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M I L I T A R Y C O M M I S S I O N S

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INTRODUCTION

Spaight, the noted British authority on the law of war, said of a young officer and aspiring writer, " * * * for an ambitious subaltern who wishes to be known vaguely as an author and, at the same time, not to be troubled with undue inquiry into the claim upon which his title rests, there can be no better subject than the International Law of War. For it is a quasi-military subject in which no one in the army or out of it, is very deeply interested, which everyone very contentedly takes on trust, and which may be written about without one person in ten thousand being able to tell whether the writing is adequate or not."[1] The prominence into which military commissions sprang after the Second World War leads to a conclusion that an attempt to retrace the history and forecast the future of this ofttimes important tribunal is worth the risk of being likened unto Spaight's subaltern.

The late Justice Holmes explained an excursion into the historical background of the Common Law with this remark, "The life of the law has not been logic; it has been experience. * * * The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if

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[1] Spaight, War Rights on Land (1911) 18.

it contained only axioms and corallaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become."[2]

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[2] Holmes, The Common Law (1948) 1.

CHAPTER I

HISTORICAL AND COMPARATIVE BASIS OF MILITARY COMMISSIONS

1. Definition of the Term Military Commission

The term "Military Commission" means a common law war court[3] set up during periods of hostilities, martial rule or military government as an instrumentality for the more efficient execution of the war powers vested in Congress and the President.[4] This tribunal may be used to try persons accused of violations of the law of war regardless of whether they are subject also to trial by courts-martial.[5] In the Twentieth Century, however, military commissions have been used almost exclusively for the trial of persons not in the military service of the power convening the commission, charged with violations of the law of war, or, in places subject to military government or martial rule, with offenses which would be tried by the municipal courts except for the war or

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[3] Birkhimer, Military Government and Martial Law (2d Ed., 1904) 351; Winthrop, Military Law and Precedents (2d Ed., 1920 Reprint) 831; Senate Report Number 130, 64th Congress, First Session, p. 40-41 (1915-1916).

[4] Fairman, The Law of Martial Rule (2d Ed., 1943) 262; J.A.G.S. Text No. 4, The Judge Advocate General's School, Ann Arbor, Michigan.

[5] U.S. v. Schultz (No. 394) 4 CMR 111; Senate Report Number 130, supra, p. 40-41.

emergency making such courts impotent.[6]

The extraordinary war court known in American jurisprudence as a military commission is to be found in a very similar form under only one other system of military courts--the British. Military commissions have taken many forms and borne many names.[7] The British called their extraordinary war court a "Court-martial" until the Boer War at which time the name "Military Courts Under Martial Law" was adopted.[8] Following the Second World War, the British war crimes tribunal was known as a "Military Court."[9]

Turning to the American side of this history of names, the judicial body convened by General George Washington for the trial of Major John Andre of the British Army on a charge of acting as a spy, was called a "Court of Inquiry."[10] A few days later, however, Joshua Hett Smith was tried by a "Special Court-martial" on a charge that he was an accomplice in the Andre affair.[11] Likewise, the tribunal convened by General

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[6] Fairman, op. cit., 272.

[7] Madsen v. Kinsella, 343 U.S. 348 (1951).

[8] Spaight, op. cit., 347; Wiener, A Practical Manual of Martial Law (1940) 134.

[9] Royal Warrant of 14 June 1945 and attached regulations, 1 United Nations, Law Reports of Trials of War Criminals (1947) 105.

[10] 6 Lawson, American State Trials, 468.

[11] 6 Lawson, American State Trials, supra, 489.

Andrew Jackson in 1818 for the trial of Arbuthnot and Ambrister on a charge alleging that they aided and abetted the Seminole Indian uprising, was called a "Special Courts-martial."[12] It is obvious that the adjective "Special" as used to describe the courts-martial convened to try Smith, Arbuthnot, and Ambrister meant extraordinary or unusual. By a curious inversion of meaning today, the word special in the phrase "Special Courts-martial" means limited or inferior--not extraordinary as it did formerly.[13]

In 1847, on the occasion of the belligerent occupation of Mexico by the forces of the United States, the term "military commission" came into use to describe a war court. At that time it was used to designate the war court for the trial of persons accused of committing common law type crimes, such as murder, rape, or robbery, within the occupied territory.[14] In this era, the war court for the trial of those accused of violating the law of war, that is, for the trial of war criminals, was named a "council of war."[15] The latter term, however, fell into disuse and by the time of the Civil

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[12] 2 Lawson, American State Trials, supra, 864.

[13] Subparagraph 15a of the Manual for Courts-Martial U.S. 1951.

[14] Winthrop. op. cit., 832; Fairman, op. cit., 272.

[15] Winthrop, op. cit., 832; Green, Military Commissions and Provost Courts (Headquarters ETOUSA, Judge Advocate Section, 1944) 1.

War the term "military commission" was in wide use as a designation for the American common law war court.[16] The Union Forces used military commissions to dispose of about two thousand cases during the Civil War period.[17] The adjective "special" appears to have continued in use until the post Civil War period. As an example, the tribunal which tried Henry Wirz, the commandant of the prisoner of war inclosure at Andersonville, Georgia was styled a "Special Military Commission."[18] As all military commissions are special in the sense that they are agencies for the exercise of extraordinary war powers, it follows that use of the word special to modify the term military commission is pleonastic. In any event, after the Civil War period, military commissions were known by that name alone without embellishment.

Passing from the Civil War period, it may be seen that the judicial bodies which tried the Modoc Indians in 1873, Rafael Ortiz in 1899, and Lather Witcke, alias Pablo Waberski, in 1918, were each styled a military commission.[19] The

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[16] Winthrop, op. cit., 833; Birkhimer, op. cit., 140.

[17] Winthrop, op. cit., 833-834; Cf. Robinson, Justice in Grey (1941) at pages 359-360, where it is stated: "* * * the Confederate States made no use of military commissions and only a limited use of provost courts."

[18] The Trial of Henry Wirz, Executive Documents Printed by order of 40th Congress, 2d Sess. (1867-1868) Vol. 8.

[19] See respective Records of Trial, National Archives, Washington, D. C.

tribunal which tried the Nazi Saboteurs in 1942 was called likewise a military commission.[20] This term was used to describe the tribunal for the trial of war crimes in the Far East Command following the Second World War.[21] A few of the earlier war crimes trials in the European Theater were held before military commissions. However, the greater portion of the war crimes trials in the European Theater were by Special Military Government Courts.[22] The word special was used in this connection to distinguish military government court for the trial of war crimes from the same type of court used to dispose of offenses ordinarily triable by local courts.[23]

It may be said on very reputable authority that the name given to the common law war court is immaterial.[24] The

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[20] Ex parte Quirin, 317 U.S. 1 (1942).

[21] Letter (File AG 000.5 (5 Dec 45) LS) General Headquarters, Supreme Commander for the Allied Powers, Subject: "Regulations Governing the Trials of Accused War Criminals," dated 5 Dec 45; Letter (File AG 000.5 (24 Sep 45) JA) Headquarters, United States Forces, Pacific, Subject: "Regulations Governing the Trials of War Criminals," dated 24 Sep 45.

[22] Report of the Deputy Judge Advocate for War Crimes, European Command, June 1944 to July 1948.

[23] Subparagraph 32G, FM 27-5 (United States Army and Navy Manual of Civil Affairs Military Government, 1947).

[24] Fairman, op. cit., 272; Madsen v. Kinsella, 188 F.2d 276 (4th Cir. 1951).

jurisdiction, procedure, and purpose of this extraordinary tribunal has not been affected by differences in nomenclature in the past and there is no reason to believe that it will be affected by any future name changes. It is concluded, however, that if the name military commission is retained and uniformly used, much confusion will be eliminated.

2. Origin and Legal Basis

It is probable that military commissions and tribunals of a similar nature came into being because commanders no longer wished to bear the sole responsibility when the liquidation of a pirate, a spy, or an otherwise unlawful belligerent appeared necessary or expedient. There is no discoverable evidence to establish with precision the point in history where commanders largely ceased using their unlimited power in this connection[25] and commenced the use of boards of officers to aid them in disposing of those deemed guilty of offenses against the law of war.[26] It is clear,

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[25] Wheaton, International Law (7th English Edition, 1944) 240.

[26] In Tilinko v. Attorney General for Natal (95 Law Times Report, N.S., 854 (1907)) the Earl of Halsbury expressed this opinion: "If there is war, there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called 'courts' to administer punishment, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons

however, that at the time Grotius,[27] Victoria,[28] and Wolff[29]

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acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved"; In the King v. Allen (2 Irish Reports 241 (1921)) C. J. Molony said: "In considering any question arising out of administration of martial law by military Courts, we must not lose sight of the fact that they are not, in strictness, Courts at all; but, as Mr. Justice Stephen says, 'merely committees formed for the purpose of carrying into execution the discretionary powers assumed by the Government.'"; Mr. David Dudley Field, in argument before the Supreme Court in the Milligan case (71 U.S. 2, 29 (1867)) said: "What is a military commission? Originally, it appears to have been an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer in cases where he might act for himself if he chose."; Attorney General Speed in his justification of the trial by military commission of the assassins of President Lincoln (11 Op. Atty. Gen. 316) said: "The object of such tribunals is obviously intended to save life, and when their jurisdiction is confined to offenses against the laws of war, that is their effect. They prevent indescriminate slaughter; they prevent men from being punished or killed upon mere suspicion."

[27] Grotius (De Jure Belli ac Pacis, Libri Tres (Translation by Kelsey, Clarendon Press, Oxford, England, 1925)) stated: "There is no danger from prisoners and those who have surrendered or desire to do so; therefore in order to warrant their execution it is necessary that a crime shall have been previously committed, such a crime, moreover, as a just judge would hold punishable by death."

[28] Scott in commenting on the writings of Victoria (Scott, The Spanish Origin of International Law--Francisco de Vitoria and His Law of Nations, 232-233 (Oxford at the Clarendon Press, 1934)) stated: "The lives of children and 'other innocent parties' were according to Victoria, to be spared. * * * Passing from the subject of the innocent * * * Victoria proceeds to discuss the question whether in a just war the lives of all those whose guilt is certain may be taken. He apparently feels that he is here on dangerous, that is to say, uncharitable ground. Therefore he summons his courage, as it were, by recalling his premise that war is waged: 'Firstly, in defense of ourselves and what belongs to us; secondly, to recover things taken from us; thirdly, to avenge a wrong suffered by us; fourthly, to secure peace and

wrote treatises on the law of war, there was no requirement that the determination of the guilt or innocence of the alleged offender against the law of war was to be made by a judicial body. In 1907 there appeared in the Hague Regulations a provision requiring that spies be tried.[30] Although this was probably the first expression of this requirement in conventional law, it has been seen, supra, that since the latter part of the 18th Century it had been the practice to afford the spy or unlawful belligerent some sort of trial

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security.' The question before him is two fold: what is permissable in actual battle; and what may be done when the war is over? Victoria had no hesitancy as to the use of the sword in the 'actual heat of battle . . . and, briefly, . . . so long as affairs are in peril.' But may all who have borne arms be killed? 'Manifestly, yes,' says Victoria, stating in two words the views of those who cling to the old order of things, to the word which 'killeth,' and rejects the word which 'maketh alive.' The proof for the affirmative on this question is to be found in the twentieth chapter of Deuteronomy, * * * ."

According to Scott, Victoria did not like the rule which he announced and argued that in many instances it was too harsh, pointing out that, independently of the law of war, the articles of surrender usually provided that the lives of the garrison should be spared. Supposing, however, that such a stipulation was omitted, Victoria held that it would not be unjust for the more notorious offenders to be put to death on order of conquering prince.

[29] Wolff wrote (Jus Gentium Methado Scientifica Petractatum (Translated from the 1764 edition, Oxford, Clarendon Press, 1934)) " * * * it is not allowable to kill those captured in war, not even immediately, much less at any other time, unless some especial offense shall have been committed because of which they are liable for punishment."

[30] Wheaton, op. cit., 220.

prior to punishment.

It has been stated by writers and authorities that military commissions were created by necessity.[31] As it frequently has been necessary to punish those whose conduct in warfare failed to meet the minimum standards of the law of war, and as it is no longer customary, at least after the 18th Century, to accomplish this result by use of the naked power of the commanding officer, military commissions or

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[31] Attorney General Speed stated (11 Op. Atty. Gen. 392), in a discussion of military commissions: "An army, like all other organized bodies, has a right, and it is its first duty, to protect its own existence, and the existence of all its parts, by the means and in the mode usual among civilized nations when at war."; In his testimony before the Senate Committee concerning Article of War 15 (Senate Report Number 130, supra, p. 40-41) General Crowder expressed the following views: "General Crowder: * * * Yet as I have said, these war courts never have been formally authorized by statute. Senator Colt: They grew out of usage and necessity? General Crowder: Out of usage and necessity. I thought it just as well, as inquiries would arise, to put this information in the record."

In the Nazi Saboteur case (Ex Parte Quirin, supra) the Supreme Court held: "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to sieze and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."; See also In Re Yamashita, 327 U.S. 1, 12, in which opinion the court stated: "The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced."; Fairman, op. cit., 273; Whiting, War Powers Under the Constitution of the United States (43d Ed., 1871) 277; Birkhimer, op. cit., 528.

similar tribunals have been created as a means to an end.

Although military commissions are not constitutional courts in the sense that they were expressly provided for in that document, they exist under the Constitution.[32] The fact that tribunals in the nature of military commissions existed and operated to discharge an important and necessary function of the military arm of the government prior to the adoption of the Constitution, coupled with the fact that the Constitution does not prohibit such courts, leads to a conclusion that they are implicitly authorized. In any event the question, if ever arguable, is no longer so.[33]

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[32] The Supreme Court has expressed this opinion (Madsen v. Kinsella, supra, 346) "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war."

Attorney General Speed stated (11 Op. Atty. Gen. 298) "A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare."

[33] In Ex parte Quirin, supra, 41, 45, the Supreme Court considered the question thusly: "An express exception from Article III, Section 2, and from the Fifth and Sixth Amendments of trials of petty offenses and of criminal contemps has not been found necessary in order to preserve the traditional practice of trying these offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war. * * * We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try

3. Distinction Between Military Commissions and Other Military Tribunals

The distinction between the several kinds of military tribunals is at best a wavering line which tends at times to

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offenses against the law of war by military commissions."; In Madsen v. Kinsella, 93 F. Supp. 323 (S.D. W.Va. 1950) the District Judge expressed this opinion concerning military commissions: "The power of the United States thus to govern a conquered and occupied country does not stem from any explicit provision of the Federal Constitution. It is, however, implicit in the words of that instrument which makes the President the commander-in-chief of the army and navy."

In I United Nations, Law Reports of Trials of War Criminals, supra, 111, the editors expressed their opinion concerning the legal basis of military commissions as follows: 'They were not created by statute, but recognized by statute law. In very recent decisions (the so-called Saboteur case, ex parte Richard Quirin (1942), in re Yamashita (1946) and in re Homma (1946)) the Supreme Court of the United States had occasion to consider at length the sources and nature of the authority to create Military Commissions. The Supreme Court stated that Congress and the President, like the courts, possess no power not derived from the Constitution of the United States. But one of the objects of the Constitution, as declared in its preamble, is to "provide for the common defense." As a means to that end the Constitution gives to Congress the power to "provide for the common Defence," "To raise and support Armies." "To provide and maintain a Navy," and "To make rules for the Government and Regulation of the land and naval forces." Congress is given authority "to declare war . . . and make rules concerning Captures on Land and Water," and "To define and punish Piracies and Felonies committed on the high seas and Offenses against the Law of Nations." In the exercise of the power conferred upon it by the constitution to "define and punish . . . offenses against the Law of Nations," of which the law of war is a part, the United States Congress has by a statute, the Articles of War, recognized the "Military Commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for trial and punishment of offenses against the law of war. The Supreme Court pointed out that Congress by sanctioning the trial by

disappear. Basically there are three types of cases triable by military tribunals as follows: (1) violations by members of the military establishment of the code which governs them; (2) civil crimes, which, because the civil authority is superceded by the military and the civil courts are closed or suspended, cannot be disposed of by ordinary tribunals; and (3) violations of the law of war. In British and American practice mentioned first type of case has been handled by courts-martial.[34] In United States military jurisprudence violations of the second type formerly were disposed of by military commissions,[35] or provost courts.[36] However, in one theater of war during and following the Second World War, these cases were disposed of by Military Government Courts.[37] Type three violations are normally

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Military Commission of enemy combatants for violations of war had not attempted to codify the law of war or mark its precise boundaries. Instead it had incorporated, by reference, as within the pre-existing jurisdiction of Military Commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within the jurisdiction.'

[34] Tilinko v. Attorney General for Natal, supra, 853; Wiener, op. cit. 134.

[35] Subparagraph 32a, FM 27-5, supra.

[36] Fairman, op. cit., 272; Birkhimer, op. cit., 147; Subparagraph 32a, FM 27-5, supra.

[37] Madsen v. Kinsella, 188 F.2d 276 (4th Cir. 1951); I United Nations, Law Reports of Trials of War Criminals, supra, 122; Subparagraph 32b FM 27-5, supra.

referred to military commissions, but in many instances are handled by military government courts.[38] And pursuant to the Uniform Code of Military Justice, United States, general courts-martial have jurisdiction to try all types of cases otherwise cognizable by military tribunals.[39] Other differences based upon composition, manner of appointment, procedure and jurisdiction are treated more fully in other portions of this work.

Generally, from a standpoint of the number of members and the importance of the cases tried, the military commission is comparable to the general court-martial, and the provost court is comparable to the summary court-martial.[40] As an exception, it should be noted that provost courts in the metropolitan area of Tokyo, Japan, between 19 February 1946 and 13 March 1952 were composed of from one to three or more officers. They handled civil type offenses without regard to the seriousness of the case.[41] Military government courts in the European Theater during and following the Second World

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[38] Wiener, op. cit., 134; Report of the Deputy Judge Advocate for War Crimes, European Command, supra, 52.

[39] Article 18, Uniform Code of Military Justice, United States; paragraph 14 of the Manual for Courts-martial, U.S. 1951.

[40] Fairman, op. cit., 275.

[41] History of Provost Courts, Metropolitan Tokyo area, 19 February 1946 to 31 March 1952, 13.

War were classified as General, Intermediate, and Summary courts. These last mentioned tribunals are comparable from a standpoint of composition and jurisdiction to General, Special, and Summary courts-martial under the Uniform Code of Military Justice, United States.[42]

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[42] Subparagraph 32b, FM 27-5, supra; Articles 16, 18, 19, and 20, Uniform Code of Military Justice, United States; Subparagraphs 4b, 14a, 15a, and 16a, Manual for Courts-martial, supra.

CHAPTER II

JURISDICTION OF MILITARY COMMISSIONS

4. Jurisdiction -- as to Offenses

Aside from their functions in situations of domestic martial law,[1] military commissions ordinarily may exercise jurisdiction over the fields of: First, violations of the laws and usages of war, covering prohibitions of certain types of unnecessary, inhumane, or dishonorable acts, and breaches of other obligations owed in respect to combatant or non-combatant persons, private or public property, affected by the war or its related occupation, or owed to or by belligerent, including occupying, nations and their nationals, under general principles of international law, and: Second, violations of laws properly and specifically established or sanctioned by military government, covering breaches of its security and general governmental regulations, and of such

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[1] Davis, Military Law, 303-307; Fairman, The Law of Martial Rule (2d Ed., 1943), Chaps. V, VI, X.

Martial Law, in the strict sense, under United States usage, confined to non-enemies in domestic territory, is sufficiently severable from the balance of the general subject to be here left for a separate study, which it merits.

An illustration of the British concept, involving the question of when sufficient hostilities exist in domestic territory to permit military courts to try civilians although the civilian courts remain open, is given in Marios v. General Officer Commanding (1901, 18 Law Times L. R. 185.

criminal enactments as it either may promulgate or continue in effect from the local code.[2]

The two fields[3] are not so distinct as they appear. As there may be an occupation during hostilities, the difference is not between a state of war and of non-belligerent status. Offenses under both categories may arise at the same time, since under correct terminology the laws of war have a breadth which covers not only hostilities but also the general obligations of both parties to a foreign occupation at all times.[4] Perhaps the underlying principle is best

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[2]A time-honored delineation of the jurisdiction, which, however, overlooks war crimes in domestic or allied territory, and military government regulations in occupied territory, is as follows:

"Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians or military persons, *** in the enemy's country during its occupation by our armies and while it remains under military government ***. The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil authority is superceded by the military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature ***" (Dig. Op. JAG 1912, 1067). Also see: FM 27-5, United States Army and Navy Manual of Civil Affairs, Military Government, 1947, 31, 32; Fairman, op. cit. Chaps. VIII, X; Hall, International Law 8th Ed. 466, 467.

The same areas of jurisdiction may be involved when courts-martial try certain offenses under the joint jurisdiction conferred by UCMJ, Art. 18 (CM 318380, Yabusake, 67 BR 271.

[3]More or less detailed enumerations of cognizable

understood by reference to the distinction between (a) acts peculiar to war or to occupation by reason of its hostile character, and (b) crimes against government stability or public justice, in an occupation, such as still might be committed if occupied territory were still, although restlessly, under jurisdiction of its own sovereign.

(1) The first field of substantive jurisdiction. "War crimes" is the short title for punishable violations of generally recognized rules derived from historical custom, international convention, or enlightened scholarly opinion as to the proper conduct of the various incidents of warfare and hostile occupation.[5] War crimes encompass a wide variety of acts which, without comprehensive enumeration, are briefly indicated[6] as follows:

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offenses, which incidentally illustrate that the several types are so interlocked that nearly every attempt to deal with them discusses both with a single breath, may be found in the following authorities: Davis, op. cit., 310, n. 2; Winthrop, Military Law and Precedents (2d Ed., 1920 Reprint), 839-840; Dig. Op. JAG 1912, p. 1070.

[4]Exercise of the law of hostile occupation is authorized by the usage of nations, being regulated by the Laws of War, a branch or subdivision of Public International Law. (Davis, op. cit., 300).

[5]Fenwick, International Law, 543-545.
FM 27-10, Rules of Land Warfard, 1940, par. 4.
J.A.G.S. Text No. 7, Law of Land Warfare, pp. 1-5.

[6]"Military necessity does not admit of cruelty -- that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation

(a) Illegitimate measures of warfare or acts during warfare and related incidents, such as murder or other avoidable violence or oppression against non-combatant persons; murder, violence or other mistreatment of prisoners of war; failure to render proper medical care to the sick and wounded; pillage, appropriation, destruction, or other violation of protected public or private property; attacking merchant ships without prior request for visitation; debauching dead bodies; denial of quarter; assassination; treacherous use of a flag of truce or willful and avoidable firing upon the same; violation of a recognized parole or of an armistice; punishment of enemy persons without a fair trial; breach by persons of either party to a hostile occupation of duties imposed in such situation by international law; failure to recognize Red Cross and similar international ameliatory activities;

(b) Illegal belligerancy, which includes acts of active hostility by persons not acting in the proper uniform and status of a lawful belligerent, which are performed in the proximity of their enemy, and within a theater of war.[7] Acts referred to hereunder may be of the types previously enumerated,

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of a district. It admits of deception, but disclaims acts of perfidy ***" (Lieber's Code, General Order No. 100, Adjutant General's Office, 1863; in Appendix "A", Davis, Int. L.).

See also: list of war crimes in History of the United

or may consist in the mere doing of hostile acts of kinds that would be legal if the person were in the status of a lawful belligerent;[8]

(c) Spying, an offense which technically is distinguishable from a war crime in some respects, but is treated in most ways the same.[9] Where the spy is a citizen of this country and has remained within it, the offense does not even have international character. But within the restricted definition of the offense contained in Article 106 of the Uniform Code of Military Justice, a military commission has jurisdiction regardless of whether the international factor is present. On the other hand, it seems that if the spy is not a United States citizen or resident alien, the commission may have jurisdiction both under that Article and under the broader definition and basis of the law of war;

Nations War Crimes Commission, 34; FM 27-10, Rules of Land Warfare, 1940, par. 347.

Compare certain war crimes denominated "grave breaches" under 1949 Geneva (Sick and Wounded) Convention, Art. 50; 1949 Geneva (Wounded, Sick at sea, or Shipwrecked) Convention, Art. 51; 1949 Geneva (Prisoners of War) Convention, Art. 130; 1949 Geneva (Civilian) Convention, Art. 147; in DA Pamphlet 20-150, entitled "Geneva Conventions of 12 August 1949 for the Protection of War Victims," dated October 1950.

[7]Ex parte Quirin, 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct.2. Rules of Land Warfare, 1940, par. 348.

[8]Hyde, International Law (2d Rev. Ed.) 1899; Lachs, War Crimes 34.

[9]Laughterpacht, Oppenheim's International Law, (7th Ed.) Vol. 2, p. 422, 575; FM 27-10, 1940, supra, par. 203.

(d) War treason and the statutory offense of aiding the enemy. These two offenses differ in that the first is a true international offense, is usually peculiar to occupied territory, and can be committed as against us only by non-United States citizens, while the second, as defined in Article 104 of the Uniform Code of Military Justice, is a strictly national offense that can be committed in the United States by resident aliens and at any place of contact with enemy persons by United States citizens. War treason, which presented difficult problems during military occupations in both World Wars,[10] has been said to consist of all acts (except espionage, and hostilities in arms on the part of the civilian population which constitute war rebellion) committed within the lines of a belligerent, that are harmful to him and intended to favor the enemy. It may be committed not only in occupied enemy territory, but also in a zone of hostilities or anywhere within the lines or territory of a belligerent.[11] However, one feature of war treason always is that it can be committed by persons owing only a duty of obedience to the injured government, whereas national treason[12] and the statutory offense of aiding the enemy are based on

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[10] Fenwick, International Law (3rd Ed.), 554-556,574.

[11] Lauterpacht, op. cit., Vol. II, 575.

[12] Lauterpacht, op. cit., Vol. II, 425.

the higher duty, although it may be one arising from temporary residence, of allegiance to the injured state.

(2). The second field of substantive jurisdiction. When military commissions serve as tribunals of military government,[13] in which role they sometimes have been denominated "provost courts", "military government courts", or simply, as most recently, "military courts", the essence of their governmental function is the adjudication of charges, firstly, of offenses affecting the security and mission of the occupation,

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[13] As described by an eminent military authority of an earlier era, the law of hostile occupation, from the United States viewpoint," applies to territory over which the Constitution and laws of the United States have no operation, and in which the guarantees which are contained in that instrument are entirely ineffective. Its exercise is sanctioned because the local authority is unable to maintain order and protect life and property in the immediate theater of military operation and, to some extent, because the invading belligerent may, as a war measure, suspend, wholly or in part, the municipal law of the enemy in such territory." (Davis, op. cit., 300).

Precedents unfolding in recent years have assured that, despite the non-applicability of the Fifth and Sixth Amendment-guarantees of grand jury indictment and jury trial (Ex parte Quirin, supra; Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936.), a close approximation of the due process clause requires, nevertheless, that military courts act within jurisdictional limitations and upon an evidentiary basis. This provides the ultimate objective of a fair trial, according to military forms, and is applicable not only in courts martial (U.S. v. Clay, 1 CMR 74) but also in military commission trials of enemy war criminals (Re Yamashita, 327 U.S. 1. 90 L. Ed. 499, 66 S. Ct. 340) and in executive trials of United States civilians, among others, who commit civil-type offenses in occupation areas (Madsen v. Kinsella (1950, D.C. W. Va.), 93 F. Supp. 319, affd. 188 F. 2d 272).

and secondly, of such ordinary civil-type offenses by the local population as the military occupation commander does not leave under jurisdiction of the local courts. Such commander has considerable discretion in these matters. Laws and regulations promulgated by him are invariably tried by his occupation tribunals. Beyond that, to the extent deemed necessary, he may establish those tribunals as substitutes for the local judiciary, although he will in general let the latter continue as to subjects having no security or political implications.[14] Many occupation-security regulations merely re-state, still in a very generalized form, duties which are placed upon an occupied population by international law, so that some of the same offenses previously mentioned as war crimes may then appear with designations more specifically adapted to the occupational situation.[15]

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[14] FM 27-5, 1947, supra, par. 31b.

[15] General Davis cites numerous types of Civil War cases before military commissions, some of them being occupation offenses, which were charged "either as 'violations of the laws of war' or specifically by their particular names or descriptions." He further comments that, not infrequently, the crime as charged and found was a combination of two species of offenses above indicated; as in the case of the alleged killing by shooting or unwarrantably harsh treatment of officers or soldiers after they had surrendered, or while they were held in confinement as prisoners of war, upon which the charges were alleged as "murder in violation of the laws of war." (Davis, op. cit., 310 n. 2).

(3). Place of offense as affecting its characterization as a war crime or other offense under the law of war. Although an occupation offense necessarily must have occurred in occupied territory, the rule as to war crimes is quite broad,[16] restricting the locus of a justiciable offense only within the limits of the theater of war[17] including, again, related occupied territory. Omitting questions of policy affecting when an existing jurisdiction may be exercised, the offense need not necessarily occur in a combat area or a zone of hostilities, but the situs of jurisdiction generally comprehends all territory of all nations who are parties to the conflict[18] and in a few specialized situations extends

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[16] "There are *** no territorial limits as to where a war crime can take place -- it can be committed anywhere: on land, on sea, and in the air." (Lachs, op. cit., 42).

[17] In general, military tribunal jurisdiction under international law attaches only with respect to acts which have occurred within the theater of war or territory under martial government, as the case may be (Winthrop, op. cit., 836).

The scope of the last statement is apparent from the United States Army's definition of "theater of war" (which itself includes and is wider than the "theater of operations" as being "those areas of land, sea, and air which are, or may become, directly involved in the conduct of the war". (FM 100-5, War Department Field Service Regulations, 15 June 1944, par. 1).

[18] The concept of "theater of war" in words of a 19th century European scholar was more comprehensive still, embracing "all the countries in which two powers may assail each other, whether it belongs to themselves, their allies, or to weaker states who may be drawn into the war through fear or interest" (Jomini, The Art of War, 11.) Particularly

even into neutral territory.[19]

(4) Time of offense as affecting its characterization as a substantive type subject to the jurisdiction of military commissions. To state expressly that which is implicit throughout, the historic doctrine has been that a war crime or occupation offense could arise only during a war[20] or a hostile occupation[21] respectively. If the events occurred before or after those periods, the facts would not involve the international law of war; they then might be a

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under modern concepts of total war, as the case of Ex parte Quirin illustrates, the so-called "zone of interior" is included as clearly as a combat area or foreign territory (and see United States ex rel Wessels v. McDonald, 1920, 265 F. 754).

[19]Lachs, op. cit., 41; of interest in this connection are cases, of T. E. Hogg who peacefully boarded a Union vessel in a port in Panama with intent to seize her for the Confederacy, and of John Y. Beall who attempted the same after boarding a Union ship at a Canadian port on Lake Erie (cited in Ex parte Quirin, supra, 317 U.S. 1, n. 10; Winthrop, supra, 837, 839) although these particular cases are capable of explanation on the much simpler ground that under international law the national jurisdiction follows and remains with the national flag aboard a ship.

[20]Fairman, op. cit., 266.
Lachs, op. cit., 36.

[21]Madsen v. Kinsella, supra.

violation of purely domestic law or none at all.[22] However, history took another step forward in recent years, when the Nurenburg International Military Tribunal was recognized, in its charter, to have jurisdiction of acts which preceded and instigated a war of aggression, and crimes against humanity committed against any civilian population, before or during the war.[23] At about the same time, on 5 December 1945, regulations promulgated by the Supreme Commander for the Allied Powers, Far East, provided for jurisdiction over offenses which "need not have been committed after a particular date *** but in general should have been committed since or in the period immediately preceding the Mukden incident of 18 September 1931."[24] It may be added, nevertheless, that cases applying the full scope of such jurisdiction as to time of the subject-offense were rare in World War II practice.

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[22]It was upon this basis that depredations and murders by raiding Indians in Texas, during a status of peace, were held not to violate the laws of war (Dig. Op. JAG 1912, 1069).

In a rather unique court martial decision, it has been held that, while for a United States civilian merchant seaman to wrongfully pretend, to an enemy national, to be a member of our armed forces may be a violation of the laws of war if committed during hostilities, it is not such when done during a post-belligerent occupation (CM 318380, Yabusaki, supra, 67 BR 274.

[23]Oppenheim, op. cit., II, 578.

[24]History of UNWCC, 468, supra. Prosecution of crimes against humanity, at least on a mass scale, is not subject to the ex post facto doctrine familiar to national law (Keenan and Brown, Crimes Against International Law, 51, 54, 118).

5. Jurisdiction -- War crimes; as to Persons.

With few limitations,[25] any person[26] who may be guilty of a particular type of war crime is subject to military commission jurisdiction in respect to it. The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is universally recognized.[27]

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[25] In a restrictive view, based on terms of a national ordinance, in review of the case of Robert Wagner et al, the French Court of Cassation held that a French military trial court was without jurisdiction to try a German for unlawful killing of a victim of English rather than French nationality. (3 Law Reports of Trials of War Criminals 48, hereinafter abbreviated "LRTWC"). However, the international law rule does not so limit jurisdiction to victims of the same nationality as the trial tribunal. The "doctrine of universality of jurisdiction" was thus stated by the father of the modern science of international law, in 1612: "The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them, but excessively violate the law of nature or of nations." (Grotius, De Jure Belli ac Pacis, Libri Tres). In opinions of recent years, resting in part upon the doctrine of universality of jurisdiction, it has been said that every sovereign state under international law has jurisdiction to punish pirates and war criminals in its custody, regardless of the nationality of the victim or place of the offense (Report of the Deputy Judge Advocate for War Crimes, 59) trial of German nationals by a British military court for offenses against non-British victims, in "Zyklon B" case, 1 LRTWC 103).

In at least one series of cases it has been held that the perpetrator and victim must be of different nationalities in order to raise an international offense, although their two nations may be enemy co-belligerents (Report of the Deputy Judge Advocate for War Crimes, 59). This limitation,

In elaboration, military commissions may, under the requisite circumstances, have jurisdiction over members of enemy armed forces, and civilian non-combatants who accompany them,[28] other enemy persons, being civilians not directly connected with armed forces,[29] enemy unlawful belligerents;[30] enemy prisoners of war who have committed war crimes before or after capture,[31] interned enemy civilians who commit other than disciplinary offenses during captivity,[32] civilians of neutral nations,[33]

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however, is inapplicable to the recently-recognized offense of genocide.

[26] Anyone may be guilty of a war crime (Lachs, op. cit., 33).

[27] Johnson v. Eisentrager, supra; Dig. Op. JAG 1912, 1067.

[28] Lachs, op. cit., 25.

[29] Exemplified by the medical-murder of Allied civilian slave laborers by enemy civilians (Kintner, The Hadamar Trial, p. XXXV, in which the victims, being mostly Polish and Russian, were "liquidated" as a war measure, to relieve their burden upon the German economic system due to incurable tuberculosis).

[30] Six of the seven defendants in the case of Ex parte Quirin, supra, were of this category.

[31] The stated jurisdiction over prisoners of war, while existing under the general law of war, is limited under United States application. Since the 1929 Geneva (Prisoners of War) Convention, we have considered it advisable to use courts-martial, rather than military commissions for trial of all criminal offenses committed while the perpetrator is a prisoner of war (JAGS Text No. 7, Law of Land Warfare, 1 Sept. 1943, p. 12). It appears that under our probable future application of the 1949 Conventions, a similar restriction on use of military commissions will be applied as to pre-capture offenses

members of United States forces either military or civilian[34] and United States civilian citizens, other than those accompanying our armed forces, when guilty of spying, aiding the enemy,[35] or unlawful belligerency under certain conditions.[36]

Most possible questions of war-crimes jurisdiction are resolved by the discussion under the preceding heading concerning the definitions, conditions, and categories of persons who may be guilty of the various substantive offenses. Although the category of the offender, as well as factors of time and place, may affect the existence of a substantive offense, examination will show that when these are established

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of prisoners of war (see infra., sec. 12).

[32](Dig. Op. JAG 1912-40, p. 182). It would appear that, while an enemy civilian may become a prisoner of war, those who become merely alien civilian internees no longer are "assimilated" to prisoners of war to such extent as necessarily to come within the same policy restricting the use of military commissions as to them (see status of internees indicated in 1949 G. Civ. Conv.; compare policy under the 1929 Convention, JAGS Text No. 7, Law of Land Warfare, 1 Sept. 1943, p. 100, n. 241).

[33](Dig. Op. JAG 1912, 1056, a case of Scotchmen who involved themselves by manufacturing banknotes for the Confederate Government and then attempted to pass through the North on the way home).

[34]Colby, War Crimes, 23 Mich. L.R., 502, citing orders by General G. B. McClellan; as to soldiers committing civil felonies in hostile countries, see FM 27-10 (1940) par. 355.

[35]The broad terms of the Military Code articles covering spying and aiding the enemy, referring at large to "any person who", would seem to cover all foreigners and all citizens alike (UCMJ, Arts. 104, 106). But by legal construction,

there generally are no further jurisdictional considerations.

Under the modern principle that persons accused of war crimes always are entitled to a fair trial[37] it is implicit that such person must be brought and afforded an opportunity to defend before the court,[38] and must be mentally

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based partly on Constitutional considerations, these provisions are deemed to confer military jurisdiction over United States citizens, providing they have not come from enemy lines, only as to those who are accompanying our armed forces or who commit the alleged offense in a theater of active military operations or other place over which military control and jurisdiction are exercised to the exclusion of our own civil courts (FM 27-10 (1940), supra, pars. 204, 205b; Morgan, Court Martial Jurisdiction, 4 Minn. L.R. 79,107,115; but contra in respect to spies, see Op. 250.4, Dig. Op. JAG 1912-40, p. 183); United States ex rel Wessels v. McDonald, 265 F. 754, 763 (1920).

The limitation as to what foreigners may be held by us for the offense of aiding the enemy was previously discussed. (Sec. 4, p. 22, supra.).

[36] In the celebrated saboteur case early in World War II, it was held that military commissions had cognizance over acts of unlawful hostility by enemy belligerents who had entered domestic territory from enemy lines and then discarded their lawful enemy uniforms, regardless of the fact that United States civil courts were open, and even as to one enemy belligerent who was assumed to be a United States citizen (Ex parte Quirin, supra.).

[37] "Whatever the choice of the State concerned may be, or be it an International Court, a fair trial must be secured. It is the minimum of justice *** a principle of international law." (Lachs, op. cit., 84; also see FM 27-10, 1940, pars. 13, 211, 351, 356; FM 27-5, 1947, par. 32c).

[38] Trials of war criminals in absentia by French and Belgian courts following World War I, although an opportunity was provided for the accused to present their defense through issuing them an "invitation" to appear (Colby, op. cit., 23 Mich. L.R. 482, 497), are contrary to United States military and civil practice.

competent. Aside from the latter limitations, however, there no longer is a general immunity of any category of persons from war-crimes jurisdiction.[39] In that extent, the jurisdiction is unlimited as to persons. New restrictions upon use of military commissions for cases of all ordinary prisoners of war and some war criminals, as a result if not by specific terms of the 1949 Conventions, are discussed later.[40]

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[39] The United States members of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, in 1919, based on the doctrine formerly prevailing concerning special privileges of chiefs of state, dissented from the proposition, incorporated as Article 227 of the Treaty of Versailles, that the German Kaiser might be placed on trial for recognized acts of international aggression. Nevertheless, although he was not tried, legal writers later considered that the initial decision to do so was a precedent changing the older doctrine and removing the ex post facto objection, thus leading to a change of American interpretation for the future (Hyde, op. cit., 2410-2415).

[40] See infra, sec. 12 of this chapter, and Chapter IV.

6. Jurisdiction -- War Crimes; as to Place of Offense.

Except where the facts cause limitations of domestic law to enter into the case,[41] the military jurisdiction is not affected by the place in which a war-crime was committed.[42] On the other hand, jurisdiction over an occupation offense is restricted, as indicated in its very name, to those requisite types which occur within the particular occupied territory to which the court is related.

7. Jurisdiction -- War Crimes; as to Time of Offense.

Assuming a war crime to have been committed, there are very few situations in which the time of the offense will affect the jurisdiction of a military commission. It is necessary that the offense have occurred during the same period of war, including related periods of occupation, rather than during any former hostilities that have been concluded by a final restoration of an unreserved status of peace. As to national military tribunals, at one time it was considered

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[41] If United States citizens who had no connection with our military forces and had not come from the enemy lines (see the distinguishable facts in Ex parte Quirin, 317 U.S. 1, supra, and the dicta in Ex parte Milligan, supra) were to commit a war-crime in our domestic territory, as by mistreating enemy prisoners of war interned here, jurisdiction would lie in the civil courts only.

[42] The evidence that the defendants in Ex parte Quirin, supra, had crossed naval and military coast-defense lines was not shown to establish jurisdiction, but to show a substantive war-crime offense, from which jurisdiction necessarily followed.

to be improper[43] for them to exercise jurisdiction over an offense committed in the same war but before their nation became a party to it, but this limitation no longer exists.[44] In the case of an enemy spy, there always is the distinctive rule that no punishment may be adjudged for his activity if the agent has regained the safety of his own lines in an interval before his capture.[45]

The broad rule is clearly stated as to occupation tribunals serving either strictly under the laws of war or as substitutes for the local civil courts.[46] Among the offenses against the local code which such tribunals may hear are offenses committed before the occupation was established,[47] and probably even before the initiation of the war when within any applicable statute of limitation. However, military government regulations are not enforcible except over areas and persons subject to their effect when the offense was committed.[48]

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[43] Hyde, op. cit., 2414, n. 17.

[44] In support of determinations that United States tribunals could try war criminals for offenses committed in World War II but before the United States entered it, it was pointed out that "it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. And this is true irrespective of when or where the crime was committed; the belligerency or non-belligerency status of the punishing power, or the nationality of the victims." Report of the Deputy Judge Advocate for War Crimes, European Theater, 508.

8. Jurisdiction -- War Crimes; as to Place of Trial.

War crimes cases usually are brought to trial in or near the territory where the facts occurred. This may facilitate the availability of witnesses, as well as tending to assuage the violated sense of justice of a persecuted local population in some cases. As a more remote objective of international law enforcement, it also serves, through the geographical association, to etch an historical object lesson in sharper outline for the benefit of posterity. Nevertheless, this custom is founded merely on practical considerations of the nature indicated, and is neither invariable nor jurisdictional.

There are times, as in a trial for numerous offenses that occurred at different locations, or those having only a general effect over various areas, where to follow the ordinary practice is impracticable or impossible. The same would apply in case of a prosecution during hostilities for an offense committed in territory still held by the enemy.

The similarity in character between the two chief military tribunals indicates the applicability of the same legal principle as to place of trial. As applied to general courts-martial, the rule is that, if other jurisdictional requirements are met, the court may hear a case although the

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[45] Halleck, International Law, (4th Ed.) 40.

[46] Dig. Op. JAG 1912, p. 1067.

[47] Davis, op. cit., 312, n. 2; Fairman, op. cit., 268.

offense was committed in the area of a different command[49] or even in a different country, since the jurisdiction of a court martial with respect to offenses against military law, except in certain statutory offenses incorporated under Article 134 of the Uniform Code of Military Justice, is not affected by the place where the court sits.[50] Although the issue undoubtedly would be contested, it seems by analogy that the same result would follow if a war crimes case arising in foreign territory were to be brought to trial in this country.[51] The latitude of the United States practice is evident from cases in which war crimes trials were conducted by us after hostilities, with consent of the Chinese government, our ally, in territory which this nation itself had never occupied.[52] For strictly military-government cases, however, the hearing must be held by the occupier and in the occupied country.[53]

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[48] Fairman, op. cit., 267

[49] Similarly, as to other than courts-martial, it makes no difference to the jurisdiction of the military court, in the point of view of the British, whether the alleged crime had been committed within or without the convening officer's command. (1 LRTWC, supra, 41).

[50] MCM, 1951, par. 8. And see Winthrop, op. cit., 81. The jurisdiction of a court martial is not territorial (CM 317064, Johns, 66 BR 184; Colby, War Crimes, 23 Mich. L.R. 499). It may sit outside the command of the convening authority (CM324235, Durant, 73 BR 70), and if convened in a foreign land it may adjourn to the United States to hear testimony (IX Bull JAG 13; Durant v. Hiatt, 81 F. Supp. 948, affd. 177

9. Jurisdiction -- War crimes; as to Time of Trial.

Although, as we have seen, military jurisdiction over a war crime is not limited generally by such factors as place and time of the offense, or the place of trial, there is a very definite limitation upon the time of holding the trial. Following the date of commission of such an offense, which naturally fixes the earliest possible time of trial, there eventually may arrive a time after which the jurisdiction to bring and carry out a prosecution will no longer exist.[54]

F 2(d) 373).

[51] If such a case occurred, the defendant undoubtedly would assert a right to trial by civil court, although such plea would not be valid under the general tenor of dicta in the Quirin and Eisentrager cases.

More restrictive results reached in some other countries are imposed by local law. Thus, after World War II, the Norwegian courts, which were not similar to military commissions anyway, took the position that they could try war criminals only if the acts were committed in Norway in violation of Norwegian municipal criminal law. (3 LRTWC 47, supra).

[52] Johnson v. Eisentrager, supra, 339 U.S. 763.

[53] 1949 Geneva (Civilians) Convention, Art. 66

[54] A striking instance of "falling between stools" is thus recounted by Colby: "When an officer in the Army of the United States committed an offense against a native of the Philippines, nothing could be done. The offense was against the laws of war, during the insurrection and military occupation. Since the war had ceased and peace had been proclaimed, he could not be tried by a military commission. Since the offense took place in those islands the United States courts could not try him. Since he was part of the occupying army the Philippine courts could not try him. Since he had left

This termination of jurisdiction is established by the end of the necessity, being the war and related occupation[55] if any, which were the facts which gave rise to such jurisdiction initially. However, the mere termination of hostilities is no bar to military commission trial.[56] As stated by one authority, under universal precedent, "The jurisdiction of a military commission convened under the law of war may be exercised up to the date of peace agreed upon between the hostile parties or the declaration by the competent authority of the termination of the war status."[57]

It is further recognized in the present day that the situation may be affected by possible reservations of continued jurisdiction for prosecution and punishment of war crimes under express provisions in a formal surrender agreement

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the military service, no court martial had any jurisdiction over him. So, in 1903, the Attorney General had to inform the Secretary of War that the officer in question could not be tried (Colby, War Crimes, 23 Mich. L.R. 482, at 617, citing 24 Op. Atty. Gen. 570).

[55] Fairman, op. cit., 266. Under the same principle, limiting the duration of the Provisional Court of Louisiana until the restoration of civil authority in the State, its jurisdiction did not expire immediately when the last Confederate general, Kirby Smith, surrendered on 26 May 1865 (Burke v. Miltenberger, 19 Wall 519, 522).

By way of exception, however, if jurisdiction exists during an occupation, the jurisdiction may be maintained, by keeping the offender in custody, in case a military withdrawal forces an end to the occupation while the war progresses. (Fairman, op. cit., 267).

or peace treaty.[58] Nevertheless, in absence of such terms in a final agreement, or upon their effectuation, the resumption of a full peace status extinguishes any further military jurisdiction over war crimes of that period, committed by members of enemy armed forces or other non-resident enemy aliens. While the principle of amnesty[59] thus arising in favor of the latter is not necessarily available to persons, enemy or otherwise, who have committed violations of allegiance or civil crimes while domiciled in our domestic territory during the war,[60] the principal generally would be effective to the extent of compelling subsequent proceedings against the latter to be held before a civilian court.

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[56]This long-standing rule was re-affirmed by the Supreme Court in Re Yamashita, 327 U.S. 1, supra.

One authority, referring to offenses of unlawful killing during a war, theorizes that the crime is "considered to adhere to the actor" and remains punishable "at any and all times, at least so long as war continues" (Halleck, op. cit., 40).

[57]Davis, op. cit., 1901, 311. Accordingly, citing this principle, the Supreme Court, on habeas corpus, found no jurisdictional defect in the trial in 1945 of the Japanese General Yamashita for war crimes committed during prior hostilities in the Philippines. (Re Yamashita, 327 U.S. 1, supra). However, all proceedings by military commission which remain pending, or which are not completed so far as the passage, approval, and order of execution upon the sentence, at the time of resumption of a full peace status, are thereupon terminated (Davis, op. cit., 312, n. 2).

[58]Under Art. 228 of the Treaty of Versailles, signed on 28 June 1919, the German Government recognized the right of the Allied and Associated Powers thereafter to bring before

10. Jurisdiction -- Civil Cases or Modes of Relief.

A collateral subject requires a brief notice at this point. Although history has seen the vast majority of military commissions utilized to try criminal cases, there is no reason or rule in international law which prohibits their use for granting civil relief.[61] Accordingly, if the commanding general of an occupation force finds that the population is suffering hardship or injustice because the local civil courts cannot or will not function, it lies within his power to set up emergency civil courts.[62] The creation of such courts, under executive authority in behalf of the President, is an incident

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military tribunals persons accused of offenses against the laws and customs of war, and agreed to surrender persons by name, rank, or office as specified. (Hyde, op. cit., 2414, n. 18).

[59] As a negation of a prior amnesty, it was observed in the Yamashita case, that "Japan, by her acceptance of the Potsdam Declaration and her surrender (document) had acquiesced in the trials of those guilty of violations of the law of war" (Re Yamashita, supra).

[60] Hyde, supra, 2416, n. 3.

[61] Since a grant of civil jurisdiction is exceptional, it must be in express terms. Ordinarily, a commission convened for trial of offenses under the law of war will have no jurisdiction of civil suits, proceedings, or forms of relief (Dig. Op. JAG 1912, 1069; Winthrop, op. cit, 841, n.21).

[62] Recognition of this authority in regulations was more express in the 1943 edition of FM 27-5 (Manual of Military Government and Civil Affairs) than under the 1947 revision.

to the power to establish a military government.[63] Reports of cases reflect the establishment of provisional civil courts by General Kearney in New Mexico in 1846,[64] of a "Provost Court" in New Orleans in 1862, which once rendered a civil judgment for recovery of $130,000.00,[65] and one in Puerto Rico, in 1899, having jurisdiction only in cases of "diversity" of nationality.[66] In addition, military criminal tribunals sometimes have been authorized to take types of action which ordinarily characterize a more plenary scope of judicial power.[67]

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[63] Mechanic's Bank v. Union Bank, 22 Wall 276, 296; Santiago v. Nogueras, 214 U.S. 260, 53 L. Ed. 989.

[64] Leitensdorfer v. Webb, 20 How. 176; Dig. Op. JAG 1912, 1065.

[65] Mechanics Bank v. Union Bank, supra. The "Provisional Court of Louisiana," which succeeded the Provost Court in New Orleans in 1862, under Executive order, determined a case in admiralty which was affirmed by the United States Supreme Court in The Grapeshot, 9 Wall. 129. Its jurisdiction in an action on a mortgage was recognized later in Burke v. Miltonberger, 19 Wall. 519. (Dig. Op. JAG 1912, 1065).

[66] Santiago v. Nogueras, supra.

[67] Winthrop records instances in the Civil War of a proceeding in rem against a steamboat, for trading within the enemy's lines, of fines directed to be paid to the injured party by way of indemnification of the individual, of stolen property required to be restored by judicial order, of fines directed to attach as a lien on the real estate of the offender until paid or required to be levied on his property, of orders that property be held as security, forfeited, or confiscated, of forfeitures of liquor licenses and other rights, and of judgments for costs against the defendant and taking of a bond for good behavior (Winthrop, op. cit., 842-845).

After World War II, the British military courts and United States military commissions in one theater (China-Burma-

11. Jurisdiction -- Concurrent Jurisdiction of Military Commissions and Courts-Martial.

Since military commissions came upon the scene in order to close gaps in essential military jurisdiction not covered by our courts-martial,[68] their instances of joint jurisdiction are exceptions to the general rule. During the Civil War, by statute of 3 March 1863, the two courts had concurrent jurisdiction over murder, manslaughter, robbery, larceny, and other specified crimes when committed by persons in the military service.[69] By an act of 2 July 1864, they had similar concurrent jurisdiction over certain war-time offenses of fraud, bribery, and neglect of duty involving procurement officers, inspectors, and employees.[70] Although jurisdiction over such offenses was not exercised by military commissions subsequent to that war, joint jurisdiction in the two courts continued over the offenses of aiding the enemy and spying.[71] Shortly prior to our entry into World War I,

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India) were authorized to adjudge restitution of property as part of an otherwise criminal cause. (1 LRTWC 109, supra).

[68] Winthrop, op. cit., 831.

[69] Davis, op. cit., 308, n. 4.

[70] Davis, idem.

[71] Present UCMJ Arts. 104 and 106.

the jurisdiction of courts martial[72] through the then Article of War 12 (being contained as Article 18 in the Uniform Code of Military Justice, 1951) was extended to cover most if not all war-crimes offenses, concurrently with military commissions.[73] That measure also had the effect, and perhaps was intended for the primary purpose, of enabling enemy prisoners of war to be tried concurrently by courts-martial, as later was required exclusively under Article 63 of the 1929 Geneva (Prisoners of War) Convention.[74] Another result at that time was to provide concurrent authority, exercised only in exceptional situations, for courts-martial to try the type of occupation cases in which United States tribunals apply the local code as substitutes for the local judiciary.[75]

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[72]It has been contended that former Article of War 96, the general article now replaced by UCMJ Art. 134, was adequate to cover war crimes by our own forces (Colby, op. cit., 505).

It also will be borne in mind that whenever common law crimes, such as those under present Articles 118 through 130 of the Uniform Code of Military Justice, are committed by members of our forces against enemy persons, these in fact are war crimes whether so denominated or not (Law of Land Warfare, Judge Advocate General's School Text No. 7, 1943 Ed.,p. 9). Similarly, the offenses of looting and pillaging by our forces, when committed against enemy persons or property, are examples of international offenses incorporated specifically into the national code for courts-martial (UCMJ, Art. 103 (b)(3)).

[73]See historical annotation in Re Yamashita (1946), 327 U.S. 1, n. 7.

[74]The Judge Advocate General has had occasion to consider which Articles of the military code a prisoner of war may be held to have violated in an assault committed during

12. Jurisdiction -- Effect of the 1949 Conventions on National Tribunals.

General. A consideration of the effect of the several 1949 Conventions[76] upon the jurisdiction and probable utilization of military commissions in the future was a main objective of the instant study since, as mentioned under a prior heading,[77] international agreements are a primary source of the governing law of war. Although these conventions of 1949 have not yet received Senate ratification so as to be mandatorily effective upon this country at the time of this writing in early 1953, their eventual ratification is to be anticipated. With that assumption in mind, it will be noted that, for the mutual parties thereto, the 1949 Conventions, as a group, will replace the Geneva (Red Cross) Convention of 27 July 1929, the Geneva (Prisoners of War) Convention of 27 July 1929, and also certain lesser known earlier conventions,[78] although they merely supplement Chapter 2 of

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captivity (II Bull. JAG 52).

[75] CM 318380, Yabusaki, 67 BR 271, supra; CM 347931, Fleming, 2 CMR 312.

[76] Contained in DA Pamph. No. 20-150, Oct. 1950, supra.

[77] See supra, section 4, p. 19.

[78] 1949 GSW, Art. 59; 1949 GWSS, Art. 58; 1949 GPW, Art. 134 (for fuller titles of Conventions, see infra, p. 21, n. 6).

Section I (Prisoners of War), Section II (Hostilities), and Section III (Flags of Truce) of the Hague (Laws and Customs of War on Land) Conventions of 29 July 1899 and 18 October 1907.[79]

Scope of the four new Conventions. While many provisions of older Conventions have been rephrased, clarified and elaborated upon in the new agreements, a careful comparison discloses surprisingly few major departures from what already has become recognized as universal law under the earlier provisions. The general tenor is a continuation of the same humanitarian spirit, with a broadened liberality in specific safeguards and other details.

The agreement relating to prisoners of war[80] is, in a sense, the most basic, since the other three in effect incorporate certain of its standards by reference. Thus, under the agreement relating to sick and wounded members of armed forces and certain related personnel in the field, these protected persons, if fallen into the hands of the enemy, are entitled to be treated as prisoners of war;[81] at the same time, captured professional medical personnel and chaplains, while not technically becoming prisoners of war, are entitled to the same benefits and to other rights in addition.[82] A precisely parallel result obtains, mutatis mutandis, as to

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[79] 1949 GPW, Art. 135; 1949 Civ., Art. 154. See older conventions in TM 27-251, Treaties Governing Land Warfare (1944).

captured persons who are wounded or sick at sea, or shipwrecked, on the one hand,[83] and to their respective religious, medical, or hospital personnel on the other hand.[84] However, expressly excluding persons captured during hostilities and who thereby necessarily become prisoners of war,[85] there is a separate class of persons covered by the agreement relating to persons who are subject to internment as enemy civilians upon falling into hands of the opposing nation during either warfare, belligerent occupation, or post-belligerent occupation.[86] While the convention relating to the latter, in providing for punishment of offenses by them, in effect incorporates Articles 105 through 108 of the 1949 Convention on Prisoners of War,[87] the interdependence is diminished by the fact that most of the same substance is contained in Articles 72 through 74 and 76 of the 1949 (Civilians) Convention itself.

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[80] 1949 GPW.

[81] 1949 GSW, Arts. 5, 12, 13, 14, 25, 29.

[82] 1949 GSW, Arts. 24, 26, 28, 30.

[83] 1949 GWSS, Arts. 4, 12, 13, 16, 39.

[84] 1949 GWSS, Arts. 36, 37, 39.

[85] 1949 G. Civ., Art. 4.

[86] 1949 G. Civ., Arts. 2, 4.

[87] 1949 G. Civ. Art. 146, last par.

Changes as to offenses covered. The restriction on reprisals against hostages, which did not exist in Civil War days[88] but later became a prohibition against only those reprisals which were excessive in relation to their legitimate justification and were not preceded by reasonable inquiry,[89] has now been made absolute by attaching an unconditional mandate against the taking of hostages.[90]

The scope formerly covered by the long-known offense of "war rebellion" has been greatly narrowed by one of the new Conventions. War rebels formerly were defined as "persons within territory under hostile military occupation who rise in arms against the occupying forces".[91] Under the new provisions, persons of organized resistance movements in occupied territory, acting together as a hostile militia or volunteer corps,[92] are entitled on capture to be treated as legitimate

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[88] In General Lieber's code, hostages were treated as prisoners of war, and both were subject to reprisals. (G.O. 100, (1863), Instructions for the Government of the Armies of the United States in the Field, Arts. 54, 55, 59).

[89] Under FM 27-10, 1940, pars. 358, 359, hostages were treated as prisoners of war but, unlike the latter who were protected by Art. 2 of the GPW Convention of 1929, hostages remained subject to reprisals under some conditions.

[90] 1949 G. Civ., Arts. 33, 34.

[91] F M 27-10, 1940, par. 349.

[92] Persons who take up arms individually, and without being members of regular forces, are still denied rights of prisoners of war if captured (Laughterpacht, op. cit., II, 257).

prisoners of war, if they follow four general requirements as to responsible and open activity.[93] These terms are bound to present vast difficulties in interpretation and enforcement. In essence, while they do not negate the principle that an occupied populace owes obedience to the occupier, or permit them to lead a dual role of night-time violence and day-time subserviance through merging with the general public, the effect is to accord belligerent rights to those persons of an occupied country who are subjugated and later separate themselves and take the field on an open and sustained basis. While underground sabotage remains prohibited,[94] it is now possible for a legitimate status of open resistance to be attained.

While it has been stated that the ex post facto doctrine is not applicable under international law,[95] actual decisions usually have avoided that position. Any doubt on this point is resolved by a new provision that "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."[96]

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[93] 1949 GPW Art. 4 A (2), and see Art. 4 B (1); Laughterpacht, op. cit., II, 214.

[94] 1949 Civ. Art. 5; however, the degree of the offense has, in certain circumstances, been reduced; 1949 Civ. Art. 68.

[95] See page 27, note 24, supra.

[96] 1949 GPW Art. 99.

Changes as to persons, particularly prisoners of war, within military commission jurisdiction. The new Conventions do not directly preclude the exercise of jurisdiction by military commissions over all categories of war criminals, the same as before. It is believed, however, contingent upon future policy-decision by appropriate United States authority, that the probable manner of implementing certain terms will result, from now on, in the trial of many war criminal cases of this nation by courts-martial instead of by military commissions.

Article 102 of the 1949 (Prisoners of War) Convention, repeats a substantially identical provision of the 1929 Convention on the same subject, as follows:

> "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power ***" (1929 GPW Art. 63; 1949 GPW Art. 102).

That provision must be considered in connection with the fact that after the Mexican and Civil War eras, in which military commissions had to be used to try soldiers for civil-type offenses committed in foreign territory because the then Articles of War had no coverage thereof,[97] it later became the modern custom of the United States armed forces, based partly on

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[97] Art. 33 of 1806 Articles; Arts. 58, 59, 1874 Articles; Winthrop, op. cit., 831-832, 979, 990.

purely historical and perhaps partly on Constitutional reasons, to use only courts-martial for all trials of our own armed forces members.[98] Under the noted equivalent provision of the 1929 Convention, the classification of enemy prisoner of war was interpreted not to include war criminals.[99] Consequently, under joint application of the mentioned provision and of our national practice as to the forum for our own forces, we tried our forces and those who then were entitled to be considered as enemy prisoners of war, before courts martial,[1] while we remained at liberty to use military commissions for trial of war criminals.[2] An entirely new provision of the 1949 Geneva (Prisoners of War) Convention, which appears destined to change that jurisdictional situation in a large degree, reads as follows:

> "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." (1949 GPW Art. 85).

The Russian Government took a reservation to this article of the Convention, in terms which indicate that the use of the phrase "laws of the Detaining Power" is not understood to refer to national substantive laws but to such national

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[98] J. A. G. S. Text No. 4, War Powers and Military Jurisdiction, 31.

[99] J. A. G. S. Text No. 7, Law of Land Warfare, 102;

procedure as may be used to enforce the international law of war.[3] Since the actual reference is thus to the law of war, it is clear that the term "acts committed prior to capture," in the same Article of the 1949 Convention, means war crimes. Therefore, the effect of Article 85 is to say that persons captured in hostilities or taken into custody in an occupation area while hostilities are still in progress elsewhere,[4] if in all other respects they are of such a category as to be eligible to become prisoners of war within paragraphs A and B(1) of Article 4 of the 1949 Geneva (Prisoner of War) Convention, must at all times and even in a prosecution for prior war crimes, be accorded the rights of prisoners of war. Even as to those war criminals thus included, such rights, of course, will include the right to be tried by the same courts

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V Bull. JAG 263; Laughterpacht, op. cit., II, 209. The rationale is to the effect that by committing war crimes such as violation of parole, the individual forfeited the right to be treated as a prisoner of war (Art. 12, 1907 Hague Convention).

[1]See p. 29, n. 31, supra; Chap. IV, n. 17, infra.

[2]Re Yamashita, supra; Johnson v. Eisentrager, supra.

[3]The Russian reservation to this 1949 Convention stated in pertinent part: "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." D A Pamphlet No. 20-150, supra, P. 253).

(courts-martial in the case of the United States) which try members of the Detaining Power's own forces for the same or most nearly comparable offenses.

In enlarging the category of persons who become entitled to rights of prisoners of war, the mentioned Convention indirectly results in a corresponding narrowing of a major class of persons formerly tried by the United States before military commissions. The questions arise, what is the degree of this change, and what war criminals, if any, and other persons, may still be tried before military commissions of this nation?

Stated briefly, of the persons formerly within the "applied jurisdiction" of military commissions (using that term to designate the scope of that actual or legal jurisdiction which may be exercised consistently with national policies), military commissions still have cognizance of those persons who never in fact acquire the status of prisoners of war under paragraphs A and B(1) of Article 4 of the 1949 Geneva (Prisoners of War) Convention. Such persons

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[4]This interpretation, of paragraph B(1) of Article 4 of the 1949 GPW Convention as providing that members and former members of enemy armed forces, when interned in an occupied country, will become prisoners of war only if hostilities are not then completely finished, is indeed a close point. However, that conclusion is believed to follow from the context of that paragraph in the Convention, as well as from the traditional concept which identifies a "prisoner of war" with a state of fighting in progress between public enemies. (See definitions in law dictionaries; Black, Bouvier).

generally include: First, all indigenous persons, other than members of enemy armed forces during hostilities[5] who commit any offense in either a belligerent or post-belligerent occupation area, regardless of whether the offense is of a war crime nature or a purely occupation character; they may become "protected persons" but not prisoners of war. Second, all persons other than the several classes of lawful belligerents and persons lawfully accompanying enemy armed forces (as defined in said Article 4) who commit war crimes, either during or incident to hostilities; these are precluded from becoming prisoners of war, and therefore remain subject to military commission jurisdiction. Third, and this point is easy to overlook in a hasty glance at the Conventions, even members and former members of enemy armed forces as referred to in paragraph B(1) of Article 4, who have committed war crimes at any time but who are not captured or otherwise taken into custody until after the complete close of active hostilities,[6] do not then become prisoners of war within the cited paragraph,

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[5] Members of open resistance units who commit war crimes in occupied territory during hostilities must be excluded, because they become prisoners of war under paragraph A(2) of Article 4 of the Convention. But if they do not comply with that article, it is otherwise and they are saboteurs or unlawful belligerents.

[6] Although involving a different point, an older opinion of The Army Judge Advocate General has recognized the distinction between prisoners of war and "surrendered enemy forces" (V Bull. JAG 263).

but remain triable by military commission. The three foregoing broad categories are still within the "applied jurisdiction" of military commissions.[7]

Those war criminals and others not protected by the status of prisoner of war nevertheless have certain legal rights under the 1949 Geneva (Civilian) Convention,[8] although specification as to kind of trial court for them is not included. That matter primarily involves procedural provisions to be discussed in Chapter Four.

13. Jurisdiction -- Tribunals having Multi-national Authorization; History.

The appearance of the application of the international law of war through trial by international tribunals is comparatively recent. With the laws of war largely being a reflection of gradually developing precepts recognized in the common conscience of mankind, it follows that, to the universal interest in their observance, there is attached an equally wide responsibility for their enforcement. Yet practical application of the concept of international adjudication of the international criminal law of war did not materialize

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[7] On the other hand, if the war criminal, of enemy armed forces or otherwise, is captured or interned during hostilities, his resulting status of prisoner of war will prevent his trial, due to factors previously discussed, by other then court-martial prior to his final repatriation and release (1949 GPW, Art 5; 1949 G. Civ. Arts. 5, 6).

[8] 1949 G. Civ. Arts. 5, 6, 70.

until the present century?[9] Even after World War I, the concept remained only that.[10] But during World War II, in the Moscow Declaration of 1 November 1943, it was significantly enunciated by the United Kindgom, United States, and the Soviet Union, speaking in the interest of the then 32 United Nations, that German war criminals in general would be returned to the scene of their "abominable deeds" to receive punishment, but that the major war criminals whose offenses had no particular geographic location would be "punished by a joint decision" of the Allies.[11]

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[9]It will be recalled that following the final defeat of Napoleon at Waterloo in 1815, he was exiled to St. Helena pursuant to a Convention signed between England, Austria, Russia, Prussia and the French government of Louis XVIII. Contemporary legislation of England, which was responsible for his detention, justified it as being "necessary for the preservation of the tranquility of Europe", and provided that he should be deemed to be and treated as a prisoner of war. One authority comments, "His status was evidently that of a man waiting a trial which was never granted." (Glueck, War Crimes, 224). Thus, along with the absence of trial, one may note that the custody was more of a preventive nature than punitive.

[10]Article 227 of the Treaty of Versailles, in 1919, provided for the German Kaiser to be tried "for a supreme offense against international morality and the sanctity of treaties" before a special tribunal to be composed of one judge each from the United States, Great Britain, France, Italy, and Japan. This tribunal was not deemed to be technically of a judicial character, but was to be guided "by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." The effort was nullified when Holland, where he had fled for "political" asylum, refused to surrender him for trial (Hyde, op. cit., 2413).

[11]History of UNWCC, 107, supra.

From experience with the opposite course after the other war, it was recognized this early that advance preparations for joint action was necessary if effective punishment was to be administered.[12] Consequently, in the same period, on 20 October 1943, the organization known as the United Nations War Crimes Commission was formed. It served primarily as a "clearing house" for joint planning and investigative functions. Seventeen nations, not including the Soviet Union because of disagreement as to representation for its component republics, participated in it.[13]

Against that background, the period following World War II saw two notable trials by tribunals in the nature of military commissions which were appointed in the name of, and participated in throughout by, more than one nation.[14]

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[12] Idem, 109. This has reference to the fiasco of the Leipzig trials by Germany in 1921, upon which see Myerson, Germany's War Crimes and Punishment, 147 et. seq.; 16 American Journal of International Law 674-724; Loud and caustic comments of members of British Parliament, quoted in Colby, op. cit., 614-615, n. 160.

[13] Taylor, Final Report on the Nuernberg War Crimes Trials, 128; Hist. of UNWCC, 118, supra; Laughterpacht, op. cit. II, 583.

[14] (a) The International Military Tribunal at Nuremberg (sometimes briefly referred to as IMT EUCOM), which tried Goering and other high Nazi leaders, was established in a charter annexed to a four power agreement dated 8 August 1945 (text of the agreement and charter are contained in Trials of War Criminals before the Nurenberg Military Tribunals, Vol. XIII, p.p. xii, xiv). Each nation supplied one member, the one from England being a jurist; the one from the United

One of these, upon test before the United States Supreme court, was recognized as an international organ whose function was not subject to review by a national appellate court.[15]

Nevertheless, it was realized that the mixed composition[16] of such full-scale international tribunals -- involving four sets of judges and prosecutors, and constant translations to and from as many languages -- was too complicated for general use. In Germany, under authority of Control Council Law No. 10, promulgated by the four national Zone Commanders on 20 December 1945, each of them was authorized by the Council as a whole to establish "appropriate tribunals" and to try war criminals.[17] On that basis, a series of

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States, a former Attorney General; the one from France, a professor; and one from Russia a Major General. Thus the membership was predominantly civilian and legally trained. There was a joint prosecution staff, with an Associate Justice of the United States Supreme Court as Chief Counsel for the United States component. (Laughterpacht, op. cit., II, pp. 577-582; International Military Tribunal, Trial of the Major War Criminals, Vol. 1, pp. 1-7).

(b) The International Military Tribunal at Tokyo (abbreviated IMTFE), which tried Tojo and other top war criminals of Japan, was set up under a charter annexed to a proclamation, dated 19 January 1946, issued by General MacArthur acting by virtue of multi-national authority in his capacity as Supreme Commander for the Allied Powers in the Pacific. The court was composed of members from eleven nations, including in behalf of the United States, a former Judge Advocate General, Major General Myron C. Cramer (Laughterpacht, op. cit., II, 581, n. 2; see judgment of tribunal in 41 American Journal of International Law, 172).

[15] Koki Hirota v. MacArthur, 338 U. S. 197, 69 S. Ct. 157.

[16] A staff report to a member of one tribunal reflected

twelve trials[18] were also conducted at Nuremberg by the United States, involving originally 185 defendants who were at the smaller end of those who fell within the Moscow Declaration category of "major criminals whose offenses have no particular geographical location."[19] When one of these cases of enemy war criminals also happened to go to a United States appellate court on petition for habeas corpus, it was held that the tribunal was not a tribunal of the United States, so as to be subject to review by writ from any national court, because it too was established pursuant to multi-national authority.[20] The members of these tribunals, three for each case, were composed entirely of civilians, of whom 25 out of 32 had been State court judges, one a law school dean,

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a new concept in the implementation of the Moscow Declaration concerning international "joint decision", in stating, "Each individual member will consider particularly the standards of the law of his own country to determine whether or not a particular act violates standards of fairness." (Keenan and Brown, op. cit., 172).

[17] Taylor, op. cit., 136; text in Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XII, p.xix.

[18] For summary of case-titles and charges, see idem, 118.

[19] Idem, 136-137.

[20] Flick v. Johnson, 174 F. 2d 983; cert. denied, 338 U. S. 879, 940.

and the others prominent practicing attorneys.[21] However, the fact of their having legally-trained civilian judges is not inherently a distinguishing feature of these international tribunals. Nor is the fact that they announced written decisions[22] peculiar to them, since whenever deemed appropriate these features can be applied equally to national military commissions.[23]

The immunity of internationally-directed tribunals from habeas corpus proceedings before the civil courts of this country, as held under the Hirota and Flick cases above mentioned, is a characteristic to be noted. It is doubtful, however, whether trial by such tribunals would be decided upon solely to avoid post-trial harrassment of the military authorities who hold convicted war criminals in custody. And, in any event, as discussed immediately below, fundamental standards must be substantially the same.

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[21]Taylor, op. cit., 35.

[22]See written decision contained in record of each case of the 12-trial series, in 14 volume set entitled Trials of War Criminals before the Nurenberg Military Tribunals.

[23]Under war crimes jurisdictional regulations promulgated for the United States China Theater on 21 January 1946, a United States military commission might consist of Army or other service personnel or of both service personnel and civilians(1 LRTWC 113, 115, supra). In the Jaluit Atoll Case, a military commission appointed by the Commandant, United States Naval Air Base, Kwajalein Atoll, Marshall Islands, in late 1945, was composed of four naval officers and two army officers (idem, 71). In the trial of General Yamashita by a national military tribunal of the United States, as appears

14. Jurisdiction -- Tribunals having Multi-national Authorization; Effect of the 1949 Conventions

The nations adhering to the 1949 Conventions did so in their individual sovereign capacities. The references to trials in provisions of the Convention make no mention of proceedings by international tribunal. In absence of express provision therefor, this is not taken to mean that the possibility of such tribunals is abolished. Then, is it possible for trials by future international tribunals to be conducted without observance of restrictions imposed upon national tribunals by express terms of the Convention? In particular, can it fairly be said that, by employing international tribunals, no regard need be given to the previously mentioned joint effect, under Articles 85 and 102, of the Convention of requiring that war criminals taken prisoner of war be tried only "By the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power"? No, even though the concept of a single detaining power may seem incongrous in the case of an international trial, it must be assumed that the spirit of the

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in the footnotes to the case upon petition to the Supreme Court (Re Yamashita, supra), a written decision was rendered by the commission, just as in the two primary and the twelve secondary international trials at Nuremberg.

Hence, the question of wider use of civilian judges

Convention would be applicable.[24] The parties to the Convention must have intended an agreement which would govern the subject and not be easily rendered ineffective.[25] The provisions as to a detaining power in case of an international trial therefore, generally should be applied to require a parity with the courts and procedure of the particular nation which is most instrumental from the standpoints of interest, custody, and prosecution in the particular case. Only if the offense is of a general and unlocalized character in the broadest sense can it be said that the mentioned provisions of the Convention have no degree of application, and even then all members to the Convention still are obliged to assure that basic "safeguards of proper trial and defense" are provided.[26]

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and written decisions, which are definitely desirable under certain conditions, does not necessarily lead to a conclusion in favor of a permanent international criminal court, as has been suggested (Laughterpacht, op. cit., II, 584).

[24]One author has explained that in the trial of the major Axis war criminals before the Nurenberg International Military Tribunal, the component nations merely were doing jointly what each of them could have done separately (Laughterpacht, op. cit., II, 580).

The converse of the proposition necessarily is that the nations could not do collectively that which they could not do individually.

[25]Art. 12 of the 1949 GPW, to which Russia made a reservation, permits a Detaining Power to transfer prisoners of war to another nation, which of course could try them for offenses under the Convention.

[26]See these general requirements as reflected in 1949 GPW Arts. 84, 99, 129, and 1949 G. Civ. Arts. 5, 71, 146.

CHAPTER III

APPOINTMENT OF MILITARY COMMISSIONS

15. Appointment -- Authority

It goes without saying, that a tribunal for prosecuting violations of the laws of war must be appointed by competent authority, acting in an authorized manner and in behalf of a recognized belligerent nation. There being no applicable statutory provision therefor, such authority competent to make the appointment is commonly stated to be the same for a military commission as for a general court-martial, which, speaking generally and allowing for occasional exceptions in regard to the rank, as applied to the Army, has reference to a general officer in command of at least a separate brigade or the equivalent of a territorial department.[1] Although the phrase "any field commander" also is sometimes employed in this connection,[2] it is not clear that this modifies the effect of the preceding statement.[3] Nor is it a

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[1] Davis, op. cit., 309; Winthrop, op. cit., 835, n. 81; and see UCMJ, Art. 22.

[2] Re Yamashita, 327 U. S. 1, supra.

[3] However, as Fairman points out, express authorization from the President could create an appointing authority not existing otherwise, in a commander of "any separate force or body of troops outside the territorial limits of the United States" (Fairman, op. cit., 276).

departure to note that the President, who has statutory authority to appoint courts-martial,[4] can and occasionally does appoint military commissions.[5]

Formerly, there were a few instances of commissions being appointed by commanders of smaller areas such as "districts", which were considered valid.[6] However, contrary to the British practice in respect to their equivalent military tribunals,[7] the United States view concerning military commissions adheres to the rule applicable to our courts-martial,[8] under which the power of a competent appointing authority cannot be transferred by delegation to a subordinate.

While it has long been considered that there is no definite prohibition which disqualifies a competent authority from appointing the commission when he is a prosecutor or accuser in the case, such as limits the appointment of courts-martial,[9] the modern development of more positive and express

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[4] UCMJ, Art. 22, supra.

[5] Ex parte Quirin, supra; Dig. Op. JAG 1912-40, sec. 369 (5); editorial comment in 1 LRTWC 112, supra.

[6] Winthrop, op. cit., 835.

[7] At about the time of the Boer War, the British considered that their "military court", which was at least a first cousin of our military commission, could be appointed by "any commanding officer", and that the latter could delegate his power to an officer of his command "not below the rank of captain." (Spaight, War Rights on Land (1911), 348).

Delegation of appointive authority for military tribunals was still recognized by the British in 1945.

requirements concerning trials for war criminals[10] must be taken to preclude such an appointment of a military commission if it can be avoided without unreasonable delay or other manifest prejudice to the service or the public interest.[11]

Despite the usual association of military commissions with military appointing authority, they may be appointed under authority of a civilian governor of occupied territory. Such tribunal may be called by another name but is, nevertheless, in the nature of a military commission, being appointed under delegation of Presidential authority and stemming from the same Constitutional executive power.[12]

(par. 2(a) of regulations attached to the Royal Warrant of 14 June 1945, in Taylor, Final Report, supra, 254.)

[8] MCM, 1951, par. 5a(5); but see the somewhat broader rule stated in one older authority as follows, "The general rule is that authority to appoint martial-law courts and approve their sentences rests only with the commanding general. It is not a power to be lightly dealt with. The exigency may be such as to cause the power to be trusted to inferiors, yet when it is reflected that these tribunals sometimes may have jurisdiction of causes involving life, the liberty of the citizen and his entire property, the gravity of the responsibility thus imposed becomes apparent - a responsibility which never should be placed in subordinate hands except upon occasions of extreme and pressing necessity." (Birkhimer, Military Government and Martial Law (1904), 527).

[9] UCMJ, Art. 22b.

[10] See p. 31, n. 37, supra.

[11] Winthrop, op. cit., 835, n. 82.

[12] Madsen v. Kinsella, 188 F. 2d 272, supra. If additional nomenclature would benefit the subject, the United

16. Appointment -- Membership.

Military commissions appointed by military authorities as tribunals of the United States have been composed invariably of commissioned officers of the army or navy, although it would be within the appointing officer's discretion to include civilians, as has been done under British martial law, or enlisted men, in the membership.[13] As might be expected, tribunals appointed by an American civilian governor for the exercise of United States jurisdiction in occupied territory may consist of civilian judges.[14] One may mention, while distinguishing, the fact that United States army commanders have appointed tribunals composed of civilian judges for trials of war crimes, when acting under multi-national directives in a capacity of military governor for the United States zone of a joint occupation. The tribunal in the latter situation is "in all essential respects an international court".[15]

States Court of the Allied High Commission for Germany, in that case, might be termed an "executive" tribunal, being a civilian agency of the President for aiding in his "responsibility *** of governing any territory occupied by the United States by force of arms."

[13] Winthrop, op. cit., 835.

[14] Madsen v. Kinsella (1952), supra.

[15] Flick v. Johnson (1949), supra.

The number of members of a military commission is not specified by statute but rests in the discretion of the convening authority.[16] Particularly in war crimes cases, the usage prior to World War II established the minimum number at three.[17] Of these, one of the members sometimes was required to serve in a dual role as judge advocate[18] although usually a judge advocate was detailed separately as a prosecuting officer.[19] And yet, due to the absence of statutory restriction, it was considered that a military commission constituted with less than three members, or which proceeded to trial with less than three members, or which was not attended by a judge advocate would, while contrary to precedent, not necessarily be an illegal tribunal.[20] This bears out the statement of Disraeli that, "In the state of martial law there can be no irregularity in the composition of the court, as the best court that can be got must be

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[16]The court in Vallendigham's case was convened with nine members, of whom seven served at the trial (Winthrop, op. cit., 836).

[17]Davis, op. cit., 309; Fairman, op. cit., 276; Winthrop, op. cit., 836. The same minimum is still applicable (1 LRTWC 115, supra).

[18]In regulations for military commissions for the Civil War, General Halleck provided, "They will be composed of not less than three members, one of whom will act as judge advocate or recorder where no officer is designated for that duty. A larger number will be detailed where the public service will permit." (G.O. 1, Dept. of the Mo., 1862; Winthrop, op. cit., 836).

[19]Dig. Op. JAG 1912, 1070; Winthrop, op. cit., 836, n. 87.

assembled."[21] By the same token, while there is no technical requirement as to the rank of members on a military commission,[22] the principle of fair trial requires that their rank bear some relation both to the official rank of the accused, if any, and the gravity of the allegation.[23]

The older writers on military commissions make no mention of defense counsel before them.[24] This, however, is accounted for by the simple fact that, under the former English precedents for courts-martial themselves, defense counsel originally were not recognized, and when later countenanced in the court room they still were not permitted to examine witnesses or address the court[25] since they were not considered to be a party to the case as was the judge

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[20]Davis, op. cit., 309; also, citations in preceding note.

[21]Winthrop, op. cit., 835, n. 83. "*** if the situation is one in which it is lawful for the commander to exercise jurisdiction, he is free to avail himself of the personnel at his disposal" (Fairman, op. cit., 273, 276).

[22]Winthrop, op. cit., 835; compare UCMJ Art. 25d.

[23]The Canadian tribunals reached this result, as to the rank, by a specific provision to the effect that if the accused were an officer of the enemy forces, the convening authority should so far as practicable, but was under no compulsion to do so, appoint as many officers as possible of equal or superior relative rank of the same *** service as accused. (History of UNWCC, supra, 469).

[24]Davis, op. cit.; Winthrop, op. cit.

[25]Davis, op. cit., 38-39; Winthrop, op. cit., 165-167.

advocate who prosecuted.[26] General courts-martial defendants first obtained a right to an appointed defense counsel, under United States military law, in 1890,[27] although it was not until 31 May 1951 that such counsel was required always to have legal training.[28]

Against this background of continued development in courts-martial, it is not surprising to find military commissions following their lead, as is their characteristic feature, upon the same path of progress marked by the steadily advancing footprints of human law in general.[29] Accordingly, in all war crimes trials of World War II, the accused was universally accorded the right to have professionally-qualified counsel appointed or otherwise furnished by the convening authority, which practice has become a matter of right.

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[26] Winthrop quotes the British writer Simmons, speaking as of 1875, to the effect that there had not at that time been "any relaxation of the well-established rule of courts-martial as to the silence of professional advisors and their taking no part in the proceedings. On the contrary, it has been felt that such courts should be more than ever on their guard to resist any attempt to address them on the part of any but the parties to the trial". (Winthrop, op. cit., 166).

[27] General Order No. 29 of 1890, broadened by par. 926, Army Regs. of 1895.

[28] UCMJ Art. 27, act of 5 May 1950, 50 U.S.C. 551-736.

[29] Soon after 1900, General Davis pointed out that a prohibition upon confiscation of private property in war had not yet been recognized. (Davis, International Law, 287). It is now firmly established (FM 27-10, 1940, pars. 323, 326, based on Hague Rules of 1907). This illustrates another

By now, the appointment of a prosecutor, separate from the membership of the commission proper, has long been required. During trials following World War II, one member with legal training was generally appointed, although this was not always made an express requirement in regulations, and was then not as yet required for courts-martial.

17. Appointment -- Orders.

Under the general rule of analogy, and as observed in practice during World War II war crimes trials, the form of the orders and related incidents for the appointment of military commissions, allowing only for appropriate adaptions of terminology, follow the forms applicable for courts-martial.[30]

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statement by General Davis while he was The Judge Advocate General, to the effect that the Laws of War "are undergoing constant modification ***. The tendency of these changes is, and always has been, in the direction of greater humanity and liberality." (Davis, idem, 286).

[30] See MCM, 1951, Chap. VIII. For a form of order convening a military court, and other related forms, which at one time received Navy approval, see Civil Affairs Manual, Procedure for Military Government Courts, OPNAV 13-23 (RESTRICTED - 1944), 45.

IV. Procedure For Military Commissions

The trial procedure of military commissions have swung as a pendulum from informal to formal and back to informal again within the period of time comprising the history of the United States. The Andre board was convened by letter order from General Washington, which letter also contained the accusation against him.[1] Andre was interrogated by the board without any apparent concern about a right against self incrimination. After he freely and fully stated all the facts known to him, the board considered a number of letters from other parties bearing on the subject and thereafter reported that Andre "ought to be considered a spy from the enemy, and that agreeable to the law and usage of nations, it is their opinion he ought to suffer

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[1] According to one historian (6 Lawson, American State Trials, supra, 469), the Judge Advocate, John Lawrence, read the following letter of instructions to the board: "Gentlemen, Major Andre, adjutant general to the British army, will be brought before you for your examination. He came within our lines in the night, on an interview with Major General Arnold, and in an assumed character; and was taken within our lines, in a disguised habit, with a pass under a feigned name, and with the enclosed papers concealed upon him. After a careful examination, you will be pleased as speedily as possible, to report a precise state of his case, together with your opinion of the light in which he ought to be considered, and the punishment that ought to be inflicted. The Judge advocate will attend to assist in the examination, who has sundry other papers, relative to this matter, which he will lay before the board. I have the honor to be, gentlemen, your most obedient and humble servant. G. Washington"

death."[2]

In 1818 General Andrew Jackson created a great sensation by ordering the execution of Robert Ambrister, a British subject, after a military court which had previously sentenced Ambrister to be hanged, relented and on its own motion changed the sentence to less than death.[3] The critics of the Andre and Ambrister trials failed to appreciate that both cases involved violations of the law of war which, at that time were legally punishable by the commanders concerned upon their own prerogative, without the assistance of a board or court.[4]

Military commissions came into full stature during the Mexican War. From this time until the trial of the Nazi Saboteurs, which case later was considered by the Supreme Court of the United States,[5] the procedures for military commissions were substantially the same as for courts-martial.[6]

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[2] 6 Lawson, American State Trials, supra, 477.

[3] 2 Lawson, American State Trials, supra, 899-900.

[4] Wheaton, op. cit.,220.

[5] Ex parte Quirin, supra.

[6] In Birkhimer, op. cit. 138, may be found this opinion: "Whenever the armies of General Scott operated in Mexico there was not permitted the least interference with the administration of justice between native parties before the ordinary courts of the country. Trial of offenses, one party being Mexican and the other American, was referred to

About the time of the Boer War, British military courts for the trial of martial law cases followed generally the procedure prescribed for field General Courts-martial

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military commissions, appointed, governed, and limited, as nearly as practicable, in accordance with the law governing Courts-martial in the United States service. The proceedings were recorded, reviewed, approved, or disapproved, and the sentences executed like in cases of courts-martial." Cf. Birkhimer, op. cit., 539; The Trial of Honorable Clement L. Vallandigham (1863) 11; The Trial of Henry Wirz, supra; 8 Lawson, American State Trials, supra, 216; In the National Archives, Washington, D. C. may be found the record of trial of Rafael Ortiz by Military Commission on 27 March 1899 at San Juan Puerto Rico. The command judge advocate gave this opinion: "It also appears that an affadavit by Captain and assistant surgeon Edward Hoges * * * was submitted by the judge advocate. Evidence of this character is not admissable in capital cases. Attention is invited in this connection to the 91st Article of War." This opinion, which was later concurred in by the Judge Advocate General, G. N. Lieber, shows that the military lawyers of that time assumed without argument that rules for court-martial procedure were applicable to military commissions.

In Senate Report Number 130, supra, 40-41, is reported the testimony of General Crowder in support of proposed article of war 15 as follows: "Article 15 is new. We have included in Article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by courts-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced; * * * It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure." One of the most noted trials by military commission during the period of the First World War

which were the tribunals used to try British officers or soldiers or other persons subject to the Army Act. The French military tribunals for the trial of hostile nationals were composed in the same way and followed the same procedure as the councils of war which tried French soldiers for military offenses. About this same time the German system was different; the tribunals established for the trial of unlawful belligerents "rendered justice as founded on the essential laws of justice" and were bound by no special form of procedure.[7]

When Nazi Saboteurs were apprehended in civilian clothing after having landed on the shores of the United States from submarines, the problem of a trial presented itself immediately. It is not surprising that a decision was made to try them by military commission as a large amount

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was the case of Lather Witcke, alias Pablo Waberski. Witcke was convicted of spying for the Imperial German Government after a trial held at Fort Sam Houston, Texas on 16 August 1918. Although the record of trial and its accompanying papers contains no direct reference to the problem of procedure, the trial procedure reflects that all parties considered court-martial procedure applicable to military commissions. In this connection, the record of trial was forwarded to the President pursuant to Article of War 51. The sentence to death was approved, confirmed, and commuted by personal action of President Woodrow Wilson. Paragraph 2 of the Manual for Courts-martial U.S. Army, 1928; Paragraph 4, General Order Number 4, Territory of Hawaii, Office of the Military Governor, 8 December 1941.

[7] Spaight, op. cit., 348.

of precedent for the trial of the unlawful belligerent by this type of tribunal existed. It was, however, against precedent to adopt rules of procedure and modes of proof other than that prescribed for courts-martial. Nevertheless the President prescribed rules particularly of evidence which were entirely foreign to United States Court-martial practice.[8] Similar rules of evidence, made relaxed and informal for the convenience of the governments, spread to nearly all jurisdictions concerned with war crimes trials during and following the Second World War.[9] Generally

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[8] By order, Office of the Commander-in-Chief, Washington, D. C., dated 2 July 1942 (7 Fed. Reg. 5103), it was prescribed: "The commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the commission, have probative value to a reasonable man. The concurrence of at least two thirds of the members present shall be necessary for a conviction or sentence. The record of trial, including any judgment or sentence shall be transmitted directly to me for my action."

[9] The British prescribed the following (Royal Warrant of 14 June 1945 and attached regulations, supra): " * * * the Court may take into consideration any oral statement or any document appearing on its face to be authentic, providing the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissable as evidence before a Field General Court-martial * * *." In its opinion (In re Yamashita, 327 U.S. 1) the Supreme Court observed: 'The regulations prescribed by General MacArthur governing the procedure for the trial of petitioner by the commission directed that the

procedural rules were adopted which were similar to those in effect in courts-martial practice prior to the First World War. For example, peremptory challenges of members of the commission were not permitted; and a death sentence required the concurrence of only two-thirds of the members.[10]

Turning to the war courts used by other nations to try war crimes cases following the Second World War, no particular procedural or evidentiary rules became fixed by usage. However, these rules were uniformly less formal and strict than those in effect in courts-martial for the trial of the officers and soldiers of the nation concerned.[11]

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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.'" According to the Report of the Deputy Judge Advocate for War Crimes, European Command, supra, 66, 162, the military commissions which tried the earlier war crimes cases in that command operated under the following authorization: "Such evidence shall be admitted before a military commission as, in the opinion of the president of the commission has probative value to a reasonable man." The Special Military Government courts which tried the bulk of the war crimes cases in the European Theater were authorized to admit: "Hearsay, or other evidence deemed to be of probative value or helpful in arriving at a true finding."

[10] Letter (file AG 000.5 (24 Sep 45) JA), General Headquarters, U. S. Army Forces, Pacific, Subject: "Regulations Governing the Trial of War Criminals," dated 24 Sep 45; Letter (file AG 000.5 (21 Jan 46) JA), Headquarters U.S. Forces, China, Subject: "Regulations Governing the Trial of War Criminals," dated 21 Jan 46; Letter (file AG 250.4 JAG-AGO), Headquarters, U.S. Forces, European Theater, dated 25 Aug 45.

[11] I United Nations Law Reports of Trials of War Criminals, supra, 107-118.

Procedure Under the Geneva Convention of 1949

Article 85 of the Geneva Convention relative to the treatment of prisoners of war of 12 August 1949, hereinafter called GPW, provides as follows:

> 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.

And Article 102 states:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure 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.

The mandates of the forequoted articles are clear. They require that prisoners of war, including those so-called "war criminals" who are or become prisoners of war, be afforded all the judicial safeguards which are given to United States military personnel.[12] In connection with post trial review Article 106 of the GPW reads:

> Every prisoner of war shall have, in the same manner as the members 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 right

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[12] 5 Hackworth, Digest of International Law, 238 et seq.; Dillon, The Genesis of the 1949 Convention Relating to the Treatment of Prisoners of War, 5 Miami Law Quarterly 40 (1951).

to appeal or petition and of the time limits within which he must do so.

The following provision was inserted in the Manual for Courts-Martial in anticipation of the GPW being ratified.[13]

> Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, these tribunals [Military Commissions] will be guided by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial.[14]

The drafters of the Manual for Courts-Martial, 1951 were aware of the fact that Article 85 of the GPW requires that prisoners of war, accused of war crimes, be tried under the same procedure as that prescribed for trial of military personnel.[15]

Certain of the safeguards afforded by the GPW exceed those prescribed by the Uniform Code of Military Justice and the Manual for Courts-Martial, 1951. They are as follows: (1) Article 87 prohibits mandatory punishment for any offense and forbids depriving a prisoner of war of his rank; (2) Under Article 92 a prisoner of war who attempts to escape is liable only to a disciplinary punishment;

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[13] Legal and Legislative Basis, MCM 1951, page 2.

[14] Paragraph 2 of the Manual for Courts-Martial, United States 1951.

[15] Legal and Legislative Basis, MCM 1951, page 3.

(3) Article 100 provides that in a capital case the court must be advised that in determining the sentence to be adjudged they should 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, (see also Article 87). Further, this Article requires that the prisoners of war and the Protecting Powers be informed of the offenses which are capital under the laws of the Detaining Power. No other offense shall be treated as capital without the concurrence of the power on which the prisoner of war depends; (4) Article 101 forbids the carrying into execution of a death sentence before the expiration of at least six months from the date when the Protecting Power receives the communication required by Article 107; (5) Article 105 gives the defense counsel a minimum of two weeks in which to prepare for trial.

Compliance with the foregoing procedures will create delays and administrative burdens which were not encountered under the more summary procedures used in the past; however, these rules will compel adherence to the American concepts of "fair play." In any event, the effect of the conventions

have been made known to the Department of Defense.[16]

It is submitted that prisoners of war are only entitled to the judicial benefits prescribed by the GPW. Hence, if we were willing to try United States military personnel for violations of the laws of war by a tribunal more summary than courts-martial, Article 85 would permit prisoners of war to be tried by the same type of tribunal. In this connection, however, a memorandum to Chief, War Crimes Division from Chief, Military Justice Division, dated 13 March 1951 stated in part:

> An examination of the records of military commissions [Courts-Martial Record Branch, JAGO; see also 23 Michigan Law Review 505] reveals that from 1917 to date, military personnel of the United States Army have <u>not</u> been tried before military commissions. An examination of the records in this office shows that military personnel of the United States Army, charged with violating the laws of war, have been tried by courts-martial [See CM ETO, 4851 Ross, 13 BR (ETO) 79]. Prior to the period of time noted above, there is evidence that military personnel of the United States Army, similarly charged, were tried before military commissions. * * * On the basis of the records here considered, it is concluded that the present policy is to try United States Army personnel, charged with violating the laws of war, by courts-martial even though concurrent jurisdiction exists in military

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[16] Memorandum from the Secretary of the Army for General Counsel, Office of the Secretary of Defense, Subject: 'Relationship of the 1949 "Geneva Convention for the Protection of War Victims" to rules and procedures for trials of war criminals,' dated 10 May 1951.

commissions [AW 15; Art 21 UCMJ] * * *."[17]

The provisions of the GPW could be complied with by trying prisoners of war by military commissions or other tribunals if the procedures prescribed in the Uniform Code of Military Justice and Manual for Courts-Martial 1951 were used; however, this tribunal would, in actuality, be a courts-martial. To eliminate confusion and to give the tribunal the dignity which was intended by the convention it is believed that we should use the courts-martial. In other words, why not "call a spade a spade"?

The Geneva Conventions of 1949 relative to the protection of civilian persons in time of war of 12 August 1949, hereinafter called GC, provides for the treatment of and for disciplinary action against protected civilian internees. Article 70, of this convention, provides that protected civilian persons shall not be arrested, prosecuted or convicted by the occupying power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war. Articles 71, et seq, provide certain minimum safeguards of a fair trial for protected persons charged with an offense, but there are no

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[17] Memorandum from the Secretary of the Army for the General Counsel, Office of the Secretary of the Defense, supra, Tab H.

provisions prescribing specific rules of procedure. There are no provisions similar to Articles 85, 102 and 106 of the GPW convention which would accord to protected civilians trials by the same courts according to the same procedures as in the case of either members of the armed forces or civilians of the detaining power. Thus, commanders are left somewhat unfettered in the trial of protected civilians. Because of the variegated beliefs, histories, and views of the countries which the United States may occupy it is believed that the procedures should be left flexible.

It must be remembered that the 1949 conventions apply to prisoners of war and to civilian internees only while they are in a status recognized by the respective conventions. Also, the conventions are applicable to all offenses charged against such persons.

RECOMMENDATIONS

Accordingly, and in consonance with the foregoing, it is recommended that: (1) No rules of procedure, save those which appear in the convention, be promulgated for use in the trials of protected civilians; (2) Prisoners of war, entitled to the benefits of the GPW, be tried by General courts-martial in accordance with the rules of procedure attached hereto.

Rules of Procedure For Courts-Martial of The United States For Trials of Prisoners of War

SECTION I. SCOPE, PURPOSE, AND CONSTRUCTION

1. Scope of Rules. These rules shall govern all courts-martials convened under authority of the United States conducting trials of Prisoners of War.

2. Purpose and Construction of Rules. These rules are intended to implement the MCM 1951 insofar as is necessary to comply with the Geneva Convention of 1949. In case of conflict between the MCM and Geneva Convention the rule most favorable to the accused will be used.

SECTION II. JURISDICTION

3. Persons. The court-martial shall have jurisdiction over all prisoners of war held by the United States as the Detaining Power.

4. Offenses. The court-martial shall have jurisdiction over all acts constituting violations of the laws and customs of war, and 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 committed by prisoners of war before or after capture. The court shall also have jurisdiction over prisoners of war who

violate any law, regulation, or order in force in the U. S. Army.

SECTION III. APPOINTMENT, TYPES, AND MEMBERSHIP

5. Courts-martial for the trial of prisoners of war may be convened by any commander authorized to convene a General courts-martial for the trial of U. S. Personnel.

6. There shall be general courts-martial with jurisdiction identical to that granted to the same court for the trial of U. S. Personnel. No inferior courts-martial shall be convened.

7. The membership of the courts-martial shall not be less than that required by the Uniform Code of Military Justice for general courts-martial.

SECTION IV. DUTIES OF PERSONNEL

8. Members. The members of the courts-martial shall perform all the duties required of them by the GPW. Uniform Code of Military Justice and MCM 1951.

9. Law Officer. In addition to performing the duties required by the Uniform Code of Military Justice and MCM the Law Officer shall, after a finding of guilty and immediately before the courts-martial closes to consider a sentence, advise the court as follows:

"In arriving at a sentence the court must take into

consideration, to the widest extent possible, the fact that (this) (these) accused, not being (a national) (nationals) of the United States, (is) (are) not bound to it by any duty of allegiance, and that (he) (they) (is) (are) in its power as a result of circumstances independent of (his) (their) own will."

10. Trial Counsel. In addition to the duties required by the Uniform Code of Military Justice and MCM the Trial Counsel shall, after the court is called to order, introduce an affidavit certifying that the notification required by Article 104 of the Geneva Contention has reached both the Protecting Power and the prisoners representative and of the dates of receipt, (if a period of at least three weeks has not expired after the notice was received the trial cannot proceed). The trial counsel will advise the accused of his rights under Article 105 of the GC and will state in court for the record that the accused has been so advised. Trial counsel will serve, or cause to be served, charges on both the accused and his counsel at least two weeks prior to trial. 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.

11. Defense Counsel. Defense counsel shall, immediately upon receipt of charges and allied papers in the

case, inform the accused that he has been appointed to defend him and explain his general duties. He shall advise the accused of his rights under Article 105 of the GC. He shall guard the interests of the accused by all honorable and legitimate means known to the law. He shall have at least two weeks in which to prepare for trial and shall have at his disposal the reasonably necessary facilities to prepare the defense. He may freely visit the accused; confer with him in private; and confer with any witness.

SECTION V. TRIAL

12. Trial Procedure. The order of proceedings of the trial shall conform to that prescribed by Appendix 8a MCM 1951, except as provided in paragraphs 9 and 10 of these rules.

SECTION VI. EVIDENCE

13. Rule. The law officer shall admit such evidence as in his opinion would be competent and admissible in a trial of a member of the U. S. Army by courts-martial for the same offense.

SECTION VII. PUNISHMENTS

14. Punishments. No punishments more severe than those provided for in respect to members of the U. S. Army

who have committed the same acts shall be imposed. No mandatory punishment for any offense will be prescribed. Unless the record of trial shows that the Prisoner of War and the Protecting Power have been informed that the Offense is Capital or, if such notice was not given as required by the first paragraph of Article 100, GC, unless the record of trial shows that the Power on which the Prisoner of War depend has concurred in making the offense punishable by death the death sentence will not be imposed.

SECTION VIII. MISCELLANEOUS

15. Rights of Accused. The accused is entitled to the same judicial rights as members of the U. S. Army and to the additional safeguards afforded by the GC.

16. Conduct of Trial Generally. All rulings, voting, and other procedural and legal matters shall be handled in accordance with the provisions of the MCM and Uniform Code of Military Justice.

17. Notice of Right to Appeal. After conviction and sentence the accused shall be fully informed of the provisions of Articles 59 through 76, Uniform Code of Military Justice and a certificate that he has been so informed shall be included in the papers allied to the record of trial.

18. Record of Trial. The form of the record of

trial shall conform to that prescribed in the MCM. The number of copies and distribution shall be as prescribed by the MCM or other competent military authority.

19. a. Notification of Result of Trial. After conviction the convening authority shall cause a notification of such finding and sentence to be expeditiously forwarded to both the Protecting Power and the prisoners' representative. 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 included in the papers allied to the record of trial.

b. If the sentence is one which the convening authority may order into execution or if the sentence is death, a detailed communication shall as soon as possible be addressed to the Protecting power 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 defense; (3) notification where applicable, of the establishment where the sentence will be served.

20. Review. The review of the findings and sentence shall be the same as that prescribed for members of the U. S. Army trial by general courts-martial.