniform, but less than the complete uniform will suffice. A helmet or headdress which would make the silhouette of the individual readily distinguishable from that of an ordinary civilian would satisfy this requirement. It is also desirable that the individual member of the militia or volunteer corps wear a badge or brassard permanently affixed to his clothing. It is not necessary to inform the enemy of the distinctive sign, although it may be desirable to do so in order to avoid misunderstanding.

c. Carrying Arms Openly. This requirement is not satisfied by the carrying of weapons concealed about the person or if the individuals hide their weapons on the approach of the enemy.

d. Compliance With Law of War. This condition is fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime. Members of militias and volunteer corps should be especially warned against employment of treachery, denial of quarters, maltreatment of prisoners of war, wounded, and dead, improper conduct toward flags of truce, pillage, and unnecessary violence and destruction.

65. The Levée en Masse

If the enemy approaches an area for the purpose of seizing it, the inhabitants, if they defend it, are entitled to the rights of regular combatants as a *levée en masse* (see *GPW, art 4, par. A (6)*) although they wear no distinctive sign. In such a case all the inhabitants of the area may be considered legitimate enemies until the area is taken. Should some inhabitants of a locality thus take part in its defense, it might be justifiable to treat all the males of military age as prisoners of war. Even if inhabitants who formed the *levée en masse* lay down their arms and return to their normal activites, they may be made prisoners of war.

70. Enumeration Not Exhaustive

The enumeration of persons entitled to be treated as prisoners of war is not exhaustive and does not preclude affording prisoner-of-war status to persons who would otherwise be subject to less favorable treatment.

71. Interim Protection

a. Treaty Provision.

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. *(GPW, art. 5)*

b. Interpretation. The foregoing provision applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.

c. Competent Tribunal. A "competent tribunal" of the United States for the purpose of determining whether a person of the nature described in *a* above is or is not entitled to prisoner-of-war status is a board of not less than three officers acting according to such procedure as may be prescribed for tribunals of this nature.

d. Further Proceedings. Persons who have been determined by a competent tribunal not to be entitled to prisoner-of-war status may not be executed, imprisoned, or otherwise penalized without further judicial proceedings to determine what acts they have committed and what penalty should be imposed therefore.

73. Persons Committing Hostile Acts Not Entitled To Be Treated as Prisoners of War

If a person is determined by a competent tribunal, acting in conformity with Article 5, *GPW*, not to fall within any of the categories listed in Article 4, *GPW*, he is not entitled to be treated as a prisoner of war. He is, however, a "protected person" within the meaning of Article 4, *GC*.

74. Necessity of Uniform

Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.

80. Individuals Not of Armed Forces Who Engage in Hostilities

Persons, such as guerrillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents (see *GPW, art. 4*), are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.

81. Individuals Not of Armed Forces Who Commit Hostile Acts

Persons who, without having complied with the conditions prescribed by the laws of war for recognition as belligerents (see *GPW, art. 4*), commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment. Such acts include, but are not limited to, sabotage, destruction of communications facilities, intentional misleading of troops by guides, liberation of prisoners of war, and other acts not falling within Articles 104 and 106

of the Uniform Code of Military Justice and Article 29 of the Hague Regulations.

82. Penalties for the Foregoing

Persons in the foregoing categories who have attempted, committed, or conspired to commit hostile or belligerent acts are subject to the extreme penalty of death because of the danger inherent in their conduct. Lesser penalties may, however, be imposed.

83. Military Attachés and Diplomatic Representatives of Neutral States

Military attachés and diplomatic representatives of neutral States who establish their identity as such and are accompanying an army in the field or are found within a captured fortress, whether within the territory of the enemy or in territory occupied by it, are not held as prisoners, provided that they take no part in hostilities. They may, however, be ordered out of the theater of war, and, if necessary, handed over by the captor to the ministers of their respective countries. Only if they refuse to quit the theater of war may they be interned.

84. Duration of Protection

a. Treaty Provision.

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 * * *. *(GPW, art. 5).*

b. Power of the Enemy Defined. A person is considered to have fallen into the power of the enemy when he has been captured by, or surrendered to members of the military forces, the civilian police, or local civilian defense organizations or enemy civilians who have taken him into custody.

85. Killing of Prisoners

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war.

87. Renunciation of Rights Prohibited

a. Treaty Provision.

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. *(GPW, art. 7.)*

b. *Interpretation.* Subject to the exception noted in paragraph 199, prisoners of war are precluded from renouncing not only their rights but also their status as prisoners of war, even if they do so voluntarily. The prohibition extends equally to prisoners renouncing their status in order to become civilians or to join the armed forces of the Detaining Power.

92. Equality of Treatment

a. Treaty Provision.

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. *(GPW, art. 16.)*

b. The foregoing provision does not preclude the segregation of prisoners of war to maintain order in camps, to impose punishment, or for medical reasons. (See *GPW, art. 79, 5th par.*).

94. Property of Prisoners

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b. Transactions With Prisoners. It is not proper for members of the forces of the Detaining Power to engage in bartering and other transactions with prisoners of war concerning their personal effects.

c. Unexplained Possession of Large Sums of Money by Prisoners of War. The unexplained possession by a prisoner of war of a large sum of money justifiably leads to the inference that such funds are not his own property and are in fact either property of the enemy government or property which has been looted or otherwise stolen.

161. Acts Committed Before Capture

a. Treaty Provision.

Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention. *(GPW, art. 85)*

b. Applicability. The foregoing provision applies only to personnel who are entitled to treatment as prisoners of war, including prisoners accused of war crimes under international or national law.

c. In signing and ratifying *GPW* several nations indicated that they would not consider themselves bound by the obligation which follows from the foregoing provision to extend the application of the Convention to prisoners of war who have been convicted of having committed war crimes and crimes against humanity and that persons so convicted would be subject to the conditions obtaining in the country in question for those who undergo punishment.

172. Competent Authorities and Right of Defense

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b. Officers Exercising Disciplinary Jurisdiction. Either a camp commander, or a responsible officer who replaces him, or an officer to whom he has delegated disciplinary powers may impose disciplinary punishments on prisoners of war interned by the United States within the permissible limits established in Article 89, *GPW*. It is not necessary that he be designated as summary court officer, and he is not subject to the limitations on the duration of commanding officers' nonjudicial punishment established by Article 15 of

the Uniform Code of Military Justice.

178. Conditions for Validity of Sentence

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b. Interpretation. Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted, are subject to the jurisdiction of United States courts-martial and military commissions. They are entitled to the same procedural safeguards accorded to military personnel of the United States who are tried by courts-martial under the Uniform Code of Military Justice or by other military tribunals under the laws of war. (See *UCMJ, arts. 2 (9), 18, and 21.)*

185. Parole Permitted If Laws of Their Country Allow

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b. Violation of Parole. Persons who violate the terms of their paroles are, upon recapture, treated as prisoners of war but may be punished under the provisions of Article 134 of the Uniform Code of Military Justice for violation of parole.

186. Form and Substance of Parole

The parole should be in writing and signed by the prisoner. It should state in clear and unequivocal language exactly what acts the prisoner is obligated not to do, particularly as to whether he is bound to refrain from all acts against the captor or only from taking part directly in military operations.

187. Parole of United States Personnel

a. General Prohibition. Subject to the exception set forth in the following subparagraph, military personnel of the United States Army are forbidden to give their parole to a Detaining Power.

b. Temporary Parole. A member of the United States Army may be authorized to give his parole to the enemy that he will not attempt to escape, if such parole is authorized for the specific purpose of permitting him to perform certain acts materially contributing to the welfare of himself or of his fellow prisoners. Such authorization will extend only for such a short period of time as is reasonably necessary for the performance of such acts and will not normally be granted solely to provide respite from the routine rigors of confinement or for other purely personal relief. A parole of this nature may be authorized, for example, to permit a prisoner to visit a medical establishment for treatment or to allow a medical officer or chaplain to carry out his normal duties. A member of the United States Army may give a parole of this nature only when specifically authorized to do so by the senior officer or non-commissioned officer exercising command authority.

196. Activity After Repatriation

a. Treaty Provision.

No repatriated person may be employed on active military service. *(GPW, art. 117.)*

b. Interpretation. The foregoing applies only to persons repatriated under Articles 109 through 116, *GPW* (pars. 188-195), by reasons of wounds or sickness. Although it is not possible to frame any comprehensive rule concerning what constitutes "active military service," Article 117 does not

preclude a repatriated person from performing medical or strictly administrative duties but does foreclose service in combat against the power formerly detaining the individual or an ally thereof.

197. Exchange of Prisoners of War

Exchange of prisoners of war, other than those whose repatriation is required by *GPW*, may be effected by agreement between the belligerents. No belligerent is obliged to exchange prisoners of war, except if a general cartel requiring such exchange has been concluded. The conditions for exchange are as prescribed by the parties thereto, and exchanges need not necessarily be on the basis of number for number or rank for rank.

199. Asylum

A Detaining Power may, in its discretion, lawfully grant asylum to prisoners of war who do not desire to be repatriated.

469. Cartels

In its narrower sense, a cartel is an agreement entered into by belligerents for the exchange of prisoners of war. In its broader sense, it is any convention concluded between belligerents for the purpose of arranging or regulating certain kinds of nonhostile intercourse otherwise prohibited by reason of the existence of the war. Both parties to a cartel are in honor bound to observe its provisions with the most scrupulous care, but it is voidable by either party upon definite proof that it has been intentionally violated in an important particular by the other party.

498. Crimes Under International Law

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise:

a. Crimes against peace.

b. Crimes against humanity.

c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting "war crimes."

499. War Crimes

The term "war crimes" is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.

500. Conspiracy, Incitement, Attempts, and Complicity

Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable.

501. Responsibility for Acts of Subordinates

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres

and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

504. Other types of War Crimes

In addition to the "grave breaches" of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ("war crimes"):

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b. Treacherous request for quarter.

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g. Use of civilian clothing by troops to conceal their military character during battle.

* * * * *

k. Compelling prisoners of war to perform prohibited labor.

505. Trials

a. Nature of Proceeding. Any person charged with a war crime has the right to a fair trial on the facts and law.

b. Rights of Accused. Persons accused of "grave breaches" of the Geneva Conventions of 1949 are to be tried under conditions no less favorable than those provided by Article 105 and those following of *GPW (GWS, art. 49; GWS Sea, art. 50; GPW, art. 129; GC, art. 146, 4th par.* only).

c. Rights of Prisoners of War. Pursuant to Article 85, *GPW* (par. 161), prisoners of war accused of war crimes benefit from the provisions of *GPW*, especially Articles 82-108.

d. How Jurisdiction Exercised. War crimes are within the jurisdiction of general courts-martial *(UCMJ, Art. 18)*, military commissions, provost courts, military government courts, and other military tribunals *(UCMJ, Art. 21)* of the United States, as well as of international tribunals.

e. Law Applied. As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States. However, directives declaratory of international law may be promulgated to assist such tribunals in the performance of their function.

506. Suppression of War Crimes

a. Geneva Conventions of 1949. The Geneva Conventions of 1949 contain the following common undertakings:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or

ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. *(GWS, art. 49; GWS Sea, art. 50; GPW, art. 129; GC, art. 146.)*

b. Declaratory Character of Above Principles. The principles quoted in *a*, above, are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces.

c. Grave Breaches. "Grave breaches" of the Geneva Conventions of 1949 and other war crimes which are committed by enemy personnel or persons associated with the enemy are tried and punished by United States tribunals as violations of international law.

If committed by persons subject to United States military law, these "grave breaches" constitute acts punishable under the Uniform Code of Military Justice. Moreover, most of the acts designated as "grave breaches" are, if committed within the United States, violations of domestic law over which the civil courts can exercise jurisdiction.

507. Universality of Jurisdiction

a. Victims of War Crimes. The jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons.

b. Persons Charged With War Crimes. The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law. Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy per-

sonnel are promptly and adequately punished.

508. Penal Sanctions

The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. Corporal punishment is excluded. Punishments should be deterrent, and in imposing a sentence of imprisonment it is not necessary to take into consideration the end of the war, which does not of itself limit the imprisonment to be imposed.

509. Defense of Superior Orders

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obendience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders (*e.g.*, *UCMJ, Art. 92*).

510. Government Officials

The fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act.

511. Acts Not Punished in Domestic Law

The fact that domestic 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.

DOCUMENT NO. 139

U.S. v. BATCHELOR
(U.S. Court of Military Appeals, 7 September 1956)

SOURCES
7 USCMA 354 (1956)
22 CMR 144

NOTE

This is another of the post-Korea trials by U.S. courts-martial of members of the armed forces of the United States charged with misconduct as a prisoner of war. It raises once again (see DOCUMENT NO. 87, DOCUMENT NO. 92, DOCUMENT NO. 130, and DOCUMENT NO. 137), but in a somewhat different context, the problem of the continued applicability of the national military law of a prisoner of war to his actions while he is in that status. The accused was charged with, and found guilty of, a number of improper acts committed while a prisoner of war in order to obtain favored treatment from his captors, to the detriment of a number of his fellow prisoners of war, in violation of Article 105 of the U.S. Uniform Code of Military Justice (DOCUMENT NO. 110). As in other cases on the subject, the court found that the prisoner of war does continue to be subject to his own national military law. (Soviet law is apparently to the same effect. See Article 29 of the Soviet Code, DOCUMENT NO. 142.)

EXTRACTS

GEORGE W. LATIMER, JUDGE:

The accused, an American infantryman who left the shores of this country to fight on foreign soil, was captured by the Chinese Communists on November 2, 1950, while serving in combat in Korea. He remained in their hands as a prisoner of war until September 25, 1953, which was after the general exchange of prisoners, when he was turned over to the Indian Custodial Forces in the neutral zone near Kaesong, Korea. On January 2, 1954, he elected to return to American control. His trial by general court-martial — which lasted some five weeks and resulted in a record which may be described as voluminous — amounted to a searching examination into the things that he did as a prisoner at Camp 5, Pyoktong, North Korea, and the many reasons why he did them.

The trial resulted in accused's conviction of two offenses of communication with the enemy without proper authority, in violation of Article 104(2), Uniform Code of Military Justice, 50 USC § 698; uttering a letter which was disloyal to this Nation, intending thereby to promote disloyalty and disaffection among United States civilians, in violation of Article 134 of the Code, USC § 728; misconduct as a prisoner of war by informing on a fellow-prisoner, in violation of Article 105 of the code, 50 USC § 699; and wrongfully participating in the trial of a fellow-prisoner to the extent of recommending

that he be executed, again in violation of Article 134, supra. He was sentenced to dishonorable discharge, total forfeitures, and confinement for life. Intermediate appellate agencies have affirmed, but the convening authority reduced the term of confinement to twenty years. We granted review on four issues, none of which call in question the sufficiency of the evidence, and these will be stated seriatim, as considered. However, we pause to observe that the evidence supporting the findings of guilt is overwhelming, and we will not recite it in detail. Those who are interested in an extended statement of the facts should examine the board of review's decision, reported as United States v Batchelor, 19 CMR 452. For the purposes of clarity, we have arranged the evidence as it relates to each specification, and the specifications themselves have been treated in chronological order.

II

Specification 2, Charge I, unauthorized communication with the enemy.

Under this specification, the prosecution set out to prove that the accused, while incarcerated at Camp 5, from July 1951 until September 1953, improperly communicated and consorted with the enemy as a mode of daily living. That is, he embarked on a course of conduct which was inimical to the best interests of the United States, which continued over a long period of time and which was forbidden by law. It was shown that the accused was a leader of voluntary "study groups" conducted under Communist auspices; that he repeatedly expressed the view that the United Nations forces were the aggressor in Korea; that he often stated the United States was guilty of "germ warfare" in Korea; that he argued America had initiated the Korean war only to avert a depression in this country; that he asserted American soldiers were being used as the tool of American warmongers and Wall Street profiteers; and that he contended the United States was not sincere in its truce negotiations with the Communists. The accused also made daily broadcasts over the camp public address system during a certain period in which he advanced similar assertions and many others, including the claim that the United States was guilty of despicable treatment of the prisoners of war which it held. He was chairman of the Camp 5 "peace committee," prepared and circulated "peace petitions," and was instrumental in coercing other prisoners to sign the petitions. The accused introduced a certain American lieutenant to his company when that individual came to Camp 5 to make speeches, wherein the officer admitted dropping "germ bombs" while serving as a United States Air Force officer, and Batchelor followed up the speech by proclaiming he would be one of the first to condemn the American Government for ordering such barbarous warfare.

As a result of all this, the accused became a favored prisoner in that he was permitted to come and go almost as he pleased in the camp and at camp headquarters, intermittently lived at headquarters for substantial periods of time, had better food to eat, and received Chinese currency to spend rather than being issued rations. He adhered to the Communists' propaganda "line" so faithfully that he was looked upon by them as an outstanding "peace

fighter" and praised as a "young Lenin."

The accused did not dispute the Government's proof of the acts alleged in this specification or any of the others under Charges I and II. However, he did attempt to show that all of his efforts were dedicated to ameliorating the harsh lot of his fellow-prisoners and to furthering the cause of "world peace" — as the Communists understand that term — and that he honestly believed he either had or did not need authorization to carry out those aims. Furthermore, it was his position that his erroneous beliefs came about because he was suffering at the time from a mental psychosis induced by Communist pressures and propaganda. As a result, the record contains a great deal of conflicting testimony from expert medical witnesses presented by the adversaries. Because that issue was common to all of the original charges, though not to the Additional Charges, it will be mentioned briefly later on in the opinion.

Specification, Additional Charge I, giving information to his captors concerning a fellow-prisoner of war to the detriment of that prisoner.

Sometime in March or April 1951, Private John Megyesi, a prisoner of war at Camp 5, came into possession of a camera and some film, which he used secretly to take pictures of atrocities committed by his captors. Having exhausted his supply of film by June 1951, he gave the camera to one Buckley, who turned it over to Lieutenant Walter L. Mayo. Mayo had obtained a roll of suitable film and, like Megyesi, used the combination to record many of the injustices he saw perpetrated. Toward the end of July 1951, the Communists came to know that someone at the camp had a camera and directed the accused and a British prisoner of war, who was a fellow "progressive," to ascertain its wherebouts. Several days later, the accused was overheard informing his captors that Private Megyesi had the camera. Megyesi was then interrogated concerning the photographic equipment and placed in confinement for over two months. The Communists also tracked down Mayo and placed him in solitary confinement.

The accused denied he had been guilty of informing concerning Private Megyesi, and other evidence was presented on his behalf which tended to cast doubt on the recollection of Sergeant Buli, who testified he had overheard the accused's conversations with his captors concerning this incident, but that issue does not now concern us, for the court chose to believe the prosecution witnesses.

Specification, Charge II, uttering a disloyal letter with intent to cause disaffection among the civilian populace of the United States.

On October 15, 1952, the accused wrote a letter to the editor of his home town newspaper in Kermit, Texas, and asked that the letter be published, either free of charge or at his father's expense. In that letter he asserted that the United States had been guilty of bacteriological warfare in Korea; that this had been authorized by highly placed officials in this country; and that he had personally seen much evidence of this practice. The accused then called upon whoever might read the letter to "Demand Peace Now And Stop this Cruel Inhuman Act Before it is Too Late!!" Although the accused testified he

had not intended to promote disloyalty or disaffection among this Nation's civilian populace by writing this letter and seeking publication of his views, he conceded he had intended to create ill will toward the people responsible for the assumed germ warfare, and that if the President had been the person responsible, he intended to create a degree of hostility toward the Chief Executive.

Specification 1, Charge I, unauthorized communication with the enemy.

Early in June 1953, as the accused put it in one of his pretrial statements, "the Chinese thought up an idea of sending secret agents into the United States for Communist work. This was to be a super secret organization, and I was called in to consult with the Chinese on how this organization should be operated." The organization itself was not to be secret, and any former prisoner of war was to be eligible for membership. However, the accused, who was to be its leader, and the other members selected to form its guiding nucleus, were not to be revealed to the public or the general membership as such. Ostensibly the purpose of the organization would be to help former prisoners of war in cases of sickness or financial distress, and to improve their lot through other benefit plans, but ultimately it was to further the Communist Cause. Accused explained its eventual objective in this language: "[E]ventually we could set [up?] a peace platform through our propaganda sheet and gradually turn it in to a revolutionary organization." When operational, the organization was to be linked secretly to the Communist Party of the United States through the accused.

Specification, Additional Charge II, wrongful participation in the trial of a fellow-prisoner.

Wilburn C. Watson, then a private first class in the American forces, was taken prisoner by the Chinese Communists on April 21, 1951. For a variety of reasons — most of which were unsound — his captors regarded him as some sort of a spy and "trouble-maker," blaming him for inciting demonstrations against the Communists and disrupting such activities as study groups. As a result, Watson was several times beaten and threatened, kept in solitary confinement for over six months, and then placed in a hard labor camp. Early in July 1953, Watson was told by his captors that they were never going to release him and he was forced to sign a request for non-repatriation. A few weeks later, Watson was transferred to Camp 5, where all the prisoners of war who had refused repatriation were assembled.

In August 1953, Watson was placed in jail overnight and then taken under guard to an old school building of some sort. He entered to find all of the non-repatriates and about five Chinese seated around several tables arranged horseshoe fashion. The Chinese commander then announced to those assembled that they were there to decide the fate of Watson, who was accused of being a spy and a "running dog for the American imperialists." He requested their opinion in the matter, and the non-repatriates began voicing, one by one, their views concerning the disposition to be made of Watson. The accused, who was the fourth or fifth to speak, recommended that Watson be shot as a detriment to the group, for his knowledge of the doings of the

non-repatriates might be valuable to the Army if he was permitted to return to American control. Needless to say, Watson was terrified by that time, but eventually it was decided by the commander to permit him to be repatriated, and this was done.

In opposition to this charge, the accused tried to show that actually he had spoken in favor of Watson's repatriation at the time of the "trial," and that the entire episode was not really a trial, for the Chinese Communists had determined the outcome prior to the solicitation of opinions from the non-repatriates. In rebuttal, the prosecution presented Private Edward S. Dickenson, whose telling testimony against accused sounded the death knell for his hopes to escape a finding of guilty on this specification.

* * * * *

. . . .defense counsel urge that the law officer's instructions with regard to the question of "proper authority" were so inept and erroneous as substantially to prejudice the accused. A short statement of the trial situation will no doubt be helpful in bringing the issue into focus.

The accused had testified that he believed he was authorized to do many of the specific acts alleged as unlawful communication, because other prisoners, including some commissioned officers, also took part in making speeches, circulating peace petitions, and otherwise assisted the enemy. Defense counsel had placed in evidence certain portions of the Geneva Convention relating to prisoners of war which authorize prisoners to communicate with their captors concerning "intellectual diversions" or as agents of fellow-prisoners in regard to the conditions of their incarceration. Counsel then requested instructions on these subjects. The law officer first ruled that, as a matter of law, the Geneva Convention did not authorize communications such as concerns us in this instance. This, we hold, was proper, for it is the function of the law officer, and not the fact finders, to place a construction on a statute or treaty where no question of fact is raised. 53 Am Jur, Trial, § 253. The law officer informed the court-martial that, in general, prisoners of war were forbidden to communicate with their captors for any reason, but that the sovereign had granted certain exceptions to this rule, only some of which were to be found in the Geneva Convention, and that the acts alleged here, if found, would not be within any of the Convention's exceptions. He had earlier told the court that they must find, beyond a reasonable doubt, that the accused had acted without proper authority. Therefore, the law officer contented himself with merely adding a full instruction on the defense of mistake of fact to what had gone before. This, we think, was enough.

There was no dispute but what the accused had committed the specific acts alleged under Charge I. Nevertheless, to avoid technical error, the law officer required the members to make a finding as to the occurrence of the specific acts alleged. Thereafter, he instructed with respect to the issues raised by the evidence. True enough, he informed the fact finders that a mere honest belief that his acts were authorized would be enough to exonerate the accused, but if this was error in a general intent case, it favored the accused rather than prejudiced him. It is our conclusion that no error of which the

accused can complain may be found in this part of the instructions.

* * * * *

It was alleged under Additional Charge II that the accused had been guilty of misconduct while a prisoner of war, in that he had served as an informant to his captors with regard to Private Megyesi's possession of a camera. With respect to this allegation, defense counsel requested that the following instruction be given:

"Favorable treatment within the meaning of Article 105 means favorable treatment of the accused to the exclusion of all other persons. A purpose to obtain better living conditions for all prisoners of war including accused would not constitute a purpose to obtain favorable treatment within the meaning of Article 105. It is not necessary that any favorable treatment actually result."

The law officer declined to do so, and instead gave the following guide to the court-martial:

"The court is further advised that in order to find the accused guilty of Specification 2 of Additional Charge I it must be satisfied by legal and competent evidence beyond a reasonable doubt:

"One, that at Camp No. 5, Pyoktong, North Korea, on or about August 1951, the accused, without proper authority and contrary to law, customs, or regulations, in response to requests from said captors for information as to which prisoner of war had a camera and was taking pictures, made inquiry and reported to said captors that Private John Megyesi, his fellow American prisoner at said camp, was the one who had the camera and was the one his captors were looking for;

"Two, that the accused made such inquiry and report while he was in the hands of the enemy in time of war;

"Three, that the accused's purpose in making such inquiry and report was to secure favorable treatment of the accused by his captors;

"Four, that as a result of such inquiry and report, as alleged, Private Megyesi suffered detriment by being placed in solitary confinement; and

"Five, that the said Private John Megyesi was held by the enemy as a military prisoner at the time.

"Favorable treatment within the meaning of Article 105 does not mean favorable treatment of the accused to the exclusion of all other person. A purpose to obtain better living conditions for himself and all prisoners of war would constitute a purpose to obtain favorable treatment within the meaning of Article 105. It is not necessary that any favorable treatment actually result."

Defense counsel now contend that a prisoner of war who informs on a comrade for the purpose of ameliorating the conditions of all other prisoners, including himself, does not violate this Article, no matter how hard the lot which may befall his betrayed fellow. However, this is not and cannot be good law.

In United States v Dickenson, . . . we had occasion to remark, concerning Article 105, that:

". . .Its plain purpose is to prohibit one prisoner from gaining favor with his captors at the expense of another prisoner."

Clearly implicit within that phraseology is the concept that a prisoner of war must, at all costs, avoid the act of informing voluntarily concerning another prisoner. And if he, without being compelled, informs for his own preferment, even if it is only by being a member of the class to whom benefits are extended, and he who was betrayed suffers harm because of the disclosure, the Article is violated. This Nation cannot permit any one prisoner of war to exercise a free choice as to who he will destroy merely to benefit the class to which he belongs. We are a country governed by laws and not by men, and Congress in its wisdom has seen fit to require every prisoner to refrain from securing favorable treatment to improve his lot. We believe that only that rule insures the greatest good for the greatest number in the long run, for it insures that no one individual will be sacrificed at the election of another. When a prisoner voluntarily trades the life or liberty of a comrade for his own good, he cannot aid himself by contending that his doings also benefited a group of persons. It is our conclusion, therefore, that the law officer's instructions were sound.

VII

This record does not present an easy case, and it is not a pleasant task to sit in judgment on a young man who yields to temptation while a prisoner of war. The conditions under which American prisoners of war in Korea were required to live were at best abominable and at worst intolerable. During the early stages lack of adequate food, clothing, housing, and medical service resulted in a death rate which bespeaks man's inhumanity to man. Nevertheless, the accused was not subjected to any discomforts which were not shared by his comrades, and if his lot was harsh, so was theirs. At best, he was a victim of his own selfish desire to improve his internment at the expense of other servicemen; at worst, he was a soldier who betrayed his cause. In either event, it is clear that he failed to discharge his obligation to his country. If it be not so at other times, it is necessary in time of serious threat to our form of Government that this country must call upon its men in arms to withstand the horrors of war and prison to prevent an enemy from destroying that which has been our heritage for at least 167 years. It goes without saying that all men cannot stand firm against torture, physical violence, starvation or psychological mistreatment. But in this instance, the record discloses that the accused weakened when others stood fast, and it does not reveal that he was compelled to sacrifice his countrymen because of the use of those influences.

DOCUMENT NO. 140

GENEVA CONVENTIONS ACT, 1957
(United Kingdom, 23 July 1957)

SOURCES

5 & 6 Eliz. 2, c. 52
37 Halsbury's Statutes of England 67 (2d ed., 1967)
[1965] Measures to Repress 149

NOTE

This statute of the United Kingdom is presented as still another of the several approaches which have been adopted by governments in order to meet the commitment made in Article 129 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) requiring the enactment of legislation punishing violations of the grave breaches of the convention enumerated in Article 130 thereof. (For other aproaches, see DOCUMENT NO. 116, DOCUMENT NO. 132, DOCUMENT NO. 136, and DOCUMENT NO. 144.) This Act is of particular importance not only because of its breadth, but also because it was and continues to be the law applicable in so many former British colonies and because it has served as the model for many other members and former members of the British Commonwealth.

EXTRACTS

Punishment of offenders against conventions

1. (1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say-

* * * * *

(c) article 130 of the convention set out in the Third Schedule to this Act;

* * * * *

shall be guilty of felony and on conviction thereof-

(i) in the case of such a grave breach of aforesaid involving the wilful killing of a person protected by the convention in question, shall be sentenced to imprisonment for life;

(ii) in the case of any other such grave breach as aforesaid, shall be liable to imprisonment for a term not exceeding fourteen years.

(2) In the case of an offence under this section committed outside the United Kingdom, a person may be proceeded against, indicted, tried and punished therefor in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.

(3) Neither a court of quarter sessions nor, in Scotland, the sheriff shall

have jurisdiction to try an offence under this section, and proceedings for such an offence shall not be instituted in England except by or on behalf of the Director of Public Prosecutions or in Northern Ireland without the consent of the Attorney General for Northern Ireland.

(4) If in proceedings under this section in respect of a grave breach of any of the scheduled conventions any question arises under article 2 of that convention (which relates to the circumstances in which the convention applies) that question shall be determined by the Secretary of State and a certificate purporting to set out any such determination and to be signed by or on behalf of the Secretary of State shall be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown.

(5) The enactments relating to the trial by court-martial of persons who commit civil offences shall have effect for the purposes of the jurisdiction of court-martial convened in the United Kingdom as if this section had not been passed.

DOCUMENT NO. 141

THE LAW OF WAR ON LAND
(United Kingdom, 1958)

SOURCE

The Law of War on Land, being Part III of the Manual of Military Law (HMSO, 1958)

NOTE

This is the British Army's military manual updating its views as to the law governing operations on land. It is based upon events which have occurred during and subsequent to World War II (1939-1945) and the ratification by the United Kingdom of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). In most areas of possible controversy its positions coincide with those enunciated in the U.S. Army's military manual, the *Law of Land Warfare* (DOCUMENT NO. 138). This is understandable inasmuch as representatives of the two armies met at Cambridge to discuss the drafts of the two manuals and attempted, with considerable success, to eliminate a number of divergences of opinion. (Because of the nature of the presentation, some notes have been included.)

EXTRACTS

(ii) The Conditions Required of Irregular Combatants

91. The first condition, "to be commanded by a person responsible for his subordinates," is fulfilled if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority, or if the members are provided with certificates or badges granted by the government of the State to show that they are officers, or soldiers, so that there may be no doubt that they are not partisans acting on their own responsibility. State recognition, however, is not essential and an organisation may be formed spontaneously and elect its own officers.

92. The second condition, relating to a fixed distinctive sign recognisable at a distance, would be satisfied by the wearing of a military uniform, but something less than a complete uniform will suffice. The distance at which the sign should be visible is necessarily vague, but it is reasonable to expect that the silhouette of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceful inhabitant, and this by the naked eye of an ordinary individual at a distance at which the form of an individual can be determined. As encounters now take place at ranges at which it is impossible to distinguish the colour or the cut of clothing, it would seem desirable to provide irregulars with a helmet or some type of hat which is completely different in outline from ordinary civilian head-dress. It may, however, be objected that a head dress does not legally fulfil the condition that the sign must be fixed. Something in the nature of a badge sewn on the clothing should therefore be worn in addition.

93. It is not necessary to inform the enemy of the distinctive mark adopted to fulfill the second condition, although to avoid misunderstandings it may be convenient to do so.

94. The third condition is that irregular combatants shall carry arms openly. They may therefore be refused the rights of the armed forces if it is found that their sole arm is a pistol, hand-grenade, or dagger concealed about the person, or a sword-stick or similar weapon, or if it is found that they have hidden their arms on the approach of the enemy.

95. The fourth condition is that irregular corps shall conduct their operations in accordance with the laws and customs of war. In particular, it is necessary that they should have been warned against the employment of treachery, maltreatment of prisoners, wounded and dead, improper conduct towards flags of truce, pillage, and unnecessary violence and destruction.

96. Should *regular* combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war. But they would appear to be entitled, as a minimum, to the limited privileges conferred upon civilian spies or saboteurs by the Civilian Convention, Art. 5. On the other hand, members of the armed forces wearing uniform who are found in the enemy areas obtaining information are not considered as spies. Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies. The mere fact that a regular member of the armed forces is caught out of uniform in enemy territory will expose him to the suspicion of espionage or sabotage. However, he may be able to show that he was engaged in neither. Thus he may have baled out from an aircraft or be an escaping prisoner of war. The fact that he was not in uniform at the time of capture, however, adds to the difficulties of proving that he is neither a spy nor a saboteur. In contrast, the commission of war crimes, *i.e.*, violations of the laws of war, by regular members of the armed forces does not deprive them of the privileges of belligerent and prisoner of war status, although they are to be tried for such acts in the same way as prisoners of war are tried for offences committed after capture.

(iii) The Levée en Masse, Deserters and Fugitives

97. A rising of — in the words of the Hague Rules — "the inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves," is described as a *levée en masse*. Such persons are recognised as being entitled to the privileges of belligerent forces if they fulfil the last two conditions laid down for irregulars, namely, carry arms openly and conduct their operations in accordance with the laws and customs of war. They are exempt from the obligations of being under the command of a responsible commander and wearing a distinctive sign. The inhabitants of a territory already invaded by the enemy who rise in arms do not enjoy the privileges of belligerent forces and are not entitled to be treated as prisoners

of war, unless they are members of organised resistance movements fulfilling the conditions set out in the P.O.W. Convention, Art. 4A(2).

102. The privileges granted to irregular combatants by Hague Rules apply whether such combatants are serving with regular forces or separate from them.

103. Deserters and subjects of a belligerent fighting in the enemy's ranks are traitors to their country and when captured are liable to the penalty for treason. They cannot be regarded as enemies in the military sense of the term and cannot claim the privileges of members of the armed forces of the enemy.

104. It is not, however, for officers or soldiers in determining their conduct towards a disarmed enemy to occupy themselves with his qualifications as a belligerent. Whether he belongs to the regular army or to an irregular corps, whether he is an inhabitant or a deserter, their duty is the same: they are responsible for his person and must leave the decision of his fate to the competent authority. No law authorises them to have him shot without trial, and international law forbids summary execution absolutely. If his character as a member of the armed forces is contested, he should be sent before a court competent to enquire into the matter. P.O.W. Convention, Art. 5, provides that in case of doubt as to whether a person who has committed a belligerent act and has fallen into the hands of the enemy is entitled to be treated as a prisoner of war, he enjoys the protection of the Convention until such time as his status has been determined by a competent tribunal. Moreover, the same Convention lays down that even with regard to conflicts which are not of an international character and in connection with which persons who have been captured are not entitled to be treated as prisoners of war, the parties to the conflict must observe certain provisions of a fundamental character.

(iv) Special Missions and Airborne Troops

105. Troops on hostile missions, whether conveyed to enemy or enemy-occupied territory by air, land or water, and airborne troops whether landed there by parachute, glider or ordinary aircraft, although operating by highly skilled methods of surprise and violent combat, are entitled, as long as they are members of the organised armed forces of the opposing belligerent and wear uniform, to be treated as regular combatants, even if they operate singly.

122. Few of the customs of war have undergone greater changes than those relating to the treatment of prisoners. In ancient times soldiers captured were killed, mutilated or enslaved. In the Middle Ages they were imprisoned or held to ransom. It was only in the 17th century that they began to be regarded as prisoners of the State and not the property of the individual captors. Even during the wars of the 19th century they were often subject to cruel neglect, unnecessary suffering and unjustifiable indignities. After the Second World War a great number of German and Japanese officers were tried and convicted for the murder or maltreatment of prisoners of war. The Charter of I.M.T., Art. *6(b)* included among war crimes "murder or ill-treatment of prisoners of war".

123. The greater part of the law of war concerning prisoners of war is now

contained in the P.O.W. Convention, in the Hague Rules, Section I, Ch. II, the Wounded Convention and in the Neutrality Convention, Ch. II. Some of these written provisions are merely declaratory of customary rules of international law which, in turn, are expressive of compelling principles of humanity and chivalry. The greater number of them are the direct result of the experiences of the Second World War.

126. On the other hand, defectors from the enemy are not considered to be entitled to be treated as prisoners of war.[1]

127. Private enemy individuals and senior enemy officials do not become prisoners of war upon capture by the armed forces. If military security renders it absolutely necessary, such persons may be placed in assigned residences and interned as protected persons under the Civilian Convention, Arts. 41 and 42. If, however, senior enemy officials accompany the armed forces of a belligerent in any of the capacities listed in para. 124*(d)*, they are entitled to prisoner of war status upon capture.[2]

128. Diplomatic agents of a belligerent State who are accredited to the opposing belligerent must be allowed to withdraw to their own countries upon the outbreak of war. They may only be interned or placed in assigned residence if they refuse to return. When enemy diplomatic agents are encountered by a State's armed forces outside its own territory, *e.g.*, in territory invaded or occupied, the position is not clear. The British view is that such persons must be allowed to retire to their own State, even at some risk to the security of the State thus allowing their withdrawal.[3]

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1. Defectors are not considered to have "fallen" into the power of the enemy within the meaning of Art. 4A. Deserters in the military law sense became prisoners of war if they are captured. Prisoners of war who defect during captivity retain their status and cannot be deprived of it. "The term 'fallen' clearly shows that it concerns combatants who pass into enemy hands, not of their own free will but by a force beyond their control because they are under its restraint," see Wilhelm, "Can the Status of Prisoners of War be Altered?" in *Revue Internationale de la Croix-Rouge*, July 1953, p. 516, and September, 1953, p. 681.

2. Heads of State, whether sovereigns or Presidents of Republics, are in some cases, by the constitutional law of their own States, Commanders-in-Chief of the Armed Forces. Accordingly, they are entitled to prisoner of war status under Art. 4A(1) of the Convention. It is, however, open to a belligerent to confer prisoner of war status upon a person not included in the categories listed in the P.O.W. Convention, Art. 4A, who would otherwise be liable to less favourable treatment. To that extent the enumeration of categories in that article is not exhaustive.

3. The normal case will arise when two states A and B are at war with each other and State D is allied to State *B*. State *A* invades and occupies State *D* and finds there a diplomat of State *B* accredited to State *D*. In such case the British view stated in the text is that State *A* must allow the enemy diplomat to retire from State *D* to State *B*. The practice of States on this point has not been uniform.

129. It is unlawful to take as prisoners military attachés or diplomatic agents of neutral States who accompany an army in the field or are found in a captured place, provided that they are in possession of identification papers and take no part in hostilities. They may, however, be ordered to leave the theatre of war and if necessary handed over by the capturing State to the Minister of their respective countries.

134. Transfers of prisoners of war may only be made by the Detaining Power to a State which is a party to the Convention (which may be a neutral or an ally) and after the Detaining Power has satisfied itself of the willingness and ability of that State to apply the Convention. When prisoners are transferred in such circumstances responsibility for the application of the Convention rests on the State to which they are transferred while they are in its custody. Nevertheless, if the latter State fails to carry out the provisions of the Convention in any important respect, the transferring State, upon being notified of that fact by the Protecting Power, must take effective measures to correct the situation or must request the return of the prisoners of war, which request must be complied with.

For the purposes of the Convention the Detaining Power must be one State and not a group of States, and cannot be any organisation other than a State. This means in practice that any system of "international control" of prisoners of war would be inconsistent with the Convention. Thus where a unified military command is constituted consisting of members of the armed forces of several States associated together for common action, *e.g.*, under the United Nations Charter, or as members of a common defence organisation, such association of States or international organisation cannot be considered a Detaining Power for the purpose of the Convention. Prisoners of war have that status from the moment when they fall into the hands of the enemy and it is from that moment that there must be one State functioning as the Detaining Power and responsible for the various obligations imposed upon it by the Convention. That Detaining Power will, in the first instance, be that State whose armed forces or other agencies first captured the prisoner of war concerned. Thereafter any transfer of such prisoners out of the control of the capturing State, *i.e.*, the Detaining Power, must comply with the provisions of the Convention, Arts. 12 and 122, dealing with transfer, and any such transfer can be made only by individual States who are parties to the Convention.

135. It follows from the above observations that neither the United Nations, the North Atlantic Treaty Organisation, Western Union, the South East Asia Treaty Organisation, nor any similar organisation or union can be a Detaining Power for the purpose of the Convention. A more complex situation will arise where the armed forces of several States are so integrated as to form a composite international force. Even then the smaller units will normally be composed entirely of the troops of one of the States contributing to such an integrated force. Accordingly, prisoners captured by members of such a unit will be considered to be the prisoners of the State to which the capturing troops belong, and that State will, under the Convention, become

the Detaining Power of those prisoners from the time of their capture.

136. The State detaining prisoners of war is bound to provide free of charge for their maintenance and medical care, see Art. 15.

Differences of treatment between prisoners of war are permissible only on the basis of military rank, physical or mental health, professional abilities, or sex; there must be no adverse distinction based on race, nationality, religious belief, political opinions, or the like, see Art. 16.

137. A commander may not put his prisoners of war to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears that they will regain their liberty through the impending success of the forces to which they belong. It is unlawful for a commander to kill prisoners of war on grounds of self-preservation.[1] This principle admits of no exception, even in the case of airborne or so-called commando operations — although the circumstances of the operation may make necessary rigorous supervision of and restraint upon their movement.

624. The term "war crime" is the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians.[2] It has also been customary to describe as war crimes such acts as espionage and so-called war treason which, although not prohibited by international law, are properly liable to punishment by the belligerent against which they are directed. However, the accuracy of the description of such acts as war crimes is doubtful.

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1. The last authenticated case prior to the Second World War of the killing of prisoners in cold blood occurred in 1799, at Jaffa, when 3,563 Arabs were shot down or bayoneted on the sea shore by order of Napoleon, "as he was unable to spare an escort to conduct the prisoners to Egypt without wasting his small army" (Rose, Life of Napoleon (9th ed., 1924), vol 1, p. 204). Whether a commander may release prisoners of war in the circumstances stated in the text is not clear. No provision is made in the Convention for such release, and there may well be occasions when such a release will deprive the prisoners of war of such maintenance and food as is available, as, for example, if they are relased in a desert or jungle or in mountainous districts. If such a release be made, it would seem clear that the commander should supply the prisoners with that modicum of food, water and weapons as would give them a chance of survival. For the German practice with regard to the very considerable numbers of Russians captured in 1941 and 1942 see the I.M.T. Judgment, p. 47, and the *German High Command Trial*, 12 W.C.R., pp. 41-46.

2. War crimes may be committed by nationals both of belligerent and of neutral States. A State may elect to punish its own nationals under the appropriate municipal laws for acts that amount to war crimes. Members of the British armed forces can be proceeded against under the relevant sections of A.A., 1955, for murder, manslaughter, *etc.*

627. Obedience to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment.

628. No criminal responsibility is incurred by a person for such acts as he is physically compelled, against his will and in spite of his resistance, to perform.

630. Compulsion arising from hunger or from immediate danger to a person's life or property will not excuse the commission of a war crime, although such compulsion may be considered by a court in mitigation of punishment.

631. In some cases military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control. Thus, for example, when troops commit, or assist in the commission of, massacres and atrocities against the civilian inhabitants of occupied territory, or against prisoners of war, the responsibility may rest not only with actual perpetrators but also with the commander. Such responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible, if he has actual knowledge or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.

637. Charges of war crimes are subject to the jurisdiction of military courts, whether national or international, or of such other courts as the belligerent concerned may determine. With regard to the trial of civilians for "grave breaches" of the 1949 Conventions which include the most serious war crimes, jurisdiction can only be conferred upon the ordinary courts of the Power concerned or upon the courts set up by the Occupant. Prisoners of war charged with "grave breaches" and of all other war crimes must be tried by the same courts and in the same manner as in the case of crimes committed whilst in captivity. The courts, whether military or civil, of neutral States may also exercise jurisdiction in respect of war crimes. This jurisdiction is independent of any agreement made between neutral and belligerent States. War crimes are crimes *ex jure gentium* and are thus triable by the courts of all States. It is fundamental that there must be a trial before punishment. British military courts have jurisdiction outside the United Kingdom over war crimes committed not only by members of the enemy armed forces but also by enemy civilians and other persons of any nationality, including those of British nationality or the nationals of allied or neutral States. It is not necessary that the victim of the war crime should be a British subject. Persons accused of war crimes are properly charged not with an offence against the municipal law of the belligerent but with an offence or offences against the laws and customs of war, although the constitution and procedure of the particular national court trying the case may be determined by the

municipal law.

638. All war crimes are punishable by death, but a more lenient penalty may be pronounced. Corporal punishment is excluded, and cruelty in any form is prohibited.

Trials of prisoners of war for grave breaches of the 1949 Conventions and other violations of the laws of war must comply with the requirements of the P.O.W. Convention, particularly Arts. 82, 85, 102 and 105-108.

671. Neutral territory, being inviolable, affords sanctuary to members of the armed forces, to the war material of belligerents, and to private citizens of the belligerent States and their property. It is not a violation of neutrality to receive them and, if they are being pursued, to compel the other party to halt at the frontier. However, a neutral State which receives belligerent troops on its territory must intern them, as far as possible, at a distance from the theatre of operations; they are not permitted to rest, refresh and re-equip themselves and then to rejoin the armed forces of the belligerent State.

674. Interned troops are in many respects in the position of prisoners of war, and the rules concerning prisoners of war apply to them in a general way. They may be kept in camps or confined in fortresses or in places assigned for the purpose, and under such guard as is necessary in order to secure that they take no further part in the war. The provisions of the P.O.W. Convention, Art. 4B(2), where they are applicable, require that persons who are received by a neutral State on its territory and who come within one of the categories mentioned in Art. 4A are (subject to certain exceptions) entitled to receive, as a minimum, the benefit of the provisions relating to the treatment of prisoners of war under that Convention. In the absence of any special convention the neutral State must supply them with proper food, clothing, and care in sickness, recovering the cost at the conclusion of peace.

677. Prisoners of war who succeed in escaping into neutral territory regain their liberty, but they are not entitled as of right to remain there. It rests with the neutral State whether it will grant or refuse them admission, and in the latter case whether or not it will allow them to remain on its territory. If they are permitted to remain, the neutral State may compel them to make their residence in a specified locality.

678. Prisoners of war brought into neutral territory by troops who take refuge there regain their liberty, but they must be treated by the neutral State in the same way as prisoners of war who have escaped, see the Neutrality Convention, Art. 13 (2). Under the P.O.W. Convention, Art. 109, parties to the conflict may make agreements providing for the internment in neutral countries of able-bodied prisoners of war who have undergone a long period of captivity.

FIRST SCHEDULE

The Prisoner of War Determination of Status Regulations, 1958

1.[1]—(1) Whenever it appears to an officer (hereinafter called the unit commander) who is the commanding officer of a body of Her Majesty's forces

or who is the commandant of any camp or other place set apart for the internment of prisoners of war, that a doubt exists as to whether any person in his custody who has committed a belligerent act before capture, belongs to any of the categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949, he shall, subject to Regulation 4, convene a board of inquiry under these Regulations as soon as may be for the purpose of inquiring into, and determining by report, the status of the person in respect of whose status a doubt has arisen as aforesaid, and pending determination of that status, that person shall be treated for all purposes as, and enjoy the full privileges of, a prisoner of war.

(2) If, in any case to which the preceding paragraph applies a unit commander does not convene a board of inquiry in accordance with that paragraph or cannot do so by virtue of Regulation 4, he shall, as soon as may be practicable, notify a superior authority of the fact that he has not or cannot convene the board of inquiry and it shall thereupon be the duty of that superior authority to convene the board of inquiry.

(3) Nothing in the preceding paragraphs of this Regulation shall be construed as limiting in any way the power of a superior authority to convene a board of inquiry for the purpose mentioned in paragraph (1) of this Regulation.[1]

2. If at any time before making such report it shall appear to the board of inquiry convened under these Regulations that there is insufficient evidence to establish that a belligerent act has been committed by the person whose status is the subject matter of determination before the board it shall so state when making the report.

3. Except insofar as they shall be inconsistent with anything contained in these Regulations, the provisions as to the constitution of a board of inquiry and as to the procedure thereof contained in section 135 of the Army Act, 1955, and any Rules made thereunder and for the time being in force, shall apply to a board of inquiry under these Regulations as if said provisions were set out herein.

4. Such a board of inquiry shall not be convened by a unit commander unless he is of or above the rank of major or corresponding rank.

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1. These Regulations are necessary to provide for tribunals to determine the status of persons who having committed belligerent acts are subsequently captured by Her Majesty's forces, see Art. 5. For example, if a policeman in enemy territory is captured after having been seen to fire on the approaching British forces, he must be treated as a P.O.W. until a competent tribunal (*i.e.*, a board of inquiry convened under these Regulations) determines whether he is to be treated as a P.O.W., within one of the categories mentioned in Art. 4.

5. So far as practicable the person whose status is to be determined shall be present throughout the inquiry and have all the rights and privileges that a person who may be affected by the findings of a board of inquiry convened under section 135 of the Army Act, 1955, and any Rules made thereunder and for the time being in force would have.

6. The report of any board of inquiry shall not require the confirmation of any superior officer or authority, and shall be effective for the purpose of determining the status of the person concerned under the Geneva Convention Relative to the Treatment of Prisoners of War, 1949:

Provided that any officer or authority superior to the officer who convened the board of inquiry may, if of the opinion that the report of the board of inquiry is not supported by any evidence recorded before the board of inquiry, convene a fresh board of inquiry under and for the purposes of these Regulations and thereupon the report of the first board of inquiry shall be void and of no effect.

7. The record of the proceedings of a board of inquiry held under these Regulations shall be forwarded to the War Office and retained there.

8. The report of any board of inquiry under these Regulations shall not be binding on any civil court or court-martial.

9. These Regulations may be cited as the Prisoner of War Determination of Status Regulations, 1958.

DOCUMENT NO. 142

LAW OF CRIMINAL RESPONSIBILITY FOR MILITARY CRIMES - UNION OF SOVIET SOCIALIST REPUBLICS
(25 December 1958)

SOURCES

3 Soviet Statutes and Decisions, No. 4, Summer 1967, at 88 and 93

57 AJIL 74, n. 7

NOTE

This statute of the Soviet Union is presented as still another of the several approaches which have been adopted by governments in order to meet the commitment made in Article 129 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) requiring the enactment of legislation punishing violations of the grave breaches of the convention enumerated in Article 130 thereof. (For other approaches, see DOCUMENT NO. 116, DOCUMENT NO. 132, DOCUMENT NO. 136, and DOCUMENT NO. 140.) This legislation is claimed by Soviet commentators to be the Soviet Union's implementation of Article 129 of the convention. While it is true that the statute was enacted in 1958, about four years after the ratification of the convention by the Soviet Union, Article 32 is substantially a reenactment of a provision contained in a 1927 statute on military crimes; and this latter was, in turn, a reenactment of legislation dating back to pre-Communist days. (Included below after each statutory provision is an official commentary prepared under the editorship of Maj. Gen. for Justice A.G. Gornyi, then the Chief Military Procurator.)

EXTRACTS

Article 29. Criminal actions of person in military service as prisoner of war.

(a) The voluntary participation, by a person in military service who is a prisoner of war, in work having military significance or in other measures known to be capable of causing loss to the Soviet Union or to states allied with it, in the absence of the indicia of treason, shall be punished by deprivation of freedom for a term of three to ten years.

(b) Force against other prisoners of war or cruel treatment of them on the part of a prisoner of war in a senior position shall be punished by deprivation of freedom for a term of three to ten years.

(c) The commission, by a person in military service who is a prisoner of war, of actions directed toward harming other prisoners of war, from mercenary motives or for the purpose of securing leniency toward himself on the part of the enemy, shall be punished by deprivation of freedom for a term of one to three years.

Commentary.

1. A serviceman of the Soviet Army always must be true to his Motherland and must observe military discipline, Soviet laws, and military statutes.

If a serviceman is captured by the enemy, he must use all possibilities to liberate himself and his comrades from captivity and return to his own army. In the Statute of Internal Service it is stated: "While in captivity, a serviceman shall be obliged to hold high the honor and dignity of the Soviet fighting man, sacredly preserve a military and state secret, display fortitude and courage, a feeling of friendship and mutual support for comrades in captivity, prevent them from aiding the enemy, refuse with scorn all attempts of the enemy to use him for inflicting loss on the Armed Forces of the USSR and the Soviet Motherland."

In Article 29 the Law has established criminal responsibility for criminal actions of a serviceman who is in captivity. These actions encroach upon the interests of the Armed Forces of the USSR or states allied with it as well as upon the interests of prisoners of war.

Three indicia of the crime have been formulated in the article: voluntary participation in work having military significance, force against other prisoners of war or cruel treatment of them, and the commission by a prisoner of war of actions directed toward harming other prisoners of war.

2. Voluntary participation in work having military significance (subsection "a" of the present article), from the objective side, expresses itself in the direct fulfillment of such work or in guiding it.

It should be kept in mind that the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War prohibits the compulsory enlistment of prisoners of war for the fulfillment of work which has a military character or military purposes, military significance. Among such work, the Convention refers to work in metallurgical, machine construction, and chemical industry, in construction having a military character or having military purposes, work on transport or loading or unloading work having a military character or military significance, etc.

Only a serviceman in the captivity of the enemy may be the subject of voluntary participation in work having military significance.

From the subjective side, the crime under consideration is committed only intentionally. The subject of the crime is conscious that he is participating in work or undertakings having military significance, and performs such an act by his personal desire. If a serviceman has been compulsorily enlisted to fulfill work having military significance, his actions do not contain the indicia of a crime. Motives for voluntary participation in work having military significance may include: desire to ease grave conditions of stay in captivity, desire to receive additional sources of nourishment, to improve the state of his health, etc.

Voluntary participation in work or undertakings having military significance, as is emphasized in the text of the Law, is punished under subsection "a" of the present article only in the absence in this act of the indicia of treason. Consequently, if voluntary participation in the named work or

undertakings is committed, for example, for the purpose of causing loss to the military might of the USSR or rendering aid to the enemy in his struggle against the Soviet state, then these actions shall be subject to qualification under Article 1 of the Law on Criminal Responsibility for Crimes Against the State.

3. Force against other prisoners of war or cruel treatment of them (subsection "b" of the article commented upon), from the objective side, supposes either physical force (for example, infliction of blows, bodily injuries, mistreatment of a prisoner of war or causing other damage to his health, etc.) or psychological force such as the threat of murder, assault and battery, infliction of bodily injuries, etc. Cruel treatment may be expressed in compelling a prisoner of war to fulfill excessive work, in an outrage upon a prisoner of war, inflicting grave suffering on him, in the deprivation of food, supplies, rest, etc.

A prisoner of war who holds a senior position (for example, senior of a group, command of prisoners of war, etc.) may be the subject of the given crime.

From the subjective side, the crime being considered shall be characterized by the presence of direct intent on the part of the guilty person. It may be committed from mercenary or other base motives.

If the force or cruel treatment has been committed by a prisoner of war who holds a senior position for the purpose of terminating the patriotic activities of other prisoners of war, their struggle against the enemy, with the intention to render aid to the enemy in the conduct of his hostile activity against the USSR, such actions shall form the indicia of treason.

4. Commission of actions directed toward harming other prisoners of war (subsection "c"), from the objective side, may be expressed in denouncing to the administration of a camp violations by prisoners of war of the camp's regime, avoiding work, preparation for escape, or the escape of a prisoner of war, in taking away food, clothes, etc., from a prisoner of war.

Only a prisoner of war in captivity may be the subject of this crime.

From the subjective side, the crime may be committed only with direct intent and from mercenary motives or for purposes of securing leniency toward himsef on the part of the enemy.

* * * * *

Article 32. Mistreatment of prisoners of war.

(a) Mistreatment of prisoners of war, occurring repeatedly or in conjunction with special cruelty, or directed against ill or wounded persons, or the wrongful performance of duties with respect to the sick and wounded by persons charged with their treatment and care, in the absence of the indicia of a graver crime, shall be punished by deprivation of freedom for a term of one to three years.

(b) Mistreatment of prisoners of war without the aforementioned aggravating circumstances shall entail the application of the rules of the Disciplinary Code of the Armed Forces of the USSR.

Commentary.

1. A humane attitude toward prisoners of war is a firm principle of Soviet policy. The 1949 Geneva Convention Relative to the Treatment of Prisoners, signed by the Soviet Union, strictly prohibits infringements on the life and physical inviolability of prisoners of war, on their human dignity, taking of hostages, conviction and application of criminal punishment without the judgment of a court. Prisoners of war must be provided with food, quarters, and clothes just as the forces of their own army.

2. The objective side of mistreatment of prisoners of war may be reflected in actions (for example, beatings) or failure to act (for example, deprivation of food).

Commission of the specified acts repeatedly or with special cruelty represents a serious social danger and entails responsibility in accordance with subsection "a" of the present Article.

Mistreatment of prisoners of war not in conjunction with aggravating circumstances (repeatedly committing acts or special cruelty) itself entails disciplinary responsibility of the guilty person (subsection "b" of the present article).

The objective side of wrongful performance of duties with respect to the sick and wounded may be reflected in not rendering immediate help, insufficient medical care and maintenance of sick and wounded prisoners of war, etc.

3. Any serviceman may be the subject of mistreatment of prisoners of war, but only a person charged with the duty of treatment of prisoners of war and their care (primarily medical personnel) is a subject of the wrongful performance of duties with respect to the sick and wounded.

4. From the subjective side, mistreatment of prisoners of war presupposes only intent, but nonperformance of duties with respect to the sick and wounded presupposes either intent or negligence.

DOCUMENT NO. 143

OPINION OF THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES ARMY CONCERNING THE USE OF "TRUTH SERUM" IN QUESTIONING PRISONERS OF WAR (21 June 1961)

SOURCE

JAGW 1961/1157, 21 June 1961, SUBJECT: Use of "Truth Serum" in Questioning Prisoners of War (Archives of The Judge Advocate General of the United States Army)

NOTE

Despite the importance of the interrogation of prisoners of war in the quest for military information, and the grave possibility of the misuse in this regard of the power which the Detaining Power exercises over prisoners of war, there is remarkably little reported material on this subject. Although only a very few of the war crimes trials which followed World War II (1939-1945) involved this problem, that certainly was not because no improprieties occurred in this area. (See, for example, DOCUMENT NO. 70.) The opinion given below involves a problem which does not appear to have arisen in actual practice.

TEXT

1. I refer to your informal request for the opinion of this division as to the legality of using a chemical "truth serum" when questioning captured enemy personnel.

2. Article 17 of the Geneva Convention Relative to the Treatment of Prisoners of War (T.I.A.S. 3364) provides pertinently that:

> "Every prisoner of war, when questioned . . ., 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.
>
> ". . .
>
> "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.
>
> "Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph."

Examination of the *travaux preparatories* of the Convention confirms that the signatories intended by the language quoted above to prohibit all forms of coercion and treatment designed to obtain any information whatsoever, including that which a prisoner is required to give by the first sentence of Article 17. The rationale in support of this protection is predicated in part

upon the fact that since a prisoner is under a duty to refrain from giving military information to his catpors, he must therefore be protected against inquisitional practices by his captors. The means to be used for identifying prisoners of war unable to state their identity are subject to the same restrictions. Fingerprint comparisons and transmission of photographs are permissible methods mentioned in the commentary on this part of Article 17.

Use of the proposed "truth serum" as purported medical treatment of prisoners of war could contravene Article 13, which in pertinent part provides that:

> ". . .no prisoner of war may be subjected 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."

3. In view of the foregoing, it is the opinion of this division that the suggested use of a chemical "truth serum" during the questioning of prisoners of war would be in violation of the obligations of the United States under the Geneva Convention Relative to the Treatment of Prisoners of War.

DOCUMENT NO. 144

CZECHOSLOVAK PENAL LAW
(29 November 1961)

SOURCES

No. 140/1961 of the Czechoslovak Collection of Laws
[1965] Measures to Repress 173, 175

NOTE

This law of Czechoslovakia is presented as still another (and as the last chronologically) of the several approaches which have been adopted by governments in order to meet the commitment made in Article 129 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) requiring the enactment of legislation punishing violations of the grave breaches of the convention set forth in Article 130 thereof. (For other approaches, see DOCUMENT NO. 116, DOCUMENT NO. 136, DOCUMENT NO. 140, and DOCUMENT NO. 142.) The Czech approach, which is also that of a number of other countries, while simple and all-inclusive, and guaranteeing that *every* specified type of maltreatment of prisoners of war will fall within its ambit, fails to draw any distinction between the various offenses which are deemed to be grave breaches. Thus, the range of punishment for injuring a prisoner of war by striking him with the butt of a rifle and for his premeditated murder is exactly the same.

EXTRACTS

#263. Whoever, during a war, violates the prohibitions of international law by the inhuman treatment of civilian noncombattants, refugees, wounded, members of the armed forces who have laid down their arms, or prisoners of war, shall be punished with a sentence of deprivation of liberty for from 3 to 10 years.

DOCUMENT NO. 145

RESOLUTION XXI, "IMPLEMENTATION AND DISSEMINATION OF THE GENEVA CONVENTIONS," ADOPTED BY THE XXth INTERNATIONAL CONFERENCE OF THE RED CROSS (Vienna, October 1965)

SOURCE

Report of the XXth International Conference of the Red Cross, Vienna, 1965, at 105

NOTE

A humanitarian convention such as the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) is of little value if its contents are unknown to those whom it may directly concern, either as prisoners of war, or, perhaps of even more importance, as capturing personnel, or as administrators of prisoner-of-war camps, or as guards therein. For this reason a provision was included in Article 127 of the convention pursuant to which each Party undertakes to disseminate the text of the convention widely and to include instruction on its provisions to the members of its armed forces and, if possible, to its civilian population. Unfortunately, there is no provision for reporting the extent of compliance with this commitment and there is good reason to believe that actual compliance is minimal; hence this resolution and a similar one adopted by the XXIInd International Conference of the Red Cross at Teheran in 1973 (DOCUMENT NO. 168). (See also, Article 83 of the 1977 Geneva Protocol I, DOCUMENT NO. 175.)

TEXT

XXI

Implementation and Dissemination of the Geneva Conventions

The XXth International Conference of the Red Cross,

considering that by virtue of Article 47 of the First Geneva Convention of 12 August 1949, Article 48 of the Second Convention, Article 127 of the Third Convention and Article 144 of the Fourth Convention the Contracting Parties have undertaken to give the widest possible dissemination, both in time of peace and war, to the texts of the Conventions in their respective countries and in particular to introduce the study thereof into the military and, if possible, civilian instruction syllabuses so that the principles may be known by the whole population,

considering that the application of these Articles is of the greatest importance in ensuring the observance of these Conventions,

considering further that it is essential that members of the armed forces have adequate knowledge of the Geneva Conventions,

appeals to all States parties to the Geneva Conventions to make increased efforts to disseminate and apply these Conventions, in particular by including the essential principles of the Conventions in the instruction given to officers

and troops,

further appeals to National Societies to strengthen their activities and to co-operate with their Governments in this field,

expresses the wish that Governments and National Societies submit periodic reports to the International Committee of the Red Cross on the steps taken by them in this sphere,

notes with satisfaction and gratitude the efforts made by the ICRC to ensure the application of the Geneva Conventions and requests it to continue with this task.

DOCUMENT NO. 146

RESOLUTION XXII, "PERSONNEL FOR THE CONTROL OF THE APPLICATION OF THE GENEVA CONVENTIONS," ADOPTED BY THE XXth INTERNATIONAL CONFERENCE OF THE RED CROSS (Vienna, October 1965)

SOURCE

Report of the XXth International Conference of the Red Cross, Vienna, 1965, at 106

NOTE

During World War II (1939-1945) Switzerland was the Protecting Power for some 35 belligerent States. Sweden and Spain also acted in this capactiy although to a considerably lesser extent. The manpower problem thereby created is obvious. Embassies of the Protecting Powers in the territories in which they operated had to have their personnel allocations increased again and again. The new personnel so assigned were frequently without any training whatsoever in their completely new and, for them, unprecedented functions. (Even in Vietnam, with its comparatively limited requirements in this area, there were frequent complaints that individuals inspecting the prisoner-of-war camps had no concept whatsoever of what they were supposed to be doing and how they were supposed to do it.) The present resolution attempts to propose a plan for remedying this situation by creating a pool of trained personnel in every country so that a Protecting Power would, in accordance with Article 8(1) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), be able to select trained neutrals to supplement its own manpower resources. (See also Article 6 of the 1977 Geneva Protocol I, DOCUMENT NO. 175.)

TEXT

XXII

Personnel for the Control of the Application of the Geneva Conventions

The XXth International Conference of the Red Cross,

noting that in conflicts occurring throughout the world the Geneva Conventions, which have been ratified by a large number of States to mitigate the hardships these conflicts cause, are still not rigorously applied in all cases,

recalling that Articles 8 and 9, common to the four Conventions, oblige Parties to the conflict to facilitate, to the greatest possible extent, the task of the Protecting Power entrusted with co-operating in the application of the Conventions and controlling this application,

considering that with a view to ensuring the application of the humanitarian Conventions and the scrutiny of this application it is essential to make available — in the event of a conflict — to the Protecting Powers and their possible substitutes a sufficient number of persons capable of carrying out this scrutiny impartially,

invites the States parties to the Conventions to envisage the possibility of setting up groups of competent persons for the discharge of these functions, entrusted to them in the Conventions, under the direction of the Protecting Powers or their possible substitutes,

expresses the wish that the International Committee of the Red Cross, which has declared itself prepared to do so, contribute to the training of these persons.

DOCUMENT NO. 147

RESOLUTION XXIV, "TREATMENT OF PRISONERS OF WAR," ADOPTED BY THE XXth INTERNATIONAL CONFERENCE OF THE RED CROSS (Vienna, October 1965)

SOURCE

Report of the XXth International Conference of the Red Cross, Vienna, 1965, at 107

NOTE

In June 1965 the International Committee of the Red Cross (ICRC) sent a letter to each of the belligerents in Vietnam calling for compliance with the 1949 Geneva Conventions, including the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). The United States and the Republic of Vietnam (South Vietnam) advised the ICRC that they were applying the conventions and they accepted the ICRC's offer of cooperation. The Democratic Republic of Vietnam (North Vietnam) answered that captured enemy pilots were considered to be criminals and declined the offer of assistance of the ICRC. They also stated that enemy personnel held by them had been permitted to correspond with their families but they were no longer permitted to do so because they had infringed "regulations" concerning correspondence. The "National Liberation Front of South Vietnam" (Viet Cong) denied that it was bound by the conventions. The ICRC representatives thereafter began to visit prisoner-of-war camps in South Vietnam. This resolution of the XXth International Conference of the Red Cross, meeting in Vienna in October 1965, was undoubtedly an effort to obtain reciprocal treatment for prisoners of war held by North Vietnam and the Viet Cong. It was, unfortunately, completely unsuccessful.

TEXT

XXIV

Treatment of Prisoners of War

The XXth International Conference of the Red Cross,

recalling the historic role of the Red Cross as a protector of victims of war,

considering that only too often prisoners of war find themselves helpless and that using of prisoners of war as object of retaliation is inhumane,

recognising that the international community has consistently demanded humane treatment for prisoners of war and the facilitation of communication between prisoners of war and the exterior, and condemned reprisals directed against them,

calls upon all authorities involved in an armed conflict to ensure that every prisoner of war is given the treatment and full measure of protection prescribed by the Geneva Convention of 1949 on the protection of prisoners of war, including the judicial safeguards afforded to every prisoner of war

charged with any offence, and that the International Committee of the Red Cross is enabled to carry out its traditional humanitarian functions to ameliorate the condition of prisoners of war.

DOCUMENT NO. 148

RESOLUTION XXV, "APPLICATION OF THE GENEVA CONVENTIONS BY THE UNITED NATIONS EMERGENCY FORCES," ADOPTED BY THE XXth INTERNATIONAL CONFERENCE OF THE RED CROSS (Vienna, October 1965)

SOURCE

Report of the XXth International Conference of the Red Cross, Vienna, 1965, at 107

NOTE

The problem of the application of the 1949 Geneva Conventions, including the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), by and to United Nations emergency forces has long plagued the international community. For example, the argument has been advanced by some, and bitterly rejected by others, that such forces are not bound by the law of war. In its report to the XXth International Conference of the Red Cross, meeting in Vienna in October 1965, the International Committee of the Red Cross (ICRC) stated that its meeting of experts had concluded that there was no legal impediment to the United Nations becoming a Party to the 1949 Geneva Conventions. (The ICRC did not mention that other experts are just as certain that only States may be Parties to those conventions.) As will be noted, the resolution adopted by the Conference did not go that far, referring merely to the obligations of and to members of the national elements made available to and composing any emergency force established by the United Nations.

TEXT

XXV

Application of the Geneva Conventions by the United Nations Emergency Forces

The XXth International Conference of the Red Cross,

considering that the States parties to the Geneva Conventions have undertaken to respect them and make them respected in all circumstances,

considering further that it is necessary for the United Nations Emergency Forces to respect these Conventions and be protected by them,

expresses its satisfaction at the practical measures already taken by the United Nations,

recommends:

1. that appropriate arrangements be made to ensure that armed forces placed at the disposal of the United Nations observe the provisions of the Geneva Conventions and be protected by them;

2. that the Governments of countries making contingents available to the United Nations give their troops — in view of the paramount importance of

the question — adequate instruction in the Geneva Conventions before they leave their country of origin as well as orders to comply with these Conventions;
3. that the authorities responsible for the contingents agree to take all the necessary measures to prevent and suppress any breaches of the said Conventions.

DOCUMENT NO. 149

RESOLUTION XXVI, "REPRESSION OF VIOLATIONS OF THE GENEVA CONVENTIONS," ADOPTED BY THE XXth INTERNATIONAL CONFERENCE OF THE RED CROSS (Vienna, October 1965)

SOURCE

Report of the XXth International Conference of the Red Cross, Vienna, 1965, at 108

NOTE

Seeking means of compelling compliance with, and punishing violations of, an international humanitarian convention such as the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) is a never-ending and never completely successful enterprise. However, it is an absolutely essential task and this has long been appreciated by all concerned. In Article 1 of the Convention the Parties "undertake to respect and to ensure respect for the present Convention in all circumstances." Article 12(1) makes the Detaining Power itself responsible for the treatment received by prisoners of war. By Article 129 the Parties undertake to enact legislation to provide "effective penal sanctions" for the grave breaches of the convention enumerated in Article 130 thereof as well as all other violations of the convention and to try or extradite violators found within their territory. The International Committee of the Red Cross (ICRC) has demonstrated the importance which it places on this subject by twice (1964 and 1968) requesting and twice (1965 and 1969) publishing information concerning the national legislation available in this area. (See DOCUMENT NO. 116, DOCUMENT NO. 132, DOCUMENT NO. 136, DOCUMENT NO. 140, and DOCUMENT NO. 144.) Its first report, submitted to the XXth International Conference of the Red Cross, meeting in Vienna in October 1965, resulted in the present resolution. Moreover, the ICRC included provisions in this regard in its draft protocol which became the working document for the Diplomatic Conference which first met in Geneva in 1974, and such provisions, as amended by the Diplomatic Conference, now constitute Article 85 86(1) of the 1977 Geneva Protocol I (DOCUMENT NO. 175).

TEXT

XXVI

Repression of Violations of the Geneva Conventions

The XXth International Conference of the Red Cross,

recalling Resolution VI adopted by the Council of Delegates (Geneva, 1963),

further recalling that according to Article 49 of the Ist Geneva Convention of 12 August 1949, Article 50 of the IInd Convention, Article 129 of the IIIrd Convention and Article 146 of the IVth Convention, Governments have the

obligation to provide penal sanctions in cases of violations of the Geneva Conventions,

thanks the International Committee of the Red Cross for the efforts it has made to study the question of suppressing violations of the Geneva Conventions,

requests the ICRC to continue its work,

further requests Governments, National Societies and institutions of comparative law to give the ICRC their full support and the information required for a study of this problem,

appeals to Governments which have so far not done so to complete their legislation so as to ensure adequate penal sanctions for violations of these Conventions, and

requests the ICRC to submit a report on the results achieved to the next International Conference and to make this the subject of a publication for the general public.

DOCUMENT NO. 150

RESOLUTION XXVII, "PROTESTS REGARDING ALLEGED VIOLATIONS OF THE HUMANITARIAN CONVENTIONS," ADOPTED BY THE XXth INTERNATIONAL CONFERENCE OF THE RED CROS (Vienna, October 1965)

SOURCE

Report of the XXth International Conference of the Red Cross, Vienna, 1965, at 108

NOTE

Acting as the medium for the transmittal of a protest concerning an alleged violation of a provision of a multilateral humanitarian convention is always an unwanted and thankless chore. (See DOCUMENT NO. 99.) By the date of this resolution the International Committee of the Red Cross (ICRC) had felt obliged to adopt the position that it would not transmit such a protest if there was any other viable method of transmission available to the aggrieved party. (Actually, this was not really a major change in policy as the ICRC had normally acted in this area only in the absence of a Protecting Power or other available diplomatic channel.)

TEXT

XXVII

Protests regarding Alleged Violations of the Humanitarian Conventions

The XXth International Conference of the Red Cross,

after examining the Report submitted by the International Committee of the Red Cross on protests regarding alleged violations of the humanitarian Conventions,

whereas the aim in transmitting such protests to an accused party is that a full enquiry should be opened and a detailed report made,

considering that this procedure has never yielded any concrete results,

takes note that the ICRC will no longer transmit such protests, except in the absence of any other regular channel, where there is need of a neutral intermediary between two countries directly concerned.

DOCUMENT NO. 151

UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM. DIRECTIVE NO. 20-5, INSPECTIONS AND INVESTIGATIONS: PRISONERS OF WAR — DETERMINATION OF ELIGIBILITY (21 September 1966, revised 15 March 1968)

SOURCE
62 AJIL 768

NOTE

The problem of determining the entitlement to prisoner-of-war status of irregular combatants, such as members of "resistance movements," or "partisans," or "guerrillas," etc., is frequently a difficult one. Article 4A(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) attempted, but without too much success, to clarify this matter. Articles 43-45 of the 1977 Geneva Protocol I (DOCUMENT NO. 175) are clearly intended to simplify the problem by reducing the requirements for qualification for prisoner-of-war status. Article 5(2) of the 1949 Convention provides that when entitlement to prisoner-of-war status is in doubt, the individuals concerned "shall enjoy the protection" of the Convention "until such time as their status has been determined by a competent tribunal." Unfortunately, there is no indication in the Convention as to the nature of a "competent tribunal." On a number of occasions courts trying individuals in the doubtful category have themselves made such determinations. (See, for example, DOCUMENT NO. 152, DOCUMENT NO. 153, DOCUMENT NO. 157, and DOCUMENT NO. 160.) The British Army Manual, THE LAW OF WAR ON LAND (DOCUMENT NO. 141), includes a set of regulations establishing the procedure for members of that Army to make the determination at the military level. The U.S. Army Manual, THE LAW OF LAND WAREFARE (DOCUMENT NO. 138), has a much more limited coverage, its paragraph 71*c* merely stating that a board of not less than three officers will constitute a "competent tribunal" and that they will act "according to such procedure as may be prescribed." The directive reproduced below, promulgated by the senior U.S. headquarters in Vietnam, Military Assistance Command, Vietnam (MACV), during the U.S. involvement in the hostilities in that area (c. 1965-1973), is an elaboration on the mentioned provision of the U.S. Army Manual, establishing in detail the overall procedure to be followed. (References will be noted therein to other MACV directives. Only one of the directives so cited (Directive No. 381-46, DOCUMENT NO. 155) has been reproduced herein.)

EXTRACTS

1. *PURPOSE*. To prescribe policies and procedures for determining whether personnel in the custody of the United States who have committed belligerent acts are entitled to prisoner of war status.

2. *GENERAL.*

a. Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to Prisoner of War (PW) status is in doubt until such time as his status has been determined by a competent tribunal.

b. This directive provides authority and establishes procedures for:

(1) The convening of GPW Article 5 tribunals.

(2) The convening of the MACV PW Rescreening Team.

c. Screening, classification and disposition of detainees will be in accordance with MACV Directive 381-46.

d. Evacuation, processing and accountability of PW will be in accordance with MACV Directive 190-3.

3. *APPLICABILITY.* This directive applies to prisoners of war, non-prisoners of war and doubtful cases who are captured by or are in the custody of United States forces.

4. *DEFINITIONS.*

a. The definitions and criteria for classification of detainees will be in accordance with Annex A, MACV Directive 381-46.

b. Doubtful cases. Persons who have committed a belligerent act and whose entitlement to status as a PW is in doubt.

c. Convening Authorities. Commanders of those major subordinate units which may reasonably be expected to take prisoners and who are authorized to convene general courts-martial under Article 22 of the Uniform Code of Military Justice.

5. *BACKGROUND.*

a. The United States is a party to the Geneva Conventions of 12 August 1949. There are four separate Conventions. Number I is for the amelioration of the condition of the wounded and sick of armed forces in the field (GWS). Number II is for the amelioration of the condition of the wounded, sick, and shipwrecked members of armed forces at sea (GWS Sea). Number III provides for treatment of prisoners of war (GPW). Number IV provides for the protection of civilians (GC). Each convention is reproduced in full in DA Pamphlet 27-1, AF Pamphlet 110-1-3 (Treaties Governing Land Warfare) and NWIP 10-2 (Law of Naval Warfare).

b. The United States considers the armed conflict presently existing in Vietnam to be international in character. Accordingly, all articles of all four Geneva Conventions are applicable.

c. Article 5, GPW, provides for the convening of tribunals by a detaining power. The sole purpose of a tribunal is to determine in doubtful cases, whether a detained person who has committed a belligerent act is entitled to status as a prisoner of war.

d. The responsibility for determining the status of persons captured by US forces rests with the United States. Before any detainee is released or transferred from United States custody, his status as prisoner of war or non-prisoner of war must be determined.

e. Some persons obviously are prisoners of war; e.g., NVA or Viet Cong regulars taken into custody on the battlefield while they are engaged in open combat. Others obviously are not prisoners of war; e.g., civilians who are detained as suspects, found to be friendly, and released; or returnees who received favored treatment under the Chieu Hoi program. In other cases entitlement to PW status may be doubtful. In doubtful cases the necessity for a determination of status by a tribunal may arise.

f. A detainee will be referred to an Article 5 tribunal only when:

(1) He has committed a belligerent act, and

(2) Either of the following conditions exist:

(a) There is doubt as to whether the detainee is entitled to PW status.

(b) A determination has been made that the status of the detainee is that of a non-prisoner of war and the detainee or someone in his behalf claims that he is entitled to PW status.

6. *RESPONSIBILITIES.*

a. All United States military and DOD civilian personnel who take or have custody of a detainee will:

(1) Comply with the provisions of the Geneva Conventions. Violation of the humane provisions of the Conventions is an offense under the Uniform Code of Military Justice. Persons who commit violations of the Geneva Conventions may be subject to trial by court-martial.

(2) Afford to each detainee in their custody treatment consistent with that of a prisoner of war, unless or until it has been determined by competent authority in accordance with this directive that the detainee is not a prisoner of war.

b. Commanders of subordinate commands (defined in paragraph 2 of MACV Directive 310-2) will:

(1) Insure that personnel of their commands comply with paragraph 6a, above.

(2) Insure that before any detainee is released from US custody his status has been determined by competent authority.

(3) Insure that all prisoners of war and non-prisoners of war, in the custody of their forces, are evacuated, processed, and accounted for in accordance with MACV Directive 190-3.

(4) Insure that all detained persons in the custody of US forces, who are sick or wounded, are provided medical treatment and care required by their state of health.

(5) Insure that persons determined to be non-prisoners of war are segregated from prisoners of war prior to their transfer to Vietnamese authorities.

c. Navy, Air Force, and Coast Guard units may transfer doubtful cases to the most convenient US Army or Marine GCM authority competent to convene tribunals under the provisions of this directive.

d. The Interrogating Officer will:

(1) Determine whether the status of a detained person is that of a

prisoner of war, non-prisoner of war, or doubtful case. (This determination will be recorded on the Detainee Report Form (see also MACV Directive 381-11).)

(2) Refer the following cases to the appropriate Staff Judge Advocate or Staff Legal Officer:

(a) Doubtful cases.

(b) Cases in which he has made an initial determination that the status of the detainee is that of a civil defendant.

(3) In doubtful cases or in those cases in which he has made an initial determination that the status of a detained person is that of a civil defendant, forward the Detainee Report Form and a summary of the relevant facts upon which his decision was based (or a copy of the preliminary interrogation report) to the appropriate Staff Judge Advocate or Staff Legal Officer for review.

(4) Turn all prisoners of war and non-prisoners of war over to the proper authorities in accordance with MACV Directive 381-46.

e. Tribunals will:

(1) Consist of three or more officers. Where practicable, the members should be judge advocates or other military lawyers familiar with the Geneva Conventions. In any event, at least one member of the tribunal will be a judge advocate or other military lawyer familiar with the Geneva Convention. The senior member shall act as president of the tribunal.

(2) Follow the procedures set forth at Annex A of this directive and may make such additional rules of procedure consistent with the Geneva Conventions as are deemed necessary to insure a full and fair inquiry into matters before them.

(3) Apply the provisions of Article 4, GPW, and MACV Directive 381-46, in making a determination of entitlement or nonentitlement to prisoner of war status.

f. Convening authorities will:

(1) Convene Article 5 tribunals when required by this directive or Officers from other commands or other services may be assigned to tribunals as members or counsel with the concurrence of the other commander concerned.

(2) Insure that tribunals are conducted promptly and that the procedures set forth at Annex A are followed.

(3) Insure that each tribunal decision is recorded serially and forwarded to COMUSMACV, ATTN: SJA. or

(4) Insure that there were no irregularities in the tribunal proceedings.

(5) Indicate in the forwarding indorsement the disposition of the detainee subsequent to the hearing.

(6) Have all persons who are determined to be civil defendants turned over to the proper Vietnamese authorities for possible trial and punishment under the laws of the Government of Vietnam. As civil defendants such persons are entitled to the protection of common Article 3 of the Geneva

Conventions.

g. The MACV Staff Judge Advocate will:

(1) Review all decisions of US tribunals appointed under this directive to insure that there were no irregularities in the proceedings. A determination by a tribunal that the detainee is entitled to PW status is final. In cases in which PW status has been denied, COMUSMACV, for good and sufficient reason, may order a rehearing or may administratively grant PW status.

(2) Forward all tribunal decisions to the USARV Provost Marshal.

(3) Provide legal guidance to subordinate commanders concerning the conduct of Article 5 tribunals.

h. The USARV Provost Marshal will:

(1) Maintain a permanent file of all tribunal decisions.

(2) Maintain a permanent file of Detainee Report Forms.

i. The Staff Judge Advocate or Staff Legal Officer (SLO) of units taking prisoners will:

(1) Provide legal guidance to interrogating officers concerning the determination of prisoner of war status.

(2) Review all cases in which the interrogating officer has made an initial determination that the status of a detainee is that of a civil defendant.

(a) If the SJA or SLO concurs in the interrogating officer's initial determination, he will indicate his concurrence on the Detainee Report Form and will attach a summary of the relevant facts upon which the decision was based to the Detainee Reort Form.

(b) If the SJA or SLO disagrees with the interrogating officer's initial determination that the status of the detainee is that of a civil defendant, or the detainee or someone in his behalf claims that he is entitled to PW status, the SJA or SLO may accord the detainee PW status or refer the case to a tribunal, indicating his action on the Detainee Report Form.

(3) Review all doubtful cases.

(a) If the SJA or SLO concurs in the interrogating officer's determination that the detainee's status is doubtful, he will refer the case to a tribunal.

(b) If the SJA or SLO determines that the detainee should be given prisoner of war status he may accord PW status, indicating his action on the Detainee Report Form.

j. The MACV PW Rescreening Team will serve for the purposes, be composed as, and follow the procedures, set forth at Annex E of this directive.

* * * * *

ANNEX A

TRIBUNAL PROCEDURES

1. *JURISDICTION.* Military tribunals convened pursuant to MACV Directive 20-5 shall be limited in their deliberations to the determination of whether detained persons ordered to appear before it are entitled to prisoner of war status.

2. *APPLICABLE LAW.* In making its determination of entitlement or nonentitlement to prisoner of war status the tribunal should apply the following:

a. The Geneva Conventions of 12 August 1949, with special attention given to Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

b. The definition of PW currently applicable in Vietnam contained in MACV Directive 381-46.

c. The Law of Land Warfare, FM 27-10, Paragraphs 60-83.

d. The Law of War as recognized by international law.

3. *MEMBERSHIP.* The tribunal shall consist of not less than 3 officers. When practicable, the members should be judge advocates or other military lawyers familiar with the Geneva Conventions. In any event, at least one member of the tribunal will be a judge advocate or other military lawyer familiar with the Geneva Conventions. The senior member shall act as president of the tribunal.

4. *COUNSEL FOR THE TRIBUNAL.* A judge advocate or other military lawyer shall be designated as counsel for the tribunal. Counsel is not a member of the tribunal and has no vote. He is responsible for the clerical and preliminary work of the hearing including advising the detainee of his rights. He arranges for the attendance of witnesses and assembles the documents for use by the tribunal. At the hearing he presents all evidence relevant to the issue and is responsible for preparing the report of the hearing.

5. *QUORUM.* The presence of three members appointed to the tribunal, one of whom must be a judge advocate or other military lawyer familiar with the Geneva Conventions, shall be necessary to constitute a quorum.

6. *VOTING.* All decisions of the tribunal shall be by majority vote. In the event the votes are evenly divided, the decision shall be in favor of PW status.

7. *RIGHTS OF THE DETAINEE.* The detainee shall be advised of and accorded the following fundamental rights considered to be essential to a fair hearing:

a. No person may be deprived of his status as a prisoner of war without having had an opportunity to present his case with the assistance of a qualified advocate or counsel.

b. The detainee shall be entitled to the services of a competent interpreter.

c. The detainee shall have the right to be present with his counsel at all open sessions of the tribunal.

8. *COUNSEL FOR THE DETAINEE.* Each detainee shall have the right to be represented by counsel. He may select anyone reasonably available, including a fellow detainee. If the detainee does not wish to make a selection or if the counsel requested is not reasonably available, the convening authority shall appoint a judge advocate or other military lawyer familiar with the Geneva Conventions as counsel for the detainee.

9. *RIGHTS OF COUNSEL FOR THE DETAINEE.*

a. Counsel shall have a period of at least one week before the hearing in

order to prepare his case. This right may be waived by counsel.

b. Counsel shall be informed of the procedure to be followed by the tribunal at the hearing.

c. Counsel shall be afforded free access to visit the detainee and interview him in private.

d. Counsel shall be afforded a reasonable opportunity to confer privately with essential witnesses, including prisoners of war.

e. Counsel shall have the right to call witnesses, to examine and cross-examine witnesses, and to present evidence in behalf of the detainee subject to such reasonable restrictions as the tribunal may impose.

f. Counsel may address the tribunal during the proceedings, make a final argument, and make a statement in behalf of the detainee.

10. *RIGHT TO TESTIFY.* The detainee may testify in his own behalf or remain silent at his option.

11. *EVIDENCE.*

a. The tribunal shall not be bound by the rules of evidence prescribed for trials by court-martial. It should consider any matter presented which is relevant to the issue whether written or oral, sworn or unsworn.

b. The tribunal may refuse to consider any oral or written matter presented if it is irrelevant, immaterial, or unnecessarily repetitive or cumulative.

12. *INTERPRETER.*

a. Each detainee has the right to the services of a qualified interpreter throughout the proceedings and in his dealings with his counsel.

b. The attorney-client privilege also shall apply to the interpreter.

13. *POWERS OF THE TRIBUNAL.* The tribunal shall have the power to:

a. Order US military witnesses to appear and to request the appearance of civilian witnesses.

b. Question all witnesses including the detainee, should he choose to testify at the hearing.

c. Require the production of documents and real evidence.

d. Require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness.

e. Appoint officers for carrying out any task designated by the tribunal, including the taking of evidence on commission.

f. To determine the mental and physical capacity of the detainee to participate in the hearing.

14. *CONDUCT OF HEARING.*

a. The president upon calling the tribunal to order should first read the order appointing the tribunal.

b. Counsel for the tribunal will cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants.

c. The president should then explain to the detainee his rights, the purpose of the hearing, and the possible consequences of the decision.

d. Counsel for the tribunal will read the report of the interrogating officer summarizing the facts upon which the interrogating officer's decision was based.

e. Witnesses expecting to be called will be excluded from the hearing except while testifying. An oath or affirmation will be administered by counsel for the tribunal.

f. Counsel for the detainee may make or waive an opening statement.

g. Counsel for the tribunal should then present all relevant evidence to which he has access through the testimony of witnesses, documents, or real evidence without regard to whether the evidence is favorable or unfavorable to the detainee.

h. Counsel for the detainee and counsel for the tribunal may cross-examine witnesses or develop new matters as long as they are relevant to the issues before the tribunal.

i. Counsel for the detainee may present witnesses, documents, affidavits, real evidence, and sworn or unsworn statements in behalf of the detainee.

j. Either counsel may call witnesses in rebuttal or surrebuttal.

k. At the conclusion of the presentation of evidence by both counsel the tribunal may recall witnesses or call additional witnesses.

l. After all evidence is in and after closing oral argument has been made by both counsel, the hearing will be closed.

m. The tribunal will deliberate in closed session. Only voting members will be present.

n. In closed session the tribunal will make its determination of status. Its decision will be recorded using the format at Annex B of MACV Directive 20-5 as a guide and will be signed by all members.

o. In open session the president will announce the decision of the tribunal.

15. *POST HEARING PROCEDURES.*

a. In cases in which the detainee has been determined to be entitled to PW status, a brief resume of the facts and circumstances upon which the decision was based will be appended to the decision. A copy of the order appointing the tribunal will be attached.

b. In cases in which the detainee has been determined *not* to be entitled to PW status, the following items will be attached to the decision:

(1) A copy of the order appointing the tribunal.

(2) A statement of the time and place of the hearing, persons present, and their qualifications.

(3) A summary of the testimony of all witnesses heard by the tribunal.

(4) Certified copies of all supporting documents upon which the decision was based.

(5) Drawings, photographs, or accurate descriptions of items of real evidence considered by the tribunal.

c. Counsel for the tribunal will assist in the preparation of the record of proceedings.

d. The original and 2 copies of the tribunal's decision and all supporting documents will be forwarded by the president to the convening authority within one week from the date of the announcement of the decision; the original will be forwarded by the convening authority to COMUSMACV, ATTN: SJA; one copy will be retained by the convening authority; one copy will be made available to the detainee or his counsel upon request.

ANNEX E

MACV PW RESCREENING TEAM

1. *PURPOSE.* To review the cases of PWs captured and classified by US forces whose entitlement to PW status is questioned by the GVN.

2. *BACKGROUND.* From time to time, MACV receives requests from the GVN, through the Joint General Staff, to review the cases of certain PW, captured and classified by US forces and held in Vietnamese PW camps, who have been erroneously classified as PW. The MACV PW Rescreening Team is created to respond to these requests.

3. *COMPOSITION.* THE MACV PW Rescreening Team will be composed of four officers. They will be one each from MACJ1, MACJ2, MACJA and the capturing unit.

4. *RESPONSIBILITIES.*

a. MACJ1 representative will have primary general staff supervision over the rescreening activities.

b. MACJ2 representative will be responsible for classification of those rescreened.

c. MACJA representative will advise and assist in the classification of those rescreened.

d. Capturing unit representative will provide advice and assistance to the rescreening team and provide all available capturing unit records and reports on the PW to be rescreened.

5. *PROCEDURES.*

a. Requests from GVN for PW rescreening will be received and coordinated by MACJ1. In the event that a roster of PW whose status is being questioned does not accompany the request for rescreening, MACJ1 will obtain such roster prior to the rescreening. Upon receipt of the roster, MACJ1 will furnish two copies of it to MACJ2.

b. Prior to the visit of the MACV PW Rescreening Team to the PW camp, a combined interrogation team, coordinated by MACJ2, will assure that sufficient records are available on each PW who is to be rescreened to enable a decision to be made in his case. The record on each PW to be rescreened must contain the report of an interrogation conducted by a US interrogator. For this purpose the initial Preliminary Interrogation Report will suffice.

c. MACJ2 will notify MACJ1 when the records of the PW are in order and ready for rescreening. MACJ1 will then arrange for the rescreening and will notify the participants of the date.

d. Rescreening shall be accomplished at the PW camp where the PW and their records are located. Personnel from the capturing unit will be

present during the rescreening, in order that the rescreening team might have the benefit of their advice and assistance, as well as the records and reports of the capturing unit and initial interrogators. It is considered desirable that appropriate RVNAF personnel be present during the rescreening to advise and assist the MACV PW Rescreening Team. Such personnel may assist in the rescreening, but it must be emphasized that the determination concerning the status of a US captured and classified PW is a unilateral decision made by US personnel.

e. The rescreening team will utilize all documents available in the rescreening of PW. Such documents will include, but not be limited to: the Preliminary Interrogation Report; other written record of interrogations; the Detainee Card; the Detainee Report Form; and PW camp records.

f. When considered necessary, the rescreening team will interview individual PW and conduct such interrogation as is deemed necessary.

g. After considering all available evidence, the rescreening team will make a determination whether each PW whose case has been studied should be continued in that status or reclassified as a civilian. Status will be changed from PW only when the evidence clearly indicates that to be appropriate.

h. Each case will be reviewed by the MACJA representative. Reclassification to non-PW status will not be accomplished without his concurrence. Any case about which the MACJA representative has doubts will be referred to an Article 5, GPW, tribunal in accordance with the provisions of this directive.

i. The case of any detainee who claims PW status, but who the rescreening team feels should be reclassified as a civilian, will be referred to an Article 5, GPW, tribunal in accordance with the provisions of this directive.

DOCUMENT NO. 152

STANISLAUS KROFAN & ANOR. v. PUBLIC PROSECUTOR
(Singapore Federal Court, 5 October 1966)

SOURCES

[1967] 1 M.L.J. 133
10 M.L. Rev. 346 (1968)

NOTE

This is one of several cases involving the dispatch of saboteurs by Indonesia to the Federation of Malaysia during the "armed confrontation" between those two States (1963-1966). (See also, DOCUMENT NO. 153 and DOCUMENT NO. 157.) The accused claimed to be members of the Indonesian armed forces and, therefore, to be entitled to all of the benefits and protections of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), even though, when captured in Singapore, then a part of the Federation, they were wearing civilian clothes. (Concerning the wearing of the uniform while committing the parallel offense of spying, see Article 46 of the 1977 Geneva Protocol I, DOCUMENT NO. 175.)

EXTRACTS

Wee Chong Jin C.J.: The appellants were tried, convicted and sentenced by the High Court in Singapore on the following charge:—

"That you (1) Stanislaus Krofan (2) Andres Andrea, on or about the 4th 14th day of April, 1965, at about 9.20 p.m. at Tanjong Rhu, Singapore, is a which is a security area, did carry without lawful authority 43 lbs. of and explosives, and thereby committed an offence under section 57(1)(b) and der punishable under section 57(1) of the Internal Security Act, 1960."

We propose to set out only those facts which are material for determining the question raised in this appeal. The appellants on the evening of 14th April 1965 came into Singapore from one of the nearby Indonesian islands in a boat which carried no lights. They came ashore carrying with them explosives which they claimed they had been ordered by their superiors to explode in Singapore. They claimed they were members of the armed forces of Indonesia though at the time of their entry into Singapore they were wearing civilian clothing. They were apprehended without offering any resistance immediately after they set foot on Singapore soil with the explosives in their physical possession. At the material date there was a state of "confrontation" between Indonesia and Malaysia, of which Singapore was a member State. For the purposes of this appeal it is not disputed that as a result of this state of confrontation, Indonesia and Malaysia were in "armed conflict" within the meaning of that expression in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as "the 1949 Geneva Prisoners of War Convention").

When the trial commenced before Kulasekaram J. on 17th September 1965,

Singapore was no longer a member State of Malaysia, having been separated from Malaysia on 9th August 1965. The appellants were represented by counsel at the trial who took a preliminary point that as the appellants claimed to be "prisoners of war, some competent body has to decide whether they are or not"; "that so far no competent body has given any verdict as to the status whether they are prisoners of war or not" and that "if they are then this court cannot try them." On this point counsel for the prosecution replied to the effect that if the appellants were claiming to be protected prisoners of war within the meaning of the 1949 Geneva Prisoners of War Convention, the case for the prosecution would be that on the facts they did not come within the ambit of its article 4.

Unfortunately this issue was not tried as a preliminary issue and no evidence was led to enable the trial judge to arrive at a decision on it nor apparently did the trial judge rule on it before the trial proceeded with the prosecution calling evidence to support the charge. After the defence had been called upon and both appellants had concluded giving their evidence it would appear from the record that the trial judge was invited, at the late stage, to decide whether or not on the evidence before him the appellants fell within the definition of prisoners of war as defined in article 4 of the 1949 Geneva Prisoners of War Convention. The trial judge however made no definite finding on that issue and after indicating he had doubts as to what their status was, made "no order" to enable their status to be determined by "a competent tribunal" as provided under article 5. The trial judge however stated "Apart from the fact that they may enjoy this protection under the Convention as prisoners of war, the prosecution has abundantly proved the case that the offence has been commited."

Five days later the trial was resumed, it would appear at the request of the prosecution, to clarify the situation which had arisen as the result of the "no order" made by the trial judge and suffice it for us to say that the judge attempted to clarify the situation by adjourning the trial until the status of the appellants had been determined by "a competent tribunal" as provided under article 5.

* * * * *

On 29th April 1966 the adjourned proceedings were resumed and although the prosecution raised a new argument that the 1949 Geneva Prisoners of War Convention was not part of the law of Singapore at the material date even though it was then a member of State of Malaysia, the trial judge declined to deal with that argument. He, however, took the unusual course of convicting the appellants on the charge against them on the ground that it was desirable to have finality to the matter. He held that the prosecution had proved its case to his entire satisfaction in respect of both appellants on the charge against them and convicted them.

* * * * *

. . . the next question is whether or not the appellants were prisoners of war within the meaning of article 4 of the 1949 Geneva Prisoners of War Convention. It is not in dispute that on the facts the present apellants are not

persons belonging to the category set out in article 4A(2). Counsel for the appellants submitted that they fall within the caregory set out in article 4A(1) which is in the following terms:—

"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."

The undisputed facts are that the appellants came to Singapore at night in a boat which carried no lights, wearing civilian clothing and carrying explosives with them for the purpose of exploding these explosives in Singapore at a time when there was a state of armed conflict between Indonesia and Malaysia of which Singapore was then a part. On those facts it seems clear, assuming they were members of the armed forces of Indonesia, that they entered Singapore as saboteurs to commit acts of sabotage.

The question therefore, is whether members of the armed forces of a party to the conflict who enter enemy territory dressed in civilian clothing as saboteurs are prisoners of war in the sense of the said Geneva Convention.

When there is a state of war between two or more States, the belligerent States have under international law customarily or by special convention agreed to comply with certain rules or regulations. These rules or the law of nations respecting warfare have their origin in usages so called "*usus in bello*", and which through custom and treaties or conventions became legal rules. One of the most important rules of the law of nations respecting warfare for the purposes of this appeal are contained in "Regulations Respecting the Laws and Customs of War on Land" (hereinafter referred to as "The Hague Regulations") agreed upon at the Second Peace Conference of 1907 at The Hague.

The Hague Regulations contain *inter alia* provisions dealing with the status of belligerents, the position of prisoners of war and the position of spies. As will be seen from the preamble these regulations do not aim at giving a complete code of the laws of war on land and cases outside their scope still remain the subject of customary rules and usages. Moreover most of their provisions were declaratory of existing customary international law.

Under article 3 of the Hague Regulations the armed forces of the belligerents in case of capture by the enemy have the right to be treated as prisoners of war. Articles 4 to 20 enacted exhaustive rules regarding their captivity. Many of these rules were merely declaratory of the existing customary principle that prisoners of war should be treated by their captors in the same manner as their own troops.

Under article 29 a spy is defined as a person who acts clandestinely or on false pretences to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party. It goes on to explain that accordingly a soldier not wearing a disguise who has penetrated into the zone of operations of the hostile army for the purpose of obtaining

information, is not a spy.

Under articles 30 and 31 a spy taken in the act shall not be punished without previous trial and a spy, who after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war.

The provisions of the Hague Regulations, which we have just referred to, clearly indicate that spies need not on capture be treated as prisoners of war and this is in conformity with existing customary international law and they further clearly indicate that a member of the armed forces who operates out of uniform in the zone of operations of the enemy for the purpose of obtaining information, is considered a spy.

However, the position of members of the armed forces caught out of uniform while acting as saboteurs in enemy territory is not dealt with by the Hague Regulations. In the *Saboteurs' Case (Ex parte Quirin & Ors.)* the Supreme Court of the U.S.A. in 1942 treated disguised saboteurs as being in the same position as spies. This view is also held by the authors of the *Manual of Military Law* Part III an official publication in 1958 of the United Kingdom War Office at paragraph 96 page 34 where it is stated "Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies." We are of the opinion that this view does not offend against the rules of the law of nations respecting warfare and indeed states the position under customary international law. It seems to us to be consistent with reason and the necessities of war to treat a regular combatant in disguise who acts as a saboteur as being in the same position as a regular combatant in disguise who acts as a spy. Both seek to harm the enemy by clandestine means by carrying out their hostile operations in circumstances which render it difficult to distinguish them from civilians. In the case of the "soldier" spy it is universally accepted that he loses his prisoner of war status and need only be treated as any other spy would be treated. There seems no valid reason therefore why a "soldier" saboteur, who by divesting himself of his uniform cannot readily be distinguished from a civilian, should not also be treated as any other saboteur would be treated. Both, by reason of their having purposely divested themselves of the most distinctive characteristic of a soldier, namely his uniform, have forfeited their right on capture to be treated as other soldiers would be treated i.e. as prisoners of war.

We will now examine the position under the 1949 Geneva Prisoners of War Convention. Under article 4A(1) persons belonging to the category of "members of the armed forces" of a party to the conflict are prisoners of war. Has this definition of prisoners of war altered the position of the "soldier" spy or "soldier" saboteur who has divested himself of his uniform? We are of the opinion it has not. The conditions of modern warfare are not such as to make the spy or the saboteur any less dangerous or more easily distinguishable or more easily apprehended than at the time of the Hague Regulations. As we have mentioned, the Hague Regulations gave the status of prisoners of war to "members of the armed forces" of the belligerents. The words used in article 4A(1) of the Geneva Convention and article 3 of the Hague Regulations to

describe regular combatants are identical namely "members of the armed forces." In our opinion the principle applicable remains the same, namely, that a regular combatant who chooses to divest himself of his most distinctive characteristic, his uniform, for the purpose of spying or of sabotage thereby forfeits his right on capture to be treated as other soldiers would be treated i.e. as a prisoner of war. If such a spy or a saboteur is tried under the domestic legislation of the detaining power such trial can take place in camera, no notification is required to any Protecting Power and no rights of communication under article 107 of the 1949 Geneva Prisoners of War Convention exist. However, he must be treated with humanity and afforded a fair and regular trial.

In the present case the appellants were charged with having committed an offence under the domestic legislation of Singapore, they were represented by counsel at the trial, the trial was conducted in open court before a judge of the High Court in accordance with the rules of procedure applicable. In fact they were accorded the same treatment and trial as anyone else in Singapore would be who is accused of having committed a similar offence.

We are therefore of the opinion that the appellants are not prisoners of war within the meaning of article 4 of the said Geneva Convention and there can be no question that they have not been treated with humanity or not been granted a fair and regular trial.

The only other question raised by the appellants that we need to deal with is the point that there was a miscarriage of justice because the trial judge after holding that there was a doubt as to the status of the appellants nevertheless convicted them in order to have finality on the matter. As the doubt in the mind of the trial judge is only as to the status of the appellants and as, for the reasons we have already set out, we are of the opinion that the appellants on the undisputed facts are not entitled to the status of prisoners of war, we consider that no substantial miscarriage of justice has occurred and accordingly acting under the proviso to section 60 of the Courts of Judicature Act 1964 we dismiss this appeal and affirm the conviction and the sentences.

Appeals dismissed.

DOCUMENT NO. 153

PUBLIC PROSECUTOR V. OIE HEE KOI (AND ASSOCIATED APPEALS) (Privy Council, 4 December 1967)

SOURCES

[1968] 1 All E.R. 419
[1968] A.C. 829
42 ILR 441 (1971)

NOTE

In 1963 the Federation of Malaysia, consisting of Malaya, Singapore, Sabah, and Sarawak, came into existence over the objections of the Philippines and Indonesia. Sukarno, then the dictator of Indonesia, responded by an "armed confrontation" which continued until Sukarno's overthrow in 1965. One method employed by Indonesia in implementing the "armed confrontation" was to send armed men into Malaysia by air and by sea for the purpose of sabotage. (See DOCUMENT NO. 152.) This case involves the trial of a number of such individuals, some of whom, when captured in Malaysia and tried for violations of the Internal Security Act of that country, claimed to be prisoners of war and, therefore, to be entitled to the judicial safeguards contained in the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), including the provision requiring the giving of prior notice of their trial to the Protecting Power. (See DOCUMENT NO. 53.) They were convicted and sentenced to death by the High Court of Malaya. On appeal, the Federal Court of Malaysia reversed as to two accused who were found to be entitled to prisoner-of-war status. The prosecution appealed to the Privy Council of the British House of Lords, the appellate court of last resort of the Federation of Malaysia. The Board held: first, that a national of a Detaining Power, or one who owed allegiance to it, could not be a prisoner of war; and, second, that unless an accused affirmatively asserted a claim to prisoner-of-war status and to the protections afforded by the 1949 Convention, such protections need not be accorded to him, even though the evidence disclosed that he had been captured while a member of an enemy armed force engaged in a military mission in uniform. (For contrary views on the question of citizenship, see DOCUMENT NO. 55 and DOCUMENT NO. 80. For what appears to be a contrary view with respect to procedure, see DOCUMENT NO. 151.)

EXTRACTS

LORD HODSON: In these associated appeals the main question is whether the accused were entitled to be treated as protected prisoners of war by virtue of the Geneva Conventions Act, 1962, to which the Geneva Conventions of 1949 are scheduled.

The accused are so-called Chinese Malays either born or settled in Malaysia

but in no case was it shown whether or not they were of Malaysian nationality. Most carried blue identity cards issued pursuant to the National Registration Regulation which by reg. 5(2) *(a)* provide for the issue of "blue bordered cards with blue printing to citizens of the Federation of Malaya". One carried a red card appropriate to a non-citizen.

They were captured during the Indonesian confrontation campaign. All but two were dropped in Malaysia by parachute as members of an armed force of paratroopers under the command of Indonesian Air Force officers. The main party was dropped in Johore wearing camouflage uniform. Each man carried a fire-arm, ammunition, two hand grenades, food rations and other military equipment. Of the main party thirty-four out of forty-eight were Indonesian soldiers and fourteen Chinese Malays which included twelve of the accused. One was dropped from a different plane similarly equipped. The remaining two accused landed later by sea and were captured and tried. One of these likewise claimed the protection of the Geneva Convention.

All the accused were convicted of offences under the Internal Security Act, 1960 of the Federation of Malaya and sentenced to death . . .

* * * * *

All the accused appealed against their convictions on charges laid under s. 57 and s. 58 of the Act of 1960 and their appeals were dismissed by the Federal Court of Malaysia save in two cases namely that of Oie Hee Koi (Appeal No. 16 of 1967) and that of Ooi Wan Yui (Appeal No. 17 of 1967) in both of which the appeals were allowed on the ground that the accused were prisoners of war within the meaning of the Geneva Conventions Act, 1962, of the Federation of Malaya (herein referred to as "the Act of 1962") and as such were entitled to protection under the Geneva Convention relative to the treatment of prisoners of war (Sch. 3 to the Act of 1962).

In these two cases the public prosecutor appeals by special leave from the decision of the Federal Court. In the remaining cases the accused appeal by special leave against the decisions of the Federal Court upholding their convictions.

* * * * *

Their lordships observe first that the offences with which the accused were charged were all committed within the territorial jurisdiction of the court of trial. The direction not to proceed with the trial which is to be given in the case of a protected prisoner of war is mandatory, that is to say, imperative in character. It seems that enactments regulating the procedure to be followed in courts are usually imperative and not merely directory. See MAXWELL on INTERPRETATION OF STATUTES (11th Edn.) p. 367. The direction is one which is given to the court of trial itself, that is to say to the court of first instance. It does not purport to be an ouster of jurisdiction but is a direction not to proceed *until etc.*

Their lordships observe in the second place that the Act of 1962 does not indicate directly whether or not a protected prisoner of war includes nationals of or persons owing allegiance to the captor state. Reference to the protecting power does indicate indirectly that the prisoner of war whose interest is to be

protected is a national of some state other than the captor state, or a member of the forces of a party to the conflict but this leaves open the question whether prisoner of war status can be claimed by persons in the latter category who are nationals of or owe allegiance to the captor state. Where there is no protecting power designated by parties to the conflict and protection cannot be arranged accordingly, it is provided by art. 10 of the Convention that the protecting power shall accept the services of a humanitarian organisation such as the International Committee of the Red Cross to assume the humanitarian functions performed by the protecting power under the Convention.

* * * * *

Article 5 [of the 1949 Convention] so far as material provides:

". . . 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 art. 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

The trials of the accused were conducted on the assumption, which their lordships do not call in question, that there was an armed conflict between Malaysia and Indonesia bringing the Convention into operation. Article 2 applies the Convention not only to cases of declared war but to "any other armed conflict" which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The existence of such a state of armed conflict was something of which the courts in Malaysia could properly take judicial notice, or if in doubt (which does not appear to have been the case) on which they could obtain a statement from the executive. It was also assumed that both Malaysia and Indonesia are parties to the Convention and their lordships were informed that this assumption is in accordance with the facts. Thus, whether any individual accused was entitled, under the Act of 1962, to be treated as a protected prisoner of war, would depend on the following: (i) whether as a matter of fact he was a member of the armed forces of Indonesia or of a volunteer corps forming part of such armed forces and, if so; (ii) whether as a matter of law, the Convention, and consequently the Act of 1962, applies to persons of Malaysian nationality or owing allegiance to Malaysia; (iii) whether, as a matter of fact, he was a national of Malaysia or a person owing allegiance to Malaysia.

Article 5 of the Convention is directed to a person of the kind described in art. 4 about whom "a doubt arises" whether he belongs to any of the categories enumerated in art. 4. By virtue of art. 5 such a person is given the protection of the Convention for the time being, i.e., until such time as his "status has been determined by a competent tribunal". The question then arises whether the description "protected prisoner of war" in s. 2 of the Act of 1962 includes persons entitled to provisional protection under art. 5 of the Convention, as well as persons falling within art. 4 of the Convention. Their lordships are of opinion that this is the case. Thus a person to whom art. 5 applies is a protected prisoner of war within s. 2 of the Act of 1962 so long as

that protection lasts. If the determination is positive, then he is protected because he falls within one of the categories in art. 4, and the provision for notice in s. 4 of the Act of 1962 must be complied with. If the determination is negative, the protection of the Convention ceases so far as the individual is concerned, and his trial can proceed free from any further restriction arising under s. 4 of the Act of 1962.

When it is established that an accused person is within one of the categories in art. 4 of the Convention, s. 4 of the Act of 1962 can be complied with only by giving the requisite notice; where it is doubtful whether a person is within one of the categories of art. 4 of the Convention then, so long as that position remains, all that is required is that the trial shall not proceed unless the notices have been given. An enquiry into status could be directed without such a notice, as s. 4 of the Act of 1962 does not apply to such an enquiry. Section 4 of the Act of 1962 relates to all protected prisoners of war whether the protection arises under the terms of art. 5 of the Convention or because it is established that an accused is within the terms of art. 4 of the Convention. Where the doubt arises under art. 5 of the Convention two courses are open (i) to give the notices as required by s. 4 of the Act of 1962 or (ii) to obtain a determination whether or not the accused is a protected person. If the second course is followed and the result is negative, then the prosecution can proceed without giving the notices required by s. 4 of the Act of 1962. In only one of the cases did any "doubt arise" at or before their trial whether the accused persons belonged to any of the categories enumerated in art. 4 of the Convention. This single case will be dealt with separately hereafter.

In the two cases in which the public prosecutor is appellant, that is to say that of Oie Hee Koi and that of Ooi Wan Yui, already mentioned, the Federal Court, on the point being taken on appeal from the trial judge, held that the accused were entitled to protection. By decision of the Federal Court in the other cases where the convictions were upheld, the contention that the accused were entitled to protection. By decisions of the Federal Court in the these cases with the single exception referred to above no point had been raised at the trial, and therefore no "doubt arose" so as to bring s. 4 into operation.

Their lordships are of the opinion that on the hearing of their appeals by the Federal Court no burden lay on the prosecution to prove that those of the accused who had raised no doubt at their trials as to the correctness of the procedure followed were not entitled to be treated as protected prisoners of war. Although the burden of proof of guilt is always on the prosecution, this does not mean that a further burden is laid on it to prove that an accused person has no right to apply for postponement of his trial until certain procedural steps have been taken. Until "a doubt arises" art. 5 does not operate, and the court is not required to be satisfied whether or not this safeguard should be applied. Accordingly where the accused did not raise a doubt no question of mistrial arises.

The only authority to which their lordships' attention was drawn which supports the view that the Geneva Convention, or rather its predecessor

which used similar language, applied so to speak automatically without the question of protection or no protection being raised is the case of *R. v. Guiseppe* . Twelve Italian prisoners of war were tried by a magistrate and convicted on a charge of theft, no notice having been given to the representative of the protecting power as required by the Convention. It was held on an application for review at the special request of the Crown that the conviction and sentences should be set aside. Thus it appears that the Crown asked for review in a case where the prisoners of war were nationals of the opposing forces and plainly entitled to the protection of the Convention. Their lordships do not regard this decision as good authority for the proposition that there was a mistrial in the cases under review.

The position of the accused was covered prima facie by customary international law as stated in the passage which appears on p. 268 of 2 OPPENHEIM'S INTERNATIONAL LAW (7th Edn.) edited by the late Professor Lauterpacht concerning the armed forces of belligerents. This passage cited by THOMSON, L.P., in the Federal Court in Lee Hoo Boon's case reads as follows:

> "The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who, without having been members of his armed forces, fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished."

This edition was published in 1951 after Aug. 12, 1949, the date of the Geneva Conventions, and in their lordships' opinion correctly states the relevant law.

A study of the Convention relative to the treatment of prisoners of war leads to a strong inference that it is an agreement between states primarily for the protection of the members of the national forces of each against the other. Many of the articles of the Convention lead to this conclusion, but there are two which point convincingly in this direction namely art. 87 and art. 100. The former deals with penalties to which prisoners of war may be sentenced by the detaining power and contains this language:

> "When fixing the penalty, the courts or authorities of the detaining power shall take into consideration, to the widest extent possible, the fact that the accused, *not being a national of the detaining power*, is not bound to it by *any duty of allegiance*, and that he is in its power as the result of circumstances independent of his own will."

Article 100 deals with death sentences and contains these words:

> "The death sentence cannot be pronounced against a prisoner of war unless the attention of the court has, in accordance withe art. 87, para. 2 (supra), been particularly called to the fact that *since the accused is not a national of the detaining power*, he is not bound to it by any *duty of allegiance*, and that he is in its power as the result of circumstances independent of his own will."

Each of these articles appears to rest on the assumption that a "prisoner of

war" is not a "national of the detaining power". Moreover the reference to the duty of allegiance might fairly suggest the further inference that a person who owes this duty to a detaining power is not entitled to prisoner of war treatment. If the matter rested on inference from these articles alone, the argument might not be conclusive, but as has been shown, the inference so to be drawn coincides, as regards nationals of the detaining power, with commonly accepted international law.

On behalf of four of the accused Lee Hoo Boon (No. 13 of 1967), Lee Siang (No. 14 of 1967), Lee Fook Lum (No. 16 of 1966) and Lee A. Ba (No. 36 of 1966) an argument was addressed to their lordships that even nationals of the detaining power are entitled to the benefit of the Geneva Convention.

Reliance was placed on art. 82 and art. 85 of the Convention as dealing with prisoners of war generally. These persons are said to be subject to the laws in force in the armed forces of that detaining power (art. 82), and when prosecuted under the laws of the detaining power for acts committed prior to capture they are said to retain even if convicted the benefits of the present Convention (art. 85). Thus it is argued that the customary international law set out in the passage from OPPENHEIM quoted above has been in effect abrogated. Their lordships do not accept this submission and have already given reasons for reading the Convention as concerned with the protection of the subjects of opposing states and the nationals of other powers in the service of either of them, and not directed to protect all those whoever they may be who are engaged in conflict and captured. It appears, on examination, that art. 85 was inserted in the Convention to deal with a limited and particular case of persons accused of violations of the articles of war or of war crimes (see *In re Yamashita*) and that no general change in customary international law was intended.

The principal authority relied on for the argument that all captured persons are to be treated alike is *In re Territo*, a decision of the Circuit Court of Appeal (Ninth Circuit) dated June 8, 1946. The question there under appeal was whether the petitioner's restraint by the authorities as a prisoner of war was justified or whether he was entitled to a writ of habeas corpus. The citizenship of the petitioner was immaterial to the decision. His detention did not depend on whether or not he was a citizen of the United States of America. The passage relied on reads as follows (6):

> "we have reviewed the authorities with care and we have found none supporting the contention of the petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle."

The following passage refers expressly to various authorities which do not support the contention that the particular protection relied on by the majority of the appellants extends to nationals of the detaining power who fall into that power's hands. Notwithstanding the words used by the court their lordships do not, therefore, find this decision assists the argument for the appellants.

Having reached the conclusion that the Convention does not extend the

protection given to prisoners of war to nationals of the detaining power, their lordships are of opinion that the same principle must apply as regards persons who, though not nationals of, owe a duty of allegiance to, the detaining power. It may indeed be said that allegiance is the governing principle whether based on citizenship or not. . . .

* * * * *

It was not proved that the accused were citizens of Malaysia nor that they owed allegiance to Malaysia, though in many cases there was evidence which, if the issue had directly arisen, might have suggested that they did; but further findings of fact would have been required to decide either question. Except in the one case where the accused claimed the protection of the Convention at the trial there was no mistrial in proceedings without the notices required by s. 4 having been given. There was nothing to show that the accused were protected prisoners of war or to raise a doubt whether they were or were not. The mere fact that they landed as part of the Indonesian armed forces did not raise a doubt and no claim was made to provide any basis for the court, before whom the accused were brought for trial, applying s. 4 of the Act except in the one case.

In this single case, that of *Teo Boon Chai* v. *The Public Prosecutor* (No. 15 of 1967), it appears from the record that the accused's counsel claimed that his client was not a Malaysian citizen, and not an Indonesian citizen either, and that he should therefore be treated as a prisoner of war under the Geneva Convention. The claim was brushed aside on the wrong basis, videlicet that jurisdiction was in question. In the Federal Court the point was taken that it was for the accused to prove that he was entitled to protection and that he did not do so. The claim, having been made to the court before whom the accused was brought up for trial in the circumstances already stated, was in their lordships' opinion sufficient to raise a doubt whether he was a prisoner of war protected by the Convention. The court should have treated him as a prisoner of war for the time being and either proceeded with the determination whether he was or was not protected, or refrained from continuing the trial in the absence of notices. In this case only their lordships consider that there was a mistrial and that justice requires that the appeal be allowed and the convictions quashed and the case remitted for retrial.

In the remaining cases there was no mistrial by reason of the absence of the notices required by s. 4. It is unnecessary to decide whether, if the accused were otherwise entitled to the protection of the Convention, the Convention did not attach since by adandoning their uniforms they were liable to be treated as spies to whom art. 4 has no application. Further findings of fact would be necessary before a decision could be reached on this matter.

* * * * *

Their lordships accordingly reported to the Head of Malaysia that the appeals in Nos. 16 and 17 of 1967 be allowed so as to restore the convictions on the first and second charges in No. 16 and the second and third charges of No. 17, and to quash the convictions on the third charge in No. 16 and the first charge in No. 17; that the appeal in case No. 15 be allowed, all the convictions

therein be quashed and the case remitted for re-trial on the first and second charges; that the appeals in all the remaining cases be dismissed save and except that the convictions on the charges based on s. 58 of the Internal Security Act, 1960 be quashed in every case.

LORD GUEST and SIR GARFIELD BARWICK delivered the following dissenting judgment: These appeals arise out of what has been described as the Indonesian confrontation of Malaysia. The charges against the accused were breaches of various provisions of the Internal Security Act No. 18/1960. The main question raised in all the appeals was whether the accused were entitled as prisoners of war to the protection of the Geneva Convention, dated Aug. 12, 1949, as applied to Malaya by the Geneva Conventions Act, 1962. In all cases the twelve accused were convicted by the trial judge and sentenced to death. In two cases, No. 16 of 1967 Oie Hee Koi and No. 17 of 1967 Ooi Wan Yui, alias Wong Kam Chin, the convictions and sentences were quashed by the Federal Court of Malaysia. In the remaining cases the appeals of the accused were dismissed and the convictions sustained. Appeals have been taken by the prosecutor in case Nos. 16 and 17 and the remaining cases the accused have appealed to the Board.

On the main question the members of the Board are unanimous that in all the cases except No. 15 of 1967 Teo Boon Chai, alias Tey Ah Sin, the accused were not entitled to the protection of the Geneva Convention. In order to appreciate the point on which our dissent is entered, it is necessary to describe more fully the arguments on the question of the applicability of the Geneva Convention. In reply to the claim that the accused were entitled to the protection of the Geneva Convention the prosecution argued that the Convention did not apply to Malaysian nationals or persons owing allegiance to Malaysia. This argument was countered by the accused saying that it was irrelevant whether they were Malaysian nationals or persons owing allegiance to Malaysia as both classes of persons were protected by the Convention. The argument for the prosecution has been sustained by the unanimous judgment of the Board for the reasons there given. An incidental question was raised in the course of this argument as to whether the onus was on the prosecution to prove that the accused were Malaysian nationals or persons owing allegiance to Malaysia or whether the onus was on the accused to bring themselves within the protection of the Convention. Again the unanimous advice of the Board, as we understand it, is that when the point was raised as to prisoner of war status the onus was on the accused to prove that they were within the Convention. We find ourselves in complete agreement with the Board's advice on these matters and with the relevant reasons given. We are also in agreement with the Board's advice in connexion with the additional matters raised in Lee Fook Lum (No. 16 of 1966) and Lee A Ba (No. 36 of 1966).

It is on the case of No. 15 of 1967 Teo Boon Chai, alias Tey Ah Sin, that we find ourselves in disagreement with the advice of the majority of the Board. They have advised the quashing of the conviction in this case and that the case should be sent back for retrial. The reasons are that although in the remaining

cases no question of prisoner of war status was raised at the trial, in this case such question did arise when the accused pleaded to the charges and the following took place as recorded at the trial:

> "*Chan:* Accused is not a Malaysian citizen and not an Indonesian citizen either. He should therefore be treated as a prisoner of war under the Geneva Convention. *Ajaib Singh:* Court has jurisdiction as accused was born and bred in this country. Unless there is proof of his being a national of any country other than Malaya he cannot take advantage of any Conventional Treaty. *Court:* I rule that the court has jurisdiction to try accused."

Mr. Chan was the advocate appearing for the accused. No further reference was made to the matter and no evidence was led for the accused to justify this purported challenge of the jurisdiction, nor was any other objection taken to the trial proceeding.

Section 4 (1) of the Geneva Convention Act, No. 5 of 1962, provides as follows:

> "The court before which — *(a)* a protected prisoner of war is brought up for trial for any offence; or *(b)* a protected internee is brought up for trial for an offence for which that court has power to sentence him to death or to imprisonment for a term of two years or more, shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in sub-s. (2), so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power and, if the accused is a protected prisoner of war, on the accused and the prisoners' representative."

By s. 2 a protected prisoner of war is a person protected by the Convention, i.e., The Geneva Convention set out in Sch. 3. Article 4 (A) of the Convention defines the various categories of prisoners of war and art. 5 is in the following terms:

> "The present Convention shall apply to the persons referred to in art. 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 art. 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

It is said that when the accused claimed through his advocate the protection of the Convention, there arose a doubt within the meaning of art. 5 as to his status and that the court should then have adjourned the trial until a notice had been served on the protecting power under s.4(1) of the Act of 1962, and that the subsequent trial was a nullity. With respect to the opinion of the majority, we cannot follow this argument. Although the draftsman of s.4 of the Geneva Conventions Act, 1962, probably contemplated, as the language of the section suggests, that the status of the accused in relation to the Convention will have been determined by some competent tribunal before he is brought up for trial, s.4 must, in our opinion, be construed as apt to include

the case where an accused is brought to trial before that status is determined and to empower the court to determine that status. Thus, although by definition "protected prisoner of war" means a person protected by the Convention and art. 5 requires that captured enemies enjoy the protection of the Convention until their status is determined, in our opinion, the obligation on the court under s.4 to adjourn the proceedings does not arise until that status is determined; and, if not already determined by some other tribunal, it does not arise until it is determined by the court itself. The accused, in our opinion, will be given the protection of the Convention for which art. 5 provides, if having claimed and evidenced his status before the court, the question whether or not he is a protected prisoner of war is determined by the court before any other step is taken in his trial. Here, the accused in reality did not raise the appropriate claim. In any case he did not press the claim he did make and certainly did not evidence his status as a prisoner of war. The "doubt" which would have to arise under art. 5 would be whether the person belonged to the categories mentioned in art. 4(A). Having regard to all that took place at the time, the point taken by the accused at the trial in substance was that because he was not a Malaysian citizen nor an Indonesian citizen the court had no jurisdiction to try him. This was really an assertion that the Convention applied to those within Malaysian allegiance, though not to Malaysian national (citizens). This had nothing to do with the question whether the accused was a prisoner of war within one of the categories of art. 4. The point taken by the accused's advocate was really the contrary of what the Board has unanimously decided, namely that the Convention applied to all prisoners of war who being Malaysian nationals merely owed allegiance to Malaysia. Moreover, the point taken by the accused's advocate was in our view misconceived. There was no question as to the jurisdiction of the court; the only available plea was whether the court should adjourn under s. 4(1) of the Act of 1962. This point was never taken by the accused at the trial. For these reasons it seems to us that the accused was in precisely the same position as the other accused and the same reasons would apply for dismissing his appeal as in these cases. The real point in this case on the Geneva Convention was not taken till the hearing before the Federal Court.

In substance our disagreement with the majority judgment is that Case No. 15 of 1967 is on all fours with the remaining cases. The Federal Court in our judgment arrived at a correct conclusion. We would have advised that the appeal be dismissed and the conviction affirmed.

DOCUMENT NO. 154

RESOLUTION 2312 (XXII), "DECLARATION ON TERRITORIAL ASYLUM," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS
(14 December 1967)

SOURCE
11 Djonovich 321

NOTE

The rules with respect to asylum for prisoners of war during the course of international armed conflict are contained in the 1907 Hague Convention V (DOCUMENT NO. 34). This resolution of the General Assembly of the United Nations is, nevertheless, relevant to prisoner-of-war problems because, like Article 129(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), it attempts to deny asylum to those who are alleged to have committed war crimes by violating the laws of war protecting, among others, prisoners of war. Denial of asylum under these circumstances would apply even after the termination of hostilities.

EXTRACTS

The General Assembly

* * * * *

Recommends that, without prejudice to existing instruments dealing with asylum and the status of refugees and stateless persons, States should base themselves in their practices relating to territorial asylum on the following principles:

Article 1

1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.

DOCUMENT NO. 155

UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM. DIRECTIVE NO. 381-46, MILITARY INTELLIGENCE: COMBINED SCREENING OF DETAINEES
(27 December 1967)

SOURCES

National Archives of the United States
62 AJIL 766 (Annex only)
12 Santa Clara Law. 236 (1972) (Annex only)
12 Wm. & Mary L. Rev. 798 (1971) (Annex only)

NOTE

Article 5(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) provides that when entitlement to prisoner-of-war status is in doubt, the individuals concerned "shall enjoy the protection" of the Convention "until such time as their status has been determined by a competent tribunal." Unfortunately, there is no indication in the Convention as to the nature of a "competent tribunal." The problem attained considerable magnitude during the U.S. involvement in the hostilities in Vietnam (c. 1965-1973). This resulted in the promulgation by the senior U.S. headquarters in that country, Military Assistance Command, Vietnam (MACV), of one directive establishing the detailed procedure to be followed in establishing the tribunal and in deciding cases where there was doubt as to the entitlement to prisoner-of-war status (DOCUMENT NO. 151); and the present directive, which establishes the criteria to be applied in making the determinations in such cases. Apart from the United Kingdom's "Prisoner of War Determination of Status Regulations, 1958" (DOCUMENT NO. 141), these two directives appear to represent the only major implementation to date of the provisions of Article 5(2) of the 1949 Convention and will undoubtedly serve as a useful source for any subsequent action by a belligerent.

EXTRACTS

1. *PURPOSE.* This directive provides policy guidance for the combined screening of detainees, and for the activation, as required, of Combined Tactical Screening Centers (CTSC).

2. *GENERAL.*

a. The forces that capture or detain suspect personnel are responsible for the prompt screening and classification of detainees.

b. Criteria for determination of status and classification of detainees is contained in paragraphs 3 and 4 of Annex A.

c. Disposition of detained personnel who have been classified will be made in accordance with paragraph 5 of Annex A.

d. Close coordination between the capturing forces, civil authorities,

and military police is essential to accomplish the screening, classification, and disposition of the detained personnel.

3. *APPLICABILITY.*

a. This directive applies to all US forces and FWMAF [Free World Military Assistance Forces] assigned, attached, or under operational control of MACV.

b. CTSC are to be activated on an "as needed" basis in conjunction with combined operations, to optimize the screening of detained persons. Deactivation will occur as soon as the tactical situation dictates and the requirement for the center no longer exists.

4. *DISCUSSION.* Classification of persons detained is the sole responsibility of the detaining US or FWMAF. All detainees must be classified into one of the following categories:

a. Prisoners of War.

b. Non-Prisoners of War.

(1) Civil Defendants.

(2) Returnees.

(3) Innocent Civilians.

5. *CONCEPT*

a. The success of the combined screening is dependent upon close coordination and integrated planning among all participating and interested organizations. Maximum cooperation and the availability of essential data will aid in the immediate release of innocent civilians and proper treatment of returnees.

b. Combined screening of detainees will be conducted at the lowest echelon of command practical; normally, at the brigade or division Prisoner of War (PW) collecting points. Screening centers should be located near sector/sub-sector headquarters for ease of access to both military and civilian files.

c. The mission of the CTSC is to optimize the screening and classification of a large number of detained personnel to permit effective exploitation of knowledgeable sources for immediate tactical information and to expedite the proper disposition of PW's and Non-Prisoners of War.

* * * * *

8. *SCREENING PROCEDURES.*

a. The detaining unit will insure that the proper documentation is initiated and maintained on every individual detained. It is imperative that data reflect circumstances of capture and whether documents [or] weapons were found on the detainee.

b. Maximum use must be made of interrogators and interpreters to conduct initial screening and segregation at the lowest possible level. Participation in the initial screening by all agencies represented in CTSC is encouraged. However, the sole responsibility for determining the status of persons detained by US forces rests with the representatives of the United States Armed Forces.

c. Detainees will be classified in accordance with the criteria established in Annex A. Every possible arrangement will be made to insure that it is a

joint effort by the participants of the CTSC, that all possible information and facts have been gained from interrogation, and that all pertinent files and records have been checked.

d. To preclude rejection by the PW camp commanders of PW's of questionable status, evidence gathered to substantiate the determination that the detainee is entitled to PW status must be forwarded with the prisoner. Improperly documented PW's will not be evacuated to PW camps.

* * * * *

ANNEX A

CRITERIA FOR CLASSIFICATION AND DISPOSITION OF DETAINEES

1. *PURPOSE.* To establish criteria for the classification of detainees which will facilitate rapid, precise screening, and proper disposition of detainees.

2. *DEFINITIONS.*

a. Detainees. Persons who have been detained but whose final status has not yet been determined. Such persons are entitled to humane treatment in accordance with the provisions of the Geneva Conventions.

b. Classification. The systematic assignment of a detainee in either PW or Non-Prisoner of War category.

c. Prisoners of War. All detainees who qualify in accordance with paragraph 4a, below.

d. Non-Prisoners of War. All detainees who qualify in accordance with paragraph 4b, below.

3. *CATEGORIES OF FORCES.*

a. Viet Cong (VC) Main Force (MF). Those VC military units which are directly subordinate to Central Office for South Vietnam (COSVN), a Front, Viet Cong military region, or sub-region. Many of the VC units contain NVA personnel.

b. Viet Cong (VC) Local Force (LF). Those VC military units which are directly subordinate to a provincial or district party committee and which normally operate only within a specified VC province or district.

c. North Vietnamese Army (NVA) Unit. A unit formed, trained and designated by North Vietnam as an NVA unit, and composed completely or primarily of North Vietnamese.

d. Irregulars. Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level VC organizations. These forces perform a wide variety of missions in support of VC activities, and provide a training and mobilization base for maneuver and combat support forces.

(1) Guerrillas. Full-time forces organized into squads and platoons which do not necessarily remain in their home village or hamlet. Typical missions for guerrillas include propaganda, protection of village party committees, terrorist, and sabotage activities.

(2) Self-Defense Force. A VC paramilitary structure responsible for the defense of hamlet and village in VC controlled areas. These forces do not

leave their home area, and they perform their duties on a part-time basis. Duties consist of constructing fortifications, serving as hamlet guards, and defending home areas.

(3) Secret Self-Defense Force. A clandestine VC organization which performs the same general function in Government of Vietnam (GVN) controlled areas. Their operations involve intelligence collection, as well as sabotage and propaganda activities.

4. *CLASSIFICATION OF DETAINEES.*

a. Detainees will be classified PW's when determined to be qualified under one of the following categories:

(1) A member of one of the units listed in paragraph 3a, b, or c, above.

(2) A member of one of the units listed in paragraph 3d, above, who is captured while actually engaging in combat or a belligerent act under arms, other than an act of terrorism, sabotage, or spying.

(3) A member of one of the units listed in paragraph 3d, above, who admits or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms other than an act of terrorism, sabotage, or spying.

b. Detainees will be classified as Non-Prisoners of War when determined to be one of the following categories:

(1) Civil Defendants

(a) A detainee who is not entitled to PW status but is subject to trial by GVN for offenses against GVN law.

(b) A detainee who is a member of one of the units listed in paragraph 3d, above, and who was detained while not engaged in actual combat or a belligerent act under arms, and there is no proof that the detainee ever participated in actual combat or belligerent act under arms.

(c) A detainee who is suspected of being a spy, saboteur, or terrorist.

(2) Returnees (Hoi Chanh). All persons regardless of past membership in any of the units listed in paragraph 3, above, who voluntarily submit to GVN control.

(3) Innocent Civilians. Persons not members of any units listed in paragraph 3, above, and not suspected of being civilian defendants.

5. *DISPOSITION OF CLASSIFIED DETAINEES.*

a. Detainees who have been classified will be processed as follows:

(1) US captured PW's and those PW's turned over to the US by FWMAF will be detained in US Military channels until transferred to the ARVN PW Camp.

(2) Non-Prisoners of War who are suspected as civilian defendants will be released to the appropriate GVN civil authorities.

(3) Non-Prisoners of War who qualify as returnees will be transferred to the appropriate Chieu Hoi Center.

(4) Non-Prisoners of War determined to be innocent civilians will be released and returned to the place of capture.

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DOCUMENT NO. 156

UNITED STATES v. STAFF SERGEANT WALTER GRIFFEN
(U.S. Army Board of Review, 2 July 1968)

SOURCES

39 CMR 586 (1968); pet. rev. den.
18 USCMA 622, 39 CMR 293 (1968)

NOTE

This is one of several cases (see also DOCUMENT NO. 171) in which a member of the U.S. armed forces was tried by a U.S. court-martial for a violation of the law of war committed during the course of the U.S. involvement in the hostilities in Vietnam (c. 1965-1973), the offense here being the killing of a prisoner of war who had become an unwelcome appendage. (Had the accused been tried by the enemy, his offense would have been termed a "war crime," a violation of the law of war. As he was tried by his own military authorities, that same offense was termed "murder," a violation of U.S. military law.) As is not uncommon in this type of case, as well as in "war crimes" cases which are tried as such, the defense was obedience to the orders of a superior. (See for example, DOCUMENT NO. 69, DOCUMENT NO. 72, DOCUMENT NO. 85, DOCUMENT NO. 97, DOCUMENT NO. 100.)

EXTRACTS

PORCELLA, Judge Advocate:

In this contested case, the accused was found guilty of acting jointly with others in committing an unpremeditated murder in violation of Article 118 of the Uniform Code of Military Justice. After reducing the period of confinement from ten years, the convening authority approved a sentence of total forfeitures, confinement at hard labor for seven years and reduction to the lowest enlisted grade.

In their assignment of errors, counsel for the appellant contend that the law officer erred prejudicially in failing to instruct the court on the applicable law of the defense of obedience to superior orders. In considering this contention, we will recite those facts which appear pertinent to our disposition of the case.

On 4 April 1967, in Vietnam, a platoon of the 1st Cavalry Division was providing security for an engineer element near Bong Son. About 10 o'clock in the morning, members of the platoon apprehended an indigenous male of military age who, after evacuation and interrogation by a higher echelon, was "confirmed" to be a member of the hostile Viet Cong. Later that day, as the platoon was preparing to cross a large open rice paddy, a security element on the right flank found an unarmed male native about 40 to 45 years old in a bunker. He was brought to the command post area, and a helicopter was requested for his evacuation. Meanwhile, the accused noticed that activities of his platoon were being observed by a native he suspected might be a

member of the Viet Cong. A patrol was dispatched to apprehend him. However, the search was unsuccessful. While the patrol was reconnoitering by fire and discharging grenades in bunkers, one of its members was injured by a secondary explosion. Using radio communications, overheard by several witnesses, Lieutenant Patrick, the platoon leader, conversed with Captain Ogg, the company commander. He arranged for the air evacuation of the wounded man but was told this prisoner would not be evacuated by helicopter. The precise conversation concerning the disposition of the prisoner is not clear. However, the understanding of Captain Ogg's order appears to have been that the prisoner should be killed. There is evidence that Lieutenant Patrick gave the accused a direct order to the same effect. Specialist Garcia, the medical technician attached to the platoon, removed the prisoner from the command post area and escorted him, his hands tied behind his back, to an embankment, where the accused and Private First Class Woods each fired several shots at him with M-16 rifles. The prisoner expired as a result. His body contained numerous fragments from M-16 bullets.

The accused testified, in part, to the following effect: He overheard Captain Ogg state in his radio transmission that the prisoner should be killed. Then Lieutenant Patrick said: "Sergeant Griffen, take him down the hill and shoot him. Come back and let me know." The accused admitted firing his rifle at the prisoner and thereafter reporting back to Lieutenant Patrick. He committed the act because he had been ordered to do so and for the safety of his men. He believed the order to be legal because his platoon leader, a lieutenant, had once been relieved when a prisoner who had been securely tied escaped during the night. Also, he felt that the security of the platoon would have been violated if the prisoner were kept, since their operations had already been observed by another suspect. In addition, several months earlier, all the members of his platoon had either been killed or wounded in that same general area after their positions had been observed.

Prior to argument, the defense submitted a proposed instruction on obedience of orders as a defense to the offense charged. The law officer did not give the requested instruction. Rather, he instructed the court as follows on this subject:

"Now, the general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable. This justification does not exist, however, when those acts are manifestly beyond the scope of his authority, or the order is such that a man of ordinary sense and understanding would know it to be illegal.

"I tell you as a matter of law that if instructions or orders were received over that radio or were given to the accused in this case to kill the prisoner suspect who was helpless there before them, such an order would have been manifestly an illegal order. You are advised as a matter of law, any such command, if in fact there was such a command, was an illegal order.

"A soldier or airman is not an automaton but a reasoning agent who is under a duty to exercise judgment in obeying the orders of a superior

officer to the extent, that where such orders are manifestly beyond the scope of the issuing officer's authority and are so palpably illegal on their face that a man of ordinary sense and understanding would know them to be illegal, then the fact of obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders. This is the law in regard to superior orders."

In deciding the issues in this case, we will assume that a superior officer ordered the accused to kill the native male then in the platoon's custody.

The intentional killing of another person without premeditation, provacation, justification, or excuse and not while in the perpetration of a felony is unpremeditated murder. (UCMJ, Art 118, 10 USC § 918). However, a homicide committed in the proper performance of a legal duty is justifiable and not a crime. Thus, killing to prevent the escape of a prisoner if no other reasonably apparent means are adequate or killing an enemy in battle are cases of justifiable homicide. (MCM, US, 1951, ¶ 197b). Conversely, the killing of a docile prisoner taken during military operations is not justifiable homicide. In this connection, section 85, Department of the Army Field Manual 27-10, Law of Land Warfare, July 1956, promulgates the following doctrine:

"85. Killing of Prisoners

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movement of prisoners of war."

The general rule is that the acts of a subordinate, done in good faith in compliance with his supposed duty or orders are, subject to certain qualifications, justifiable. (MCM, US, 1951, ¶ 197b). In his authoritative work, Winthrop stated:

"That the act charged as an offense was done in obedience to the order — verbal or written — of a military superior, is, in general, a good defense at military law.

* * * * *

". . . Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power of discretion of the commander as to admit of no rational doubt of their unlawfulness." (Winthrop, Military Law and Precedents, 2d Ed. (1920 Reprint) 296-297.)

The Manual for Courts-Martial, U.S. Army, 1921 (¶ 415, page 355) stated:

"To justify from a military point of view a military inferior in disobeying

the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted. An order requiring the performance of a military duty or act can not be disobeyed with impunity unless it has one of these characteristics."

The Manual for Courts-Martial, United States, 1951 (¶ 197b, p. 351, contains the following discussion relating to the defense of duty or orders as justification for a homicide:

". . . the acts of a subordinate, done in good faith in compliance with his supposed duties or orders are justifiable. *This justification does not exist, however, when* those acts are manifestly beyond the scope of his authority, or *the order is such that a man of ordinary sense and understanding would know it to be illegal . . .*" (Emphasis supplied.)

(Substantially similar provisions appeared in the MCM, USA, 1928, ¶ 148a and MCM, USA, 1949, ¶ 179a.

In CM 326604, Gusik, 75 Board of Review 265, 279, the Board of Review said:

"It will be seen, therefore, that indispensable to the shield of immunity from criminal responsibility afforded one for homicide committed pursuant to lawful orders of his superior, and in the performance of a public duty, are the following:"

(a) That the order or authority was lawful or of such character that he had a right under the circumstances to believe and did believe it to be lawful,

(b) That he acted reasonably within the scope of such authority, and

(c) Not with malice, cruelty, or by willful oppression flowing from a wicked heart."

A well known treatise contains the following comments (36 Am Jur Homicide § 72, p. 208):

". . . But an order which is illegal in itself and not justified by the rules and usages of War, or which is, in its substance, clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same a crime in law."

Also to the same effect see 1 Wharton's Criminal Law and Procedure by Anderson, Defenses § 118, p. 258 (1957)*; United States v Clark, 31 Fed. 710, 716 (ED. Mich., 1887); 40 C.J.S. Homicide § 107, p. 967 (1944).

United States doctrine expressed in Department of the Army Field Manual 27-10, The Law of Land Warfare, July 1956, is as follows:

"The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not

reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment."

Having considered the foregoing authorities, we accept the following principle for application in this case (¶ 197b, MCM, US, 1951, quoted supra): The act of a subordinate, done in good faith in compliance with the supposed order of a superior, is not justifiable when the order is such that a man of ordinary sense and understanding would know it to be illegal. (See ACM 7321, Kinder, 14 CMR 742, 773 (1954).

We now turn to the question: Did the law officer err in failing to give an appropriate instruction on justification as a defense to a homicide committed in good faith compliance with the order of a superior? As previously noted, the defense counsel made a request for such an instruction, but the law officer instructed contradictorily. He informed the court to the effect that if an order to kill the prisoner had been given, it would have been manifestly illegal.

A law officer is required to give an appropriate instruction when there is some evidence that will allow a reasonable inference that a defense is in issue (United States v Black, 12 USCMA 571, 31 CMR 157 (1961)). Evaluating the record, we find the evidence clear and convincing that an unarmed, unresisting prisoner whose hands were bound behind his back was killed at close range by rifle fire discharged by the accused and another soldier. We note no evidence which could provide an inference suggestive of self-defense, or that the killing was to prevent the escape of the prisoner, or for that matter, any other justification or excuse for the killing. Also, there are strong moral, religious, and legal prohibitions in our society against killing others which should arouse the strongest scruples against killings of this kind. In fact, it is difficult to conceive of a military situation in which the order of a superior would be more patently wrong. Accordingly, we view the order as commanding an act so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding. As there was no evidence which would have allowed a reasonable inference that the accused justifiably killed the prisoner pursuant to the order of a superior officer, it follows, as a matter of law, that this defense was not in issue, the law officer did not err by refusing to give an instruction on it, and that the law officer properly instructed the court that such an order would have been manifestly illegal.

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DOCUMENT NO. 157

MOHAMAD ALI AND ANOTHER v. PUBLIC PROSECUTOR
(Privy Council, 28 July 1968)

SOURCES

[1968] 3 All E.R. 488
[1969] A.C. 430
42 ILR 458 (1971)

NOTE

This is another of the cases arising out of the "armed confrontation" between Indonesia and the Federation of Malaysia which followed the latter's creation as a State in 1963 and continued until Sukarno's fall in 1965. (See DOCUMENT NO. 152 and DOCUMENT NO. 153.) The two accused were charged with entering Singapore and there committing an act of sabotage which resulted in the deaths of three civilians. They claimed to be members of the Indonesian armed forces and, therefore, entitled to the judicial protections contained in the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108), including the provision requiring the giving of prior notice of their trial to the Protecting Power. (See DOCUMENT NO. 53.) Upon finding that they were, at all relevant times, dressed in civilian clothes, the High Court of Singapore found them guilty of murder and sentenced them to death. On appeal, the Federal Court of Malaysia affirmed. (Subsequently, affidavits of Indonesian army officers were filed stating that the accused were in fact members of the Indonesian armed forces.) The Privy Council of the House of Lords, the appellate court of last resort of the Federation of Malaysia, held that when a member of an enemy armed force is captured while engaged in sabotage (or espionage) and not in uniform, he is not entitled to prisoner-of-war status. (To the same effect, see DOCUMENT NO. 175.)

EXTRACTS

VISCOUNT DILHORNE: On Oct. 20, 1965, the appellants were convicted in the High Court of Singapore under the Penal Code of the murder of three civilians and sentenced to death. Their appeals to the Federal Court of Malaysia were dismissed on Oct. 5, 1966, and they now appeal by special leave.

On Mar. 10, 1965, at 3.7 p.m. an explosion took place in a building called MacDonald House in Orchard Street, one of the main streets of Singapore. The Hongkong and Shanghai Banking Corporation occupied part of the building. Other parts were occupied by other persons including the Australian High Commission. Just before the explosion took place, a witness at the trial said he saw a Malayan Airways canvas travelling bag on the floor of the mezzanine floor. Smoke was coming from the bag and he heard a hissing noise. The explosion killed two girl secretaries employed by the bank and injured a driver who died two days later. The appellants were charged with the

murder of these three persons. Later examination of the building showed that the explosive used was twenty to twenty-five pounds of nitro-glycerine.

Three days later, at about 8 a.m., on Mar. 13, the appellants were rescued from the sea some distance from Singapore by a bumboat man. He saw them in the sea clinging to a plank. The second appellant told him that he and the first appellant were fishermen and had been fishing when their boat had been capsized by another boat. He swore that neither of the appellants was wearing uniform and that one of them was bare bodied and wearing a pair of darkish trousers and the other a sports shirt and pair of long trousers. A marine police boat came up and the appellants were taken on board it. The police officer on board gave evidence that the appellants were dressed as the bumboat man had said and that they had no identification papers. He said that they told him that they were fishermen. The appellants were taken to the marine police station. The police sergeant at the station said that they told him they came from Indonesia and had been fishing. He too said that they were dressed as the bumboat man had said. Later that morning the appellants were seen by an inspector of police. He gave evidence that the first appellant told him that he was a fisherman and that the second appellant said that he was a farmer. He also said that they were dressed as the bumboat man had said. Evidence was also given that when they were admitted to prison they were dressed in this fashion and not in uniform. In prison they were allowed to mix with Indonesian prisoners some of whom were wearing jungle green uniform. After that the appellants were seen in uniform.

At 1.25 p.m. on Mar. 13 Inspector Hill interviewed the first appellant and after cautioning him put a number of questions to him. The first appellant told him that he had come from Java and had come to Singapore at about 11 a.m. on Mar. 10; that after he and the second appellant had had their lunch, they had gone into a building and up some steps and that they had each placed a bundle containing explosives on the steps before reaching the first floor, that the second appellant had lit the fuse and that they had then left the building. He said that this had happened at about 3 p.m.

At 2.35 p.m. the same day the first appellant was charged with the murder of the three persons killed by the explosion. He was again cautioned and he then made a statement saying that he had come to Singapore at about 11 a.m. on Mar. 10, that he had gone with the second appellant to look for a target, that he and the second appellant had placed "two bundles of explosives on stairs before reaching the first floor", that the second appellant had lit the fuse and that after that they had left and taken a bus. In neither of these statements did the first appellant claim to be a member of the Indonesian armed forces.

At about 4.20 p.m. Assistant Superintendent Khosa interviewed the second appellant at the marine police station. In answer to questions put to him after caution, he said that he had come to Singapore on Mar. 10 with the first appellant, that after lunch they had gone to a building and placed two bundles on a staircase, that he had lit the fuse at about 3 p.m., and that after leaving the building he had got on a bus. Later that day he was charged with

the murders and after caution, he made a statement repeating what he had already said and also saying that he had come to Singapore on the instructions of "Kommando Operasi Tertinggi" and that his instructions were as a sworn soldier to carry a parcel and light it "at the electric power station . . . or any other building". At 6.15 p.m., the first appellant had an interview with Mr. Yeo, then fourth magistrate. He told him that he was a member of the Indonesian army and that he had come to give the magistrate information with regard to the duties he had been instructed to perform by his superiors. After the magistrate had satisfied himself that this appellant wished to make a voluntary statement, what the appellant said was recorded. In substance he repeated what he had already said but he added that he had been instructed by Lt. Paulus Subekti to cause trouble in Singapore.

On Mar. 18 the appellants were picked out at an identification parade by a bus conductor. His bus had gone down Orchard Road just before the explosion and he said that at the traffic lights just beyond the bus stop by the Hongkong and Shanghai Bank the appellants boarded his bus. He said that they were then dressed in civilian clothes.

The appellants were tried in the High Court by CHUA, J., sitting alone in accordance with the provisions of the Emergency (Criminal Trials) Regulations 1964.

* * * * *

At the opening of the trial counsel for the appellants asserted that they were both members of the Indonesian armed forces and that they were entitled to the protection of the Geneva Convention relative to the Treatment of Prisoners of War, 1949. In 1962 the Geneva Conventions Act was passed in the Federation of Malaya to give effect to this, among other, Conventions. Section 4(1) of this Act provides inter alia, that the court before which a protected prisoner of war is brought up for trial for any offence shall not proceed with the trial until it is proved to the satisfication of the court that a notice giving the full name and description of the accused and other details about him including the offence with which he is charged and the court before which the trial is to take place and the time and place of trial has been served not less than three weeks previously on the protecting power and on the accused and the prisoner's representative.

In support of this contention the first appellant gave evidence that he was a member of the Indonesian armed forces, a corporal in the "Korps Kommando Operasi", a regular force. He swore that when they had been rescued from the sea, he and the second appellant had been wearing uniform. He said that his and the second appellant's identity cards had been in plastic bags which were lost when their sampan sank. The second appellant also gave evidence that he was a member of the Korps Kommando Operasi and that he was wearing military uniform when he was rescued. He also said that he had not been allowed by his commander to wear his identity disc. After hearing evidence from the bumboat man and the other witnesses who had seen the appellants shortly after their rescue as to the appellant's clothing, the learned judge ruled that the appellants were not entitled to the status of prisoners of

war. He said that the evidence was overwhelming that when they were rescued they were not wearing uniform. He also found that they first claimed to be fishermen while later on one claimed to be a farmer. He held that they had failed to disharge the onus of proving that they were members of the regular armed forces of Indonesia and that he had no doubt that they were not members of the regular armed forces of Indonesia. He added that if they were members of the Indonesian armed forces, they were not in his opinion entitled to the status of prisoners of war. He said:

> "In my view, members of enemy armed forces, who are combatants and who come here with the assumption of the semblance of peaceful pursuits divesting themselves of the character or appearance of soldiers and are captured, such persons are not entitled to the privileges of prisoners of war."

After the hearing of the appeal by the Federal Court affidavits were filed on behalf of the appellants sworn by two officers of the Indonesian Army, stating that the appellants had since March, 1965, been members of the Indonesian armed forces and serving in units under the "Kommando Mandala Siaga" and documents purporting to be their personal military records were produced. None of this information was obtainable during confrontation between Indonesia and Singapore or prior to the hearing of the appeal by the Federal Court.

At the trial both appellants retracted the statements they had made. They said that they had left Indonesia on Mar. 13 and that their sampan had sunk while they were on their way to a place in Singapore to collect a boat. Their counsel argued that the information obtained from Indonesia showed that the judge's conclusion that the appellants were not members of the Indonesian armed forces was wrong and, having found that they were not telling the truth about that, he consequently rejected their alibi defence. Even if it be the case that they were at the time members of the Indonesian armed forces and that the judge's conclusion that they were not was wrong, there were in their lordships opinion ample grounds for the rejection of the alibi defence. Their lordships see no such reason to suppose that the learned judge's conclusion materially contributed to the rejection of the alibi defence which conflicted with the statements that each of the appellants had made immediately after capture.

* * * * *

Counsel also argued that the appellants were prisoners of war within the Geneva Convention and that the requirements of that Convention were not complied with, with the result that there was a mistrial. Article 2 of the Convention provides that it shall apply to all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. At the commencement of the trial Crown counsel submitted that there was no state of war or armed conflict between Indonesia at the time but when CHUA, J., said that in his view there was a state of armed conflict, Crown counsel did not pursue the matter. The first question dealt with by the Federal Court was

whether or not the Convention was applicable to Singapore. That court declined to decide the question which, they said, had not been raised before the trial judge and that court dealt with the appeal on the assumption that the Convention was applicable to Singapore. Counsel for the respondent sought to argue before the Board that it was not, but as the question had not been raised at the trial, he was not given leave to do so. The appeal was therefore heard on the basis that the Convention applied to Singapore and that at the time there was a state of armed conflict between Indonesia and Malaysia.

The issue to be determined is whether in the circumstances of this case, the appellants were entitled to the protection of the Convention. The view of CHUA, J., on this has already been stated. The Federal Court held that there could not

> "be the least doubt that the explosion at MacDonald House was not only an act of sabotage but one totally unconnected with the necessities of war."

They went on to say:

> "It seems to us clear beyond doubt that under international law a member of the armed forces of a party to the conflict who, out of uniform and in civilian clothing, sets off explosives in the territory of the other party to the conflict in a non-military building in which civilians are doing work unconnected with any war effort forfeits his right on capture to be treated as a prisoner of war."

They consequently held that the appellants were not prisoners of war within the meaning of the Convention.

It is first necessary to consider the regulations annexed to the Hague Convention concerning the Laws and Customs of War on Land of 1907. The first section of those regulations is headed "Of Belligerents" and art. 1 is the first article in that section and in the chapter headed "The Status of Belligerents". It reads as follows:

> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfiling the following conditions:
>
> (1) To be commanded by a person responsible for his subordinates;
>
> (2) To have a fixed distinctive emblem recognisable 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'."

Chapter II of this section is headed "Prisoners of War". The regulations do not in terms say that a person with the status of belligerent is on capture entitled to be treated as a prisoner of war but that is clearly implied. As DR. JEAN PICTET wrote at p. 46 in the "COMMENTARY ON THE GENEVA CONVENTION" published by the Red Cross in 1960:

> "Once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most important of these is the right, following capture, to be recognised as a prisoner of war."

Article 29 of the regulations reads as follows:

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

Article 31 provides:

"A spy who, after rejoining the army to which he belongs, is subsequently recaptured by the enemy, is treated as a prisoner of war. . ."

These two articles show that soldiers who spy and are captured when wearing a disguise are not entitled to be treated as prisoners of war. In "WAR RIGHTS ON LAND" by MR. J.M. SPAIGHT, published in 1911, the following appears at p. 203:

"The spy is usually a soldier who has abandoned the recognised badge of his craft and his nation and adopted some disguise to shield his real character and intent. He has thrown away the insignia of his status, the evidence of his brotherhood among fighting men . . . The spy in modern war is usually a soldier who dons civilian dress, or the uniform of the enemy, or of a neutral country . . ."

Article 4 of the Geneva Convention added a number of new categories of persons entitled to treatment as prisoners of war. It is only necessary to refer to art. 4A, sub-paras. (1), (2) and (3). They read as follows:

"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 organised 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 organised 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 recognisable 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 forces who profess allegiance to a government or an authority not recognised by the Detaining Power."

The wording of sub-para. (1) and sub-para. (2) is clearly modelled on art. 1 of the Hague Regulations. The conditions which have to be fulfilled by militias and volunteer corps not forming part of the army or armed forces are the same.

There is no indication in the Convention that its intention was to extend the protection given to soldiers beyond that given by the regulations; and in the MANUAL OF MILITARY LAW, Part III (1958) in para. 96 is stated:

> "Should *regular* combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war."

On this basis the conclusion must be drawn that it does not suffice in every case to establish membership of an armed force to become entitled on capture to treatment as a prisoner of war.

In neither the Hague Regulations nor in the Geneva Convention is it expressly stated that a member of the armed forces has to be wearing uniform when captured to be entitled to be so treated. In the case of certain militias and volunteer corps certian conditions have to be fulfilled in relation to those bodies for a member of them to be entitled to treatment as a prisoner of war. It is not, however, stated that such a member must at the time of his capture be wearing "a fixed distinctive sign recognisble at a distance".

International law, however, recognises the necessity of distinguishing between belligerents and peaceful inhabitants. SPAIGHT wrote in WAR RIGHTS ON LAND at p. 37:

> "The separation of armies and peaceful inhabitants, is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable."

Although para. 86 of the MANUAL OF MILITARY LAW recognises that the distinction has become increasingly blurred, it is still the case that each of these classes has distinct rights and duties.

For the "fixed distinctive sign to be recognisable at a distance" to serve any useful purpose, it must be worn by members of the militias or volunteer corps to which the four conditions apply. It would be anomalous if the requirement for recognition of a belligerent with its accompanying right to treatment as a prisoner of war, only existed in relation to members of such forces and there was no such requirement in relation to members of the armed forces. All four conditions are present in relation to the armed forces of a country or, as PROFESSOR LAUTERPACHT in OPPENHEIM'S INTERNATIONAL LAW (7th Edn.), Vol. II, at p. 259 calls them "the organised armed forces". In WAR RIGHTS ON LAND MR. SPAIGHT wrote at p. 56 in relation to art. 1 of the regulations: "The four conditions must be united to secure recognition of belligerent status."

DR. PICTET at p. 48 of the COMMENTARY ON THE GENEVA CONVENTION stated: "The qualification of belligerent is subject to these four conditions being fulfilled." And at p. 63 in relation to sub-para. (3) of art. 4A:

> "These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of sub-para. (1): they wear uniform, they have an organised hierarchy and they know and respect the laws and customs of war."

In relation to troops landed behind enemy lines, PROFESSOR LAUTERPACHT at p. 259 of OPPENHEIM, vol. II, wrote that so long as they

> ". . . are members of the organised forces of the enemy and wear uniform, they are entitled to be treated as regular combatants even if they operate singly."

Thus considerable importance attaches to the wearing of uniform or a fixed distinctive sign when engaging in hostilities. In an article in the BRITISH YEAR BOOK OF INTERNATIONAL LAW 1951 by MAJOR R. A. BAXTER, entitled "So-called 'unprivileged Belligerency'; spies, guerillas and saboteurs" the author at p. 343 stated:

> "The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. 'Unlawful belligerency' is actually 'unprivileged belligerency'. International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents. The peril to the enemy inherent in attempts to obtain secret information or to sabotage his facilities and in attacks by persons whom he often cannot distinguish from the peaceful population is sufficient to require the recognition of wide retaliatory powers. As a rough-and-ready way of distinguishing open warfare and dangerous dissimulation, the character of the clothing worn by the accused has assumed major importance. The soldier in uniform or the member of the volunteer corps with his distinctive sign have a protected status upon capture, whilst other belligerents not so identified do not benefit from any comprehensive scheme of protection."

In his LEGAL CONTROLS ON INTERNATIONAL CONFLICT (1954) PROFESSOR JULIUS STONE at p. 549 in relation to the distinction between privileged or "protected" or "lawful" and unprivileged or "unprotected" or "unlawful" belligerents or combatants, stated:

> "The latter distinction draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection. 'Non-combatants' who engaged in hostilities are one of the classes deprived of such protection, but there are also many others. These include notably military personnel who conduct hostilities without conforming to the requirements of art. 1 of the Hague Regulations ('guerillas' in the strict sense), spies and saboteurs. Such unprivileged belligerents, though not *condemned* by international law, are not protected by it, but are left to the discretion of the belligerent threatened by their activities."

At p. 563 he wrote:

> "It is clear, for example, that the donning of disguise by military personnel (for instance of prisoners of war for purposes of escape) does not destroy their status as privileged belligerents."

In a footnote to p. 563 he wrote:

> ". . .the greater difficulty of the position of 'evaders' is a practical one, namely, that the circumstances place upon them the burden, a very heavy one, except in cases of escaped prisoners of war, of showing that they are not spies or saboteurs."

This seems to indicate that he regarded the donning of civilian clothes by soldiers to commit sabotage as depriving them of the status of privileged belligerents.

In this appeal it is not necessary to attempt to define all the circumstances in which a person coming within the terms of art. 1 of the regulations and of art. 4 of the Convention as a member of an army or armed force ceases to enjoy the right to be treated as a prisoner of war. The question to be decided is whether members of such a force who engage in sabotage while in civilian clothes and who are captured so dressed are entitled to be treated as protected by the Convention.

In para. 96 of the MANUAL OF MILITARY LAW it is stated that:

> "Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies."

and in para. 331:

> "If they are disguised in civilian clothing or in the uniform of the army by which they are caught or that of an ally of that army, they are in the same position as spies. If caught in their own uniform, they are entitled to be treated as prisoners of war."

In THE LAW OF LAND WAREFARE (1956) the American equivalent to the MANUAL OF MILITARY LAW, the following paragraph appears:

> "74. Necessity of Uniform. Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces."

In *Ex p. Quirin* the United States Supreme Court had to consider motions for leave to file petitions for writs of habeas corpus. The case related to a number of Germans who during the course of the last war landed in uniform on the shores of the United States with explosives for the purpose of sabotage. On landing they put on civilian clothes. They were captured. In the course of delivering the judgment of the Supreme Court, STONE, C.J., said:

> "The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war . . ."

and at p. 15:

> "By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."

In the light of the passages cited above, their lordships are of the opinion that under international law it is clear that the appellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Geneva Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they had placed the explosives and lit them and when they were arrested. In their opinion CHUA, J., and the Federal Court were right in rejecting the appellants' plea on this ground.

* * * * *

As, if they were members of the Indonesian armed forces, in their lordships' opinion, they forfeited their rights under the Convention by engaging in sabotage in civilian clothes, it is not necessary to consider whether they also forfeited them by breach of the laws and customs of war by their attack on a non-military building in which there were civilians. Having forfeited their rights, there was in their lordships' view no room for the application of art. 5 of the Convention and, not being entitled to protection under the Convention, the appellants' conviction for murder committed by them when dressed as civilians and within the jurisdiction of Singapore cannot be invalidated.

For these reasons, their lordships were of the opinion that the appeals should be dismissed.

DOCUMENT NO. 158

RESOLUTION 2444 (XXIII), "RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS," ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS (13 January 1969)

SOURCE
12 Djonovich 164

NOTE

The United Nations having been established primarily to prevent war, for many years its various organs shied away from any effort to regulate the conduct of war, apparently on the theory that to do otherwise would be to admit defeat in the area of the primary objective. On 12 May 1968 the International Conference on Human Rights, meeting in Teheran, discarded this attitude by adopting a resolution which, among other things, requested the General Assembly to invite the Secretary General to study how compliance with the existing humanitarian law of war could be improved and what additional rules were required. In response to that request the General Assembly adopted the present resolution, its first attempt to participate in the evolution of the law of war. (The Secretary General responded to the General Assembly's invitation with a lengthy report which, while it contained some proposals, was primarily of historical significance. Since then the General Assembly has adopted a series of resolutions bearing the same title and the Secretary General has responded with a series of reports. Unfortunately, all of this accomplished little except to indicate the General Assembly's support of the efforts of the Geneva Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts to accomplish its mission. In this regard, see DOCUMENT NO. 175.)

TEXT

The General Assembly,

Recognizing the necessity of applying basic humanitarian principles in all armed conflicts,

Taking note of resolution XXIII on human rights in armed conflicts, adopted on 12 May 1968 by the International Conference on Human Rights,

Affirming that the provisions of that resolution need to be implemented effectively as soon as possible,

1. *Affirms* resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down *inter alia*, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian populations

as such;

(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;

2. *Invites* the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study:

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;

(b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners [of war] and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare;

3. *Requests* the Secretary-General to take all other necessary steps to give effect to the provisions of the present resolution and to report to the General Assembly at its twenty-fourth session on the steps he has taken;

4. *Further requests* Member States to extend all possible assistance to the Secretary-General in the preparation of the study requested in paragraph 2 above;

5. *Calls upon* all States which have not yet done so to become parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949.

DOCUMENT NO. 159

PROPOSED SYSTEM OF STANDARD TELEGRAM MESSAGES TO AND FROM PRISONERS OF WAR (February 1969)

SOURCE

Proposed System of Standard Telegram Messages to and from Prisoners of War (sequel to Resolution IX of the 1949 Diplomatic Conference, Geneva). Report submitted by the International Committee of the Red Cross to the XXIst International Conference of the Red Cross, Istanbul 1969. D.S. 3/2 (February 1969)

NOTE

In Articles 71(2) and 74(5) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) the Diplomatic Conference which drafted that convention in its final form indicated its desire to increase the speed and decrease the cost of telegraphic messages which prisoners of war were to be permitted to send and receive under certain circumstances. (See DOCUMENT NO. 124 and DOCUMENT NO. 165.) Resolution 9 of the 1949 Diplomatic Conference (DOCUMENT NO. 105) was adopted as one means of achieving the desired result. It requested the International Committee of the Red Cross (ICRC) "to prepare a series of special messages" which could be used to convey by number most of the messages which might conceivably be required for transmittal between a prisoner of war and his family. The ICRC complied with the request contained in the resolution by submitting its "Proposed System" to the XXIst International Conference of the Red Cross in Istanbul in September 1969. While no affirmative action has been taken on the "Proposed System," no such action is really necessary as the specimen telegraphic messages and the procedure to be followed are now available for use by belligerents in time of international armed conflict.

EXTRACTS

III. LIST OF STANDARD MESSAGES AND USE OF CODE

The list of proposed standard messages is given below. This type of correspondence on an international scale would have to pass postal authorities whose language is limited to their own country, so that the system must be simple and available to all. It implies the printing beforehand of as many copies as required of strictly identical cards each bearing the full code in all the necessary languages. For instance, country A, having interned nationals of countries B, C and D will issue cards in the languages of countries A, B, C and D. The cards in languages B, C and D will be handed to the prisoners who will compose their messages by marking a cross in the boxes they choose. The authorities can then easily read the messages from a card in language A. The procedure will be the same but in inverse order in the country of receipt. The authorities in the country at the receiving end of the message can read it by

reference to a card in their own language. Having interned nationals from countries E, F and G, they will have had cards printed in languages E, F and G. They will then mark on these cards in the proper place the relevant standard messages in the language used by the destinee.
The message will therefore include:

1) the code sign R C T [protected person indicator] and M F T [code indicator];
2) receiver's name and address;
3) sender's name and address;
4) indication of the language in which the message should be delivered (i.e. the language used by the sender);
5) date and time at which the telegram is given in for despatch or is actually despatched.

STANDARD R C T - M F T MESSAGES

Receiver's address
(in block capitals)

.....
.....
.....

Language:

[Here follow 62 numbered messages]

Instruction for use of code

A. The code may not be used without its *invariable* indication R C T - M F T.
B. As a general rule the sender receives a card or set of cards on which is printed the full code *in his mother tongue.*
C. The message is composed by marking a cross on the card against the standard phrases chosen.
D. State in the appropriate place the language in which the message is to be delivered.
E. The card, when marked, is handed to the transmitting or collecting office. *It will be signed by the sender and bear the receiver's address in block capital Latin letters.*
F. At the receiving end the relevant code numbers on a corresponding card *in the language in which the message is to be delivered* are marked. (D above)
G. This card is then delivered to the receiver.

DOCUMENT NO. 160

THE MILITARY PROSECUTOR v. OMAR MAHMUD KASSEM AND OTHERS
(Israeli Military Court, Ramallah, 13 April 1969)

SOURCES

Law and Courts in the Israel-Held Areas 17 (1970)
47 ILR 470 (1971)

NOTE

The case is concerned with a problem which first reached major proportions during World War II (1939-1945), has already increased in exent in post-World War II hostilities, and promises to grow in magnitude in each future international armed conflict — the entitlement to prisoner-of-war status of irregular combatants, such as members of "resistance movements," or "partisans," or "guerrillas," etc. Article 4A(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) attempted, but without too much success, to clarify this matter. Articles 43-45 of the 1977 Geneva Protocol I (DOCUMENT NO. 175) are clearly intended to simplify the problem by reducing the requirements for qualification for prisoner-of-war status, primarily by relieving individuals of the need to meet some of the conditions specified, conditions which had their origin in Article 9 of the 1874 Declaration of Brussels (DOCUMENT NO. 27). The present case, of course, applies Article 4A(2) as it existed in 1969. The opinion is probably unique in its discussion of the requirement, established in the 1949 Convention, that the resistance group "belong to a party to the conflict." In addition to the foregoing, and its discussion of the four conditions which must be met to qualify for prisoner-of-war status, the Court also discusses the problem of the "competent tribunal" which Article 5(2) of the Convention designates as the arbiter in cases of dubious entitlement to prisoner-of-war status. The Court was obviously, and understandably, unaware of the directives on this subject which had been issued by the U.S. Military Assistance Command, Vietnam (see DOCUMENT NO. 151 and DOCUMENT NO. 155). For changes in the law discussed herein, see DOCUMENT NO. 175.

EXTRACTS

DECISION

After we had heard the evidence of Sergeant Abraham Erdos, a witness for the prosecution, and part of the evidence of Corporal Ronald Dayan, the second witness for the prosecution, the first of the accused pleaded that he was a prisoner of war, and similar pleas were made by the remaining defendants.

When the defendants were asked by the court whether they were prepared to testify so that it could be ascertained whether the conditions entitling them to be regarded as prisoners of war were fulfilled, the first defendant refused

to testify, stating that he did not recognise the jurisdiction of the court.

The second defendant, on the other hand, was prepared to testify on oath. In the course of his evidence, he claimed that he belonged to the "Organization of the Popular Front for the Liberation of Palestine" and when captured was wearing military dress and had in his possession a military pass issued to him on behalf of the Popular Front, bearing "the letters J.T.F. [Popular Front for the Liberation of Palestine], my name and my serial number" (p. 19 of the record). At the outset of his cross-examination, this witness decided that he no longer wished to continue giving evidence. Further witnesses for the defence were not heard. In view, however, of the prosecutor's statement at p. 16 of the record, we assume that the defendants wore dark green uniforms and mottled caps, and we also assume that they were in possession of passes as mentioned in the evidence of the second defendant.

The first problem arising in this trial is how it can be determined that a given person is entitled to the treatment and status of a prisoner of war, and who may determine that such a person is indeed entitled to that status.

On this problem, we have reached the following conclusions:

(a) Every court has a basic right, inherent in its very existence, to define the scope of its material jurisdiction, and, whenever the question of jurisdiction arises before a court, it may consider and determine whether it is actually competent to deal with the issue brought before it.

(b) This court is competent to decide whether the offences alleged against the defendant in the charge-sheet have in fact been committed; our competence with regard to these offences derives from the provisions of section 8 of the Order Concerning Security Instructions. On the other hand, the plea that the defendants are prisoners of war, though not expressly mentioned among the defences recognized by the legal code elaborated in the Orders regulating criminal responsibility, is of the class of plea that could nullify our jurisdiction with regard to the offences imputed to the defendants or require the alleged acts to be treated as acts whose perpetrators should not be bought to trial at all, which means that the defendants would not be punished for them.

It appears from the foregoing that our jurisdiction under section 8 of the Order Concerning Security Instructions is limited by the provisions of customary International Law and those of the various Conventions regarding the treatment of prisoners of war. In so far as Israel is a party to these Conventions, the limitation is a result thereof. In so far as Israel is not a party, the limitation flows from the fact that these Conventions are declaratory of a legal situation which is part of the body of customary International Law. It is an established rule that prisoners of war are not to be brought to trial for offences committed immediately before their capture, unless these offences are war crimes; there are other exceptions to this rule which are not relevant here.

Our very assumption concerning the limitation of our jurisdiction with

regard to persons who may be accorded the status of prisoners of war empowers us to decide — even if only incidentally to our determination of who is punishable under the Order and who, by virtue of being a prisoner of war, is not — whether an accused person who claims prisoner-of-war status is indeed to be classified as such and, consequently, to decide that we have no penal jurisdiction over him and that upon capture his proper place is a prisoner-of-war camp.

We are fully aware of the provisions of the Geneva Convention of August 12, 1949, regarding the treatment of prisoners of war, and especially Article 5, of which the second paragraph provides that "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."

We do not know whether a "competent tribunal", within the meaning of Article 5, has been set up in any part of the civilized world either under the Geneva Convention or any other international agreement. It seems to us that — at least in the present state of International Law — this article is solely intended to prevent commanders in the field from arbitrarily determining whether a person captured in combat operations is or is not entitled to prisoner-of-war status. It is designed to enable the two parties to conduct a judicial inquiry into the status of such a person in accordance with accepted principles of law and justice, so that the question whether a combatant comes within the scope of Article 4 of the Convention shall not be decided under pressure of military operations and in the heat of battle.

* * * * *

In view of all the above, we hold that we are competent to examine and consider whether the defendants are entitled to prisoner-of-war status, and if we so decide, we shall then cease to deal with the charge.

For the purpose of determining status and in order to let the defendants have the benefit of all possible doubt regarding their right to be considered prisoners of war, we have decided to assume the following facts in their favour, although even these have not been fully established:

a. All the defendants belong to an organization called the Popular Front for the Liberation of Palestine.
b. On October 26, 1968, the defendants crossed the Jordan from the East to the West Bank, wearing dark green dress and mottled peaked caps and carrying arms and ammunition, as well as passes issued to them by the Organization to which they belong, showing the name of the organization, the name of the holder and his personal number.
c. On October 27, 1968, while in the West Bank area, they encountered members of the Israel Defence Forces, and an exchange of fire occurred at Auja near Jericho.

On the other hand, the following facts have been established:

a. On the evidence of the first witness for the prosectuion, Sergeant Erdos—

1) At a distance of 900-1,000 m. it was impossible to distinguish between civilians and the two defendants who were moving on a hill opposite the witness and were wearing green clothes. At p. 11 of the record, the witness says: "At a distance of 900-1,000 m. we saw two persons in green dress moving on the edge of the hill. I did not think they were saboteurs and therefore I did not take cover but continued to advance to the open terrain and kept on looking. . . "
2) When captured, the defendants' equipment included knap-sacks with clothes in them (p. 12) — they were civilian clothes (p. 13) — as well as arms, ammunition and other military equipment, comprising, *inter alia*, Kalatchnikov assault rifles.

b. Of the evidence of the witness Moshe, we accept as credible the following relevant parts:
   1. The aim of the Organization is to operate by way of sabotage . . . including attack on persons by every means, to strike at the foundation of the State of Israel and to destroy it.
   2. The Organization not only exists in Jordan but has leaders in other countries of our region as well.
   3. The Organization operates independently in Jordan under instructions of its leaders, without any connection with the Jordan Government. It originates from a political body called the Arab Nationalists (Qawmiyun al-'Arab), which the Jordan authorities have pursued for years. It operates on underground lines, without any approval from the Jordan authorities. The Jordan Government has sometimes taken action against it to prevent it from operating in Jordan territory, in the West Bank and in Israel territory across the Jordan border. There have been instances in which the Jordan Army has acted against its bases with heavy weapons.
   4. The Organization is not a part of the Jordan Army and is considered an illegal organization in Jordan itself.
   5. The Organization is not a part of any organization having regular legal status in the Kingdom of Jordan.
   6. The Organization's approach is the same to civilian as to military objectives, and one of its principal methods of solving any problem is armed struggle, *i.e.*, the use of force, including terrorism, murder and sabotage.
   7. Kalatchnikov assault rifles are not standard weapons in the Jordan Army. They are found chiefly among saboteurs, who receive them from countries which support them and their sabotage activities. Kalatchnikovs are used in Egypt and Syria.
   8. The following acts of violence have been committed by the said Organization:
      a) the throwing of grenades in Jerusalem (the "Night of the Grenades");
      b) the placing of grenades at the Tel Aviv Central Bus Station;
      c) the placing of explosives in various locations in Jerusalem and

Romema;

d) the placing of an "infernal machine" in a car in Mahane Yehuda Market, Jerusalem;

e) an attack upon an "El-Al" aircraft in Athens;

f) an attack upon an "El-Al" aircraft in Zurich.

These are only part of the Organization's operations.

9. The members of the Organization sometimes wear military uniform and openly carry arms outside inhabited areas and sometimes they do not wear uniform in the course of action and do not carry arms openly for fear of being caught.

Having found as aforesaid, we shall now inquire into the kinds of combatants to whom the status of prisoners of war is accorded upon capture by enemy forces.

From the historical aspect, great changes have occurred in the treatment of prisoners of war, and the Second World War gave rise to new categories of combatants whom civilized States have found it proper to classify as combatants entitled to prisoner-of-war status.

The principles of the subject were finally formulated in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949. Whether we regard this Convention as an agreement between the Contracting Parties or whether we regard it as expressive of the position under customary International Law relating to the treatment of prisoners of war, we proceed on the assumption that it applies to the State of Israel and its armed forces; Israel in fact acceded to the Convention on July 6, 1951, and Jordan did so on May 29, 1951.

Article 4A of this Convention defines all those categories of person who, having fallen into enemy hands, are regarded as prisoners of war within the meaning of the Convention. For the purpose of deciding the status of the defendants before us, we shall consider paragraphs (1), (2), (3) and (6) of Article 4A.

Without a shadow of doubt, the defendants are not, in the words of paragraph (1), "Members of the armed forces of a Party to the conflict" or "members of militias or volunteer corps forming part of such armed forces".

Article 2, which prescribes the scope of its application, states that it applies 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 recognised by one of them".

* * * * *

This makes it clear that the Convention applies to relations between States and not between a State and bodies which are not States and do not represent States. It is therefore the Kingdom of Jordan that is a party to the armed conflict that exists between us and not the Organization that calls itself the Front for the Liberation of Palestine, which is neither a State nor a government and does not bear allegiance to the regime which existed in the West Bank before the occupation and which exists now within the borders of the Kingdom of Jordan. In so saying, we have in fact excluded the said Organi-

zation from the application of the provisions of paragraph (3) of Article 4 (see facts Nos. 3, 4 and 5 which we have found, p. 37 of the record). [P. 774.]

Paragraph (6) of Article 4 is also not pertinent, since the defendants are not "inhabitants of 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".

We can be brief. The Organization to which the defendants belong does not answer even the most elementary criteria of a *levée en masse*. We have not to do with the population of an area which an enemy is approaching or invading. In October, 1968, we were not approaching an area whose population was not yet under our effective control and we were certainly not invading new areas, and there cannot be the least doubt that, in the period from June 5, 1967, to October, 1968, that "population" had time to "form itself into regular armed units".

Another category of persons mentioned in the Convention are irregular forces, *i.e.*, militia and volunteer forces not forming part of the regular national army, but set up for the duration of the war or only for a particular assignment and including resistance movements belonging to a party to the armed conflict, which operate within or outside their own country, even if it is occupied. To be recognised as lawful combatants, such irregulars must, however, fulfil the following four conditions: (a) they must be under the command of a person responsible for his subordinates; (b) they must wear a fixed distinctive badge, recognizable at a distance; (c) they must carry arms openly; (d) they must conduct their operations in accordance with the laws and customs of war.

Let us now examine whether these provisions of Article 4A, paragraph (2), are applicable to the defendants and their Organization.

First, it must be said that, to be entitled to treatment as a prisoner of war, a member of an underground organization on capture by enemy forces must clearly fulfil all the four above mentioned conditions and that the absence of any of them is sufficient to attach to him the character of a combatant not entitled to be regarded as a prisoner of war. In support of this view we need only refer to Greenspan, *op.cit.*, p. 38 ("In order to obtain recognition as lawful belligerents, all irregulars must fulfil all of the following four conditions"); Schwarzenberger, *op.cit.*, p. 325; Oppenheim *International Law*, 7th ed., Vol. II, p. 215; von Glahn, *The Occupation of Enemy Territory*, p. 54.

For some reason, however, the literature on the subject overlooks the most basic condition of the right of combatants to be considered upon capture as prisoners of war, namely, the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of prisoners of war upon capture.

It is natural that, in international armed conflicts, the Government which previously possessed an occupied area should encourage and take under its wing the irregular forces which continue fighting within the borders of the

country, give them protection and material assistance, and that therefore a "command relationship" should exist between such Government and the fighting forces, with the result that a continuing responsibility exists of the Government and the commanders of its army for those who fight in its name and on its behalf.

No International Law is possible without the maintenance of certain fundamental principles regarding the conduct of war, making it subject to laws and customs, restrictive of military practices, which safeguard basic rules designed to prevent unnecessary suffering and hardships (a topic to which we shall revert). If International Law indeed renders the conduct of war subject to binding rules, then infringements of these rules are offences, the most serious of which are war crimes. It is the implementation of the rules of war that confers both rights and duties, and consequently an opposite party must exist to bear responsibility for the acts of its forces, regular and irregular. We agree that the Convention applies to military forces (in the wide sense of the term) which, as regards responsibility under International Law, belong to a State engaged in armed conflict with another State, but it excludes those forces — even regular armed units — which do not yield to the authority of the State and its organs of government. The Convention does not apply to these at all. They are to be regarded as combatants not protected by the International Law dealing with prisoners of war, and the occupying Power may consider them as criminals for all purposes.

The importance of the allegiance of irregular troops to a central Government made it necessary during the Second World War for States and Governments-in-exile to issue declarations as to the relationship between them and popular resistance forces (see, *e.g.*, the Dutch Royal Emergency Decree of September, 1944). In fact, the matter of the allegiance of irregular combatants first arose in connection with the Geneva Convention. The Hague Convention of October 18, 1907, did not mention such allegiance, perhaps because of the unimportance of the matter, little use being made of combat units known as irregular forces, guerrillas, etc., at the beginning of the century. In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.

In the present case, the picture is otherwise. No Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The Organization itself, so far as we know, is not prepared to take orders from the Jordan Government, witness the fact that it is illegal in Jordan and has been repeatedly harassed by the Jordan authorities. The measure that Jordan has adopted against it have included the use of arms. This type of underground activity is unknown in the international community, and for this reason, as has been pointed out, we have found no direct reference in the relevant available literature to irregular forces being treated as illegal by the authorities to whom by the nature of

things they should be subject. If these authorities look upon a body such as the Popular Front for the Liberation of Palestine as an illegal organization, why must we have to regard it as a body to which international rules relating to lawful bodies are applicable?

Despite all, let us nevertheless be extremely liberal and endeavour to proceed on the assumption that each member, even of such an illegal body, is entitled upon capture to be treated as a prisoner of war, if that body fulfils the four basic conditions mentioned in the first article of the rules concerning the laws and customs of war on land, which form an annex to the Hague Convention of October 18, 1907.

We will now examine the applicability of those four conditions.

(a) *They are under the command of a person responsible for his subordinates.*

It has not in fact been proved to us that such a commander exists or, if he exists, that he is responsible for his subordinates before military courts. It should perhaps be mentioned here that, according to the Manual of Military Law, p. 33, paragraph 91, note 1, such commanders and the forces subordinate to them are not lawful combatants and are subject to the law of the occupying Power.

(b) *They possess a fixed distinctive badge, recognizable at a distance.*

Under the conditions of present-day warfare, this requirement is conceivably fulfilled if, by their uniforms and other equipment, the persons in question can be clearly discerned as being not civilians but combatants. For the purpose of this requirement, in spite of the evidence of the witness for the prosecution, Sergeant Erdos, that at the distance of his observation he did not think that they were saboteurs although he saw them wearing green clothes, we are prepared to hold that civilians resident in the area where the encounter with the Israeli forces took place do not usually wear green clothes or mottled caps and that the defendants, therefore, fulfilled the instant conditions. Nevertheless, the presence of civilian clothes in the possession of the defendants at the time of the encounter may cause not a little difficulty (see Manual of Military Law, p. 107, paragraph 331, note 1). This point will be discussed below in the context of the fourth condition.

(c) *They carry arms openly*

The subject of irregular forces is not concerned with individuals, and the fact that the defendants bore arms in combat does not of itself allow us to conclude that they carried arms openly, in accordance with the present condition. On the contrary, the facts established by the evidence of the witness Moshe indicate precisely that this Organization operates underground and does not carry arms openly. Obviously, during their contact with Israeli troops, the defendants used their weapons, but the presence of arms in their possession was not established until they began to fire at the Israeli forces, and in this connection it should be noted that the first prosecution witness, Sergeant Erdos, said that when he saw the two persons dressed in green he did not identify them as soldiers nor did he see their weapons and therefore walked on openly, exposed, until shots were fired by the

defendants. We should also recall that the witness Moshe gave evidence that the members of the Organization do not carry arms openly. The phrase "carrying arms openly" is not to be understood to mean carrying arms in places where the arms and the persons carrying them cannot be seen, or carrying arms, such as Kalatchnikov assault rifles, in the course of using them in an engagement. Accordingly it does not seem to us that the members of the Front for the Liberation of Palestine can be held to carry arms openly.

(d) *They conduct their operations in accordance with the laws and customs of war*

This condition is most essential. Let us note only that its non-fulfilment completely precludes any possible claim to lawful belligerency. Lawful belligerency is incompatible with disregard of the rules and customs of war.

In fact, if we give thought to the matter, we shall see that all the above conditions must also apply, as in fact they do, to regular forces. The Manual of Military Law, p. 34, paragraph 96, says:

> "Should regular combatants fail to comply with these four conditions, they must in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture."

Let us now try to determine, briefly and far from exhaustively, what the phrase "in accordance with the laws and customs of war" means.

The laws and customs of war stem from two sources. One is a series of agreements and Conventions concluded between States, from the St. Petersburg Declaration of 1868 to the Geneva Convention of 1949. The other is a body of unwritten rules of behaviour accepted by civilized nations in times of war and armed conflict.

* * * * *

From all the foregoing, it is not difficult to answer the submission of counsel for the defence that a handful of persons operating alone and themselves fulfilling the conditions of Article 4A(2) of the Convention may also be accorded the status of prisoners of war. Our answer does not follow the line of reasoning of learned counsel.

From the judgment in *Mohamed Ali and Another v. Public Prosecutor* [1968] 3 All E.R. 488, it may be inferred that — as we know from the basic provisions of international law — a soldier, even a regular soldier, may exclude himself from the status of a protected combatant if, by his behaviour, he divests himself of the character as such — in the *Mohamed Ali* case by the fact that he and his associates put on civilian clothes and went to Singapore to carry out an act of sabotage and as a result civilians were injured and killed. By the same token, it may be said that a person or body of persons not fulfilling the conditions of Article 4A(2) of the Convention can never be regarded as lawful combatants even if they proclaim their readiness to fight in accordance with its terms. He who adorns himself with peacock's feathers does not thereby become a peacock.

* * * * *

If we now consider the facts we have found on the evidence of the witness

for the prosecution, Moshe, as above, we see that the body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of customary International Law accepted by civilized nations.

The attack upon civilian objectives and the murder of civilians in Mahne Yehuda Market, Jerusalem, the Night of the Grenades in Jerusalem, the placing of grenades and destructive charges in Tel Aviv Central Bus Station, etc., were all wanton acts of terrorism aimed at men, women and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of International Law and, according to the authorities quoted, are crimes for which their perpetrators must pay the penalty. Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.

The presence of civilian clothes among the effects of the defendants is, in the absence of any reasonable explanation, indicative of their intent to switch from the role of unprotected combatants to that of common criminals. Acts involving the murder of innocent peoples, such as the attack on the aircraft at Athens and Zurich airports, are abundant testimony of this.

International Law is not designed to protect and grant rights to saboteurs and criminals. The defendants have no right except to stand trial in court and to be tried in accordance with the law and with the facts established by the evidence, in proceedings consonant with the requirements of ethics and International Law.

We therefore reject the plea of the defendants as to their right to be treated as prisoners of war and hold that we are competent to hear the case in accordance with the charge-sheet.

DOCUMENT NO. 161

RESOLUTION XI, "PROTECTION OF PRISONERS OF WAR," ADOPTED BY THE XXIst INTERNATIONAL CONFERENCE OF THE RED CROSS (Istanbul, September 1969)

SOURCES

Report of the XXIst International Conference of the Red Cross, Istanbul, 1969, at 97
9 IRRC 614 (1969)

NOTE

The Report of the XXIst International Conference of the Red Cross, held in Istanbul in September 1969, does not indicate the particular problem with which it was concerned when the Conference considered and adopted Resolution XI. There were, at the time, only a few, almost accidental, prisoners of war in the Middle East. The major area in which prisoner-of-war problems were presented and where the International Committee of the Red Cross (ICRC) was not permitted to perform its normal humanitarian functions, including inspections of the facilities in which prisoners of war were confined and investigations of the treatment which they were receiving, was, of course, North Vietnam. (See DOCUMENT NO. 147.)

TEXT

XI

Protection of Prisoners of War

The XXIst International Conference of the Red Cross,

recalling the Third Geneva Convention of 1949 on the treatment of prisoners of war, and the historic role of the Red Cross as a protector of victims of war,

considering that the Convention applies to any armed conflict of whatsoever nature between two or more parties to the Convention,

recognizing that, irrespective of the Convention, the international community has consistently demanded humane treatment for prisoners of war, including identification and accounting for all prisoners, provision of an adequate diet and medical care, authorisation for prisoners to communicate with each other and with the exterior, the prompt repatriation of seriously sick or wounded prisoners, and protection at all times from physical and mental torture, abuse and reprisals,

requests each party to the Convention to take all appropriate measures to ensure humane treatment and prevent violations of the Convention,

calls upon all parties to honour the obligations set forth in the Convention and upon all authorities involved in an armed conflict to ensure that all uniformed members of the regular armed forces of another party to the conflict and all other persons entitled to prisoner of war status are treated

humanely and given the fullest measure of protection prescribed by the Convention, and further calls upon all parties to allow the Protecting Power or the International Committee of the Red Cross free access to prisoners of war and to all places of their detention.

DOCUMENT NO. 162

RESOLUTION XIII, "REAFFIRMATION AND DEVELOPMENT OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICTS," ADOPTED BY THE XXIst INTERNATIONAL CONFERENCE OF THE RED CROSS (Istanbul, September 1969)

SOURCES

Report of the XXIst International Conference of the Red Cross, Istanbul, 1969, at 98
9 IRRC 615 (1969)

NOTE

The title of this resolution was derived from a report submitted by the International Committee of the Red Cross (ICRC) to the XXIst International Conference of the Red Cross, meeting at Istanbul in September 1969. (The title has since undergone a slight change. See, for example, DOCUMENT NO. 169.) While the ICRC report indicated that it saw no immediate needs in the area of the law pertaining to the treatment of prisoners of war, the proposed rules which evolved from the meetings of the various specialized groups of experts which followed the adoption of this resolution included a number which either were directly concerned with the prisoners of war or had an indirect impact on their treatment. So successful was the work of the ICRC which took place subsequent to the adoption of this resolution that when the XXIInd International Conference of the Red Cross met in Teheran in November 1973 and adopted a somewhat-similarly titled resolution (DOCUMENT NO. 169), the Swiss Government had already convoked a Diplomatic Conference to deliberate on the subject. The 1977 Geneva Protocol I (DOCUMENT NO. 175) was the ultimate result of these efforts.

TEXT

XIII

Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts

The XXIst International Conference of the Red Cross,

considering that armed conflicts and other forms of violence which continue to rage in the world, continuously imperil peace and the values of humanity,

noting that, in order to strive against such dangers, the limits imposed upon the waging of hostilities by the requirements of humanity and the dictates of the public conscience should be continuously reaffirmed and defined,

recalling the resolutions previously adopted on this matter by International Conferences of the Red Cross and, in particular, Resolution No. XXVIII of the XXth International Conference,

recognizing the importance of the United Nations General Assembly Resolution No. 2444 adopted on 19 December 1968 on respect for human rights in armed conflicts, as well as Resolution No. 2454 adopted on 20 December 1968,

having taken note with gratitude of the work undertaken by the ICRC in this field, following Resolution No. XXVIII of the XXth International Conference and, in particular, of the extensive report which the ICRC has prepared on this subject,

underlines the necessity and the urgency of reaffirming and developing humanitarian rules of international law applicable in armed conflicts of all kinds, in order to strengthen the effective protection of the fundamental rights of human beings, in keeping with the Geneva Conventions of 1949,

requests the ICRC on the basis of its report to pursue actively its efforts in this regard with a view to

1. proposing, as soon as possible, concrete rules which would supplement the existing humanitarian law,
2. inviting governmental, Red Cross and other experts representing the principal legal and social systems in the world to meet for consultations with the ICRC on these proposals,
3. submitting such proposals to Governments for their comments, and,
4. if it is deemed desirable, recommending the appropriate authorities to convene one or more diplomatic conferences of States parties to the Geneva Conventions and other interested States, in order to elaborate international legal instruments incorporating those proposals.

DOCUMENT NO. 163

UNITED STATES MILITARY ASSISTANCE COMMAND, VIETNAM. DIRECTIVE NO. 190-6, MILITARY POLICE: ICRC INSPECTIONS OF DETAINEE/ PRISONER OF WAR FACILITIES (22 September 1970)

SOURCE

National Archives of the United States

NOTE

Article 126 of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) requires that representatives of the Protecting Power and of the International Committee of the Red Cross (ICRC) be permitted to visit all places where prisoners of war are held by the Detaining Power. During the U.S. involvement in the hostilities in Vietnam (c.1965-1973), there were no Protecting Powers. Although the ICRC was not permitted to perform its humanitarian functions in the territory controlled by the North Vietnamese or by the Viet Cong (see NOTE in DOCUMENT NO. 147), it was permitted to do so throughout the territory controlled by the Republic of Vietnam. The directive reproduced below was the implementation by the senior U.S. headquarters in Vietnam, Military Assistance Command, Vietnam (MACV), of the authority for ICRC representatives to visit and inspect prisoner-of-war facilities in the Republic of Vietnam. (For the difficulties in this respect encountered by the Protecting Power in Japan during World War II (1941-1945), see DOCUMENT NO. 101 under the rubric "Ill-Treatment of Prisoners of War and Civilian Internees was Condoned and Concealed.")

EXTRACTS

1. *PURPOSE.* This directive establishes policies, responsibilities, and procedures in connection with inspections of detainee/prisoner of war (PW) facilities in the Republic of Vietnam (RVN) by the International Committee of the Red Cross (ICRC).

2. *APPLICABILITY.* This directive is applicable to all commands responsible for US Forces operated detainee/PW facilities and Army advisory groups responsible for advising facilities at which detainees/PW may be temporarily or permanently detained.

* * * * *

4. *POLICY.*
   a. All personnel detained are to be extended the full protection of the Genva Conventions of 12 August 1949.
   b. The Saigon delegation of the ICRC is recognized as the representative of the protecting power and is authorized to inspect all detainee/PW facilities in the RVN.
   c. Violations of the Geneva Conventions are considered serious

breaches of international law and every effort is to be made by commanders and advisors to insure full compliance.

* * * * *

5. *RESPONSIBILITIES.*

* * * * *

d. CG, USARV, is to establish necessary procedures at all US Forces operated detainee/PW facilities within his jurisdiction to insure that:
   (1) Proper escort of ICRC delegates is provided.
   (2) Adequate copies of the Geneva Conventions are available to detainees/PW.
   (3) The Geneva Conventions are complied with.

6. *PROCEDURES.*

a. Upon receipt of proposed itinerary of the ICRC delegation, MACPM is to:
   (1) Request transportation from Chief, Army Aviation Support Branch, J-3, MACV.
   (2) Appoint an escort officer to accompany the delegation.

b. If the inspection concerns a US facility, MACPM is to notify CG, USARV, and request that he:
   (1) Arrange for local transportation, meals, and billets as required.
   (2) Appoint an escort officer to accompany the delegation.

7. *REPORTS*

a. US Facilities. The USARV escort officer is to record discrepancies noted by the ICRC in detail on Part I of MACV Form 453 . . . and forward the form to the subordinate command responsible for the facility. The responsible commander is to insure that the PW facility commander conducts an investigation of reported discrepancies. The PW facility commander will record the results of his investigation, in detail, to include corrective action taken on Part II of the form. Included in this report will be a complete explanation of any discrepancies determined to be unfounded during the investigation. CG, USARV, is to record any additional corrective action taken at his level and forward the form to this headquarters. . . .

DOCUMENT NO. 164

INSTRUMENT OF SURRENDER BY THE PAKISTANI EASTERN COMMAND TO THE INDIAN AND BANGLADESH FORCES (16 December 1971)

SOURCE

New York Times, 17 December 1971, at 1, col. 4-5

NOTE

This is the instrument which brought to an end the December (1971) War between India and Pakistan in what had been East Pakistan and now became the sovereign state of Bangladesh. Perhaps the war had been so short that no Indians had been made prisoners of war by the Pakistanis; or perhaps when this instrument was signed the Indians had already recovered their prisoners of war. Whatever the reason, unlike most capitulations of this nature (see, for example DOCUMENT NO. 50 and DOCUMENT NO. 64), no provision is made here for the release of the victor's personnel.

EXTRACTS

The Pakistani Eastern Command agree to surrender all Pakistani armed forces in Bangladesh to Lieut. Gen. Jagjit Singh Aurora, general officer commanding in chief of the Indian and Bangladesh forces in the eastern theater.

* * * * *

Lieut. Gen. Jagjit Singh Aurora gives his solemn assurance that personnel who surrender shall be treated with dignity and respect that soldiers are entitled to in accordance with the provisions of the Geneva [Prisoners-of-War] convention and guarantees safety and well-being of all Pakistani military and paramilitary forces who surrender.

DOCUMENT NO. 165

TELEGRAPH REGULATIONS (Geneva, 11 April 1973) ANNEXED TO THE INTERNATIONAL TELECOMMUNICATIONS CONVENTION (Malaga-Torremolinos, 25 October 1973); and RECOMMENDATIONS OF THE INTERNATIONAL TELEGRAPH AND TELEPHONE CONSULTATIVE COMMITTEE (Geneva, December 1972)

SOURCES

Final Acts of the World Administrative Telegraph and Telephone Conference (Geneva, 1973)

International Telecommunications Convention (Malaga-Torremolinos, 1973): TIAS 8572

International Telegraph and Telephone Consultative Committee, Green Book, Vth Plenary Assembly, Geneva, 1972, IIB, at 43

NOTE

Article 71(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) specifies that prisoners of war shall, under certain circumstances, be permitted to send telegrams, "the fees being charged against the prisoners of war's accounts." Article 74(5) thereof directs the Parties to endeavor to reduce the rates charged for telegrams from or to prisoners of war. Article 81(4) required that telegraphic facilities likewise be made available to the prisoners' representatives for communicating with the Detaining Power and with various protective agencies. And, finally, Article 124 provides that the National Prisoner of War Information Bureau (see Article 122) and the Central Prisoner of War Information Agency (see Article 123) shall, so far as possible, receive exemptions from charges, or greatly reduced rates, for telegraphic services. Resolution 23 of the XVIIIth International Conference of the Red Cross, held in Toronto in 1952 (DOCUMENT NO. 124), requested the International Telecommunications Union (ITU) to take these provisions into consideration in its scheduled meeting to draft new regulations. The Telegraph Regulations (Geneva Revision, 1958), annexed to the International Telecommunications Convention (Buenos Aires, 1952), which were thereafter drafted by the ITU, did, in fact, provide for rate reductions of 75% for prisoners of war and the institutions mentioned above. These matters are now dealt with in the current versions of the Convention and Regulations and, more specifically in Recommendation F.1 of the International Telegraph and Telephone Consultative Committee (CCITT). (For another proposed method for reducing the cost of prisoner-of-war telegrams, see DOCUMENT NO. 159.)

EXTRACTS

TELEGRAPH REGULATIONS:

Article 4

Service offered to users

1. (1) The following classes of telegrams shall be obligatory in the international telegram service:

* * * * *

4. Telegrams concerning persons protected in time of war by the Geneva Conventions of 12 August 1949.

* * * * *

(2) Provisions concerning these classes of telegrams are contained in the Annex.

ANNEX TO THE TELEGRAPH REGULATIONS:

* * * * *

4. Telegrams concerning persons protected in time of war by the Geneva Conventions of 12 August 1949.

4.1. These shall include:

(a) Telegrams addressed to prisoners of war, civilian internees or their representatives (prisoners' representatives, internee committees) by recognized relief societies assisting war victims;

(b) Telegrams which prisoners of war and civilian internees are permitted to send or those sent by their representatives (prisoners' representatives, internee committees) in the course of their duties under the Conventions;

(c) Telegrams sent in the course of their duties under the Conventions by the National Information Bureaux or the Central Information Agency for which provision is made in the Geneva Conventions, 12 August 1949, or by delegations of such Bureaux or Agency, concerning prisoners of war, civilians who are interned or whose liberty is restricted, or the death of military personnel or civilians in the course of hostilities.

4.2. Telegrams sent by prisoners of war, civilian internees or their representatives shall bear the official stamp of the camp or the signature of the camp commander or one of his deputies.

4.3. Telegrams sent by the above-mentioned Bureaux or Agency, or by delegations thereof, as well as telegrams sent by recognized relief societies assisting war victims, shall bear the official stamp of the Bureau, Agency, delegation or society which sends them.

RECOMMENDATION F.1 OF THE CCITT:

Operational provisions for the international public telegram service.

* * * * *

X. Obligatory telegrams:

* * * * *

4. *Telegrams concerning persons protected in time of war by the Geneva Conventions of 12 August 1949*

4.1. In the following telegrams the service indication RCT shall be shown before the address:

4.1.1 telegrams addressed to prisoners of war, civilian internees or their representatives (prisoners' representatives, internee committees) by recognized relief societies assisting war victims;

4.1.2 telegrams which prisoners of war and civilian internees are permitted to send or those sent by their representatives (prisoners' representatives, internee committees) in the course of their duties under the Convention;

4.1.3 telegrams sent in the course of their duties under the Conventions by the national information bureaux or the Central Information Agency for which provision is made in the Geneva Conventions, or by delegations of such bureaux or Agency, concerning prisoners of war, civilians who are interned or whose liberty is restricted, or the death of military personnel or civilians in the course of hostilities.

4.2 In telegrams bearing the service indication RCT the only special services which shall be admitted are the following: urgent transmission and delivery (URGENT), prepaid reply (RPx), request for confirmation of delivery (PC) (if such services are recognized by the country of origin and destination).

4.3 The terminal and transit rates applicable to telegrams bearing the service indication RCT shall be those of ordinary private telegrams reduced by 75 per cent.

4.4 The terminal and transit rates per word applicable to telegrams bearing the service indications URGENT RCT shall be the same as that for an ordinary private telegram over the same route.

4.5 The minimum number of chargeable words for telegrams bearing the service indication RCT shall be the same as for ordinary private telegrams.

4.6 As regards priority of transmission and delivery, RCT telegrams shall rank with ordinary private telegrams of the same priority.

4.7 Telegrams sent by prisoners of war, civilian internees or their representatives shall bear the official stamp of the camp or the signature of the camp commandant or one of his deputies.

4.8 Telegrams sent by the national information bureaux and the Central Information Agency for which provision is made in the Geneva Conventions, or by delegations thereof, as well as telegrams sent by recognized relief societies assisting war victims, shall bear the official stamp of the bureau, agency, delegation or society which sends them.

DOCUMENT NO. 166

AGREEMENT ON ENDING THE WAR AND RESTORING PEACE IN VIETNAM BETWEEN THE UNITED STATES OF AMERICA, THE REPUBLIC OF VIETNAM, THE DEMOCRATIC REPUBLIC OF VIETNAM, AND THE PROVISIONAL REVOLUTIONARY GOVERNMENT OF THE REPUBLIC OF VIETNAM; WITH A PROTOCOL CONCERNING THE RETURN OF CAPTURED MILITARY PERSONNEL AND FOREIGN CIVILIANS AND DETAINED VIETNAMESE CIVILIAN PERSONNEL

(Paris, 27 January 1973)

SOURCES
24 UST 1
12 ILM 48

NOTE

These are among the agreements which ended the participation of the United States in the hostilities in Vietnam (c. 1965-1973) and which purported to end those hostilities in their entirety. There is a second, identical, Protocol, not reproduced herein, to which only the United States and the Democratic Republic of Vietnam (North Vietnam) are Parties. (The 1954 Agreement on the Cessation of Hostilities in Vietnam, referred to in Article 8(c) of the present Agreement, is reproduced in pertinent part as DOCUMENT NO. 129.)

EXTRACTS

AGREEMENT:

Chapter III
THE RETURN OF CAPTURED MILITARY PERSONNEL AND FOREIGN CIVILIANS, AND CAPTURED AND DETAINED VIETNAMESE CIVILIAN PERSONNEL

Article 8

(a) The return of captured military personnel and foreign civilians of the parties shall be carried out simultaneously with and completed not later than the same day as the troop withdrawal mentioned in Article 5. The parties shall exchange complete lists of the above-mentioned captured military personnel and foreign civilians on the day of the signing of this Agreement.

(b) The parties shall help each other to get information about those military personnel and foreign civilians of the parties missing in action, to determine the location and take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains, and to take any such other measures as may be required to get information about those still considered missing in action.

(c) The question of the return of Vietnamese civilian personnel captured and detained in South Viet-Nam will be resolved by the two South Viet-

namese parties on the basis of the principles of Article 21 (b) of the Agreement on the Cessation of Hostilities in Viet-Nam of July 20, 1954. The two South Vietnamese parties will do so in a spirit of national reconciliation and concord, with a view to ending hatred and enmity, in order to ease suffering and to reunite families. The two South Vietnamese parties will do their utmost to resolve this question within ninety days after the cease-fire comes into effect.

PROTOCOL:

The Parties participating in the Paris Conference on Viet-Nam,

In implementation of Article 8 of the Agreement on Ending the War and Restoring Peace in Viet-Nam signed on this date providing for the return of captured military personnel and foreign civilians, and captured and detained Vietnamese civilian personnel,

Have agreed as follows:

The Return of Captured Military Personnel and Foreign Civilians

Article 1

The parties signatory to the Agreement shall return the captured military personnel of the parties mentioned in Article 8 (a) of the Agreement as follows:

— all captured military personnel of the United States and those of the other foreign countries mentioned in Article 3 (a) of the Agreement shall be returned to United States authorities;

— all captured Vietnamese military personnel, whether belonging to regular or irregular armed forces, shall be returned to the two South Vietnamese parties; they shall be returned to that South Vietnamese party under whose command they served.

Article 2

All captured civilians who are nationals of the United States or of any other foreign countries mentioned in Article 3 (a) of the Agreement shall be returned to United States authorities. All other captured foreign civilians shall be returned to the authorities of their country of nationality by any one of the parties willing and able to do so.

Article 3

The parties shall today exchange complete lists of captured persons mentioned in Articles 1 and 2 of this Protocol.

Article 4

(a) The return of all captured persons mentioned in Articles 1 and 2 of this Protocol shall be completed within sixty days of the signing of the Agreement at a rate no slower than the rate of withdrawal from South Viet-Nam of United States forces and those of the other foreign countries mentioned in Article 5 of the Agreement.

(b) Persons who are seriously ill, wounded or maimed, old persons and women shall be returned first. The remainder shall be returned either by returning all from one detention place after another or in order of their dates of capture, beginning with those who have been held the longest.

Article 5

The return and reception of the persons mentioned in Articles 1 and 2 of this Protocol shall be carried out at places convenient to the concerned parties. Places of return shall be agreed upon by the Four-Party Joint Military Commission. The parties shall ensure the safety of personnel engaged in the return and reception of those persons.

Article 6

Each party shall return all captured persons mentioned in Articles 1 and 2 of this Protocol without delay and shall facilitate their return and reception. The detaining parties shall not deny or delay their return for any reason, including the fact that captured persons may, on any grounds, have been prosecuted or sentenced.

* * * * *

Treatment of Captured Persons During Detention

Article 8

(a) All captured military personnel of the parties and captured foreign civilians of the parties shall be treated humanely at all times, and in accordance with international practice.

They shall be protected against all violence to life and person, in particular against murder in any form, mutilation, torture and cruel treatment, and outrages upon personal dignity. These persons shall not be forced to join the armed forces of the detaining party.

They shall be given adequate food, clothing, shelter, and the medical attention required for their state of health. They shall be allowed to exchange post cards and letters with their families and receive parcels.

(b) All Vietnamese civilian personnel captured and detained in South Viet-Nam shall be treated humanely at all times, and in accordance with international practice.

They shall be protected against all violence to life and person, in particular against murder in any form, mutilation, torture and cruel treatment, and outrages against personal dignity. The detaining parties shall not deny or delay their return for any reason, including the fact that captured persons may, on any grounds, have been prosecuted or sentenced. These persons shall not be forced to join the armed forces of the detaining party.

They shall be given adequate food, clothing, shelter and the medical attention required for their state of health. They shall be allowed to exchange post cards and letters with their families and receive parcels.

Article 9

(a) To contribute to improving the living conditions of the captured military personnel of the parties and foreign civilians of the parties, the parties shall, within fifteen days after the cease-fire comes into effect, agree upon the designation of two or more national Red Cross societies to visit all places where captured military personnel and foreign civilians are held.

(b) To contribute to improving the living conditions of the captured and detained Vietnamese civilian personnel, the two South Vietnamese parties shall, within fifteen days after the cease-fire comes into effect, agree upon the

designation of two or more national Red Cross societies to visit all places where the captured and detained Vietnamese civilian personnel are held.

With Regard to Dead and Missing Persons

Article 10

(a) The Four-Party Joint Military Commission shall ensure joint action by the parties in implementing Article 8 (b) of the Agreement. When the Four-Party Joint Military Commission has ended its activities, a Four-Party Joint Military team shall be maintained to carry on this task.

(b) With regard to Vietnamese civilian personnel dead or missing in South Viet-Nam, the two South Vietnamese parties shall help each other to obtain information about missing persons, determine the location and take care of the graves of the dead, in a spirit of national reconciliation and concord, in keeping with the people's aspirations.

Other Provisions

Article 11

(a) The Four-Party and Two-Party Joint Military Commissions will have the responsibility of determining immediately the modalities of implementing the provisions of this Protocol consistent with their respective responsibilities under Article 16 (a) and 17 (a) of the Agreement. In case the Joint Military Commissions, when carrying out their tasks, cannot reach agreement on a matter pertaining to the return of captured personnel they shall refer to the International Commission for its assistance.

(b) The Four-Party Joint Military Commission shall form, in addition to the teams established by the Protocol concerning the cease-fire in South Viet-Nam and the Joint Military Commissions, a sub-commisison on captured persons and, as required, joint military teams on captured persons to assist the Commission in its tasks.

(c) From the time the cease-fire comes into force to the time when the Two-Party Joint Military Commission becomes operational, the two South Vietnamese parties' delegations to the Four-Party Joint Military Commission shall form a provisional sub-commission and provisional joint military teams to carry out its tasks concerning captured and detained Vietnamese civilian personnel.

(d) The Four-Party Joint Military Commission shall send joint military teams to observe the return of the persons mentioned in Articles 1 and 2 of this Protocol at each place in Viet-Nam where such persons are being returned, and at the last detention places from which these persons will be taken to the places of return. The Two-Party Joint Military Commission shall send joint military teams to observe the return of Vietnamese civilian personnel captured and detained at each place in South Viet-Nam where such persons are being returned, and at the last detention places from which these persons will be taken to the places of return.

Article 12

In implementation of Articles 18 (b) and 18 (c) of the Agreement, the International Commission of Control and Supervision shall have the responsibility to control and supervise the observance of Articles 1 through 7 of this

Protocol through observation of the return of captured military personnel, foreign civilians and captured and detained Vietnamese civilian personnel at each place in Viet-Nam where these persons are being returned, and at the last detention places from which these persons will be taken to the places of return, the examination of lists, and the investigation of violations of the provisions of the above-mentioned Articles.

Article 13

Within five days after signature of this Protocol, each party shall publish the text of the Protocol and communicate it to all the captured persons covered by the Protocol and being detained by that party.

Article 14

This Protocol shall come into force upon signature by plenipotentiary representatives of all the parties participating in the Paris Conference on Viet-nam. It shall be stricly implemented by all the parties concerned.

DOCUMENT NO. 167

DELHI AGREEMENT BETWEEN INDIA AND PAKISTAN FOR THE REPATRIATION OF PRISONERS OF WAR
(28 August 1973)

SOURCE
12 ILM 1080 (1973)

NOTE

Upon the capitulation of the Pakistani military forces in Bangladesh (previously East Pakistan) on 16 December 1971 (see DOCUMENT NO. 164), approximately 90,000 members of the Pakistani armed forces were taken into custody and removed to prisoner-of-war camps in India. Article 118(1) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) provides for the release and repatriation of prisoners of war "without delay after the cessation of active hostilities." The Security Council of the United Nations determined on 21 December 1971 that "a cease fire and cessation of hostilities prevail" between India and Pakistan. (S/RES 307, 21 December 1971; 66 AJIL 710 (1972).) Nevertheless, it was only as a result of this Delhi Agreement, entered into more than 20 months after the actual cessation of hostilities, that the repatriation of the Pakistani prisoners of war held in India began. Many of them had been prisoners of war for well over two years after the cessation of hostilities before their turn for repatriation was reached late in the spring of 1974.

EXTRACTS

* * * * *

Desirous of solving the humanitarian problems resulting from the conflict of 1971 and thus enabling the vast majority of human beings referred to in the joint Indo-Bangladesh declaration to go to their respective countries, India and Pakistan have reached the following agreement:

(1) The immediate implementation of the solution of those humanitarian problems is without prejudice to the respective positions of the parties concerned relating to the case of 195 prisoners of war referred to in clauses 6 and 7 of this paragraph;

(2) Subject to clause (1), repatriation of all Pakistani prisoners of war and civilian internees will commence with utmost despatch as soon as logistic arrangements are completed and from a date to be settled by mutual agreement;

(3) Simultaneously repatriation of all Bangalees in Pakistan, and all Pakistanis in Bangladesh referred to in clause (5) below, to their respective countries will commence.

(4) In the matter of repatriation of all categories of persons the principle of simultaneity will be observed throughout as far as possible.

* * * * *

(6) Bangladesh agreed that no trials of 195 prisoners of war shall take place during the entire period of repatriation and that pending a settlement envisaged in clause (6) [*sic*] below, these prisoners of war shall remain in India.

(7) On completion of repatriation of Pakistani prisoners of war and civilian internees in India, Bangalees in Pakistan and Pakistanis in Bangladesh referred to in clause (5) above, or earlier if they so agree, Bangladesh, India and Pakistan will discuss and settle question of 195 prisoners of war. Bangladesh has made it clear that it can participate in such a meeting only on the basis of soveriegn equality.

The special representatives are confident that the completion of repatriation provided for in this agreement would make a signal contribution to the promotion of reconciliation in the sub-continent and create an atmosphere favourable to a constructive outcome of the meeting of the three countries.

(8) The time schedule for completion of repatriation of Pakistani prisoners of war and civilian internees from India, Bangalees from Pakistan, and Pakistanis referred to in clause (5) above from Bangladesh, will be worked out by India in consultation with Bangladesh and Pakistan, as the case may be. The Government of India will make logistic arrangements for Pakistani prisoners of war and civilian internees who are to be repatriated to Pakistan. The Government of Pakistan will make logistic arrangements within its territory up to agreed points of exit for repatriation of Bangladesh nationals to Bangladesh. The Government of Bangladesh will make necessary arrangements for transport of these persons from such agreed points of exit to Bangladesh. The Government of Bangladesh will make logistic arrangements within its territory up to agreed points of exit for the movement of Pakistanis referred to in clause (5) above who will go to Pakistan. The Government of Pakistan will make necessary arrangements for transport of these persons from such agreed points of exit to Pakistan. In making logistic arrangements the Governments concerned may seek the assistance of international humanitarian organisations and others.

(9) For the repatriation provided for in this agreement, representatives of the Swiss Federal Government and any international humanitarian organisation entrusted with this task shall have unrestricted access at all times to Bangalees in Pakistan and to Pakistanis in Bangladesh referred to in clause (5) above. The Government of Bangladesh and the Government of Pakistan will provide all assistance and facilities to such representatives in this regard including facilities for adequate publicity for the benefit of persons entitled to repatriation under this agreement.

(10) All persons to be repatriated in accordance with this agreement will be treated with humanity and consideration. The Government of India and Government of Pakistan have concurred in this agreement. The special representative of the Prime Minister of India, having consulted the Government of Bangladesh, has also conveyed the concurrence of the Bangladesh Government in this agreement.

DOCUMENT NO. 168

RESOLUTION XII, "IMPLEMENTATION AND DISSEMINATION OF THE [1949] GENEVA CONVENTIONS," ADOPTED BY THE XXIInd INTERNATIONAL CONFERENCE OF THE RED CROSS (Teheran, November 1973)

SOURCES

Report of the XXIInd International Conference of the Red Cross, Teheran, November 1973, at 121
14 IRRC 28 (1974)

NOTE

For many years the International Committee of the Red Cross (ICRC) has been justifiably concerned with the problem of the implementation and dissemination of the 1949 Geneva Conventions, including the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). It has been particularly concerned that Parties have largely ignored the requirements of Article 127(1) of the Convention pursuant to which they have agreed to disseminate the text of the Convention and to conduct instruction thereon, in time of peace as well as in time of war. The ICRC has also been concerned because of the Convention's failure to provide for reports by the Parties with respect to the actions taken by them in compliance with the requirements of Article 127(1). A resolution on this subject was adopted by the XXth International Conference of the Red Cross, held at Vienna in 1965 (DOCUMENT NO. 145). The present resolution is another attempt to ensure broad public awareness of the provisions of the Convention. (See also Article 83 of the 1977 Geneva Protocol I (DOCUMENT NO. 175.) (A conference on ways and means of ensuring dissemination of and instruction on the Convention was held in Warsaw in 1977.)

TEXT

XII

Implementation and Dissemination of the Geneva Conventions

The XXIInd International Conference of the Red Cross,

convinced that, in a world torn by violence, there is a pressing need for a widespread dissemination of and instruction in the Geneva Conventions, as an expression of basic Red Cross principles, and hence a factor for peace,

aware that, owing to its educational nature, such dissemination and instruction is particularly important among the armed forces and youth,

recalling the resolutions on the subject of dissemination adopted by previous International Conferences of the Red Cross and in particular Resolution No. XXI of the XXth International Conference held at Vienna in 1965,

noting with gratification the work already accomplished in the dissemination of the Geneva Conventions by some governments, numerous National Societies and the ICRC,

calls upon governments and National Societies to intensify their efforts with a view, on the one hand, to making known to the population as a whole the basic principles of the Red Cross and international humanitarian law by all effective means available to competent authorities at all levels, and on the other hand, to imparting clear concepts regarding the Geneva Conventions to specialized spheres such as the armed forces, civil administrations, institutes of higher learning, the medical and para-medical professions, etc.,

appeals to governments and National Societies to inform the ICRC regularly of their achievements and their projects, in order that it may centralize all information on the dissemination of, and instruction in, the Geneva Conventions in the world,

request the ICRC to support the efforts of governments and National Societies in their dissemination of and instruction in the Geneva Conventions by:

(a) preparing information material suited to the spheres and areas it is proposed to reach (specialized and popular publications in various languages, posters, slides and films),

(b) advising National Societies who so wish regarding the establishment of their plans of action in this field,

(c) systematically making the achievements of governments and National Societies in the dissemination of, and the instruction in, the Geneva Conventions known in its reports and publications,

(d) itself organizing, or participating in, seminars for the training of specialists in international humanitarian law,

asks the ICRC also to examine the desirability and possibility of convening an *ad hoc* Conference on dissemination and instruction of the Geneva Conventions which would enable governments and National Societies to compare their respective experiences and devise new methods of action,

request governments and National Societies to co-operate fully with the ICRC in its efforts to bring about wider dissemination of, and effective instruction in, the Geneva Conventions,

thanks the ICRC for its action, since the XXIst International Conference, in giving the dissemination of, and instruction in, the Geneva Conventions a fresh impetus and for the support it has lent National Societies and governments.

DOCUMENT NO. 169

RESOLUTION XIII, "REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS," ADOPTED BY THE XXIInd INTERNATIONAL CONFERENCE OF THE RED CROSS (Teheran, November 1973)

SOURCES

Report of the XXIInd International Conference of the Red Cross, Teheran, November 1973, at 122
14 IRRC 30 (1974)

NOTE

After a number of years of work, and innumerable conferences of experts of various categories, the International Committee of the Red Cross (ICRC) evolved a "Draft Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts." The object of this draft was to provide additional humanitarian rules governing international armed conflict in the light of current methods and weapons of warfare. This Draft Protocol was presented to the XXIInd International Conference of the Red Cross, held in Teheran in November 1973. That Conference adopted the resolution set forth below which, in effect, urged all Governments to participate in the Diplomatic Conference which had already been convoked by the Swiss Government for the purpose of considering the Draft Protocol and to take all measures necessary to enable the Diplomatic Conference to successfully accomplish its mission. (For the Geneva Protocol I ultimately adopted by the Diplomatic Conference in 1977, after four sessions, see DOCUMENT NO. 175.)

TEXT

XIII

Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts

The XXIInd International Conference of the Red Cross,

conscious that armed conflicts continue to cause untold human suffering and material devastation,

convinced that the parties to all such conflicts need humanitarian rules designed to reduce the suffering as much as possible and to increase in the same way the protection of non-combatants and civilian objects,

aware that many modern means and methods of warfare have added to the need for a reaffirmation and development of present laws and customs applicable in armed conflicts.

confirming the dedication to these questions of the International Conferences of the Red Cross,

recalling, in particular, Resolution No. XIII of the XXIst International

Conference of the Red Cross,

noting, also, the successive resolutions adopted by the General Assembly of the United Nations on the item "Human Rights in Armed Conflicts", the latest being Resolution 3032 (XXVII), adopted on 18 December 1972,

welcoming the draft Additional Protocols to the Geneva Conventions of 1949, prepared by the ICRC after thorough consultations with government experts, particularly during conferences in Geneva in 1971 and 1972,

welcoming, further, the report presented by the ICRC on Weapons that may cause Unnecessary Suffering or have Indiscriminate Effects,

welcoming the decision of the Swiss Federal Council to convoke a Diplomatic Conference for the purpose of reaffirming and developing international humanitarian law applicable in armed conflicts,

considering that the draft Additional Protocols offer an excellent basis for discussion at the Diplomatic Conference,

expresses appreciation to the ICRC for the extensive work it has performed,

urges all governments to participate in the Diplomatic Conference,

urges the Diplomatic Conference to consider inviting national liberation movements recognized by regional intergovernmental organizations to participate in its work as observers in accordance with United Nations practice,

appeals to all governments to recognize their own long-term interests in humanitarian rules, which respond to the urgent needs to alleviate the suffering brought about by modern armed conflicts and the need to protect non-combatants in such conflicts and, for this purpose, to make use of the Diplomatic Conference to achieve substantial humanitarian gains,

appeals to all the participants at the Diplomatic Conference to be held in Geneva to do all in their power by co-operation and fruitful negotiations to secure the widest and swiftest adoption of the two Additional Protocols to the Geneva Conventions of 1949, as instruments of international humanitarian law effective on a universal basis.

DOCUMENT NO. 170

RESERVATIONS TO THE 1949 GENEVA PRISONER-OF-WAR CONVENTION MADE BY THE "PROVISIONAL REVOLUTIONARY GOVERNMENT OF SOUTH VIETNAM" AT THE TIME OF ACCESSION
(3 December 1973)

SOURCE

1975 Digest of United States Practice in International Law 812 (E. McDowell, ed.)

NOTE

During the hostilities in Vietnam the Viet Cong, through its political arm the "Provisional Revolutionary Government of South Vietnam" (PRG), steadfastly denied that it was bound by the humanitarian provisions of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108). However, late in 1973, after the United States had completely withdrawn from Vietnamese territory and hostilities were grinding to an end, the PRG notified the Swiss Government, the depository of the Convention, of its accession with reservations. While its reservations to Articles 10 and 12 of the Convention were quite similar to previous Communist reservations to these two articles (see, for example, DOCUMENT NO. 109), its reservation to Article 85 went considerably further than any previous reservation. In addition, it added a new and novel reservation to Article 4A(2), which is, in effect, not a reservation, but an attempt to rewrite the article. This is strikingly similar to the position taken by many of the new nations at the Geneva Diplomatic Conference which drafted the 1977 Geneva Protocol I (DOCUMENT NO. 175). While this "reservation" is of historical importance only as the "Provisional Revolutionary Government" has now merged with the Democratic Republic of Vietnam (North Vietnam), it is important as one clear sign of the strong movement to give prisoner-of-war status to anyone who fights as a member of a so-called "national liberation movement," even though his conduct would, under the existing laws and customs of war, label him an illegal and unprivileged combatant. (At least one other country, Guinea-Bissau, has made a reservation to Article 4A(2) similar to that made by the PRG.)

EXTRACTS

The following are the reservations stated by the P.R.G. in its notification of accession to the four Geneva Conventions:

* * * * *

Convention III — Convention Relative to the Treatment of Prisoners of War

Regarding Article 4: The P.R.G. does not recognize the "conditions" provided for under paragraph 2 of this Article concerning "Members of other

militias and members of other volunteer corps, including those of organized resistance movements" because these conditions are not appropriate for the cases of people's wars in the world today.

Regarding Article 10: The P.R.G. does not recognize as legal a request made by the detaining power either to a neutral country or to a humanitarian organization to undertake the functions performed by protecting powers unless the state of which the prisoners of war are nationals has approved this request in advance.

Regarding Article 12: The P.R.G. declares that the transfer of prisoners of war by the detaining power to a power which is a party to the Convention does not release the detaining power from its responsibility for the application of the Convention.

Regarding Article 85: The P.R.G. declares that prisoners of war prosecuted and convicted for crimes of aggression, crimes of genocide, war crimes, or crimes against humanity in accordance with the principles of the Nuremburg Court shall not benefit from the provisions of this Convention.

DOCUMENT NO. 171

UNITED STATES v. WILLIAM L. CALLEY, JR.
(U.S. Court of Military Appeals, 21 December 1973)

SOURCES

22 USCMA 534 (1973)
48 CMR 19 (1973)
(Habeas corpus granted *sub nomine* CALLEY v. CALLOWAY, 382 F. Supp. 650 (1974); rev'd 519 F 2d. 184 (1975); cert. den. *sub. nomine* CALLEY v. HOFFMAN, 425 U.S. 911 (1976))

NOTE

This case, involving the killing of a number of civilian villagers in My Lai, Vietnam, during the involvement of the United States in the hostilities in that country (c. 1965-1973), received widespread publicity in the United States and throughout the world. (The U.S. District Court granted a writ of habeas corpus on the basis, among others, that the publicity had made a fair trial impossible. The U.S. Court of Appeals reviewed that question at considerable length and reached the decision that the publicity had not infected the court-martial and it reversed the District Court. The U.S. Supreme Court denied certiorari.) Although, strictly speaking, the case does not involve a prisoner-of-war problem (the victims were probably all civilians and not members of any armed force, so that they did not have the status of prisoners of war when they were killed), extracts of the several opinions written by the three members of the U.S. Court of Military Appeals (the top of the military judicial hierarchy, composed of civilian judges) are presented here because of the discussion which they contain, and the problems which they exhibit, with respect to the defense of "superior orders."

EXTRACTS

OPINION

QUINN, Judge:

First Lieutenant Calley stands convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age. All the killings and the assault took place on March 16, 1968 in the area of the village of My Lai in the Republic of South Vietnam. The Army Court of Military Review affirmed the findings of guilty and the sentence, which, as reduced by the convening authority, includes dismissal and confinement at hard labor for 20 years. The accused petitioned this Court for further review, alleging 30 assignments of error. We granted three of these assignments.

Lieutenant Calley was a platoon leader in C Company, a unit that was part of an organization known as Task Force Barker, whose mission was to subdue and drive out the enemy in an area in the Republic of Vietnam known

popularly as Pinkville. Before March 16, 1968, this area, which included the village of My Lai 4, was a Viet Cong stronghold. C Company had operated in the area several times. Each time the unit had entered the area it suffered casualties by sniper fire, machine gun fire, mines, and other forms of attack. Lieutenant Calley had accompanied his platoon on some of the incursions.

On March 15, 1968, a memorial service for members of the company killed in the area during the preceding weeks was held. After the service Captain Ernest L. Medina, the commanding officer of C Company, briefed the company on a mission in the Pinkville area set for the next day. C Company was to serve as the main attack formation for Task Force Barker. In that role it would assault and neutralize My Lai 4, 5 and 6 and then mass for an assault on My Lai 1. Intelligence reports indicated that the unit would be opposed by a veteran enemy battalion, and that all civilians would be absent from the area. The objective was to destroy the enemy. Disagreement exists as to the instructions on the specifics of destruction.

Captain Medina testified that he instructed his troops that they were to destroy My Lai 4 by "burning the hootches, to kill the livestock, to close the wells and to destroy the food crops." Asked if women and children were to be killed, Medina said he replied in the negative, adding that, "You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use commonsense." However, Lieutenant Calley testified that Captain Medina informed the troops they were to kill every living thing — men, women, children, and animals — and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages enroute to their final objective. Other witnesses gave more or less support to both versions of the briefing.

On March 16, 1968, the operation began with interdicting fire. C Company was then brought to the area by helicopters. Lieutenant Calley's platoon was on the first lift. This platoon formed a defense perimeter until the remainder of the force was landed. The unit received no hostile fire from the village.

Calley's platoon passed the approaches to the village with his men firing heavily. Entering the village, the platoon encountered only unarmed, unresisting men, women, and children. The villagers, including infants held in their mothers' arms, were assembled and moved in separate groups to collection points. Calley testified that during this time he was radioed twice by Captain Medina, who demanded to know what was delaying the platoon. On being told that a large number of villagers had been detained, Calley said Medina ordered him to "waste them." Calley further testified that he obeyed the orders because he had been taught the doctrine of obedience throughout his military career. Medina denied that he gave any such order.

One of the collection points for the villagers was in the southern part of the village. There, Private First Class Paul D. Meadlo guarded a group of between 30 to 40 old men, women, and children. Lieutenant Calley approached Meadlo and told him, " 'You know what to do,' " and left. He returned shortly and asked Meadlo why the people were not yet dead. Meadlo replied he did not know that Calley had meant that they should be killed.

Calley declared that he wanted them dead. He and Meadlo then opened fire on the group, until all but a few children fell. Calley then personally shot these children. He expended 4 or 5 magazines from his M-16 rifle in the incident.

Lieutenant Calley and Meadlo moved from this point to an irrigation ditch on the east side of My Lai 4. There, they encountered another group of civilians being held by several soldiers. Meadlo estimated that this group contained from 75 to 100 persons. Calley stated, " 'We got another job to do, Meadlo,' " and he ordered the group into the ditch. When all were in the ditch, Calley and Meadlo opened fire on them. Although ordered by Calley to shoot, Private First Class James J. Dursi refused to join in the killings, and Specialist Four Robert E. Maples refused to give his machine gun to Calley for use in the killings. Lieutenant Calley admitted that he fired into the ditch, with the muzzle of his weapon within 5 feet of people in it. He expended between 10 to 15 magazines of ammunition on this occasion.

With his radio operator, Private Charles Sledge, Calley moved to the north end of the ditch. There, he found an elderly Vietnamese monk, whom he interrogated. Calley struck the man with his rifle butt and then shot him in the head. Other testimony indicates that immediately afterwards a young child was observed running toward the village. Calley seized him by the arm, threw him into the ditch, and fired at him. Calley admitted interrogating and striking the monk, but denied shooting him. He also denied the incident involving the child.

Appellate defense counsel contend that the evidence is insufficient to establish the accused's guilt. They do not dispute Calley's participation in the homicides, but they argue that he did not act with the malice of *mens rea* essential to a conviction of murder; that the orders he received to kill everyone in the village were not palpably illegal; that he was acting in ignorance of the laws of war; that since he was told that only "the enemy" would be in the village, his honest belief that there were no innocent civilians in the village exonerates him of criminal responsibility for their deaths; and, finally, that his actions were in the heat of passion caused by reasonable provocation.

* * * * *

The testimony of Meadlo and others provided the court members with ample evidence from which to find that Lieutenant Calley directed and personally participated in the intentional killing of men, women, and children, who were unarmed and in the custody of armed soldiers of C Company. If the prosecution's witnesses are believed, there is also ample evidence to support a finding that the accused deliberately shot the Vietnamese monk whom he interrogated, and that he seized, threw into a ditch, and fired on a child with the intent to kill.

Enemy prisoners are not subject to summary execution by their captors. Military law has long held that the killing of an unresisting prisoner is murder. Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, at 788-91.

While it is lawful to kill an enemy "in the heat and exercise of war," yet

"to kill such an enemy after he has laid down his arms . . . is murder." Digest of Opinions of the Judge Advocates General of the Army, 1912, at 1074-75 n.3.

Conceding for the purposes of this assignment of error that Calley believed the villagers were part of "the enemy," the uncontradicted evidence is that they were under the control of armed soldiers and were offering no resistance. In his testimony, Calley admitted he was aware of the requirement that prisoners be treated with respect. He also admitted he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves, and evacuate the suspect among them for further examination. Instead of proceeding in the usual way, Calley executed all, without regard to age, condition, or possibility of suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offenses before us.

At trial, Calley's principal defense was that he acted in execution of Captain Medina's order to kill everyone in My Lai 4. Appellate defense counsel urge this defense as the most important factor in assessment of the legal sufficiency of the evidence. The argument, however, is inapplicable to whether the evidence is *legally* sufficient. Captain Medina denied that he issued any such order, either during the previous day's briefing or on the date the killings were carried out. Resolution of the conflict between his testimony and that of the accused was for the triers of the facts. United States v Guerra, 13 USCMA 463, 32 CMR 403 (1963). The general findings of guilty, with exceptions as to the number of persons killed, does not indicate whether the court members found that Captain Medina did not issue the alleged order to kill, or whether, if he did, the court members believed that the accused knew the order was illegal. For the purpose of the legal sufficiency of the evidence, the record supports the findings of guilty.

In the third assignment of error, appellate defense counsel assert gross deficiencies in the military judge's instructions to the court members. Only two assertions merit discussion. . .

. . .the second allegation is that the defense of compliance with superior orders was not properly submitted to the court members.

* * * * *

We turn to the contention that the judge erred in his submission of the defense of superior orders to the court. After fairly summarizing the evidence, the judge gave the following instructions pertinent to the issue:

> The killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war, and you may consider any such killings justifiable in this case. The law attempts to protect those persons not actually engaged in warfare, however; and limits the circumstances under which their lives may be taken.
>
> Both combatants captured by and noncombatants detained by the opposing force, regardless of their loyalties, political views, or prior acts, have the right to be treated as prisoners until released, confined, or executed, in accordance with law and established procedures, by competent authority

sitting in judgment of such detained or captured individuals. Summary execution of detainees or prisoners is forbidden by law. Further, it's clear under the evidence presented in this case, that hostile acts or support of the enemy North Vietnamese or Viet Cong forces by inhabitants of My Lai (4) at some time prior to 16 March 1968, would not justify the summary execution of all or a part of the occupants of My Lai (4) on 16 March, nor would hostile acts committed that day, if, following the hostility, the belligerents, surrendered or were captured by our forces. I therefore instruct you, as a matter of law, that if unresisting human beings were killed at My Lai (4) while within the effective custody and control of our military forces, their deaths cannot be considered justified, and any order to kill such people would be, as a matter of law, an illegal order. Thus, if you find that Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, *that order would be an illegal order.*

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the order hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

* * * * *

. . .In determining what orders, if any, Lieutenant Calley acted under, if you find him to have acted, you should consider all of the matters which he has testified reached him and which you can infer from other evidence that he saw and heard. Then, unless you find beyond a reasonable doubt that he was not acting under orders directing him in substance and effect to kill unresisting occupants of My Lai (4), you must determine whether Lieutenant Calley actually knew those orders to be unlawful.

. . . In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lieutenant Calley's rank; educational background; OCS schooling; other training while in the Army, including basic training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lieutenant Calley knew the order was unlawful. If you find beyond a reasonable doubt, on the basis of all the

evidence that *Lieutenant Calley actually knew* the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

Unless you find beyond reasonable doubt that the accused acted with actual knowledge that the order was unlawful, you must proceed to determine whether, under the circumstances, *a man of ordinary sense and understanding would have known the order was unlawful. Your deliberations on this question do not focus on Lieutenant Calley and the manner in which he perceived the legality of the order found to have been given him. The standard is that of a man of ordinary sense and understanding under the circumstances.*

Think back to the events of 15 and 16 March 1968. . . Then determine, in light of all the surrounding circumstances, whether the order, which to reach this point you will have found him to be operating in accordance with, is one which a man of ordinary sense and understanding would know to be unlawful. Apply this to each charged act which you have found Lieutenant Calley to have committed. Unless you are satisfied from the evidence, beyond a reasonable doubt, that a man of ordinary sense and understanding would have known the order to be unlawful, you must acquit Lieutenant Calley for committing acts done in accordance with the order. (Emphasis added.)

Appellate defense counsel contend that these instructions are prejudicially erroneous in that they require the court members to determine that Lieutenant Calley knew that an order to kill human beings in the circumstances under which he killed was illegal by the standard of whether "a man of ordinary sense and understanding" would know the order was illegal. They urge us to adopt as the governing test whether the order is so palpably or manifestly illegal that a person of "the commonest understanding" would be aware of its illegality. They maintain the standard stated by the judge is too strict and unjust; that it confronts members of the armed forces who are not persons of ordinary sense and understanding with the dilemma of choosing between the penalty of death for disobedience of an order in time of war on the one hand and the equally serious punishment for obedience on the other. Some thoughtful commentators on military law have presented much the same argument.

The "ordinary sense and understanding" standard is set forth in the present Manual for Courts-Martial, United States, 1969 (Rev) and was the standard accepted by this Court in United States v Schultz, 18 USCMA 133, 39 CMR 133 (1969) and United States v Keenan, 18 USCMA 108, 39 CMR 108 (1969). It appeared as early as 1917. Manual for Courts-Martial, U.S. Army, 1917, paragraph 442. Apparently, it originated in a quotation from F. Wharton, Homicide § 485 (3d ed. 1907). Wharton's authority is Riggs v State, 3 Coldwell 85, 91 American Decisions 272, 273 (Tenn 1866), in which the court approved a charge to the jury as follows:

"[I]n its substance being clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given

that such order was illegal, would afford a private no protection for a crime committed under such order."

Other courts have used other language to define the substance of the defense. Typical is McCall v McDowell, 15 F Cas 1235, 1240 (CCD Cal 1867), in which the court said:

> But I am not satisfied that Douglas ought to be held liable to the plaintiff at all. He acted not as a volunteer, but as a subordinate in obedience to the order of his superior. Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto . . . The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

Colonel William Winthrop, the leading American commentator on military law, notes:

> But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and *lawful on its face,* he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, *the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness . . .*
>
> Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court.

Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, at 296-297 (footnotes omitted) (emphasis added).

In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder. Appellate defense counsel acknowledge that rule of law and its continued viability, but they say that Lieutenant Calley should not be held accountable for the men, women and

children he killed because the court-martial could have found that he was a person of "commonest understanding" and such a person might not know what our law provides; that his captain had ordered him to kill these unarmed and submissive people and he only carried out that order as a good disciplined soldier should.

Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here. The United States Supreme Court has pointed out that "[t]he rule that 'ignorance of the law will not excuse' [a positive act that constitutes a crime]. . .is deep in our law." Lambert v California, 355 US 225, 228 (1957). An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley is, in my opinion, so palpably illegal that whatever conceptional difference there may be between a person of "commonest understanding" and a person of "common understanding," that difference could not have had any "impact on a court of lay members receiving the respective wordings in instructions," as appellate defense counsel contend. In my judgment, there is no possibility of prejudice to Lieutenant Calley in the trial judge's reliance upon the established standard of excuse of criminal conduct, rather than the standard of "commonest understanding" presented by the defense, or by the new variable test postulated in the dissent, which, with the inclusion of such factors for consideration as grade and experience, would appear to exact a higher standard of understanding from Lieutenant Calley than that of the person of ordinary understanding.

In summary, as reflected in the record, the judge was capable and fair, and dedicated to assuring the accused a trial on the merits as provided by law; his instructions on all issues were comprehensive and correct. Lieutenant Calley was given every consideration to which he was entitled, and perhaps more. We are impressed with the absence of bias or prejudice on the part of the court members. They were instructed to determine the *truth* according to the law and this they did with due deliberation and full consideration of the evidence. Their findings of guilty represent the truth of the facts as they determined them to be and there is substantial evidence to support those findings. No mistakes of procedure cast doubt upon them.

Consequently, the decision of the Court of Military Review is affirmed.

DUNCAN, Judge (concurring in the result):

My difference of opinion from Judge Quinn's view of the defense of obedience to orders is narrow. The issue of obedience to orders was raised in defense by the evidence. Contrary to Judge Quinn, I do not consider that a presumption arose that the appellant knew he could not kill the people involved. The Government, as I see it, is not entitled to a presumption of what the appellant knew of the illegality of an order. It is a matter for the factfinders under proper instructions.

Paragraph 216, Manual for Courts-Martial, United States, 1969 (Rev), provides for special defenses: excuse because of accident or misadventure;

self-defense; entrapment; coercion or duress; physical or financial inability; and obedience to apparently lawful orders. Subparagraph *d* of paragraph 216 is as follows:

> An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

The military judge clearly instructed the members pursuant to this provision of the Manual. The heart of the issue is whether, under the circumstances of this case, he should have abandoned the Manual standard and fashioned another. The defense urges a purely subjective standard; the dissent herein yet another. I suggest that there are important general as well as certain specific considerations which convince me that the standard should not be abandoned. The process of promulgating Manual provisions is geared to produce requirements for the system only after most serious reflection by knowledgeable and concerned personnel. These persons have full regard for the needs of the armed forces and genuine concern for the plight of one accused. Those who prepared the Manual provision and the President of the United States, the Commander-in-Chief, who approved and made the provision a part of our law, were aware that disobedience to orders is the anathema to an efficient military force. Judge Quinn points out that this Court has established as precedent the applicability of the special defense upon proof adduced pursuant to the Manual standard. These are important general reasons for not aborting a standard that has been long in existence and often used.

It is urged that in using the Manual test of "a man of ordinary sense and understanding" those persons at the lowest end of the scale of intelligence and experience in the services may suffer conviction while those more intelligent and experienced would possess faculties which would cause them to abjure the order with impunity. Such an argument has some attraction but in my view falls short of that which should impel a court to replace that which is provided to us as law.

It appears to me that all tests which measure an accused's conduct by an objective standard — whether it is the test of "palpable illegality to the commonest understanding" or whether the test establishes a set of profile considerations by which to measure the accused's ability to assess the legality of the order — are less than perfect, and they have a certain potential for injustice to the member having the slowest wit and quickest obedience. Obviously the higher the standard, the likelihood is that fewer persons will be able to measure up to it. Knowledge of the fact that there are other standards that are arguably more fair does not convince me that the standard used herein is unfair, on its face, or as applied to Lieutenant Calley.

Perhaps a new standard, such as the dissent suggests, has merit; however, I would leave that for the legislative authority or for the cause where the record demonstrates harm from the instructions given. I perceive none in this

case. The general verdict in this case implies that the jury believed a man of ordinary sense and understanding would have known the order in question to be illegal. Even conceding arguendo that this issue should have been resolved under instructions requiring a finding that almost every member of the armed forces would have immediately recognized that the order was unlawful, as well as a finding that as a consequence of his age, grade, intelligence, experience, and training, Lieutenant Calley should have recognized the order's illegality, I do not believe the result in this case would have been different.

I believe the trial judge to have been correct in his denial of the motion to dismiss the charges for the reason that pretrial publicity made it impossible for the Government to accord the accused a fair trial.

Both the principal opinion and the analysis of the Court of Military Review state that in the enactment of the Uniform Code of Military Justice Congress has, in effect, codified the requirement of malice aforethought by defining murder as the unlawful killing of a human being, without justification or excuse. Article 118, UCMJ, 10 USC § 918. It should also be noted that in the case at bar the members of the panel were charged that a finding that the homicides were without justification or excuse was necessary to convict for premeditated murder. Furthermore, I cannot say that the evidence lacks sufficiency to convict in respect to any of the charges.

DARDEN, Chief Judge (dissenting): Although the charge the military judge gave on the defense of superior orders was not inconsistent with the Manual treatment of this subject, I believe the Manual provision is too strict in a combat environment. Among other things, this standard permits serious punishment of persons whose training and attitude incline them either to be enthusiastic about compliance with orders or not to challenge the authority of their superiors. The standard also permits conviction of members who are not persons of ordinary sense and understanding.

The principal opinion has accurately traced the history of the current standard. Since this Manual provision is one of substantive law rather than one relating to procedure or modes of proof, the Manual rule is not binding on this Court, which has the responsibility for determining the principles that govern justification in the law of homicide. United States v Smith, 13 USCMA 105, 32 CMR 105 (1962). My impression is that the weight of authority, including the commentators whose articles are mentioned in the principal opinion, supports a more liberal approach to the defense of superior orders. Under this approach, superior orders should constitute a defense except "in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal." McCall v McDowell, 15 F Cas 1235, 1240 (No. 8,673) (CCD Cal 1867); *In re* Fair, 100 F 149, 155 (CCD Neb 1900); Winthrop's Military Law and Precedents, 2d ed., 1920 Reprint, at 296-97.

While this test is phrased in language that now seems "somewhat archaic and ungrammatical," the test recognizes that the essential ingredient of discipline in any armed force is obedience to orders and that this obedience is so important it should not be penalized unless the order would be recognized

as illegal, not by what some hypothetical reasonable soldier would have known, but also by "those persons at the lowest end of the scale of intelligence and experience in the services." This is the real purpose in permitting superior orders to be a defense, and it ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part.

It is true that the standard of a "reasonable man" is used in other areas of military criminal law, *e.g.*, in connection with the provocation necessary to reduce murder to voluntary manslaughter; what constitutes an honest and reasonable mistake; and, indirectly, in connection with involuntary manslaughter. But in none of these instances do we have the countervailing consideration of avoiding the subversion of obedience to discipline in combat by encouraging a member to weigh the legality of an order or whether the superior had the authority to issue it. See Martin v Mott, 25 US 19, 30 (1827).

The preservation of human life is, of course, of surpassing importance. To accomplish such preservation, members of the armed forces must be held to standards of conduct that will permit punishment of atrocities and enable this nation to follow civilized concepts of warfare. In defending the current standard, the Army Court of Military Review expressed the view that:

> Heed must be given not only to the subjective innocence-through-ignorance in the soldier, but to the consequences for his victims. Also, barbarism tends to invite reprisal to the detriment of our own force or disrepute which interferes with the achievement of war aims, even though the barbaric acts were preceded by orders for their commission. Casting the defense of obedience to orders solely in subjective terms of *mens rea* would operate practically to abrogate those objective restraints which are essential to functioning rules of war.

United States v Calley, 46 CMR 1131, 1184 (ACMR 1973).

I do not disagree with these comments. But while humanitarian considerations compel us to consider the impact of actions by members of our armed forces on citizens of other nations, I am also convinced that the phrasing of the defense of superior orders should have as its principal objective fairness to the unsophisticated soldier and those of somewhat limited intellect who nonetheless are doing their best to perform their duty.

The test of palpable illegality to the commonest understanding properly balances punishment for the obedience of an obviously illegal order against protection to an accused for following his elementary duty of obeying his superiors. Such a test reinforces the need for obedience as an essential element of military discipline by broadly protecting the soldier who has been effectively trained to look to his superiors for direction. It also promotes fairness by permitting the military jury to consider the particular accused's intelligence, grade, training, and other elements directly related to the issue of whether he should have known an order was illegal. Finally, that test imputes such knowledge to an accused not as a result of simple negligence but

on the much stronger circumstantial concept that almost anyone in the armed forces would have immediately recognized that the order was palpably illegal.

I would adopt this standard as the correct instruction for the jury when the defense of superior orders is in issue. Because the original case language is archaic and somewhat ungrammatical, I would rephrase it to require that the military jury be instructed that, despite his asserted defense of superior orders, an accused may be held criminally acountable for his acts, allegedly committed pursuant to such orders, if the court members are convinced beyond a reasonable doubt (1) that almost every member of the armed forces would have immediately recognized that the order was unlawful, and (2) that the accused should have recognized the order's illegality as a consequence of his age, grade, intelligence, experience, and training.

The temptation is to say that even under this new formulation Lieutenant Calley would have been found guilty. No matter how such a position is phrased, essentially it means that the appellate judge rather than the military jury is functioning as a fact finder. My reaction to this has been expressed by the former chief justice of the California Supreme Court in these words:

> If an erroneous instruction or an erroneous failure to give an instruction relates to a substantial element of the appellant's case, an appellate court would not find it highly probable that the error did not influence the verdict.

R. Traynor, The Riddle of Harmless Error 74 (1970).

The same authority also expressed this thought:

> The concept of fairness extends to reconsideration of the merits when a judgment has been or might have been influenced by error. In that event there should be a retrial in the trial court, time consuming or costly though it may be. The short-cut alternative of reconsidering the merits in the appellate court, because it is familiar with the evidence and aware of the error, has the appeal of saving time and money. Unfortunately it does not measure up to accepted standards of fairness.

Id. at 20.

In the instant case, Lieutenant Calley's testimony placed the defense of superior orders in issue, even though he conceded that he knew prisoners were normally to be treated with respect and that the unit's normal practice was to interrogate Vietnamese villagers, release those who could account for themselves, and evacuate those suspected of being a part of the enemy forces. Although crucial parts of his testimony were sharply contested, according to Lieutenant Calley, (1) he had received a briefing before the assault in which he was instructed that every living thing in the village was to be killed, including women and children; (2) he was informed that speed was important in securing the village and moving forward; (3) he was ordered that under no circumstances were any Vietnamese to be allowed to stay behind the lines of his forces; (4) the residents of the village who were taken into custody were hindering the progress of his platoon in taking up the position it was to

occupy; and (5) when he informed Captain Medina of this hindrance, he was ordered to kill the villagers and to move his platoon to a proper position.

In addition to the briefing, Lieutenant Calley's experience in the Pinkville area caused him to know that, in the past, when villagers had been left behind his unit, the unit had immediately received sniper fire from the rear as it pressed forward. Faulty intelligence apparently led him also to believe that those persons in the village were not innocent civilians but were either enemies or enemy sympathizers. For a participant in the My Lai operation, the circumstances that could have obtained there may have caused the illegality of alleged orders to kill civilians to be much less clear than they are in a hindsight review.

Since the defense of superior orders was not submitted to the military jury under what I consider to be the proper standard, I would grant Lieutenant Calley a rehearing.

I concur in Judge Quinn's opinion on the other granted issues.

DOCUMENT NO. 172

AGREEMENT BETWEEN BANGLADESH, INDIA, AND PAKISTAN (New Delhi, 9 April 1974)

SOURCE
13 ILM 501 (1974)

NOTE

Subsequent to the December (1971) War between India and Pakistan in East Pakistan (now Bangladesh), the two heads of government signed an agreement on 2 July 1972 at Simla, India, pledging their two countries to work for better relations. Representatives of the two countries later met at New Delhi and on 28 August 1973 they signed an agreement for the repatriation of prisoners of war and civilians (DOCUMENT NO. 167). While Bangladesh concurred in the provisions of the 1973 Delhi Agreement, it was not a party thereto as Pakistan had still not accepted its dismemberment nor the sovereign status of its former eastern province. Subsequently, it did recognize Bangladesh as a sovereign state — and at the 1974 conference held in New Delhi Bangladesh reciprocated by agreeing to the repatriation of the 195 Pakistani prisoners of war who were being detained in India for trial by Bangladesh for war crimes allegedly committed during the 1971 civil war in East Pakistan which had immediately preceded the Indian-Pakistani armed conflict.

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* * * * *

4. On April 17, 1973, India and Bangladesh took a major step forward to break the deadlock on the humanitarian issues by setting aside the political problem of recognition. In a Declaration issued on that date they said that they "are resolved to continue their efforts to reduce tension, promote friendly and harmonious relationship in the sub-continent and work together towards the establishment of a durable peace". Inspired by this vision and "in the larger interests of reconciliation, peace and stability in the sub-continent" they jointly proposed that the problem of the detained and stranded persons should be resolved on humanitarian considerations through simultaneous repatriation of all such persons except those Pakistani prisoners of war who might be required by the Government of Bangladesh for trial on certain charges.

5. Following the Declaration there were a series of talks between India and Bangladesh and India and Pakistan. These talks resulted in an agreement at Delhi on August 28, 1973 between India and Pakistan with the concurrence of Bangladesh which provided for a solution of the outstanding humanitarian problems.

6. In pursuance of this Agreement, the process of three-way repatriation commenced on September 19, 1973. So far nearly 300,000 persons have been

repatriated which has generated an atmosphere of reconciliation and paved the way for normalisation of relations in the sub-continent.

7. In February 1974, recognition took place thus facilitating the participation of Bangladesh in the tripartite meeting envisaged in the Delhi Agreement, on the basis of sovereign equality. Accordingly, His Excellency Dr. Kamal Hossain, Foreign Minister of the Government of Bangladesh, His Excellency Sardar Swaran Singh, Minister of External Affairs, Government of India and His Excellency Mr. Aziz Ahmed, Minister of State for Defence and Foreign Affairs of the Government of Pakistan, met in New Delhi from April 5 to April 9, 1974 and discussed the various issues mentioned in the Delhi Agreement, in particular the question of the 195 prisoners of war and the completion of the three-way process of repatriation involving Bangalees in Pakistan, Pakistanis in Bangladesh and Pakistani prisoners of war in India.

8. The Ministers reviewed the progress of the three-way repatriation under the Delhi Agreement of August 28, 1973. They were gratified that such a large number of persons detained or stranded in the three countries had since reached their destinations.

9. The Ministers also considered steps that needed to be taken in order expeditiously to bring the process of the three-way repatriation to a satisfactory conclusion.

10. The Indian side stated that the remaining Pakistani prisoners of war and civilian internees in India to be repatriated under the Delhi Agreement, numbering approximately 6,500, would be repatriated at the usual pace of a train on alternate days and the likely short-fall due to the suspension of trains from April 10 to April 19, 1974 on account of Kumbh Mela, would be made up by running additional trains after April 19. It was thus hoped that the repatriation of prisoners of war would be completed by the end of April, 1974.

* * * * *

13. The question of 195 Pakistani prisoners of war was discussed by the three Ministers, in the context of the earnest desire of the Governments for reconciliation, peace and friendship in the sub-continent. The Foreign Minister of Bangladesh stated that the excesses and manifold crimes committed by these prisoners of war constituted, according to the relevant provisions of the U.N. General Assembly Resolutions and International Law, war crimes, crimes against humanity and genocide, and that there was universal consensus that persons charged with such crimes as the 195 Pakistani prisoners of war should be held to account and subjected to the due process of law. The Minister of State for Defence and Foreign Affairs of the Government of Pakistan said that his Government condemned and deeply regretted any crimes that may have been committed.

14. In this connection the three Ministers noted that the matter should be viewed in the context of the determination of the three countries to continue resolutely to work for reconciliation. The Ministers further noted that following recognition, the Prime Minister of Pakistan had declared that he would visit Bangladesh in response to the invitation of the Prime Minister of Bangladesh and appealed to the people of Bangladesh to forgive and forget

the mistakes of the past, in order to promote reconciliation. Similarly, the Prime Minister of Bangladesh had declared with regard to the atrocities and destruction committed in Bangladesh in 1971 that he wanted the people to forget the past and to make a fresh start, stating that the people of Bangladesh knew how to forgive.

15. In the light of the foregoing and, in particular, having regard to the appeal of the Prime Minister of Pakistan to the People of Bangladesh to forgive and forget the mistakes of the past, the Foreign Minister of Bangladesh stated that the Government of Bangladesh had decided not to proceed with the trials as an act of clemency. It was agreed that the 195 prisoners of war may be repatriated to Pakistan along with the other prisoners of war now in the process of repatriation under the Delhi Agreement.

DOCUMENT NO. 173

UNIVERSAL POSTAL CONVENTION. PART I. RULES APPLICABLE IN COMMON THROUGHOUT THE INTERNATIONAL POSTAL SERVICE
(Lausanne, 5 July 1974)

SOURCE

TIAS 8231, at 38

NOTE

Article 74(2) of the 1949 Geneva Prisoner-of-War Convention (DOCUMENT NO. 108) specifies that "correspondence, relief shipments and authorized remittances of money" to or from prisoners of war shall be exempt from all postal charges. Article 124 thereof provides that the National Prisoner of War Information Bureaux (Article 122) and the Central Prisoner of War Information Agency (Article 123) shall likewise enjoy the free postage privilege. The provisions set forth below are the current implementation of these commitments adopted by the Universal Postal Union. (This latest version of the Rules has not yet been published in UNTS or UST. However, Article 14 of the 1969 Tokyo Rules, published at 810 UNTS 61 and at 22 UST 1090, is practically identical.) (For a more difficult problem with respect to telegrams, sometimes a privately-owned operations, see DOCUMENT NO. 165.)

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Article 16.

Exemption from postal charges of items which concern prisoners of war and civilian internees

1. Subject to article 60, § 2, letter-post items, insured letters, postal parcels and monetary articles addressed to or sent by prisoners of war, either direct or through the Information Bureaux and the Central Prisoner-of-War Information Agency provided for in articles 122 and 123 respectively of the Geneva Convention of 12 August 1949 relative to the treatment of prisoners of war, shall be exempted from all charges. Belligerents apprehended and interned in a neutral country shall be classed with prisoners of war proper so far as the application of the foregoing provisions is concerned.

2. Paragraph 1 shall apply to letter-post items, insured letters, postal parcels and monetary articles originating in other countries and addressed to or sent by civilian internees as defined by the Geneva Convention of 12 August 1949 relative to the protection of civilian persons in time of war, either direct or through the Information Bureaux and the Central Information Agency prescribed in articles 136 and 140 respectively of that Convention.

3. The national Information Bureaux and the Central Information Agencies mentioned above shall also enjoy exemption from postal charges in respect of letter-post items, insured letters, postal parcels and monetary

articles which concern the persons referred to in §§ 1 and 2, which they send or receive, either direct or as intermediaries, under the conditions laid down in those paragraphs.

4. Parcels shall be admitted free of postage up to a weight of 5 kg. The weight limit shall be increased to 10 kg in the case of parcels the contents of which cannot be split up and of parcels addressed to a camp or the prisoners' representatives there *("hommes de confiance")* for distribution to the prisoners.

DOCUMENT NO. 174

RESOLUTION 21, "DISSEMINATION OF KNOWLEDGE OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS," ADOPTED BY THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 1974-1977

(Geneva, 7 June 1977)

SOURCE

17 IRRC 115 (August-September 1977)
U.N. Doc. A/32/144, 15 August 1977, at 42

NOTE

A Diplomatic Conference convened by the Swiss Government held sessions in Geneva in 1974, 1975, 1976, and 1977 to consider a Protocol Additional to the Geneva Conventions of 12 August 1949 (see DOCUMENT NO. 162, DOCUMENT NO. 169, and DOCUMENT NO. 175). The work of the Diplomatic Conference was completed at the 1977 session, a Final Act having been signed on 10 June 1977 and the Protocol itself having been opened for signature at Berne on 12 December 1977 (DOCUMENT NO. 175). Before adjourning *sine die* the Diplomatic Conference adopted a number of resolutions. While Resolution 21 does not specifically concern prisoners of war, its objective, to disseminate widely the knowledge of humanitarian conventions for the protection of victims of war, including prisoners of war, cannot but be of value to future prisoners of war. See also DOCUMENT NO. 168 and Article 83 of the 1977 Geneva Protocal I (DOCUMENT NO. 175).

TEXT

RESOLUTION 21

DISSEMINATION OF KNOWLEDGE OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Convinced that a sound knowledge of international humanitarian law is an essential factor for its effective application,

Confident that widespread knowledge of that law will contribute to the promotion of humanitarian ideals and a spirit of peace among nations,

1. *Reminds* the High Contracting Parties that under the four Geneva Conventions of 1949 they have undertaken to disseminate knowledge of those Conventions as widely as possible, and that the Protocols adopted by the Conference reaffirm and extend that obligation;
2. *Invites* the signatory States to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed

conflicts, and of the fundamental principles on which that law is based, is effectively disseminated, particularly by:

(a) encouraging the authorities concerned to plan and give effect, if necessary with the assistance and advice of the International Committee of the Red Cross, to arrangements to teach international humanitarian law, particularly to the armed forces and to appropriate administrative authorities, in a manner suited to national circumstances;

(b) undertaking in peacetime the training of suitable persons to teach international humanitarian law and to facilitate the application thereof, in accordance with Articles 6 and 82 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);

(c) recommending that the appropriate authorities intensify the teaching of international humanitarian law in universities (faculties of law, political science, medicine, etc.);

(d) recommending to educational authorities the introduction of courses on the principles of international humanitarian law in secondary and similar schools;

3. *Urges* National Red Cross, Red Crescent and Red Lion and Sun Societies to offer their services to the authorities in their own countries with a view to the effective dissemination of knowledge of international humanitarian law;

4. *Invites* the International Committee of the Red Cross to participate actively in the effort to disseminate knowledge of international humanitarian law by, *inter alia*:

(a) publishing material that will assist in teaching international humanitarian law, and circulating appropriate information for the dissemination of the Geneva Conventions and the Protocols,

(b) organizing, on its own initiative or when requested by Governments or National Societies, seminars and courses on international humanitarian law, and co-operating for that purpose with States and appropriate institutions.

DOCUMENT NO. 175

PROTOCOL I ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS

(Geneva, 10 June 1977 and Berne, 12 December 1977)

SOURCE

17 IRRC 3 (August-September 1977)
U.N. Doc. A/32/144, 15 August 1977, Annex I
19 ILM 1391

NOTE

The International Committee of the Red Cross (ICRC) having completed a "Draft Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts," that Draft Protocol received the approval of the XXIInd International Conference of the Red Cross at its meeting in Teheran in November 1973 (DOCUMENT NO. 169). The Swiss Government had already convoked a Diplomatic Conference to meet in Geneva in February 1974 with the Draft Protocol (and another concerned with the victims of non-international armed conflicts) as the working document. The Diplomatic Conference found it necessary to hold sessions in 1974, 1975, 1976, and 1977 before it succeeded in approving a considerably revised draft as Protocol I. Though comparatively few in number, the articles directly or indirectly applicable to prisoners of war can have an important impact on this area of the law of war.

EXTRACTS

Article 1 — General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning

Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Article 2 — Definitions

For the purposes of this Protocol:

(a) "First Convention", "Second Convention", "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; "the Conventions" means the four Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) "rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;

(c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;

(d) "substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

Article 3 — Beginning and end of application

Without prejudice to the provisions which are applicable at all times:

(a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;

(b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstances, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

Article 4 — Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Article 5 — Appointment of Protecting Powers and of their substitute

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.
2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.
3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, *inter alia*, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.
4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.
5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, incuding occupied territory.
6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of

Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

Article 6 — Qualified persons

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.
2. The recruitment and training of such personnel are within domestic jurisdiction.
3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.
4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Article 11 — Protection of persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
2. It is, in particular, prohibited to carry out on such persons, even with their consent:
   (a) physical mutilations;
   (b) medical or scientific experiments;
   (c) removal of tissue or organs for transplantaion,
   except where these acts are justified in conformity with the conditions provided for in paragraph 1.
3. Exceptions to the prohibition in paragraph 2 *(c)* may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with general accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of

the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.
6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Article 40 — Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Article 41 — Safeguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
   (a) he is in the power of an adverse Party;
   (b) he clearly expresses an intention to surrender; or
   (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
   provided that in any of these cases he abstains from any hostile act and does not attempt to escape.
3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Article 42 — Occupants of aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.

Article 43 — Armed forces

1. The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary

system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 — Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatants cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
   (a) during each military engagement, and
   (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

   Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 *(c)*.
4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.
5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Article 45 — Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.
3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Article 46 — Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.
2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or

attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.
4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Article 47 — Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
   (a) is specially recruited locally or abroad in order to fight in an armed conflict;
   (b) does, in fact, take a direct part in the hostilities;
   (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party:
   (d) is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict;
   (e) is not a member of the armed forces of a Party to the conflict; and
   (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Article 67 — Members of the armed forces and military units assigned to civil defence organizations

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:
   (a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;
   (b) if so assigned, such personnel do not perform any other military duties during the conflict;
   (c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card

referred to in Chapter V of Annex I to this Protocol certifying their status;

(d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;

(e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party;

(f) such personnel and such units perform their civil defence tasks only within the national territory of their Party.

The non-observance of the conditions stated in *(e)* above by any member of the armed forces who is bound by the conditions prescribed in *(a)* and *(b)* above is prohibited.

2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.
3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.
4. The *matériel* and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

Article 75 — Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:
  (i) murder;
  (ii) torture of all kinds, whether physical or mental;
  (iii) corporal punishment; and
  (iv) mutilation;
(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attend-

ance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

   (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

   (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.
8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Article 79 — Measures of protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A (4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this

Protocol. This card, which shall be issued by the government of the States of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Article 80 — Measures for execution

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.
2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

Article 81 — Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.
2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Article 82 — Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Article 83 — Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Article 84 — Rules of application

The High Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

Article 85 — Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.
2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.
3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
   (a) making the civilian population or individual civilians the object of attack;
   (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 *(a)* (iii);
   (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 *(a)* (iii);
   (d) making non-defended localities and demilitarized zones the object of attack;
   (e) making a person the object of attack in the knowledge that he is *hors de combat*;
   (f) the perfidious use, in violation of Article 37, of the distincitve

emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
   (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
   (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
   (c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
   (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph *(b)*, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
   (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.
5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Article 86 — Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87 — Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to

prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Article 88 — Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Article 89 — Co-operation

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Article 90 — International Fact-Finding Commission

1. *(a)* An International Fact-Finding Commission (hereinafter referred to as "the Commission") consisting of fifteen members of high moral standing and acknowledged impartiality shall be established.

   (b) When not less than twenty High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meetings, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.

   (c) The members of the Commission shall serve in their personal capa-

city and shall hold office until the election of new members at the ensuing meeting.

(d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.

(e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding subparagraphs.

(f) The depository shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. *(a)* The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article.

(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.

(c) The Commission shall be competent to:

(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

(d) In other situations, the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.

(e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

3. *(a)* Unless otherwise agreed by the Parties concerned, all enquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:

(i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;

(ii) two *ad hoc* members, not nationals of any Party to the conflict, one to be appointed by each side.

(b) Upon receipt of the request for an enquiry, the President of the Commission shall specify an appropriate time limit for setting up a

Chamber. If any *ad hoc* member has not been appointed within the time limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. *(a)* The Chamber set up under paragraph 3 to undertake an enquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation *in loco*.
   (b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.
   (c) Each Party shall have the right to challenge such evidence.
5. *(a)* The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate.
   (b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.
   (c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.
6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an enquiry, they are exercised by a person who is not a national of a Party to the conflict.
7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an enquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of fifty percent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance fifty per cent of the necessary funds.

Article 91 — Responsibility

A Party to the conflict which violates the provisions of the Conventions or of this Protocol 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.

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