THE JURIDICAL CHARACTER OF NONSTATUTORY MILITARY TRIBUNALS

A Thesis

Presented To

The Judge Advocate General's School

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A study of the origin, development, nature, and the legal basis for nonstatutory military tribunals sitting as military government and war crimes courts: an historical and analytical treatment of the organization, composition, jurisdiction, and procedure of such courts; and an evaluation of the role played by the interrelation of international and municipal legal norms in the scheme of administering justice through such military judicial organs.

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CHAPTER I

INTRODUCTION

"Law is not right alone or might alone, but the perfect union of the two."*

Background of Subject.

The instrumentality with which we are dealing is called a "Tribunal." In the context of this study etymological discussions would be mere pedantry. There can be no reasonable doubt that in the eyes of those who fashioned it, the term "Tribunal" held and holds the meaning of the word "Court" and that proceedings before these courts are conceived of as a trial.

Now a "Court," be it a court of civil or criminal jurisdiction, a court-martial or a military commission, owes its genesis to some creative act of the State whose authority it purports to exercise. Absent some legislation, whether basic (consitutional) or secondary (statutory) a Court just does not exist as a Court.

No tribunal exercises a compulsory jurisdiction implicating a legal power to administer sanctions, unless it has been created under the authority of law. A court not so based may exercise a de facto authority by force majeure; de jure, it simply does not exist; the proceedings before it do not and cannot partake of the character of a "trial."

At the outset, it may be well to distinguish military law from two other legal phases of governmental military activity,

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* Salmond, John W. Jurisprudence, (London: Stevens and Haynes 5th ed., 1916), pp. 23ff.

martial law and military government. The situations which give rise to litigation to test the extent of military jurisdiction falls into four groups. There is, first, the system of military justice established by Congress for the Armed Forces of the United States, and extending in general to the members of those services respectively and to persons who accompany or serve with the forces. Functional relation to the Armed Forces is the common factor which gives rational unity to this head of jurisdiction. This kind of military jurisdiction relates to the courts-martial system, which takes cognizance of military offenses; that is, offenses against regulations governing the conduct of its own military forces. This may be called jurisdiction under military law. A second group of problems has to do with measures of military control, unlawful under normal conditions, which in time of war or other public emergency have been taken within domestic territory enjoying the protection of the Constitution and the laws of the United States. This may be denominated martial law proper or martial rule. A third and far more troublesome bundle of problems arises out of military government "in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents."[1] This may be designated military government jurisdiction, superseding, as far as may be deemed expedient the local law, and exercised by the

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1. Ex parte Milligan, 4 Wall. (71 U.S.) 2, 141-142 (1866).

military commander under the direction of the President, with the express or implied sanction of Congress. And, finally, there is the jurisdiction to try violations of the laws of war, regardless of the place where such violations were committed, as expounded in the saboteurs case, Ex parte Quirin.[2] This may be designated as war crimes jurisdiction. The present study deals primarily and particularly with the third and fourth of these situations and only incidentally with the first and second.

In the Army of the United States military jurisdiction is of two kinds: first, that which is conferred by municipal law which regulates the military establishment; second, that which is derived from international law, and the common law of war; the first is exercised by courts-martial, while cases which do not come within the statutory jurisdiction of courts-martial are tried by nonstatutory military tribunals.[3] Although nonstatutory military tribunals have, at different times, been referred to by various designations such as "war courts," "provisional courts," "military commissions," and "provost courts" their primary purpose and general jurisdiction have always been the same--the protection of our armed forces and the maintenance of law and order. The names by which the tribunals are designated cannot affect their jurisdiction.[4]

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2. Ex parte Quirin et al., 317 U.S. 1 (1942).

3. Ex parte Vallandigham, 1 Wall. (68 U.S.) 243, 249 (1864).

4. Birkhimer, William E., Military Government and Martial Law, (Kansas City, Missouri, 2d. ed., 1904), 359; 2 Winthrop, Military Law and Precedents, (1920 Reprint) at 1296 states: "A com-

In accordance with present day United States practice military jurisdiction is exercised through two types of military tribunals; namely, (a) Courts-Martial, (General, Special and Summary), based on United States Statutory Law and (b) Military Commissions and Provost Courts, based on the common law or law of nations sitting as martial law-courts, military government courts, and war crimes courts.[5] Military offenses under the statute must be tried in the manner therein directed by court-martial. Military offenses which do not come within the jurisdiction conferred by statute on court-martials are tried and punished by military commissions, provost courts, military government courts, or war crimes courts under the law of war.[6] Military commissions have traditionally tried more serious violations of the law of war, and of the occupants proclamations, laws, ordinances and directives. The Provost Courts are courts of a summary nature concerned only with minor infractions.

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4. mander...where authorized to constitute a purely war-court, may designate it by any convenient name...and...it will be a legal body under the laws of war." Colby, "Occupation Under the Laws of War," 26 Columbia Law Rev. 146 (1926).

5. U. S. Department of the Army Field Manual FM 27-10 (Washington, D. C.: Government Printing Office, 1956), 11 /hereinafter cited as FM 27-10/. Although this Manual is an official publication of the U. S. Army, its provisions are neither statute nor treaty and should not be considered binding upon courts and tribunals applying the laws of war, although such provisions are of evidentiary value insofar as they bear upon questions of custom and practice (See para. 1); Cowles, "Trial of War Criminals (Non-Nuremberg)," 42 Am. J. Int'l. L. 299 (1948).

6. Ibid., pp. 10-11.

Although United States law (Uniform Code of Military Justice, Art. 18 /hereinafter cited as UCMJ/) provides that General Courts-Martial shall have jurisdiction to try persons subject to military law and "any other person who by the law of war is subject to trial by a military tribunal"[7] and although under this article the United States can at any time elect to try war criminals before General Courts-Martial, this has, in practice, not been done. While article 18 expressly gives concurrent jurisdiction to courts-martial in all cases cognizable by military commissions, "it is not the /U. S./ practice to convene courts-martial in situations where it has been customary to use military commissions."[8] The established jurisdiction of military commissions was carefully preserved by

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7. 64 Stat. 108 (1950), 10 U.S.C. §§ 801-940 (1958), as amended, 10 U.S.C.A. §§ 802, 858a, 958a, 923a, 936 (Supp. 1961). The Uniform Code of Military Justice (hereinafter cited as UCMJ) is the most recent exercise by Congress of its constitutional power "to make Rules for the Government and Regulation of the land and naval forces." See UCMJ, Art. 2 for persons subject to the Code. For a comparison of the jurisdiction of a military commission and a court-martial see FM 27-10, op. cit., para. 13 and Green, "The Military Commission," 42 Am. J. Int'l. L. 832 (1948).

8. "The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the UCMJ. Violations of the law of war committed within the United States by other persons will usually constitute violation of federal or state criminal law and preferably will be prosecuted under such law." See Coleman v. Tennessee, 97 U.S. 517 (1878); Dow v. Johnson, 100 U.S. 158 (1879); Wurfel, "Military-Government - The Supreme Court Speaks" 40 North Carolina L. Rev. 717 at 725. This article is an excellent current appraisal of the American law of military government predicated on the principles of military government as enunciated by the Supreme Court of the United States.

Congress, in Article 21 of the UCMJ.[9]

The use of nonstatutory military tribunals go back, in United States military practice, to the Revolutionary War; were used extensively in the Mexican War; several thousand cases were tried by such tribunals during the Civil War and the period of reconstruction; and several hundred, during the Spanish-American War and the insurgency period which followed in the Philippines. Such tribunals were likewise employed by United States forces during World War I, both in this country and in the Rhineland. A few examples are the trial of Major Andre as a British spy during the Revolution, the trial of the conspirators in the assassination of President Lincoln, the case of Pablo Waberski during World War I, and the trial of the eight German saboteurs (ex parte Quirin, supra) during World War II.

General Winfield Scott established war courts or military commissions in the Mexican War because of the narrow jurisdiction given by Congress to courts-martial. That jurisdiction did not cover many of the offenses against the law of war. General Scott correctly took the position that the military commander had implied power directly under the laws of war to effectuate that law without legislation. Though first asserted and applied during the Mexican War, the validity of this proposition was not tested in the Supreme Court of the United States until the Civil War.

In 1863, in General Orders No. 100 - the first codification of the international laws of war - Francis Lieber stated the

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9. UCMJ, Art. 21.

same principle: "Military offenses which do not come within the statute must be tried and punished under the common law of war."[10] Referring specifically to this statement, the Supreme Court recognized the validity of military commissions at its December term in 1863.[11]

In 1950, in the case of Johnson v. Eisentrager[12] the Supreme Court reaffirmed the principle that American military commissions have jurisdiction to try offenders against the law of war. The court states:

> The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long established.... This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such

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10. Section 679 of General Orders No. 100, Adjutant General's Office, 1863. Francis Lieber prepared the codification and it was published by President Lincoln for the guidance of Union forces.

11. Ex parte Vallandigham, op. cit., pp. 243, 249. Similar Supreme Court recognition of the basic principle was accorded in: United States v. Rice, 17 U.S. 246, 253 (1884); Cross v. Harrison, 57 U.S. 164, 190 (1853); Ex parte Quirin et al. op. cit.; In re Yamashita, 327 U.S. 1, 8 (1945). In the opinion of the Court written by Justice Stone the following point was made: The military commission was lawfully created because Congress had the right to define and punish offenses against the laws of war and Congress had recognized the right of military commissions to try war criminals under the authority of the Articles of War. Therefore, the Court stated: "In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Article of War are not courts whose rulings and judgements are made subject to review by this court. See Ex parte Vallandigham, ...; In re Vidal, 179 U.S. 126; cf., Ex parte Quirin, supra."

12. Johnson v. Eisentrager, 339 U.S. 763 (1950).

> forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war.' Duncan v. Kahanamoku, 327 U.S. 304, 312, 313-314. And we have held in the Quirin and Yamashita cases, supra, that the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war.

In these cases the Supreme Court said that the military commission exercises a "special authority" to sentence persons for offenses over which they have jurisdiction according to the rules and precepts of the law of nations, and more particularly the law of war.

Summary Plan of the Study.

Few aspects of the law have been productive of more genuine confusion and misunderstanding than the controversial question of the nature and extent of the jurisdiction of nonstatutory military tribunals. The differences of opinion which have so long disturbed both practice and doctrinal writings in this important domain of the law are nothing short of appalling. Not only is there an absence of substantial agreement on the terminological significance to be given to the concept "military government" itself, as well as a pronounced conflict in the authorities on the precise ends which the concept is meant to serve, but - what is far more serious - there is a hopeless discrepancy of views as to the extent of power of authorities in a military government situation, especially as relates to the establishment and administration of judicial tribunals. Frequent misusage of terms and basic theoretical contradictions combine to foster such confusion of ideas and principles as is seldom found in any branch of the law. These sharp divergencies of attitude are symptomatic of the entangled theoretical fabric which must be con-

tended with. Yet even they fail to disclose all of the obstacles that are concealed in the terrain of the extent of jurisdiction of nonstatutory military tribunals.

But although the obsecuring influences of these factors is not to be underestimated, the major difficulties encountered are, it seems, traceable to more profound sources than those implicit in classification and terminology. Most of these will be indicated from time to time during the course of this study. The more serious ones, however, merit immediate attention.

They consist principally in the failure to comprehend the exact role played by international law norms in the scheme of administering justice through military judicial organs sitting as military government or war crimes courts and in its vital function as a guaranty for the legal protection of fundamental rights; in the theoretical disagreement which prevails on the extent to which executive judicial organs are bound by the procedural "due process" requirements of the United States Constitution - a disagreement which is due partly to conflicting conceptions of the structure of international law and partly to a confusion of what are deemed fundamental rights within that structure; in the failure to distinguish between "denial of justice" under the law of nations and the denial of "due process" under domestic law; in misplaced reliance upon certain widely accepted concepts of municipal law such as Anglo-Saxon technical rules of evidence, res judicata, presentment and trial by jury, habeas corpus, and the like - principles which are without relevance in international law and whose attempted application merely obscures the real issue involved; and

finally, in the misleading effect of municipal conceptions of denial of justice and of the attempts on the part of some jurists and writers to demand the application of a United States Constitutional standard in all cases.

Many of the difficulties enumerated above will in turn, be found to spring from three closely allied sources of confusion. Most important of these from the standpoint of legal science is the delicate question raised by the relationship between municipal and international law standards; that is to say, the complicated problem of reconciling the requirements of a domestic constitutional standard with the requirements of the law of nations. Just how far is the executive's freedom of conduct absolute and free of constitutional restraint in administering military government and establishing and administering justice through military tribunals? And just what are the limits imposed upon such activities by the system of rules we call International Law?

The more disturbing preplexities arising from this interplay of domestic and international legal requirements in this area can only be dispelled after a clear understanding is obtained of the concept of military government along with the requirement for the maintenance of law and order, on the one hand, and in assuring, on the other, a satisfactory protection for the rights of occupants.

In order to untangle the subtle problems implicit in this interrelationship and to resolve the issues it presents, it will be necessary to subject to analysis the theory that the Constitution is a law binding all agents of the United States and

that it establishes "due process" procedural requirements, which may not be departed from, even if international law prescribes a lower standard. In other words, does the Constitution follow the flag?

Many of the difficulties summarily alluded to are but superficial and can be dissipated by a review of elementary principles concerning the concept of military government in international law. A review of this kind cannot fail to demonstrate that the international responsibility of the military authorities in instituting and administering military government and the establishment of judicial organs is independent of the question of responsibility under its domestic laws. It should also reveal why it is so essential to keep the distinction between municipal and international responsibility constantly in mind throughout this work.

It is just such a review which I propose to undertake, in order that a satisfactory foundation may be laid for the study of the principle problems viz.; the nature and extent of the jurisdiction of nonstatutory military tribunals in situations three and four, supra; and the nature, content, and scope of the legal rule which binds all States to grant to all accused full and effective judicial protection of their rights.

First, however, I will examine into the juridical basis for the existence of such tribunals and the authority of the military commander to establish courts to adjudicate existing criminal or civil law or statutory enactments based on belligerent occupation. With that accomplished, I will proceed to investigate the specific case of jurisdiction and the laws obligatory upon the authorities

enforcing military government, emphasing: (a) the "universality" of jurisdiction; (b) concurrent jurisdiction of military commissions; and then (c) the significance, if any, attached to recent decisions of the United States Supreme Court, as relates to jurisdiction of military commissions.

Finally, my efforts will be devoted toward a portrayal and analysis of the United States objectives and practices regarding procedural safeguards afforded by military commissions and of the systems of control to insure that persons tried by such courts receive a judicial protection for their rights which is both procedurally and substantively adequate under the law of nations. The law of nations will be found to constitute a genuine system of direction and restraint upon the exercise of military judicial power.

CHAPTER II

HISTORICAL AND LEGAL FOUNDATIONS OF NONSTATUTORY MILITARY TRIBUNALS

Juridical Basis of Nonstatutory Military Tribunals.

So we ask by what warrant are Nonstatutory Military Tribunals created? By what authority are they established? The Constitution itself provides abundant authority. The Constitution provides that the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. The constitutional authority for military government and the operation of the necessary judicial organs is derived from this grant.[13] It is also provided that Congress shall have the power to provide and to make rules for the government and regulation of the land an naval forces and to define and punish ... offenses against the law of nations,[14] thus giving that law express consti-

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13. Art. II, Sec. 1, 2, 3. Powers of the President:
Article II, Section I: The President is vested with the 'executive power' and takes an oath faithfully to 'execute the office of President' and to 'preserve, protect, and defend the Constitution...'
Article II, Section 2: 'The President shall be Commander in Chief of the Army and Navy of the United States...'
Article II, Section 3: The President 'shall take Care that the Laws be faithfully executed...'

14. Art. I, Sec. 8; Powers of Congress:
Article I, Section 8:
To provide for the common Defense and general Welfare
To constitute Tribunals inferior to the Supreme Court
To define and punish ... Offenses against the Law of Nations
To declare war ... and make Rules concerning Captures on land...

tutional recognition.

Under these grants of Power, the President "as Commander-in-Chief ... is authorized to direct the movements of the land and naval forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[15] It may be said that the protection of the State from the public enemy, using that term in its broadest aspect, as distinguishing the public enemy from the casual malefactor, has always belonged to an organized force of armed men. This force in its collective aspect embodies the physical force of the nation. Armed endeavor and resort to belligerency have been made from the days of Byzantium to our own. When war is declared, the nations military force stands ready to deliver the necessary blows; it is lawful for it to do so, and the common law recognizes the fact. The military force's sphere of lawful action, therefore, automatically enlarges with the coming of the state of war.

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14. To raise and support Armies
To make Rules for the Government
and Regulation of the land and naval Forces
To provide for calling forth the Militia
To execute the Laws of the Union, suppress
Insurrections and repel Invasions
To provide for organizing, arming, and disciplining,
the Militia, and for governing such Part of them as
may be employed in the Service of the United States...
To make all laws which shall be necessary and proper
for carrying into Execution the foregoing Powers...
For an annotated text on a historical note concerning the original Articles of War, see Military Laws of the United States, (6th ed. 1921), 1443-1506.

15. Fleming v. Page, 9 How., (50 U.S.) 603, 615 (1850).

As an immediate consequence - immediate in point of law, however delayed by circumstances it may be in application - the orb of the citizen's right contracts. Things that the soldier might not lawfully do in time of peace, he may conceivably do now with lawful immunity; and conversely, things of which the citizen might rightfully complain in the days of peace, will not serve as the basis for a suit when the nation is at war. Nor is this theorem limited to direct acts of the military force and those of its instant direction. With a force equal in the abstract, but much more apparent to the average observer, it applies to the constitutional restraints of government. In support of the war or other public emergency, and, therefore of the armed forces, the government's constitutional powers take on a wider range. The war powers of the executive, the wider scope of permissible legislation given Congress, amy properly reach far beyond the landmarks which the Constitution fixes for our journey through the days of peace. Of this proposition in the abstract, there can be no doubt.

The principle which justifies these things is as old as the common law; older than written constitutions. Indeed the principle is even older than the common law; like the jus nature of the medievalists, it pervades every system of law. That principle is that the rights of the individual must yield to those of the State in the time of the States peril from the public enemy. The State's right, in time of her peril, should be supreme, and the acts of her agents, in carrying out her commands, lawful; else we would have no state at all. "In these cases," says our Supreme Court, "the

common law adopts the principles of the natural law, and finds the right and the justification in the same imperative necessity."[16]

Wisely, the Constitution has placed no limit upon the war powers of the government. However, such powers are regulated and limited by the laws of war. One of the war powers is the right to institute military government.[17]

Concept of Military Government.

In the most comprehensive sense of the term, military government is government of specific areas by the military forces of the United States under the command of the President, which constitutionally exist in time of peace as well as in time of war, and with reference to domestic as well as to foreign territories. Military government in sensu strictiore is government of foreign or domestic territories by the armed forces of the United States resulting from occupation in time of war or in execution of treaty provisions.[18]

In FM 27-10 on the Law of Land Warfare the problem of belligerent occupation is dealt with in a detailed way.[19] It prints the corresponding norms of the 1907 Hague Regulations and

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16. Bowditch v. Boston 101 U.S. 16, 19 (1879).

17. Ex parte Milligan, op. cit., p. 142.

18. William E. Birkhimer, op. cit., p. 21. Birkhimer treats domestic territory occupied by rebels treated as belligerents as foreign territory. He states: "[F]or all war purposes, districts thus occupied by rebels are foreign. From a belligerent point of view, therefore, the theater of military government is necessarily foreign territory." Without citing any authority, he states that this proposition has "been determined by numerous decisions of the Supreme Federal Tribunal..."

19. FM 27-10, op. cit., Ch. VI paras. 351-448.

of the Geneva Convention of 1949 on Protection of Civilians, which, in its own words, is supplementary to the Hague Regulations. Many problems concerning the legal position of the belligerent occupant, his rights and duties, and the corresponding rights and duties, of the civilian population are covered in the Manual. The Manual clearly distinguishes belligerent occupation from both mere invasion and consequent subjugation. Occupation presupposes legal effectiveness, which therefore must not only be established but also maintained. It corresponds to experiences of the last war that military government can also be established over allied or neutral territory, recovered or liberated from the enemy, when that territory has not been made the subject of a civil affairs administration agreement.

As to military Government the Manual provides:

> In the practice of the United States, military government is the form of administration which may be established and maintained for the government of areas of the following types that have been subjected to military occupation:
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> a. Enemy territory
> b. Allied territory liberated from the enemy, such as neutral territory and areas unlawfully incorporated by the enemy into its own territory, when that territory has not been made the subject of a civil affairs agreement.
> c. Other territory liberated from the enemy, such as neutral territory and areas unlawfully incorporated by the enemy into its own territory, when that territory has not been made the subject of a civil affairs agreement.
> d. Domestic territory recovered from rebels treated as belligerents.[20]

In the most recent United States Department of the Army

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20. Ibid., para. 12.

Field Manual 41-10, [hereinafter cited as FM 41-10] published in May of 1962, military government is defined as follows:

> Military Government. Form of administration by which an occupying power exercises executive, legislative, and judicial authority over occupied territory.[21]

This manual further provides:

> (1) Occupied Territory (AR 320-5). The commander of an occupying force has the right, within limits set by international law, to demand and enforce such obedience from inhabitants of an occupied area as may be necessary for the accomplishment of his mission and the proper administration of an area.
> (2) Combat Zone (320-5). The law of war places limits on the exercise of a belligerent's power in the interest of protecting combatants and noncombatants from unnecessary suffering and safeguarding certain fundamental human rights. Commanders are required to refrain from employing any kind of violence not actually necessary for military purposes and to give due regard to the principles of humanity and chivalry.
> (3) Other areas. The terms of international agreements, regulations, and national policy as promulgated or interpreted by higher authority dictate the scope of authority in all other areas.[22]

The establishment of military government is both a duty and a power. Article 43 of the Hague Regulations sets the theme of the traditional law as respects belligerent occupation.

> The authority of the legitimate power having in fact passed into the hands of the occupant, the

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21. United States Department of the Army Field Manual 41-10 (Washington, D. C.: Government Printing Office, 1962), para. 2g, p. 5. [hereinafter cited as FM 41-10].

22. Ibid., para. 4g, p. 7; See also United States Department of the Army Field Manual 41-5 (Washington, D. C.: Government Printing Office, 1958), 4 [hereinafter cited as FM 41-5]; Cf. Cunningham, "Civil Affairs - A Suggested Legal Approach," Mil. L. Rev., Oct. 1960 (DA Pam 27-100-10, 1 Oct. 1960)116.

> latter shall take all the measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[23]

The obligations set out in Article 43 require the occupant to insure "as far as possible" public order and safety and to respect the laws in force "unless absolutely prevented" [emphasis supplied]. It may not make permanent changes in the constitutional or fundamental laws of the occupied country, though in a proper case it may suspend the operation even of such laws. It may change the law so far as necessary for the safety of its own army and the realization of the purposes of the war. Changes designed to destroy the privileged status of members of such groups as the Nazis and Fascist organizations after World War II may lawfully be made. Changes tending to remove racial and party discriminations and other like injustices are not forbidden; on the contrary, it approves such humanitarian changes.

Not absolutely settled is the question whether the occupying power may lawfully change existing laws which modify enemy institutions which are incompatible with an occupants war aims or objectives.

It is believed that the practice of the belligerents during World War II confirmed the view that a belligerent occupant

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23. FM 27-10, op. cit., para. 352 provides: that the rules set forth in Ch. 6 concerning the application of law of occupation in belligerently occupied areas, should "as a matter of policy, be observed as far as possible in areas through which troops are passing and even on the battlefield." See also FM 41-5, op. cit., para. 11.

may lawfully modify enemy institutions for carrying out the purposes of the war and insuring his future security.[24] Some authorities believe that, even prior to annexation of occupied territory, the occupant is likely to regard himself as clothed with freedom to endeavor to impregnate the people who inhabit the area concerned with his own political ideology. To the extent that those laws, and the institutions they represent, threaten the future security of the occupant, if not the success of his operations, the occupant is "absolutely prevented" from respecting them by the necessity of self-protection.[25]

It is submitted that a belligerent occupant must be conceded the right during occupation, both before and after an enemy's complete defeat, to remold those institutions, which, if allowed to remain unchanged during occupation, would certainly rise again in a future time to menace the occupant's security. A

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24. Some writers on international law doubt the technical legality of the sweeping reforms in domestic laws, etc. made by the Allies in Germany and Japan. Others sustain it on the ground that the allies inherited legal as well as political sovereignty from the unconditional surrender. Most agree that in the years since World War I there had been an unfortunate negligence in developing this aspect of the law of nations and that we were in a sense setting precedent in the period between 1945 and 1953 in an occupation (Germany) which was neither belligerent nor pacific. One writer calls it a period of "allied legal sovereignty." For an excellent discussion and citation of pertenent authorities see Edward Litchfield and Associates, Governing Post-War Germany, (Ithaca, N. Y.: Cornell U. Press, 1953) 11-18.

25. Hyde, Charles C., International Law (2d rev. ed., Boston: Little Brown & Co., 1945) 1884.

belligerent need not choose between obliterating the enemy state or finally withdrawing from occupation of enemy territory without modifying, if he can, the enemy's war-like and war-making inclinations, ideals, and institutions.

It is, perfectly clear, that the occupant may demand and enforce from the inhabitants of the occupied area such obedience as may be necessary for the purposes of war, the maintenance of law and order, and the proper administration of the area under the unusual circumstances of hostile occupation. One part of maintaining public order is the administration of criminal law. An occupant may employ "indigenous" courts, as they were called in World War II - local courts that are found on arrival or such as may be improvised. An occupant may set up its own military courts.[26] To protect the security of its operations, the rules of land warfare and the regulations of the commander must be enforced, and for this reliance will be placed on military tribunals set up as promptly as may be upon occupation. These tribunals will also be competent to enforce the local criminal law. How soon and how far indigenous courts can safely be given responsibility for enforcing local law is a question for the military commander.

In Madsen v. Kinsella[27] to be discussed in more detail

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26. Leitensdorfer v. Webb, 20 How. (61 U.S.) 176, 178 (1857). The Court in this case recognized, as early as the Mexican War, that the power of the military governor extended not only to the suspension and promulgation of laws, but to the establishment of a whole judicial system as well.

27. Madsen v. Kinsella, 343 U.S. 341, 348 (1951). Court cited Article 43 of The Hague Convention No. IV Annex. T.S. No. 539; See also Macleod v. United States, 229 U.S. 416, 426 (1913). The Court cited and applied Article 42 of The Hague Convention of 1899.

infra, the Supreme Court was concerned with a trial of a dependent wife in enemy (Germany) territory which had been conquered and held by force of arms and which was being governed at the time by United States military forces. In this case the Court recognized the continued vitality of the principle that authority for military commissions, as an incident of military government, continues even after a "treaty of peace." The Court stated:

> The authority for [military] commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities.

The extent of the power of the President and of military commanders under him to establish military tribunals in belligerent occupation situations is cogently summarized by Birkhimer as follows: "Thus it has been solemnly determined that the authority of the President, and of commanders under him, for the establishment of courts in conquered territory is complete, limited only by the exigencies of service and the laws of war; that such courts, if given jurisdiction by the power bringing them into existence, properly may take cognizance of questions, military, criminal, and civil; and that there is no distinction in this regard between the cases of territory conquered from a foreign enemy or rescued from rebels treated as belligerents."[28]

This doctrine is accepted in an elucidating opinion of the Attorney General of the United States in "Military Commissions."[29]

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28. Birkhimer, op. cit., p. 153.

29. 11 Op. Atty's Gen. 305, 298, 300 (1865).

Speaking of the powers of the commander to establish military tribunals the Attorney General wrote "The commander of an army in time of war has the same power to organize military tribunals ... that he has to ... fight battles. His authority in each case is from the law and usage of war"; and, that such tribunals, under the Constitution, must be constituted according to the laws and usages of civilized warfare. It is further stated in Mechanics and Traders' Bank v. Union Bank, "A court established by ... the commanding general ... will ... be presumed to have been authorized by the President."[30] Such, then, is the authority, under the laws of war and the war powers of the government, for the establishment of military governments over foreign territory. Regardless of the manner or extent to which it may be implemented by national law, the law of nations is the ultimate source of the authority to establish military tribunals to try offenses against the military government. The power to wage war is an attribute of independent states. The power to establish military government is an aspect of waging war.

Quite often, as was the case in Germany following World War II, the President will direct that the military authorities work with civilian officials in establishing military government.[31] How-

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30. 22 Wall. (89 U.S.) 276 (1874).

31. Executive Order 10062 of June 6, 1949, which sets forth the division of duties between civilian and military authorities. This was the situation in Germany up to the conclusion of the armistice. Authorities disagree as to the legal nature of the occupation between the armistice and the conclusion of the Contractual Agreement in 1953. For an excellent bibliographical study, see Philip H. Taylor, and Ralph J. D. Braibanti, Administration of Occupied Areas, a Study Guide (Syracuse University

ever, it still remains military government. In addition, the President can share governmental powers and responsibilities with other nations participating in the occupation.[32]

Law Applicable to Nonstatutory Military Tribunals Sitting as Military Government Courts or War Crimes Courts.

The question here arises: What laws are obligatory upon the authorities enforcing military government? During military occupation, the occupying forces are, of course, not subject to the law of the conquered territory. The law of the place in which an offense was committed and the law of the place in which the offense is tried, if the places are not the same, are important as guides, but such law in no sense governs the military commission. "In carrying it [military administration] out the occupant is totally independent of the constitution and the laws of the territory."[33] As seen above, "...[T]he conquering power has a right to displace the pre-existing authority and to assume to such extent as may be deemed proper the exercise by itself of all the powers and functions of government.... It may do anything necessary to strengthen itself

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31. Press, 1948). For an excellent account of the manner in which the impact of the collapse of authority affected our planning, see W. Friedman, The Allied Military Government of Germany (London: Stevens and Sons, Ltd., 1947), Ch. II. For a general discussion, see General Lucius O. Clay, Decision in Germany, (New York: Doubleday and Co., Inc., 1950).

32. Baxter, "Constitutional Forms and Some Legal Problems of International Military Command," 29 British Year Book of International Law 325 (1952).

33. Oppenheim L. F. L., ed. by H. Lauterpacht, International Law (II), (London: Longhams, Green, 6th ed., 1940) 342.

and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war."[34]

While not so familiar to lawyers generally, it is commonplace to the military and international lawyer that a body of criminal law exists for the punishment of offenses: committed in violation of the laws of war - the principles and rules of public international law which deal with the conduct, conditions, and incidents of warfare. As part of the law of nations it is a part of the available law of all nations.

The Supreme Court has expounded the nature of the applicable international law as follows:

> The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law, - the law of war.... The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offenses committed while in such service.... The laws of the state for the punishment of crime were continued in force only for the protection and benefit of its own people.... But their continued enforcement is not for the protection or control of the Army, or its officers or soldiers. These /individuals/ remain subject to the laws of war, and are responsible for their conduct.... to.... the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoiliation of property, or of other acts not authorized by the laws of war,

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34. New Orleans v. Steamship Company, 20 Wall. (87 U.S.) 387, 393-394 (1874).

> they may be tried and punished by the military tribunals. They are amenable to no other tribunal.... The officers or soldiers of neither army could be called to account civilly or criminally in those [the ordinary] tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war [emphasis supplied].[35]

No one will question the correctness of these statements as an exposition of the relevant international law. Lest there be misapprehension that the customary laws of war are vague and indeterminate, let it be noted that this body of customary law is of the same general nature as the English common law and found in much the same manner. Indeed it has received substantial codification both as regards general principles and numerous particular situations. The extent and nature of codification will be discussed in more detail infra.

At this point it should be noted that the military law of the United States is considerably older than its constitution, which provides for military as well as civil government. Our written military law is the successor of many codes, some of which remain for our inspection and edification, some do not! A pertinent statement in this connection was made by former Attorney General Biddle, while arguing the famous saboteur case in 1942. Responding to a question from the bench referring to the law of war, the Attorney

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35. These excerpts are from the opinions in Coleman v. Tennessee, op. cit., pp. 509, 516, 517, and Dow v. Johnson, 100 U.S. 158, 166, 169, 170 (1879). These cases stemmed from the Civil War.

General said: "Now, all of this law Mr. Justice Jackson, of course is not found in common law reports. It is found in history, in books and treaties, in opinions of the Judge Advocate General and in accounts of what actually took place on the battlefield." It was from just such sources that the Supreme Court found the law in that case.[36]

Speaking of the law applicable to a belligerent occupation situation Birkhimer states:

> ...The commander of the invading, occupying, or conquering army rules the country with supreme power, limited only by international law and the orders of his government.... An army in the enemy's country may do all things allowed by the rules of civilized warfare, and its officers and soldiers will be responsible only to their own government. The same rule applies to our own territory permanently occupied by the enemy."[37]

Thus the law of military occupation of foreign territory in time of war is that sanctioned by general international law and the laws of war.

Some of the laws of war date back hundreds of years but

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36. Ex parte Quirin, op. cit.; See Squibb, G. D., The High Court of Chivalry, (Oxford, Clarendon Press, 1959) 10-18. Squibb's, cogent analysis suggests the hypothesis that the Court of Chivalry in England was the ancestor of the present military government court. He dates it from approximately 1347.

37. Birkhimer. op. cit., pp. 53, 54. The obligation and the power to establish a system of military government are basic concepts of international law. See, The Grapeshot, 9 Wall. (77 U.S.) 129 (1869); Neely v. Henkel, 180 U.S. 120 (1901); 23 Opinions Attorneys-General, 427; Mitchell v. Clark, 110 U.S. 648 (1889); U.S. v. Rice, op. cit., p. 246; Pomeroy, Constitutional Law (10th ed., 1888) 595; Fairman, "Some Observations on Military Occupation," 32 Minn. L. Rev. 319 (1948).

the vastly greater number originated during the past two hundred years. Their roots are as deversified as those of all other principles and rules of international law. Humanitarian sentiments, ideas of chivalry and honor, points of agreement as to military convenience - all have contributed to the gradual development of our present laws of war. The rules of warfare comprise one of the oldest segements of modern international law. The binding authority of the laws of war has been derived from the unwritten and mutual consent of nations, expressed in the actual practices of warfare. According to this law, the power of the military commander is legally supreme. The character of government to be established and the measures to be adopted depends entirely upon the orders of the military commander. The only limits to the military authority are those which international law and usage, upon the ground of humanity and justice impose, and breaches of these are cognizable only in the military courts.[38]

In practically all respects the laws governing the military occupation of hostile foreign territory apply to the military occupation of hostile domestic territory in time of a civil war which has assumed a public character.[39] So far as regards the acts that may be done by military and civil authorities in effectuating their purposes, the necessity for them being present, there is no difference

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38. Coleman v. Tennessee, op. cit., p. 517; New Orleans v. S. S. Co., op. cit., p. 387; Dooley v. United States, 182 U.S. 222 (1901). Cf. Lieber's Instructions, op. cit.

39. New Orleans v. S. S. Co., op. cit.

between the commander's powers in a domestic insurrection and in a war.[40] Upon the actual scene of war, martial law becomes indistinguishable from military government. "When martial law is invoked in face of rebellion that rises to proportions of belligerency, it is war power pure and simple." It is in this sense that Field defines martial law as "simply military authority exercised in accordance with the laws and usages of war," and the Supreme Court defines it as "the law of military necessity in the actual presence of war."[41]

In such situations it appears the military commander has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. Commenting upon this Birkhimer states:

> "Military government is thus placed within the domain of international law, its rules the laws of war, while martial law is within the cognizance of municipal law. The difference between these two branches of military jurisdiction becomes most strikingly manifest through the dissimilar rules of responsibility under which officers exercise their respective powers in the two cases. With rare exceptions, the military governor of a district subdued by his arms is amenable to the laws and customs of war only for measures he may take affecting those found there, whatever their nationality; whereas he who enforces martial law must be prepared to answer, should the legality of his acts be questioned, not only to his military superiors, but also before the civil tribunals when they have resumed their jurisdiction."[42]

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40. Magoon's, Reports on The Law of Civil Government in Territory Subject to Military Occupation By The Military Forces of the United States (Washington: Government Printing Office 3rd ed., 1903), 12-13.

41. United States v. Diekelman, 92 U.S. 520 (1875).

42. Birkhimer, op. cit., pp. 21, 22; See Fairman, The Law of Martial Rule (Chicago: Callagham and Co., 2nd ed., 1942) 41-43 where military government and martial law are distinguished. See also

Based on the foregoing it is seen that there is a vital distinction in the power of the courts to subject the legality of the acts in the two situations to judicial scrutiny. However, great may be the authority of the military commander in exercising martial rule, his actions may be inquired into by a still higher authority, that is, the civil courts for abuse of official powers.

International Law is Basis for Punishment of War Criminals.

War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action finds no warrant in and is contrary to international law.[42a] When, therefore, we say that the belligerent inflicts punishment upon war criminals for the violation of his municipal law, we are making a statement which is correct only in the sense that the relevant rules of international law are being applied, by adoption or otherwise, as the municipal law of the belligerent. Intrinsically, punishment is inflicted for the violation of international law.

The international rules of warfare are binding not upon impersonal entities, but upon human beings. In no other sphere does the view that international law is binding only upon States and

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42. the following cases where the Supreme Court declared martial law improper. Sterling v. Constantin, 287 U.S. 378 (1932), (martial law declared improper where purpose is to prevent enforcement of federal court order); Ex parte Milligan, op. cit., (martial law improper where civil courts open); Duncan v. Kahanamoku 327 U.S. 355 (1945), (martial law improper where civil courts closed only because area military commander so ordered).

42a. FM 27-10, op. cit., para. 505(e) p. 180.

not upon individuals lead to more paradoxical consequences and nowhere has it in practice been rejected more emphatically than in the domain of the laws of war.[43] The Supreme Court, in Ex parte Quirin, supra, affirmed emphatically the principle of direct criminal liability of individuals for violations of the laws of war.[44]

The foregoing considerations also dispense with the necessity for any undue pre-occupation with the question as to what law must be applied in connection with the prosecution and punishment of war criminals. That law is, and must be, primarily, the law of nations. For, it is only to the extent that the acts of the offenders are prohibited by international law, that they can at all be considered as crimes according to the law of the individual states. The fact that the law of nations may be regarded as forming part of the municipal law of the belligerent in question is an important but in no way essential addition to the strength of the jurisdictional claim of the belligerent proceeding to punish persons guilty of war crimes. This being so, it is proper, in assuming jurisdiction over war criminals, to lay stress not on any exceptional or summary character of such jurisdiction, military or otherwise, but on its essential conformity with the law of nations. Once it is realized that the offenders are being prosecuted, in substance for breaches of international law, then any doubts due to inadequacy of the municipal law of any given State

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43. FM 27-10, op. cit., para. 3, p. 4.

44. See comment thereon, from this point of view by Hyde, 37 Am. J. Int'l L. pp. 166-172, (1944).

determined to punish war crimes recede into the background.

By way of summary, it is believed that the Attorney General of the United States in his opinion "Military Commissions" supra, very admirably summarizes the law as relates to the juridicial basis of nonstatutory military tribunals in time of war and the law which appertains thereto. The Attorney General writes as follows:

> A military tribunal exists under and according to the Constitution in time of war. ...under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offenses as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war. ...
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> That the law of nations constitutes a part of the laws of the land, must be admitted. The laws of nations are expressly made laws of the land by the Constitution, when it says that 'Congress shall have power to define and punish ... offenses against the laws of nations.' ... From the very face of the Constitution, then, it is evident that the laws of nations do constitute a part of the laws of the land. ...Hence Congress may define those laws, but cannot abrogate them,...
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> /T/he laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress....
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> .../W/e must look to the usage of nations to ascertain the powers conferred in war, on whom the exercise of such powers devolve, over whom, and to what extent do those powers reach, and in how far the citizen and the soldier are bound by the legitimate use thereof.

> The power conferred by war is, of course, adequate to the end to be accomplished, and not greater than what is necessary to be accomplished. ...The legitimate use of the great power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands....
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> ...Whether the laws of war have been infringed or not, is of necessity a question to be decided by the laws and usages of war, and is cognizable before a military tribunal....
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> ...The commander of an army in time of war has the same power to organize military tribunals and execute their judgements that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war....
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> The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, a bandit, or other offender against the law of war may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business. ...The civil tribunals of the country cannot rightfully interfere with the military in the performance of their high, arduous, and perilous, but lawful duties....
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> ...If the persons charged have offended against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.[45]

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45. These are excerpts from 11 Op. Atty's Gen. op. cit., pp. 298, 299, 300, 301, 305, 315, 316, 317.

CHAPTER III

EFFECT OF THE GENEVA CIVILIAN CONVENTION OF 1949 UPON THE CONDUCT OF CRIMINAL PROCEEDINGS IN BELLIGERENT OCCUPATION

General Comments on the Provisions of Geneva Civilian Convention of 1949 Regarding Penal Laws.

The new Geneva Civilian Convention of 1949[46] imposes important limitations as to the administration of punitive justice in occupied territory. The new Geneva Conventions deal with the protection of "war victims" that is, with the protection of persons outside of the fighting formations (civilians), or with persons of the armed forces who are at the time or permanently not able to fight. The conventions of 1949 are not wholly ideal and without weaknesses, but, in general, they represent progress. Such progress is in three directions, namely, in enlarging, strengthening, and adapting the former conventions to the present conditions of war. Further progress realized by the Geneva Convention lies in the abolishment of the clausula si omnes. Article 2, paragraph 3, of

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46. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949) Treaties and Other International Acts Series 3365. Other Conventions are: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, (12 Aug. 1949), T.I.A.S. No. 3362; The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (12 Aug. 1949), T.I.A.S. No. 3363; and The Geneva Convention Relative to the Treatment of Prisoners of War, (12 Aug. 1949); T.I.A.S. No. 3364.

all the conventions lays down that, although one of the powers to the conflict may not be a party to these conventions, not only do the others remain bound among themselves, but also toward the said power, if the latter accepts and applies the provisions. Everywhere the effort can be seen to make the law of the conventions as binding as possible.

Identical articles establish the duty for each contracting party to complete its national legislation by the incorporation of penal provisions for the repression of acts constituting a breach of the conventions; also, to apprehend persons charged with acts contrary to the conventions, regardless of their nationality, and to refer them for trial to their own courts or, if necessary, to those of another contracting state. The conventions distinguish between grave breaches and other infractions. The "grave breaches" are not defined, but a list of acts, committed against protected persons or property is given, a list which shows the bitter experience of the last war: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and expropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[47]

The Geneva conventions carefully avoid the term "war crimes," and contain nothing about the so-called "Nuremberg principles." This is probably a consequence of the controversial

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47. Conv. I, Arts. 49-54; II, Arts. 50-53; III, Arts. 129-132; IV, Arts. 146-149.

nature of these principles. Article 146, a special article, discusses "grave breaches," but without any reference to international jurisdiction. An innovation is the article according to which no contracting party shall be allowed to absolve itself or any other contrating party of any responsibility incurred by itself or by another contracting party with respect to grave breaches of the conventions. This article, is designed to make the norms compulsory.[48]

The fourth convention, relative to the protection of civilian persons in time of war, creates new international law. The first three conventions are revisions: The first convention replaces the Geneva Conventions of August 22, 1864,[49] July 6, 1906,[50] and July 27, 1929.[51] The second convention replaces the tenth Hague Convention of October 18, 1907.[52] The third convention replaces the Geneva Prisoners of War Convention of July 27, 1929.[53]

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48. Jean S. Pictet, Commentary IV Geneva Convention Relative to the Protection of Civilian Person in Time of War, (Geneva, International Committee of the Red Cross, 1958) 589.

49. Text in William M. Malloy, Treaties (Washington, 1910), II 1903-1906.

50. Ibid., pp. 2183-2205.

51. Text in 27 Am. Jour. Int'l L. (1933), Doc. pp. 43-59.

52. Ibid., II, 2326-2340. On the reform of this convention see: J. C. Mossop, British Year Book of International Law (London: Oxford University Press, (1947), pp. 398-406.

53. On the reform of the 1929 convention see: E. S. Flory, Prisoners of War, (Washington: American Council on Public Affairs, 1942); M. Tollelsen, "Enemy Prisoners of War," 32 Iowa Law Review, 51-71; Ernst H. Feilchenfeld, Prisoners of War (Washington: 1948).

Many norms of the new Geneva Conventions show the impression of the atrocities, perpetrated during the last war. Here belongs - in full harmony with present-day efforts at international protection of human rights - the prohibition against any discrimination of protected persons, "founded on sex, race, nationality, religion, political opinion, or any similar criteria."[54] Here also belongs the norm that strictly forbids "any attempts upon the lives of the protected persons or violence to their person; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments."[55]

The fourth convention, while creating new law, also remains mostly within the framework of the rules actually in force concerning the conduct of war. Thus, Article 27, valid for the territories of the belligerent and occupied territories, is an enlargement of Article 46 of the Hague regulations; not only respect for the person and honor of civilians, but also for their family rights, for their religious convictions and practices, and their manners and customs is guaranteed, and special protection is given to women.

Of general interest in this study are the norms of Articles 47-78 concerning occupied territory,[56] in relation to

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54. Art. 3 of all four conventions. Conv. I, Art. 12; Conv. II, Art. 12, Conv. III, Art. 16; Conv. IV, Arts. 13-27.

55. Conv. I, Art. 12; Conv. II, Art. 12; Conv. III, Arts. 13, 17, 89; Conv. IV, Arts. 32, 100.

56. See Oppenheim, II International Law (6th ed., 1940), op. cit., for general discussion on the law of belligerent occupation.

Articles 42-56 of the Hague Regulations, and of particular interest the brief code of penal legislation and procedure contained in the convention. Articles 65 to 77, inclusive, contain the specific safeguards afforded to civilians charged with crime in military government courts.

Article 54 of the fourth convention concerning judges and public officials in the occupied territory is in conformity with Article 43 of the Hague Regulations. This is also true of the prescription of Article 64, according to which the penal legislation of the occupied territory shall remain in force: Article 43 of the Hague regulations obliges the occupying power to respect the laws in force in the country "unless absolutely prevented." Article 64 of the fourth convention allows the occupying power to repeal the laws of an occupied territory, if they constitute a menace to the security of the occupying power or if they constitute an obstacle to the application of the convention, for example, laws providing for racial discrimination.[57]

Article 64 of the fourth convention provides:

The penal laws[58] of the occupied territory shall

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57. Pictet, op. cit., p. 335.

58. Ibid., Penal Laws "mean all legal provisions in connection with the repression of offenses: the penal codes and rules of procedure proper, subsidiary penal laws, laws in the strict sense of the term, decrees, orders, the penal clauses of administrative regulations, penal clauses of financial laws, etc."; Art. 64 is supplementary to Art. 43 of the Hague Regulations and does not appear to add anything new. See discussion concerning Art. 43 in Chapter II, supra. The same rationale applies to Art. 64 on the authority to change laws which are incompatible with an occupant's war aims or objectives.

> remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offenses covered by the said laws.
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> The Occupying Power may, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to insure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[59]

The first sentence expresses a fundamental notion of the law of occupation, that is, that "the penal legislation in force must be respected by the Occupying Power." "The idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory."[60] The reason for the absence of an express reference to the civil law was that it had been sufficiently observed during past conflicts. "There is no reason to infer a _contrario_ that the occupation authorities are not also bound to respect the civil law of the country."[61] Thus, it is seen, that penal laws may be repealed or suspended only in cases where they constitute a threat to the occupant's security or an obstacle to the application of the Geneva Civilian Conventions of 1949. The occupation authorities

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59. _Ibid_.

60. _Ibid_.

61. _Ibid_.

"cannot abrogate or suspend the penal laws for any other reason - and not, in particular, merely to make it accord with their own legal conceptions."[62] Owing to the fact that the country's courts of law should normally continue to function, "protected persons will be tried by their normal judges" who "must be able to arrive at their decisions with complete independence."[63]

According to Article 154 of the fourth convention, this convention "shall be supplementary to the IV Hague Convention of October 18, 1907, Sections II and III of the Regulations annexed." Articles 22-41 deal with the conduct of war, Articles 42-56 contain the norms concerning belligerent occupation. The cautious wording "supplementary" - not "replace" does not attempt to indicate any limitation between the Civilian Convention and the Hague Conventions.

Three Versus Two Grade System of Military Tribunal.

FM 41-10, supra, provides that "a military commander ... may establish agencies to adjudicate existing criminal or civil law or statutory enactments based on his occupation."[64] The criteria as to composition and jurisdictional limitations of such tribunals will be as prescribed by the theater commander. "Usually there are three categories of courts, patterned as to size, qualifications of members, jurisdiction, and limitations on maximum

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62. Ibid., p. 336.

63. Ibid.

64. FM 41-10, op. cit., p. 158.

punishments somewhat after courts-martial. However, the types may be reduced to two or may be increased to any number required by the situation; in any circumstance, a superior tribunal in the system should be designated to conduct legal proceedings involving protected persons, as defined in the Geneva Conventions of 1949, when the death sentence or imprisonment in excess of two years is authorized for the offense charged...."[65]

FM 41-5, supra, provides for three grades of courts.[66] However, the manual clearly indicates that the three grade structure provided for is flexible and not mandatory. That Manual is advisory in character rather than regulatory and military commanders are not bound by the structure provided for therein. On the other hand,precedents from World War II favor the three level court system.[67] The courts-martial system has three levels of courts

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65. Ibid., p. 159.

66. The following three types of courts are provided for:
    (1) General courts, with authority to impose any lawful sentence including death.
    (2) Intermediate courts, with authority to impose any lawful sentence not extending to death, or imprisonment in excess of a stated number of years (such as 10), or to a fine in excess of a stated amount (such as the equivalent of $10,000).
    (3) Summary courts, with authority to impose any lawful sentence not extending to death, or imprisonment in excess of a stated term (such as 1 year), or to a fine in excess of a stated amount (such as the equivalent of $1,000).

67. Military Government - Germany, Supreme Commander's Area of Control, Ordinance No. 2, Military Government Courts, MGG 60-3 (Issue A, June 1946); Eli E. Nobleman, American Military Government Courts in Germany, Special Text 41-10-52 (U. S. Army Civil Affairs School, Fort Gordon, Georgia) 52. This text is an excellent survey and analysis of the organization

and nonstatutory military tribunals have traditionally followed courts-martial.

Because of the impact of the 1949 Geneva Civilian Convention, a two level system of courts has been considered preferable by The Judge Advocate General's School.[68]

The School advocated a two level system, (a) General Civil Affairs courts and (b) Summary Civil Affairs courts. The following explanation was used in support of the two level preference:

> That Convention [1949 Geneva Civilian Convention] requires certain formalities to be observed in the case of serious offenses. Through a construction of Articles 71 and 72, it appears that a 'serious offense' is one for which the punishment is 'two years' imprisonment or more. In such instances, the accused has the right to free counsel, if the protecting power is not functioning. There are also certain requirements of notice to the protecting power prior to and following the proceedings. In view of such requirements, it would appear that there will be inadequate personnel to staff three levels of courts, assuming the intermediate tribunal

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67. and operation of American military occupation courts with principal emphasis upon an examination of military government courts in Germany. Nobleman's text, Appendices 1 through 13 (pp. 193-248), set forth the text of various orders, proclamations, and ordinances whereby American military tribunals have been established. See Gerhard von Glahn, The Occupation of Enemy Territory (The University of Minnesota Press, 1957) for a Commentary on the Law and Practice of Belligerent Occupation. This work contains an excellent bibliography on belligerent occupation including treaties, periodic literature, monographs and official documents.

68. Instructor's Guide--Civil Affairs Legislation and Courts (prepared by The Judge Advocate General's School, U. S. Army, Charlottesville, Va., Sept. 1961) 100.

> could take cognizance of cases involving 'serious offenses.' It would seem preferable, therefore, to establish two types of courts and to place a ceiling on the jurisdiction of the summary court of imprisonment up to two years with a corresponding lesser authority to impose other punishments, and endow the general court with plenary jurisdiction....[69]

This writer favors a three structure system the essential features of which would be readily apparent. There should be a lower or summary court for the trial of minor offenses against the law of the place and the law of the occupant. They may be thought of as the police courts of military government. These could be called Provost courts with authority to impose sentences of not more than three months imprisonment or a fine not over $500.00 or both. There would not be enough legal officers available to hold these courts, so other officers (military government

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69. "Civil Affairs Legal Functional Manual--Civil Affairs Tribunals" (The Judge Advocate General's School Draft, U. S. Army, Charlottesville, Va., Jan. 1960) 6, 7; Contra see JAGW 1962/1345, Subject "Review of Occupation Laws" wherein TJAG approved a law (Ordinance Number 2) which provides for a three grade structure as follows:
    a. ...A Civil Affairs Judicial System consisting of the following tribunals:
        (1) Trial Courts
            (a) Military Commissions
            (b) Superior Provost Courts
            (c) Summary Provost Courts
        (2) Courts of Appeal
    b. Subject to the provisions prescribed in Article 2, Military Commissions shall consist of a legal officer and any number of non-lawyer court members not less than five. A Provost Court shall consist of a legal officer, except that where the exigencies of the service require, a mature officer possessing the requisite background and temperament may be appointed as a Summary Provost Court.
    c. Courts of Appeal shall consist of three members meeting the qualifications for legal officer prescribed in Article 2.

officers if available) must be used. There should be a court, composed of not less than three officers at least one of whom shall be a lawyer, with authority to impose sentences of not more than two years imprisonment or a fine of $5,000 or both. This court could be called a Special Military Commission. Finally, there must be a court of unlimited jurisdiction, for the trial of cases which appear to involve "serious offenses" either because of the gravity of the offense charged or the importance or difficulty of the legal issues. This court could be known as the General Military Commission and should be composed of not less than five officers at least one of whom shall be a lawyer.[70]

The main difference between these proposed courts lay in their powers of imposing punishment. The grading is not a judicial hierarchy in the sense that there is any appeal from lower to higher courts thus, the system does not provide for any appeals.

Article 73 of the 1949 Geneva Civilian Convention grants a convicted persons "the right of appeal provided for by the laws

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70. Article 66 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, op. cit., provides:

> In case of a breach of the penal provision promulgated by it by virtue of ... Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country [emphasis supplied].

...This provision appears to preclude civilian military government officials from being appointed members of courts. See also Gutteridge, "The Geneva Conventions of 1949," British Year Book of International Law 294-326 (1949); Baxter, "The Geneva Conventions of 1949 Before the United States Senate," 49 Am. J. Int'l L. 551 (1955).

applied by the court." In order to comply with this Convention requirement, provision should be made for an appeals procedure. This procedure should be simple--not elaborate. In addition, provision should also be made for the review of all cases in which sentences have been imposed by any of the three types of courts. The entire system must be flexible, to meet rapidly changing conditions which can be expected on the modern day battlefield, yet it must preserve every essential of justice. In the final analysis, however, it should be pointed out that the number of grades or the type courts provided for in no way affect the legality of their juridicial character. In military government situations the power of the commander to establish courts is complete, limited only by the exigencies of service, international law and the laws of war.

CHAPTER IV

NATURE AND SCOPE OF JURISDICTION OF MILITARY GOVERNMENT AND WAR CRIMES COURTS

Universality of Jurisdiction Over War Crimes.

From the point of view of international law, all persons, military and civilian, charged with having committed offenses in violation of the law of war are subject to the jurisdiction of military tribunals. Military government courts legally may assume jurisdiction over all criminal offenses committed in occupied territory and over civil cases affecting the military government. The military commission may function also within the United States, or within its territories, as in Hawaii, in which the inhabitants are not treated as belligerents. In Ex parte Quirin, supra, the principle was affirmed that the trial need not be in the place in which the offense was committed. Normally, however, if the criminal and civil courts are open and are functioning properly and if the offense does not affect the interests of the United States or its allies or persons subject to the military law thereof, military commissions do not ordinarily exercise jurisdiction.

As relates to jurisdiction, FM 41-10, supra, provides, as follows:

> As to Persons. Jurisdiction extends to all persons in the occupied territory other than prisoners of war, members of the occupying forces, or members of armed forces of states allied with the occupant. Persons serving with, employed by, or accompanying the armed forces are sometimes made subject to the jurisdiction of such tribunals. Persons subject to United States military law (see UCMJ, article 2) do not fall under the jurisdiction of local courts of an occupied area unless expressly made subject thereto by a directive of occupation authorities.

> As to Offenses. Jurisdiction extends to violations of a proclamation, ordinance, or order issued by occupation authority, violations of the law of war (if other tribunals are not established for the adjudication of such cases), and violations of indigenous criminal or civil laws which continue in force after the area has been occupied.[71]

The fact that an offense did not take place in an area of active hostilities does not affect the jurisdiction of military tribunals. Indeed, by well-established practice United States military commissions take jurisdiction over offenses beyond particular territorial commands or national boundaries. Instead of being limited to the territory in which the offense was committed, this aspect of jurisdiction is determined largely by physical custody of the person accused.

The first relevant fact in the situation is that the practice and the doctrine of international law as well as the municipal law of a considerable number of states recognize that a belligerent is entitled to punish for war crimes. Holland, writing in 1908, was very definite on the subject: "Individuals offending against the laws of war are liable to such punishment as is prescribed by the military code of the belligerent into whose hands they fall, or in default of such code, then to such punishment as may be ordered, in accordance with the laws and usages of war, by a military court...."[72]

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71. FM 41-10, op. cit., p. 160. See also FM 41-5, op. cit., pp. 97, 98.

72. Holland, Sir Thomas E., The Law of War on Lands, (Oxford, Clarendon Press; London and New York, 1908), §§ 117, 118; See Cowles, "Trial of War Criminals (Non-Nuremburg)" 42 Am. J. Int'l L. 299 at p. 312 (1948).

In so far as war crimes have been perpetrated in the territory of the belligerent claiming the right to inflict punishment, they may be deemed to be covered by the ordinary territorial principle of criminal law. A State is entitled to punish crimes committed on its territory. The application of the territorial principle covers, in the first instance, all violations of international law in the territory under military occupation of the enemy - the main source of war crimes in World War II. For it is fundamental that the territory occupied by the enemy remains under the sovereignty of the belligerent temporarily divested of his jurisdictional rights. For this reason, juridiction thus occuring under the territorial principle covers crimes committed not only against the nationals of the State whose territory is subject to belligerent occupation, but also against the nationals of other states, including those of the occupying power. Stated more technically, the jurisdictional principle of universality is applicable to the punishment of war crimes.

In addition to the territorial principle there exist a broader basis authorizing a belligerent to punish war crimes committed by the enemy. That basis is the right claimed by some states and not stigmatized as illegal by general international law to punish war crimes wherever committed against the safety of the state and its nationals. There have been many basis of jurisdiction enunciated for the trial and punishment of alien criminals.[73] However,

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73. Alaska Packers Association v. Industrial Accident Commission of California, 294 U.S. 532 (1935); Pound, Roscoe "The Idea

we need not delve into the theory upon which jurisdiction in this broad type of case is based, because the question is one of the existence vel non of a limitation by international law on jurisdiction. If no such limitation can be found under that law, States have reserved their power in the matter. In ascertaining the answer to the question the method or approach is not to show that international law permits States to exercise such jurisdiction, but that it does not prohibit them from doing so. In the case of S. S. Lotus (France v. Turkey), decided by the Permanent Court of International Justice in 1927,[74] Turkey's position was that States may exercise jurisdiction over crime whenever the exercise of "such jurisdiction does not come into conflict with a principle of international law." The Court held in favor of Turkey, saying that the way Turkey had stated the question was "dictated by the very nature and existing conditions of international law."[75] The Court also stated that in exercising jurisdiction international law leaves States "a wide measure of discretion;" that, where there is no prohibitive rule of international law, "every State remains free to adopt the principles which it regards as best and most suitable;" that "all that can be required of a State is that it should not overstep the limits which inter-

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73. of Law in International Relations," Proc. Am. Soc. Int. Law 10 et seq. (1939); Jackson, Justice Robert H. "Full Faith and Credit - The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1, 28 (1945); See also Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," 6 British Year Book of International Law 44 (1925); "Jurisdiction with Respect to Crime," Edwin D. Dickinson, Reporter, Harvard Research in International Law, 29 Am. J. Int'l Law (Supp. No. 3) 437 et seq.

74. Judgement No. 9, Series A, No. 10. Also in 2 Hudson, World Court Reports 23.

75. Judgement No. 9, Series A, No. 10, p. 18.

national law places upon its jurisdiction;" that "within these limits, its rights to exercise jurisdiction rests in its sovereignty;" that this principle applies equally "to civil as well as to criminal cases;" that the so-called territoriality of criminal law "is not an absolute principle of international law;" that any exception to the right of States to exercise jurisdiction must be "conclusively proved;" and that, as municipal jurisprudence was divided, "it is hardly possible to see in it an indication of the existence of the restrictive rule of international law."[76]

This case holds that independent States have a freedom of action in all matters not prohibited to them by the principles or rules of international law; and that the proponent of a restriction must bear the burden of establishing the existence of a prohibitive rule of international law. France had not sustained the burden. The Court, accordingly, held that there was no principle of international law which precluded Turkey from instituting criminal proceedings against Demons, and that Turkey, in proceeding against him, had not acted in conflict with any such principle. The holding is that an independent State has legal power to vest jurisdiction in its courts to hear and determine any criminal matter - alleged war crimes - which is not prohibited by international law. In order to establish that, under international law, the principle of universality does not apply to the trial and punishment of war criminals, it is necessary to show

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76. Ibid., excerpts from pp. 19, 20, 26, 29.

that States generally, as a matter of practice expressing a rule of law, have consented not to exercise jurisdiction. Any such restriction must be conclusively proved, and to do this municipal law and practice must not be divided.

The jurisdiction exercised by United States military courts has always been personnel, not territorial, even as to members of the United States forces. The same is true of military commission sitting as war crimes courts. In the military commission case of United States v. Hogg et al., decided in 1865, the reviewing authority made the following pertinent statement:

> Military courts are not restricted in their jurisdiction by any territorial limits. They may try in one State offenses committed in another, and may try in the United States offenses committed in foreign parts, and may try out of the United States offenses committed at home. They have to do only with the person and the offense committed; all else is simply a matter of convenience, or witnesses, of the means of assembling a court, etc.[77]

The Supreme Court of the United States, in the case of Coleman v. Tennessee, supra, has taken the same position.[78]

Following are representative statements concerning jurisdiction of persons for violations of the laws of war. Like the foregoing excerpts, they speak of persons and offenses. There is no suggestion of any territorial limitation on jurisdiction: FM 27-10, supra, states that "the jurisdiction of United States military

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77. 8 Rebellion Records, Series II, 674, 678. To the same effect, United States v. Gurley 7 J.A.G. Record Book 360, 365 (1864).

78. 97 U. S. 509, 519 (1878).

tribunals in connection with war crimes is not limited to offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons."[79] Oppenheim: "In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders."[80] Dickinson, Hyde, and Finch, reporting to the American Bar Association on the trial and punishment of war criminals stated that: "it has long been an accepted principle of international law that a belligerent may punish with appropriate penalties members of the enemy forces within its custody who have violated the laws and customs of war."[81] Brierly stated that jurisdiction over war crimes "has no territorial basis, and it may therefore be exercised without any reference to the locus delicti."[82] Glueck too states that "the jurisdictional principle question presents little difficulty, because the territorial principle does not govern military tribunals in time of war."[82a]

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79. FM 27-10, op. cit., para. 507, p. 182.

80. 2 Oppenheim, Int. Law (6th ed., Lauterpacht, 1940) op. cit., § 251, p. 451.

81. Proc. Section of Int. and Comparative Law, Am. Bar. Assn. 58, 60; Also in 37 Am. J. Int. Law 663, 665 (1943).

82. Brierly, "The Nature of War Crimes Jurisdiction," 2 The Norseman, No. 3, (May-June 1944).

82a. Glueck, "By What Tribunal Shall War Offenders be Tried?" 56 Harv. L. Rev. 1059, 1065, (1943).

The Lord Chancellor (Viscount Simon), on October 7, 1942, stated in the House of Lords: "I take it to be perfectly well established inter-national Law that the laws of war permit a belligerent commander to punish by means of his military courts any hostile offender against the laws and customs of war who may fall into his hands wherever be the place where the crime was committed."[83]

The actual practice of the United States - as evidenced in the following representative cases found in unpublished military records of the United States - show that when it is a matter of doing justice in places where ordinary law enforcement is difficult, or suspended, the military tribunals of the United States have acted on the principle that crime should be punished because it is crime. It has had no concern with ideas of territorial jurisdiction and there is no evidence of a consciousness on the part of the courts of any duty not to assume jurisdiction. Jurisdiction has been assumed by military tribunals in cases where the victim was not a national of the punishing state, and where the offense took place in territory over which the military forces of the punishing state, at the time of the offense, did not have that control which results from the establishment of a status of military occupation.

General Orders No. 372, issued by Major General Winfield Scott in 1847,[84] supra, amounts to an assertion, under the laws of

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83. Parliamentary Debates, House of Lords, Vol. 124, No. 86, p. 578, (Oct. 7, 1942).

84. General Scott's Orders, 1847-1848 (bk. no. 41½), The National Archives.

war, of power by military commanders to punish crimes in unoccupied areas by foreigners against foreigners. The order speaks of Mexican highways used, "or about to be used," and the order recognized that the Mexican bands called guerilleros and rancheros were equally dangerous to Mexican and foreigners as well as to Americans. The case of United States v. Garcia,[85] tried by a Council of War, illustrate the exercise of jurisdiction under this order.

In 1864 an enemy soldier murdered several persons in enemy territory beyond the United States military lines. Later he was captured by United States forces. The Judge Advocate General held that a military commission would have jurisdiction over such an enemy soldier irrespective of "whether such crimes were perpetrated within or beyond the ordinary field of occupation of our Armies."[86]

Prior to the Spanish-American War of 1898, a Philippine revolution took place against the authority of Spain. During the course of the revolution the Philippine forces captured a large number of Spanish prisoners of war. In 1900, although United States forces occupied Manila and Northern Luzon, a large area of Southern Luzon was under the de facto sovereignty of the Philippine Insurgents. It had never been occupied by United States Forces. The accused, Major Braganza, murdered a number of the

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85. File FF 215, Courts-martial Records, The National Archives. For other cases see ibid., file nos. FF 18 and EE 608.

86. 8 J.A.G. Record Book, 529.

prisoners to prevent their rescue by the approaching American Forces. Braganza was later captured by United States Forces. He was charged under three general charges before a United States military commission, which read as follows: Charge I - "Murder in violations of the laws of war." Charge II - "Violations of the laws of war." Charge III - "Robbery, in violation of the laws of war."[87] It should be noticed that each of these general charges clearly indicates the law which was being applied. It was not Philippine law, not Spanish law, not United States law, but the international law of war. Braganza was sentenced to be hanged.

Prior to the time that Vera Cruz came under the military occupation of the United States, a Mexican was killed while attempting to prevent another Mexican, one Miguel Robles, from beating a woman. Miguel's father, Luis Garcia Robles, was present at the time of the killing. After the killing Miguel fled and was not apprehended. On May 22 General Funston ordered the appointment of a military commission. On May 28 Luis Garcia Robles was arraigned before it, on the charge of murder. His defense counsel pleaded specifically

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87. United States v. Braganza, G.O. 291, Div. Phil., Sept. 26, 1901; General Courts-Martial Records No. 30036 /hereinafter cited as "CM ____."/; G.O. 346, Div. Phil., Nov. 10, 1901; Following are other cases which arose during the insurrection period. United States v. Dacoco et. al., G.O. 92, Div. Phil., Sept. 20, 1900, CM 24951; United States v. Lomabao, G.O. 133, Div. Phil., Dec. 1, 1900, CM 20888; United States v. Versosa et. al., G.O. 136, Div. Phil., Dec. 5, 1900, CM 24058; United States v. Ferrer et. al., G.O. 120, Div. Phil., June 13, 1901; In 1902, The Judge Advocate General of the Army declared that the military commissions, "as well as provost courts, which have been held in the Philippine Islands since our troops landed there, are war tribunals, and the fact of their institution amounts, in itself, to evidence of the existence of war in those islands." (J.A.G. Card No. 12184, March 12, 1902, p. 2).

to the jurisdiction of the commission, on the grounds among others, that military government (counsel erroneously spoke of it as "martial law") was not established at the time in the town where the crime was committed. The following extract from the argument of the Judge Advocate on the pleas is of interest:

> The civil courts have been suspended. The mere fact that they are not now functioning, that no civil courts have been appointed by the commanding general of the occupying forces, is sufficient. As to the constitution of the military government here it is believed that the fact is well known to the members of the Commission that the Commanding General was appointed Military Governor of Vera Cruz; that the President intimated that it was not wise to continue a civil government here under the present conditions, and for that reason he appointed a new, or military governor to supersede the civil governor that had been appointed by Admiral Fletcher. Thus he manifested, beyond the shadow of a doubt, that a military government had been duly constituted. Such being the case military law existed, and there is no reason whatsoever why a military commission subsequently convened to try an offense that was previously committed should not have full jurisdiction in the premise.[88]

In summary, actual practice shows that the jurisdiction assumed by military courts, trying offenses against the laws of war, has been personal, or universal, not territorial. The origin of the law governing war crimes is in the law of brigandage. Accordingly, the principle evidence of the pertinent practice of

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88. United States v. Robles, G.O. 7, June 8, 1914, United States Expeditionary Forces, Vera Cruz, CM 85775, at R 4, 12, 13, 51, 53; United States v. Balan, G.O. 8, Hq. United States Expeditionary Forces, Vera Cruz, Mexico, Aug. 13, 1914, CM 87017 represents a typical war crimes Vera Cruz case on the facts.

states is to be found in relation to the trial and punishment of brigands. While the State whose nationals were directly affected has the primary interest to try and punish war criminals, all civilized States have a very real interest in the punishment of war crimes. The unpunished criminal is a menace to the social order. And an offense against the laws of war, as a violation of the law of nations, is a matter of general interest and concern. Under international law, every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it intered the war, or the place where the offense was committed.

Jurisdiction Concurrent or Exclusive.

Now we come to a somewhat refined problem concerning jurisdiction between courts-martial and military commissions. Law in modern times is primarily territorial in effect. Jurisdiction is in general terms limited by national frontiers, yet to this sound theory armed forces form a distinct exception. Military law in non-territorial and is personal in effect. It is applicable to persons subject thereto, wherever they may be, provided only they be officers or soldiers in the Army, or civilians connected therewith. In all matters that affect the relations of soldiers with one another, military law governs, and is administered through courts-martial, and this is true whether the Army is at home or abroad. Wherever they are, they remain subject to the articles of the UCMJ. Disorders and neglects to the prejudice of good order and military discipline and conduct of a nature to bring discredit upon the military service

committed by members of the occupant Army are subject to the military jurisdiction of that Army, and only to that jurisdiction. They are exempt from the civil and criminal jurisdiction of an enemy's territory. "When our armies marched into the enemy's country," says the Supreme Court, "their officers and soldiers were not subject to its laws."[89]

Article 18, UCMJ, supra, grants general courts-martial jurisdiction:

> to try persons subject to this code for any offense made punishable by this code... General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

Article 21, UCMJ, supra, provides: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost court, or other military tribunals."[90]

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89. Dow v. Johnson, op. cit., fn. 17, p. 165, followed in Freeland v. Williams, 131 U.S. 405, 416 (1889).

90. The courts appear to be undecided whether "military government courts" (belligerent occupation) are "military commissions" or "other military tribunals" (United States Military Government v. Ybarbo, op. cit., p. 207); In Madsen v. Kinsella, op. cit., the Supreme Court referred to military commissions and "United States occupation courts in the nature of such commissions" (p. 346) and in speaking of occupation courts, stated "They have taken many forms and borne many names" (p. 347). "Other military tribunals" were added to the enumeration of military courts in para. 13 FM 27-10, supra, in order to bring the list into conformity with UCMJ Art. 21.

Punitive Articles 104 ("Aiding the Enemy") and 106 ("Spies") UCMJ, supra, expressly grant authority to try and punish "any person" for violations of these articles to courts-martial and military commissions concurrently. All the remaining punitive articles provide that "any person subject to the code" who violates a punitive article "shall be punished as a court-martial may direct."

By Article 2, UCMJ, the Congress enumerated the persons that it made "subject to the code" and consequently subject to military law. At first blush, it would appear that military commissions and similar tribunals have no jurisdiction to try those "persons subject to the code" enumerated in Article 2, supra, for violation of the punitive articles expressly made punishable by courts-martial.[91]

One of the major issues raised by the appeal in the case of United States Military Government v. Ybarbo was the question of whether a dependent (enumerated in Article 2 as being subject to military law) of an American soldier, present with him in the American garrison in Germany, could properly be tried in a military

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91. FM 27-10, op. cit., para. 13, p. 11 is in accord with this view. It provides:

> /I/t has generally been held /without citing authority/ that military commissions and similar tribunals have no jurisdiction of such purely military offenses specified in the UCMJ as are expressly made punishable by sentence of court-martial (except where the military commission is also given express statutory authority over the offense (UCMJ, arts. 104, 106)).

This statement is probably predicated upon a similar statement found in U. S. Army, Manual for Courts-Martial (1921) p. 3.

government court rather than by court-martial. The dependent wife objected to the jurisdiction of the military government court and claimed she had a right to be tried by court-martial under the Articles of War. (If it had been Sergeant Ybarbo that killed his wife instead of vice versa, without doubt he would have been tried by court-martial).

The Military Government Courts in Germany had from the beginning been given concurrent jurisdiction over civilians subject to military law.[92] Although dependents were declared amenable to trial by court-martial and courts-martial were deemed to have concurrent jurisdiction with Military Government Courts to try dependents (Articles of War 2, 12, 15), it was the policy not to try dependents by court-martial.[93]

A bench of five civilian judges held that Mrs. Ybarbo was not subject to the exclusive jurisdiction of a courts-martial and that she was subject to the concurrent jurisdiction of the Military Government Courts for a crime committed in the occupied zone of Germany.[93a]

The Court traced in detail the historical development of the Articles of War and the nature of jurisdiction granted by them in general and the legislative history and committee hearings on Article of War 15 in particular. Article 15 is the forerunner and is identical in substance to Article 21, UCMJ, supra. The

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92. OMGUS, Title 23, Military Government Legislation 23.

93. Circular No. 74, Headquarters, European Command, dated Aug. 27, 1947, subject "Military Justice."

93a. United States Military Government v. Ybarbo, 1 Court of Appeals Reports, U. S. Military Government Courts for Germany 207 (1949).

Court speaking of the jurisdiction granted by Article 15 stated:

> The draftsmanship of this Article is unfortunate. It does not, as it might, refer specifically to common law crimes, but confines its reference to offenses /offenses' rather than 'crime' is the term used with respect to the Laws of War/ proscribed by statute or the laws of war....
>
> However that may be, the Military Government court in which the defendant has been tried seems to be clearly either a 'military commission' or another 'military tribunal.' Under the Common Law of War, Military Commissions (or as they are here called, Military Government Courts) had jurisdiction over soldiers and civilians. That jurisdiction was expressively saved to them by Article 15 of the Articles of War....
>
> When Congress enacted the present Article of War 15, it would seem that it did so with the full knowledge that it was saving to Military Commissions the jurisdiction it had theretofore exercised over soldiers as well as civilians under the Law of War....[94]

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94. United States Military Government v. Ybarbo, op. cit., extracts from the opinion pp. 219, 221. The Court citing Articles of War 80, 81, and 82 (Arts. 81 and 82 are identical to Arts. 104 and 106, UCMJ, supra), stated: "the articles, for some reason not entirely clear, have included the prescription and punishment of three violations of that part of the law of nations which is known as the laws of war." The ambit of Articles 104 and 106, as to the places and persons in the United States to which it is applicable, remains unsettled. Although the saboteurs in Ex parte Quirin were charged, inter alia, with espionage, the Supreme Court did not elucidate the matter. The Court upheld the jurisdiction of the military commission only on the charge of unlawful belligerency. The court stated:

> "...We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly wihtin those boundaries.... Since the first specification of Charge 1 sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge 1, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the

In 1952, the Supreme Court in the case of Madsen v. Kinsella, supra, was presented with a similar question to that posed in the Ybarbo case. In 1950, Mrs. Madsen, a dependent wife of a member of the United States Armed Forces, had been found guilty of murdering her husband, by a civilian composed United States occupation court in Germany. The Supreme Court, with only one Justice dissenting, again traced the historical development of the Articles of War and the legislative history of Article of War 15. In affirming the concurrent jurisdiction of Military Commissions to try the petitioner the Court speaking through Justice Burton stated:

> Article 15 thus forestalled precisely the contention now being made by petitioner that contention is that certain provision, added in 1916 by Articles 2 and 12 extending the jurisdiction of courts-martial over civilian offenders and over certain nonmilitary offenses, automatically deprived military commissions and other military tribunals of whatever jurisdiction they then had over such offenders and offenses. Articles 2 and 12, together, extended the jurisdiction of courts-martial so as to include 'all persons accompanying or serving with the armies of the United States

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94. specifications under Charge II and III allege violations of those Articles or whether if so construed they are constitutional.... (See pp. 45, 46);"

Green,"The Military Commission," 42 Am. J. Int'l L. p. 832 at p. 841 (1948) comments upon these Articles as follows:

> Violations of Articles of War 80, 81, and 82 by military personnel and camp followers have been tried by military commission, and there may be good reason at times for trying such persons by military commissions for offenses not included in these three articles or not efficiently justifiable under the other Articles of War (like Article of War 96) if such offense is violative of the laws of war and not strictly of a military nature, or if, indeed, officers of high rank have offended against the law of nations....

> without the territorial jurisdiction of the United States....' The 1916 Act also increased the nonmilitary offenses for which civilian offenders could be tried by courts-martial. Article 15, however, completely disposes of that contention. It states unequivocally that Congress has not deprived such commissions or tribunals of the existing jurisdiction which they had over such offenders and offenses as of August 29, 1916.... See In re Yamashita, ... and Ex parte Quirin,...
>
> The concurrent jurisdiction thus preserved is that which 'by statute or by the law of war may be triable by such military commission, provost courts, or other military tribunals.'... The 'law of war' in that connection includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government. The jurisdiction exercised by our military commissions in the examples previously mentioned extended to non-military crimes, such as murder and other crimes of violence, which the United States as the occupying power felt it necessary to suppress. In the case of In re Yamashita,..., following a quotation from Article 15, this Court said, 'By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war.' The enlarged jurisdiction of the courts-martial therefore did not exclude the concurrent jurisdiction of military commissions and of tribunals in the nature of such commissions /Emphasis supplied/.[95]

It is quite clear then, that criminal jurisdiction over "persons subject to the code," that is, subject to military law, is not exclusively vested in the court-martial. The UCMJ quite evidently intends that offenders against the laws of war as well as

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95. Madsen v. Kinsella, op. cit., excerpts from pp. 351, 352, 353, 354, 355.

other "nonmilitary crimes, such as murder and other crimes of violence," may be tried by either a military commission or a Court-martial, since the two tribunals have been granted concurrent jurisdiction.

In this connection, it is interesting to note that for "violation of all Articles of War it has been the practice for courts-martial to exercise exclusive jurisdiction."[96] As regards purely military offenses such as are specified in the Articles of UCMJ, it would seem best to follow this practice. The form and procedure of the courts-martial are more fixed and less liable to error; it has been more clearly and completely settled by statute, judicial decision, executive order, and custom; it has a well recognized and clearly

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96. Green, "The Military Commission" op. cit., p. 843; Walker, Daniel, Military Law (New York: Prentice-Hall, Inc., (1954), p. 522; See JAGW 1962/1345, op. cit., Article 4, Ordinance Number 2, wherein jurisdiction over all persons in occupied territory was granted to military commissions. Article 4 reads in part as follows:

> a. Without prejudice to any jurisdiction over persons conferred by the law of war, Military Commissions unless expressly authorized by the general or flag officer commanding the United States forces ... such jurisdiction shall not be exercised over the following categories of persons:
>
> (1) Members of the Armed Forces of the United States or of Allied nations.
>
> (2) Prisoners of War within the meaning of Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug. 1949.
>
> (3) Persons triable for grave breaches of the four Geneva Conventions for the Protection of War Victims of 1949; to whom the provisions of Article 146 of the Geneva Convention for the Protection of Civilian Persons in Time of War, 12 Aug. 1949, apply.

See Article 5, Ibid., for provision concerning "Jurisdiction Over Offenses." See also United States v. Schultz, 1 USCMA 512, 4 CMR 104 (1952). In this regard see fn. 91, supra.

derived jurisdiction. It is intended primarily for the scrutiny and judgement of offenses committed by soldiers against other soldiers and against military laws. It is more familiar to the personnel who will be proceeding in judgement, as well as to the military persons who appear before the bar. Although, it is considered better practice that persons subject to military law be dealt with by the military law governing the Army, that is, Courts-Martial; commissions should be granted jurisdiction over all persons committing offenses in violation of the law of war. The military commander should then preserve the non war crimes jurisdiction for courts-martial by prescribing that no acts already recognizable by courts-martial shall be tried by military commissions.

Effect of the 1949 Geneva Conventions Upon Jurisdiction.

Both the courts-martial and the military commission derive their authority from the military commander. Nevertheless, the difference, as far as which type court exercises jurisdiction over persons subject to military law is concerned, is more than a mere difference in form. Prisoners of war, in addition, to being enumerated as one of those classes of persons "subject to the code"[97] are also covered by the provisions of the 1949 Geneva Conventions.[98]

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97. Art. 2(9) UCMJ, op. cit.

98. Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, op. cit.; See also Pictet, Jean S. Commentary, Geneva Convention Relative to the Protection of Prisoners of War (Geneva: International Committee of the Red Cross, 1960) pp. 413-425, 476; For provisions relating to penal and disciplinary sanctions against prisoners of war see Articles 82(1), 82(2), 83, 85, 87(2), 87(3), 89, 90, 95(1), 95(2), 96(2), 97, 98(4) and (5), 101, 102, 104, 105(1),(2) and (3). For commentary on cited articles see Pictet.

Article 102 of this Convention provides that prisoners of war may 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. Article 85, makes the Convention applicable to precapture as well as post capture offenses.[99] Therefore, prisoners of war must be tried by the same type military tribunal utilizing the same procedural safeguards as try United States personnel. This means if you try persons subject to our military law by courts-martial for offenses already recognized by courts-martial you must likewise try prisoners of war for such offenses by the same tribunal. Conversely, if the practice of trying prisoners of war for war crimes by military commission is continued, then United States armed forces personnel must be subject to the jurisdiction of the same tribunal.[100] In this respect one author notes that a

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99. In In Re Yamashita, op. cit., pp. 20-23, the Supreme Court construed Art. 63 of the 1929 Geneva Prisoner War Convention to require the procedural safeguards of a court-martial only for offenses committed after capture. The present Article 85 provides that prisoners of war retain their status while being tried and after conviction.

100. Most of the trial safeguards afforded prisoners of war now apply to the trial of enemy civilians who commit war crimes by violation of any of the 1949 Conventions. (Art. 129, of the Geneva Convention Relative to the Treatment of Prisoners of War, op. cit.); Pictet, op. cit., (fn. 82) pp. 620-626; See also, Ramsey, Belligerent Occupation, (unpublished thesis submitted to The Judge Advocate General's School, May 1955) Chapter IV, for a discussion of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949, as it affects the law of belligerent occupancy.

strict compliance with Articles 85, 99, and 102 of the Convention would preclude war crimes trials of military personnel before international tribunals, such as Nuremberg, because of the unwillingness of the Detaining Power to subject members of its own force to the jurisdiction of such a tribunal.[101] Concerning the provisions of the 1949 Geneva Conventions, there has as yet been no occasion for the United States Supreme Court to consider these provisions. Nor have they been subject to judicial construction as far as the writer is aware.[102]

Effect of Recent Supreme Court Decisions Upon Jurisdiction.

Because of the broad language found in dicta of the recent decisions of the United States Supreme Court dealing with the jurisdiction of courts-martial over civilians, some doubt has been cast upon the jurisdiction of "tribunals in the nature of military commissions." The question of court-martial jurisdiction over civilians was considered by the Supreme Court in the case of Reid v. Covert, which will be subsequently discussed in greater detail in the next Chapter dealing with procedure. In that case Mrs. Clarice Covert was charged with murdering her husband, a sergeant in the United States Air Force, at an airbase in England. Mrs. Covert was residing on the base with her husband at the time. Jurisdiction

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101. Baxter, "Constitutional Forms and Some Legal Problems of International Military Command," op. cit., at pp. 354, 355. See Pictet op. cit., (fn. 98) p. 623.

102. The Pictet Commentaries cited in this study take care to emphasize "that only the participant States are qualified... to give an official and ... authentic interpretation ... of the Conventions."

was asserted under Article 2(11) of the UCMJ, supra. On the first hearing, with three Justices dissenting and one reserving opinion, jurisdiction was sustained by a sharply divided court.[103] Subsequently, the Court granted a petition for rehearing, after further argument and consideration, the Court concluded that it was unconstitutional to try a civilian dependent by court-martial overseas in time of peace for a capital offense.[104] In three subsequent decisions, McElory v. Guagliardo,[105] Grisham v. Hagan;[106] and Kinsella v. Singleton,[107] the court reaffirmed the doctrine of Reid v. Covert, supra, and extended it to include both civilian employees and dependents and both capital and noncapital offenses.

In Reid v. Covert, the Kinsella v. Madsen case was noted but deemed to be not controlling. However, not only was it not overruled it was cited with approval. Justice Black who wrote one of the three opinions in the second case was joined by three justices and voted to overrule the prior Reid decision. Justice Black speaking for the four Justices stated:

> ...While we recognize that the 'war powers' of the Congress and the Executive are broad, we reject the Government's argument that present threats to peace permit military trials of civilians accompanying the armed forces overseas in an area where no actual hostilities

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103. Reid v. Covert, 351 U.S. 487 (1955).

104. Reid v. Covert, 354 U.S. 1 (1957); See also United States ex rel Toth v. Quarles 350 U.S. 11, at pp. 22-23 (1955).

105. McElory v. Guagliardo, 361 U.S. 281 (1960).

106. Grisham v. Hagan 361 U.S. 278 (1960).

107. Kinsella v. Singleton, 361 U.S. 234 (1960).

> are under way. The exegencies which have required military rule on the battlefront are not present in areas where no conflict exists.[108]

Justice Black citing Madsen v. Kinsella stated:

> /I/t is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not.[109]

Mr. Justice Clark - who delivered the opinion of the Court in the first Reid case - was joined in his dissent in the second case by one justice. Justice Clark in his dissent stated that "Madsen was factually very similar to the present case, and in terms of relevant considerations involved it is practically indistinguishable."

He continued:

> ...The distinction that in one case the trial was by court-martial and in the other by military commission is insubstantial. The contention that jurisdiction could be sustained in Madsen under the War Power of Congress but that this power is unavailable to authorize jurisdiction in Smith /Covert/ is likewise without merit.[110]

In Madsen v. Kinsella, the Supreme Court in its opinion

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108. Reid v. Covert, 354 U.S. pp. 34, 35.

109. Ibid., fn. 63, p. 35.

110. Ibid., pp. 81, 82. The dissenting Justices pointed out that in the second Reid case:
> "the Court reverses, sets aside, and overrules two majority opinions and judgements of this /Supreme/ Court in these same cases.... In sustitute therefore it enters no opinion whatever for the Court. It is unable to muster a majority. Instead, there are handed down three opinions... (p. 78).

at no point cast any doubt on the doctrines established one hundred years or more ago regarding the establishment and powers of military commissions. The holding was quite important since it was a reaffirmation by the Court of the principles that had not been enunciated by it since the middle of the last century concerning military occupation and military tribunals. By the law of war, as the opinion points out, our military commissions had had jurisdiction or non-military crimes such as murder when committed by civilians, including American civilians accompanying the Army. It was thus established by the highest authority that the Court which tried Mrs. Madsen was in the nature of a military commission and that a military commission - the common law war court under the international law of war - may be established not only for the trial of offenses against the laws of war (war crimes) but also for the trial of cases which the civilian courts are unable or not permitted to try.

The Supreme Court subsequent to its second decision in Reid has by indirection again indicated that Reid did not affect the decision in Madsen. In the opinion of the Court in Kinsella v. Singleton, supra, it was stated "Moreover, in the critical areas of occupation, other legal grounds may exist for court-martial jurisdiction as claimed by the Government in No. 37, Wilson v. Bohlender, post, p. 281. See Madsen v. Kinsella..."[111] Again in the same case Mr. Justice Harlan, with whom Mr. Justice Frankfurter joined, in the dissent stated:

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111. Kinsella v. Singleton, op. cit., p. 244.

> In No. 37 /supra/ the Government, alternatively, relies on the 'War Power,' the offense having been committed in the American Occupied Zone of West Berlin. Cf, Madsen v. Kinsella ... Apart from whether or not the contention is available in light of the course of the proceedings below, I do not reach that issue.[112]

In view of the foregoing it is concluded that Reid v. Covert has not detracted from the authority of Madsen v. Kinsella concerning the jurisdiction of the courts which tried Mrs. Madsen and decided her appeal. These courts "derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops." In Reid the court concluded only that it was unconstitutional to try a civilian dependent by court-martial (a statutory court) overseas in time of peace.

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112. Ibid., fn. 2, p. 250. See also McElory v. Guagliardo, op. cit., fn. 2, p. 283; See Madsen v. Overholser, 251 F.2d 387 (D. C. Cir.), certiorari denied, 356 U.S. 920, petition for rehearing denied, 356 U.S. 920 (1958). Petitioner's contention in this habeas corpus proceeding against Overholser was that the ruling in the second ruling of the Court in Reid v. Covert, supra, divested the military government court of jurisdiction over her. The court of appeals denied this contention, stating that it was bound by the Madsen decision. This ruling the Supreme Court refused to review. In this regard, it is fundamental, however, that a denial of certiorari does not bind the Supreme Court to the rule announced in a lower court.

CHAPTER V

THE STANDARD OF PROCEDURAL JUSTICE

Traditional United States Objectives and Practice Regarding Procedural Safeguards.

An objective of military government, especially in a belligerent occupation situation, should be to leave behind a government oriented in Western democratic principles. The establishment and administration of a judicial system, predicated on the concept of respect for law and order, may serve as an institution to accomplish this objective. In establishing and administering such a judicial system care should be taken to insure that every essential of justice is safeguarded and that every pertinent requirement of the Geneva Conventions of 1949 has been met.

It is incumbent upon the victorious belligerent intent upon the maintenance and restoration of international law, to make it abundantly clear by his actions that his claim to inflict punishment on war criminals is in accordance with established rules and principles of the law of nations and that it does not represent a vindictive measure of the victor resolved to apply retroactively to the defeated enemy the rigours of a newly created rule. The persuasive force of any such professions must be imparied unless it is accompanied by the provision of safeguards of impartiality and by a measure of equality in the application of the law. The preservation both of the substance and of the appearance of impartiality is of particular importance in view of the fact that, in the circumstance of the situation, there cannot be any question of formal equality by a concession to the defeated belligerent of the identical

right to punish any war criminals of the victor. Under existing international law this is in no way a condition of the valid exercise of that right by the victorious belligerent. However, the most important aspect of the problem is that of guarantees of impartiality in the punishment of war crimes.

Generally speaking, the following propositions summarizing the basic rights of the accused are from holdings, mostly by The Judge Advocate General, and represent what this writer believes to have been traditionally the general practice of the United States: He has the right to have charges signed by a commissioned officer; he is entitled to a copy of the charges against him, and of amendments thereto; and he has a right to have the members of the commission and The Judge Advocate sworn in his presence. The charges and the specifications and the order convening the commission are to be in writing and be read aloud to, or within hearing of, the accused; he is given an opportunity to challenge the members of the commission; he must be allowed to plead to the charges and specifications as recited in the order convening the commission; he need not respond to questions; he has a right to be confronted with the witnesses against him; the witnesses must be sworn before they testify; all testimony should be fully set forth in the record; it is fatal error for the military commission to refuse to admit evidence of the defense material to the issues; and the guilt of the accused must be proved beyond a reasonable doubt.[113] It is error

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113. In this regard, it should be noted that FM 41-10 contains a statement which is an incorrect statement of existing law. The Manual states "the burden of proof of innocence rests with the accused in most of Europe and those portions of Asia and Africa not British nor former British territory" (p. 161).

to reject testimony that the accused was insane at the time of the offense. The accused is allowed defense counsel with the usual rights of such counsel as found in civilian courts. In practice, however, defense counsel has not always been chosen by the accused. While private counsel, of the accused's choice, has often been allowed, military defense counsel have also been assigned.

An examination of these rights reveal that they afford to every accused certain basic fundamental rights or safeguards which every American has come to take for granted when he is brought before a court of law, and approximate generally our concept of "due process."

In 1847, at the time the military commission was originated during the Mexican War, General Zachary Taylor ordered a military commission to be "governed in its proceedings by the practice of courts-martial." With but few exceptions, the procedure of military commissions for more than a century, has followed that of general courts-martial.[114] The basic reason for adopting the general courts-martial procedure is that it provides for proceedings under

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114. See JAGW 1962/1345, op. cit., Article 13, Ordnance Number 2 provides:

> Application of the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1951
> Except as otherwise provided in this Ordinance or in the Rules of Procedure prescribed by proper authorities of the United States forces for Military Commissions, Provost Courts and Courts of Appeal, and subject to any applicable rule of international law, these tribunals will be guided with respect to rules of procedure and evidence, by the provisions of the Uniform Code of Military Justice, and the Manual for Courts-Martial, United States, 1951.

oath and with judicial safeguards already familiary to military officers. Although military tribunals, in the nature of military commissions, in the absence of statutory regulation, should observe, as nearly as may be consistent with their purpose, the rules of procedure of courts-martial, this, however, is not obligatory.

Statutory Enactments Relating to Procedural Requirements.

Article 36 of the UCMJ, supra, authorizes the President to prescribe the procedure and modes of proof in cases before courts-martial, military commissions, and other military tribunals. The Article provides that the President's regulations shall, insofar as he shall deem practicable, apply the rules of evidence and the principles of law generally recognized in the trial of criminal cases in the district courts of the United States. In the absence of any contrary regulations by the President, the military commander may prescribe the rules and procedure of such military commissions.

The President has not prescribed in any detail, regulations for military commissions and provost courts as such. However paragraph 2, of the Manual for Courts-Martial, 1951, provides:

> ...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 and Provost Courts/ will be guided by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial.[115]

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115. The Manual for Courts-Martial, United States, (1951), /hereinafter cited as MCM/, 1; Special Text (ST 41-151) U. S. Army Civil Affairs School, Legal, (U. S. Army Civil Affairs School, Fort Gordon, Georgia) is a suggested guide for civil affairs tribunals; See Nobleman, American Military Government Courts in Germany, op. cit., for a detailed discussion of U. S. practices and procedures in Germany during World War II.

This paragraph of the Manual, while not mandatory in a prescriptive sense clearly indicates that the trial before such tribunals "will be guided" by the rules of procedure and evidence prescribed in the Manual for Courts-Martial.

In Madsen v. Kinsella the Supreme Court reaffirmed the authority of the President, as Commander-in-Chief, to prescribe the rules of criminal procedure for military commissions. Regarding this question the Court stated:

> In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities.[116]

The Court as indicated earlier recognized the President's authority to do this even after a peace treaty has been concluded, pending complete establishment of civil government.[117]

In enacting the UCMJ, Congress has extended its procedural requirements only to members of the American military community including prisoners of war entitled to identical treatment, by force of the Geneva Convention.[118] As for the rest, against whom

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116. Madsen v. Kinsella, op. cit., p. 348; The Supreme Court cited with apparent approval the following cases in support of the quoted statement. Duncan v. Kananamoku, 324 U.S. 833 (1945); In re Yamashita, op. cit., Santiago v. Nogueras, 214 U.S. 260 (1908); Neely v. Henkel, op. cit.; Burke v. Miltenberger, 19 Wall. (85 U.S.) 519 (1873); Leitensdorfer v. Webb, op. cit.; Cross v. Harrison, op. cit.

117. Ibid., p. 348, fn. 12.

118. Article 2 UCMJ op. cit., The Geneva Convention adds additional safeguards as relates to the trial of prisoners of war as

we apply the common law of war, the procedure in their cases remains with the military command. However, the procedure prescribed by the competent military commander should meet the requirements prescribed by the President in the Manual for Courts-Martial, 1951, supra.

In the case of In re Yamashita, supra, the Supreme Court - leaning heavily upon what was said in Congressional committee - held that when in 1916 Congress inserted occasional provisions about military commissions it intended those provisions to apply only if a person tried were "subject to military law" i.e., the Code and not merely subject to the common law of war.[119] Yamashita argued, as grounds for the writ of habeas corpus, that reception in evidence by the military commission of depositions on behalf of the prosecution in a capital case violated Article 25 of the Articles of War (substantially the same as Article 49, UCMJ), and that Article 38 (identical in substance to Article 36, UCMJ, supra) prohibited the reception of hearsay and opinion evidence. Regarding this contention the Court stated:

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118. opposed to members of the force of the detaining power. For example see Articles 101, 104(1), 105(1), 105(2), and 105(3) Geneva Convention Relative to the Treatment of Prisoners of War, op. cit.

119. The Supreme Court held that Yamashita was not a prisoner of war within the purview of Article 63 of the Geneva Convention of 1929. The Court held that that Article refers to "an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant" (p. 20); Compare Article 85 of the Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, discussed supra, which applies to both precapture and post capture offenses.

> We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates 'the persons ... subject to these articles,' who are denominated, for purposes of the Articles, as 'persons subject to military law.' In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them....
>
> By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class.... It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioners trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command. [Emphasis supplied].[120]

The court expressed no opinion on the wisdom of admitting evidence normally excluded from American military courts.

Jurisdiction of Civil Courts to Review Action of Military Commissions Sitting as Military Government or War Crimes Courts.

In the Yamashita case the entire court agreed that Con-

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120. In re Yamashita, op. cit., pp. 20, 21, 22.

gressional action in sanctioning creation of military commissions appointed by military command, to try and punish enemy combatants for violations of the law of war was valid; also, that Congress had incorporated by reference, as within the jurisdiction of such commissions, all of the offenses against the law of war, although it had not codified nor defined those offenses precisely. Beyond that point the majority and minority split sharply on practically every issue: Chief Justice Stone, speaking for the majority, pointed out the sharp restrictions which have traditionally hedged in the inquiry which a civil court may make into the proceedings and determinations of military tribunals, limiting any such review solely to the question of whether the military court or commission was acting within its jurisdiction and not violating any applicable statutes.[121] This principle was subsequently reaffirmed by the

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121. Ibid., "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions." (p. 344). Precedent in support of this point is overwhelming, Ex parte Vallandingham, op. cit.; In re Vidal, 179 U.S. p. 126 (1900); See Stein, "Judicial Review of Determinations of Federal Military Tribunals," 11 Brooklyn L. Rev. 30 (1941), and cases cited therein; Fairman, "Some New Problems of the Constitution Following the Flag," 1 Stanford L. Rev. 587 (1949); Fairman, "The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case," 59 Harv. L. Rev. 833 (1946); Kaplan, "Constitutional Limitations on Trials by Military Commissions," 92 Univ. Pa. L. Rev. 119 (1943), id., at p. 272 (1944).

Supreme Court. In Hirota v. MacArthur, Hirota and other Japanese convicted of war crimes, appeared by attorney in the Supreme Court to move for leave to file petitions for writs of habeas corpus.[122] After hearing oral arguments, the motions were denied per curiam. The Court here stated:

> We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.
>
> Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgements and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of habeas corpus are denied. /Emphasis supplied/[123]

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122. Hirota v. MacArthur, 335 U.S. 876, 878 (1948). When the matter was taken up four of the justices considered that the matter should be denied for want of jurisdiction; four took the view that leave to file should be granted and that the cases should be set for argument on the question of jurisdiction. Justice Jackson broke the equal division which had previously led to a denial of the motions. He filed a statement explaining his reasons for the action (pp. 878, 881).

123. Hirota v. MacArthur, 338 U.S. 197 (1949). Accord, Flick v. Johnson, 174 F.2d 983 (D. C. Cir.), cert. denied 338 U.S. 879 (1949), rehearing denied, 338 U.S. 940 (1950). The dismissal of Flick's petition was affirmed, on the basis "that the tribunal which tried and sentenced Flick was not a tribunal of the United States," hence "no court of this country has power or authority to review .... this judgement..." Hirota was cited as authority.

In fact, in Yamashita, Chief Justice Stone suggests that even violations of statutes concerning procedure or the admissibility of evidence may not be reviewable on petition for habeas corpus. He states in this regard:

> Nothing we have said is to be taken as indicating any opinion on the question of...whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded may be drawn in question by petition for habeas corpus or prohibition.[124]

In view of the nature of the proceedings before the military commission in the Yamashita case, which the Court accepted, it may be said that the decision stands for the proposition that insofar as persons accused of war crimes and not "subject to military law" are concerned that under practically no circumstances will a civil court interfere with the absolute freedom of discretion as to procedure and rules of evidence granted to a legally constituted military commission acting within the proper scope of its jurisdiction.

The question immediately presents itself as to whether this is applicable solely to military commissions trying persons for violations of the law of war, or whether it is equally applicable to all military tribunals. It is submitted that the latter conclusion does not follow. The Court merely held that a commission to

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124. In re Yamashita, op. cit., p. 351. But compare Justice Murphy's statement to the effect that he understands the scope of review recognized by the Court to include the question of whether the commission, in admitting certain evidence, had violated any controlling statute (p. 355).

try an alleged war criminal is not embraced within the Articles of War. The Court in its comments on the Articles of War, which partially prescribe the procedure for military courts and specify certain types of admissible evidence, very deliberately found them inapplicable to Yamashita solely because he was not "subject to military law." The 1916 revision of the Articles of War reached out and made "subject to military law" some who theretofore would have been triable by military commission but not by courts-martial. The persons "subject to military law" were thenceforth triable by either of those tribunals, however, such persons could claim the benefits of the Articles.

Therefore, the procedure and rules of evidence provided for in the present Articles of the UCMJ are applicable to "persons subject to military law" including those entitled to identical treatment under the Geneva Conventions. These Articles are applicable to the trial of such persons by courts-martial or military commission for violation of either the Articles of the UCMJ or the laws of war. However, as to persons alleged to have committed war crimes who are not "subject to military law" by the statute, they receive none of its protection and remain triable simply by the rules known to the common law of war.

The Court disposed of the contention, that Article 38 of the Articles of War [Article 36 UCMJ], which requires "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States" to govern the proceedings of military commissions in a similar fashion. The Court held, quite

consistently, that the distinction it had just made between the statutory and the common law of war jurisdiction of a military commission was applicable here. Quite aside from this, it is obvious that Article 38 /Article 36 UCMJ/ is permissive - "The President may" - and that the regulations which he is empowered to issue shall apply the rules of evidence only "in so far as he shall deem practicable." It is submitted that in the absence of action taken by the President under Article 36 UCMJ to prescribe the procedure and rules of evidence to be followed by military commissions, such tribunals are not covered by statutory rules or the rules applicable in the district courts of the United States. The Courts conclusion was that "The Articles left the control over the procedure in such a case where it had previously been, with the military command."

Justices Murphy and Rutledge strongly dissented in the Yamashita case. The dissenting opinions invoke the due process clause of the Fifth Amendment as applicable to "any person" without exception as to war crimes, and proceed to a careful examination of the procedural and evidentiary rulings of the commission in obvious disregard of the general rule against such review. Justice Murphy frankly proposes an expansion of the Court's right of inquiry into the proceedings before military tribunals, stating, "judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable."[125] Justice

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125. Ibid., p. 355.

Rutledge's lengthy dissent goes much further in reviewing not only procedural defects, but even the sufficiency of the evidence.

On the contrary, the majority of the Court felt no need to test the trial of Yamashita by the Fifth Amendment since no treaty or statute had been violated stating "from this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require."[126] This view is in accord with what the Supreme Court had held in Ex parte Quirin. In that case the saboteurs insisted that theirs was not a case "arising in the land and naval forces" in the sense of the Fifth Amendment, and that therefore they were entitled to a civil trial in accordance with the requirements of the Fifth and Sixth Amendments. The Chief Justice, who wrote the opinion denying the accused the right to file petitions for writs of habeas corpus, conceded arguendo the first

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126. For the traditional view, that enemy aliens and prisoners of war have no rights or privileges under municipal law, see Smith, "Martial Law and the Writ of Habeas Corpus," 30 Geo. L. J. 697 (1942); See Edward S. Corwin, Total War and the Constitution (New York: Alred A. Knopf, 1947) 120, regarding the President's seemingly unlimited powers as Commander-in-Chief free of the Fifth Amendment of the Constitution. Corwin states:

> The Constitution of the United States forbids Congress to pass ex post facto laws, but the prerogative of the President as Commander-in-Chief of American forces when occupying enemy territory is not so constricted. What I say above in this lecture regarding General Yamashita's case holds as to American participation in the Nuremberg trials: the only provision of the Constitution that has any bearing on the subject is the one that makes the President Commander-in-Chief of the Army and Navy

(p. 123); See also Fairman, "New Problems of the Constitution," op. cit., and Clinton Rossiter, The Supreme Court and the Commander-in-Chief (Ithaca, N. Y.: Cornell University Press, 1951), 2-7, 122. Corwin, Fairman, and Rossiter are of the view that American military government is limited only by international law and the laws of war.

proposition, but then proceeded to cancel the force of the concession by adding that "no exception was necessary to exclude from the operation" of the Fifth and Sixth Amendments cases that "were never deemed to be within their terms," and that petitioners' cases were of that kind. It was never the intention of the Fifth and Sixth Amendments, the Chief Justice continued, to require that "unlawful enemy belligerents should be proceeded against only on presentment and trial by jury." The Court made no distinction between Haupt in this respect from the other petitioners although he was a citizen of the United States.

Justice Rutledge in his dissenting opinion in Yamashita summed up the doctrine of the case in the following words:

> The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that this provision of the Articles of War, of the Geneva Convention and the Fifth Amendment apply [Emphasis supplied].[127]

Justice Rutledge's own position is based on the theory that "the Constitution follows the flag" on all occasions and everywhere except on the field of combat. "There," he concedes, "the maxim about the law becoming silent in the noise of arms applies."

Justice Murphy passes some pretty censorious comments upon the indictment as giving scope to "vengeance" and "the biased

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127. In re Yamashita, op. cit., p. 81.

will of the victor." His assertions should be considered attentively. Bias and lack of objectivity are of course to be condemned - wherever they appear. Objectivity and a dispassionate attitude are greatly to be desired, and certainly the record in Yamashita's trial discloses matters calling for serious attention. However, whether so or not, it appears that it was totally irrelevant to the question of the Supreme Courts jurisdiction, which was the only question before it on the petition for habeas corpus.

It is submitted that even within the proper limits of the scope of review as spelled out by Chief Justice Stone, the Court without great difficulty and with considerable justification, could have granted the petitions and required a retrial because of fatal defects within the proceedings and in the charge as drawn. As one eminent writer has stated the case teaches, "not that the Court approved what had been done, but that it fastened full responsibility upon the military authorities. A much tighter practice should be established."[128]

Does the Constitution Follow the Flag.

The question as to what standard of proof should be required is a burning issue about which any universal agreement is doubtless impossible. The Articles of the UCMJ enacted by Congress apply, in general, only to the system of courts-martial through which justice is administered to persons subject to military law, although a few articles, however, speak also of military com-

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128. Fairman, New Problems of the Constitution, op. cit., p. 631.

missions as well as courts-martial. As revealed earlier the military commission is the tribunal which has been developed in the practice of our Army for the trial of persons not members of our forces who are charged with offenses against the law of war or, in places subject to military government or martial rule, with offenses against the local laws or against the regulations of the military authorities.

The question immediately presents itself as to what extent, if any, military commissions are bound by constitutional requirements. Does the Constitution have any application to such tribunals and if so does it control them as it controls all other activities carried out under the authority of the United States? How far do the Constitution and laws of the United States control the proceedings of these various tribunals? How far is it a proper function of the civil judiciary ultimately to declare the law, in so far as it is applicable to them? Stated somewhat differently "Does the Constitution follow the flag," - the theory on which Justice Rutledge dissent was predicated in the Yamashita case?

Professor Fairman commences his analysis of this question with the following quotation from Mr. Justice White's opinion in Dorr v. United States which is characterized as "the settled law of the court."

> Every function of the government being ... derived from the Constitution, it follows that the instrument is everywhere and at all times potential in so far as its provisions are applicable...
>
> In the case of territories, as in every other instance, when a provision of the Constitution

> is involved, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable. [Emphasis supplied]. [129]

Fairman then poses the question, "What is the situation as to the courts of the military government [in Germany]? Does our Constitution speak to these tribunals, and if so, what does it say?" He answers his question:

> It says that the President is commander-in-chief and that he presides over our international relations; it provides powers for the waging of war, a field wherein both the President and the Congress have functions which need not be disentangled for purposes of the present inquiry. This, it is believed, pretty well covers what our Constitution has to say on the subject of American military government courts in foreign countries.[130]

As was noted in the preceeding discussion of the Yamashita case, the dissenting justices considered that since the commission was set up under the authority of the United States, the defendant was entitled to the guarantees of due process of law asserted in the Fifth Amendment. According to Justice Murphy:

> The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable

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129. Dorr v. United States, 195 U.S. 138 (1904), in Fairman, New Problems of the Constitution, op. cit., p. 587.

130. Ibid., pp. 623-624.

> rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructable nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.[131]

On the other hand, the Chief Justice, speaking for the majority of the Court, declined to hold that "due process" in the sense applicable to domestic tribunals applied to a tribunal established under international law. Except as Congress had expressly declared otherwise, the competence and procedure of such tribunals were, he thought, determined by international law and, in the case of military commissions, it belonged in the first instance to the military commander to apply the law. There is nothing novel in this doctrine. The Supreme Court has held that the Constitutional guarantees do not apply automatically to extraterritorial courts established in pursuance of treaties (In re Ross),[132] to courts in occupied foreign territory (Neeley v. Henkel),[133] or to military commissions (Ex parte Vallandingham[134] and Ex parte Quirin).[135]

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131. In re Yamashita, op. cit., pp. 26, 27.

132. In re Ross, 140 U.S. pp. 453, 464 (1890).

133. Op. cit., pp. 109, 122.

134. Op. cit., p. 243.

135. Op. cit., p. 1.

It has even been held that they do not automatically apply in annexed territories not yet incorporated into the United States (Hawaii v. Mankichi[136] and Dorr v. United States)[137] although the Court "suggested" that "certain natural rights (including the right to due process of law) enforced in the constitution by prohibition against interference with them" may be guaranteed in unincorporated territory but "what may be termed artificial or remedial rights which are peculiar to our system of jurisprudence" are not.[138]

The dissenting justices rested principally on the Fifth Amendment, although, it is believed that the Amendment was clearly not intended to apply literally in courts exercising jurisdiction over the enemy.[139] Perhaps they had in mind the distinction made in Downes v. Bidwell and Hawaii v. Mankichi between "natural" and "artificial" rights. It is submitted that the dissenting justices

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136. Hawaii v. Mankichi, 190 U.S. 197 (1902).

137. Op. cit., p. 138.

138. Downes v. Bidwell, 182 U.S. 244, 282 (1900).

139. Difficult questions are presented when an attempt is made to apply the due process clause to the trial of such persons by military commissions. In order to do so the following questions must be answered in the affirmative (1) Are military tribunals of any type subject to the due process requirements of the Fifth Amendment? In an older case the Supreme Court stated that so far as those in the military service are concerned, military law is due process, Reaves v. Ainsworth, 219 U.S. 296 (1911). Certainly an enemy soldier has no greater rights than a member of our own armed forces. (2) Is due process a proper subject of judicial review by way of a collateral attack through a petition for a writ of habeas corpus? and (3) Do non-resident enemy aliens have any Constitutional rights?

would have beenon firmer ground if they had sought standards established in international law.[140]

If any doubt still existed after the Yamashita decision that the Constitution did not extend to alien occupied territories and peoples, that doubt should have been put to rest by the subsequent ruling of the Supreme Court in Johnson v. Eisentrager, supra. This decision reflects the views of most leading cases and texts. In that case twenty-one German nationals were captured in China and tried and convicted by an American military commission in China for violations of the law of war. These Germans were returned to their native land and imprisoned in Landsberg Germany in the custody of the United States Army. Claiming that their trial, conviction and imprisonment violated Articles I and III of the Fifth Amendment and other provisions of our Constitution, they petitioned for a writ of habeas corpus to the District Court for the District of Columbia. The District Court dismissed their petition on authority of Aherns v. Clark[141] wherein the Supreme Court had decided that the "respective jurisdiction" of a Federal Court was a territorial jurisdiction.[142] On appeal to the Court of Appeals of the District of Columbia the decision of the District Court was reversed.[143]

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140. In Application of Homma, 327 U.S. 759 (1946) the Court was presented with a case analogous to that of Yamashita, and relief was denied in a per curiam opinion on authority of that case. Justices Murphy and Rutledge filed short dissenting opinions generally on the same grounds as in Yamashita.

141. 335 U.S. 188 (1947).

142. Ibid.

143. 84 App. D. C. 396, 174 F.2d 961.

On certiorari to the Supreme Court, the Court of Appeals was overruled. Justice Jackson who wrote the opinion of the Court characterized "the ultimate question [presented as] one of jurisdiction of civil courts of the United States vis-a-vis military authorities in dealing with enemy aliens overseas."[144] Justice Jackson reviews the existing doctrine regarding aliens and enemy aliens and points out that it has never been the practice to extend any Constitutional rights under American law to persons who qualify neither by reason of American citizenship nor residence within American territory.[145]

As for the contention that these Germans were protected by the Fifth Amendment, Justice Jackson notes:

> The Court of Appeals has cited no authority whatever for holding the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever there offenses, except to quote extensively from a dissenting opinion in In re Yamashita,... The holding of the Court in that case is, of course, to the contrary.[146]

Commenting upon the doctrine that the term "any person" in the Fifth Amendment spreads its protection over enemy aliens, Justice Jackson stated:

> When we analyze the claim prisoners are asserting and the court below sustained, it amounts to a right not to be tried at all for an offense against

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144. Johnson v. Eisentrager, op. cit., p. 765.

145. Ibid., pp. 763, 768, 775-782.

146. Ibid., p. 783.

> our armed forces. If the Fifth Amendment protects them from military trials, the Sixth Amendment as clearly prohibits their trial by civil courts. The latter requires in all criminal prosecutions that the 'accused' be tried 'by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' And if the Fifth be held to embrace these prisoners because it uses the inclusive term 'no person' the Sixth must, for it applies to 'accused.'
>
> If this Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers. American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to discipline, including military trials for offenses against aliens or Americans... It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies....
>
> If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.
>
> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. Cf. Downes v. Bidwell, ... None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it. /Emphasis supplied/[147]

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147. Ibid., excerpts from pp. 782, 783, 784, 785. Mr. Justice Black dissented, his views being shared by Justices Douglas and Burton.

It is submitted that the reasoning stated in the foregoing quotation is dispositive of the contention that all military adjudicative organs who act by virtue of the authority of the United States are bound to respect every principle codified in our Constitution. In the words of Mr. Justice White, supra, "the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable " /Emphasis supplied/. It is submitted that the Constitution simply does not automatically extend its protection to aliens especially alien enemies tried by military commissions. The Fifth and Sixth amendments were never intended to be applicable to proceedings before military commissions in such cases. The only provision of the Constitution which governs these tribunals is the provision providing that the President as Commander-in-Chief is responsible. The specific provisions of the Constitution governing the organization and operation of the Government of the United States, do not, by their own force, govern the organization and operation of our military tribunals trying offenses alleged as violations of the laws of war. No doubt the military commanders who are agents of the President in this respect will in the main be animated by the conceptions of justice that prevail in this country.[148]

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148. O'Brien, The Constitution of the United States and the Occupation of Germany, 1 World Polity 61 (1957). Professor O'Brien in this illuminating and thought provoking article is of the opinion that the law should be that:

> the Constitution, since it is the basis for all official acts of the government ... places substantive and procedural limitations on all officers of the United States who exercise its authority

Impact of Recent Supreme Court Decisions Upon "Due Process" Requirements.

Recently, in the case of Ikeda v. McNamara,[149] Bennet Ken Ikeda, a citizen of the United States in a civilian status in the Ryukyu Islands (Okinawa) petitioned the United States District Court for the District of Columbia for a writ of habeas corpus. At the time of filing the petition, petitioner was in the custody of the Army in the Ryukyu Islands as a result of being bound over for trial by an order of a judge of the United States Civil Administration Court (hereinafter referred to as USCAR). Petitioner was charged with certain violations of Civil Administration Ordinances under Articles of the United States Civil Administration Ryukyu Penal Code.

The petition places in issue the constitutional authority of USCAR courts to try United States nationals who are not indicted

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148. anywhere, over anyone, for any reason ... Conquered enemies are entitled to certain rights as men. ...The problem is not, therefore, whether conquered peoples have rights; it is rather, how the United States intends to guarantee them their God-given rights. (pp. 103, 104, 107).
However, Professor O'Brien's premises are based primarily on dissenting opinions in a long line of cases including Yamashita and Eisentrager. He, himself, acknowledges "for the present, however, it is quite clear that the Court is not going to change its recent rulings in this regard and the decision in cases such as those of Yamashita and Eisentrager must be accepted as constitutional doctrine and law."

149. Bennett Ken Ikeda v. McNamara, United States District Court For The District of Columbia, Habeas Corpus No. 416-62, Oct. 19, 1962, signed by Judges Charles F. McLaughlin.

by grand jury or accorded a jury trial.

The Ryuku Islands were incorporated as an integral part of the Japanese state in 1871. The military occupation of these islands by the United States began with the Battle of Okinawa in April 1945 and from that time until the effective date of the Treaty of Peace with Japan, 28 April 1952,[150] the Islands were governed by the executive department as occupied territory. Article III of the Treaty of Peace with Japan vested in the United States all power of administration, legislation, and jurisdiction over the Islands until such time as the United States should propose that they be placed under United Nations trusteeship.

Congress has not yet provided for the government of the Ryuku Islands. Pending such action by Congress the President under the doctrine established by the Supreme Court decisions discussed supra, may continue to govern the Ryukyu Islands until such time as Congress does act. Included in the power to govern is the exercise of legislative, executive, and judicial powers. Pursuant to these powers the President in June 1957 promulgated Executive Order 10718 which established the USCAR court system. Neither the terms of the Executive Order, as amended, nor by the terms of any rules and regulations in implementation thereof is any provision made for indictment by a grand jury as required by the Fifth Amendment to the Constitution or for a trial by jury as required by Article III, Section 2, Clause 3 of the Constitution and by the

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150. T.I.A.S. 2490.

Sixth Amendment to the Constitution.

On October 19, 1962, the District Court for the District of Columbia, having heard oral argument, found that the Court had jurisdiction of the parties and of the subject matter of the cause. The petition for habeas corpus was granted on the basis of the Courts conclusion that "the denial to the petitioner of trial before a court, of indictment by a grand jury ... and of trial by a jury ... is in violation of the petitioner's constitutional rights."[151]

At first blush, it would appear that the Court erred in the Ikeda case, supra, and that the cases of Madsen v. Kinsella, In re Yamashita, and Johnson v. Eisentrager were dispositive of the issues presented. However, in view of the trend of recent decisions of the United States Supreme Court and the very broad and sweeping langauge used in those decisions, the question bears closer scrutiny.

It is clear that the early decisions of the United States Supreme Court support the constitutionaly of denying to United States nationals the right to grand jury indictment and jury trial before such courts as the USCAR courts.[152]

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151. Ikeda v. McNamara, op. cit.; For a complete Report on Administration of Justice in the Ryukyu Islands see JAGW 1961/1234.

152. Madsen v. Kinsella, op. cit.; Hawaii v. Mankichi, op. cit. In annexing Hawaii in 1898, the U. S. Senate adopted the Newlands Resolution providing for the continuation in effect of Hawaiian legislation "not contrary to the Constitution of the United States." The accused, a Hawaiian, was tried and convicted for manslaughter. The Hawaiian act governing criminal procedure did not provide for grand jury indictment and the provision relating to the trial jury system was inadequate. Mankichi contended the Hawaiian legislation was unconstitutional. The Supreme Court decided against him on the basis that only "fundamental rights" contained in the Constitution were applicable

The broad language used in the decisions of Reid v. Covert,[153] wherein the jurisdiction of courts-martial over civilians was declared unconstitutional, raises some doubt as to whether the Supreme Court recognized any limitations with respect to the constitutional guarantee concerning jury trial even when the trial is by military commission.

As previously indicated, on the rehearing in Reid v. Covert, the dissenting Justices became the majority. Pertinent to this issue are the following extracts from the dissenting opinions in the first decision:

> Trial by jury in a court of law and in accordance with traditional modes of procedures after an indictment by a grand jury is one of the most vital barriers to governmental arbitrariness. These procedural safeguards were embedded in the Federal Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience... The protection of constitutional rights of Americans abroad is not limited to 'fundamental' rights, but in any event trial before a civilian judge and trial by an independent jury picked from the common citizenry are such fundamental rights.[154]

In 1957 the Supreme Court handed down its second, and final decision in the case of Reid v. Covert. Mr. Justice Black

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152. in Hawaii and that the grand and petit jury provisions were of a procedural rather than of a fundamental nature. See also Dorr v. United States, op. cit.; Balzac v. Puerto Rico, 258 U.S. 298 (1921); Rassmussen v. United States, 197 U.S. 516 (1905); In re Ross, op. cit., p. 453 (1890).

153. See also McElory v. Guagliardo, op. cit.; Grisham v. Hagan, op. cit.; Kinsella v. Singleton, op. cit., which extended the doctrine laid down in Reid.

154. Reid v. Covert, 351 U.S. 485.

delivered an opinion in which three Justices joined. At the outset he noted:

> These cases raise basic constitutional issues of the utmost concern. They call into question the role of the military under our system of government. They involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures,... /Emphasis supplied/

The opinion continues:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all limitations imposed by the constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14. It seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval forces.' Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. The Constitution does not say that Congress can regulate 'the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces.' /Emphasis supplied/ [155]

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155. Excerpts from Reid v. Covert, 354 U.S. pp. 3, 5, 6, 21, and 30.

It will be observed that the opinion of Justice Black not only did not overrule the "Insular Cases" supra, (Hawaii v. Mankichi and related cases) but it very carefully showed that they were not applicable and distinguished them from the Reid case. In this regard the opinion provides:

> The Court's opinion last term also relied on the 'Insular Cases' to support its conclusion that Article III and the Fifth and Sixth Amendments were not applicable... We believe that reliance was misplaced... The 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. /Emphasis supplied/.[156]

It is submitted that the Supreme Court's holding in the Reid case in no way affects prior holdings of the Court as relates to military commissions or tribunals in the nature of such com-

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156. Ibid., pp. 12, 14. The comments in Justice Black's decision concerning the "insular" cases (Hawaii v. Mankichi and related cases) and the Ross case are particularly pertinent (See fn. 152 above). After distinguishing the "Insular cases," Justice Black continued: "At best, the Ross case should be left as a relic from a different era." As to the "Insular" cases Justice Black commented:

> Moreover it is our judgement that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. (p. 14).

missions. The Court was in no way concerned with military tribunals under the Constitutional Authority of the President as Commander-in-Chief as derived from Article II, Section 2, Clause 1, of the Constitution. The Court was solely concerned with the Powers of Congress to extend the scope of persons "subject to military law" and consequently trial by Courts-martial, whereby indictment by grand jury and trial by jury were denied.

In the Reid case the Supreme Court was presented with but one constitutional issue; that is, the power of Congress to enact legislation under Article I, Section 8, Clause 14, of the Constitution, "to make Rules for the Government and Regulation of the land and naval forces," [157] taken in conjunction with the Necessary and Proper Clause, which made civilians subject to military law and to trial by courts-martial. Accordingly, the Court's decision, properly limited, stands for the proposition that it is unconstitutional for Congress to subject a civilian to trial by courts-martial in peace time.

The broad language used by Justice Black in his opinion, when considered out of context, might be interpreted to mean that under no circumstances might an American civilian be subject to trial by a military tribunal contrary to the Fifth and Sixth Amendments. It is manifest that this conclusion is unwarranted on the basis of his opinion. The language when considered in context and in conjunction with the issue posed warrants no such conclusion. The

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157. Ibid., p. 19.

opinion of Justice Black did not overrule but to the contrary distinguished the "Insular Cases" wherein no right to grand jury indictment and jury trial were afforded. However, obiter dictum in the opinion does state that "it seems peculiary anomalous to say" that indictment by a grand jury and trial by a jury is not considered to be a "fundamental right" as was held in the "Insular Cases." Concerning this the opinion states:

> While it has been suggested that only those constitutional rights which are 'fundamental' protects Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its amendments.[158]

Inspite of some of the broad statements of Justice Black discussed above, it is submitted that the decision in Reid v. Covert, is not authority for the proposition that the jurisdiction or procedure of military commissions or executive courts which derive their constitutional authority from the President as Commander-in-Chief are bound by the holding in that case. This conclusion is supported to some extent by the fact that subsequent to the second decision in Reid v. Covert, Mrs. Madsen in a habeas corpus proceeding contended that the last ruling of the Court in the Reid case divested the military government court of jurisdiction over her. The court of appeals denied this contention, stating that it was bound by the Madsen decision. This ruling the Supreme Court refused to review.[159]

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158. Ibid., pp. 8,9.

159. Madsen v. Overholser, see fn. 112, supra.

It will be recalled that decisions of the United States Supreme Court have specifically held that where territory has previously been under military occupation and is subsequently placed under the exclusive control of the United States, the Executive may continue to exercise governmental authority pending Congressional action.[160] It is also important to observe that the Supreme Court decision in Reid v. Covert which struck down the jurisdiction of courts-martial conferred by Congress over civilians accompanying or serving with the armed forces in time of peace did not purport to divest the jurisdiction of military commissions to try civilians, even though they are American citizens, where such commissions sit as military government courts in occupied areas or areas formerly occupied pending Congressional action. On the contrary, the Supreme Court assiduously avoided overruling Madsen v. Kinsella,[161] wherein it was held that the President, as Commander-in-Chief, could establish and prescribe the jurisdiction and procedure of such commissions in territory occupied by Armed Forces of the United States.

It might be argued that Madsen v. Kinsella is not controlling since it was not squarely in point as the jury trial issue was not directly raised nor specifically considered by the court. It is noted that there was no indictment or presentment by grand

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160. Cross et. al. v. Harrison, op. cit.; Dooley v. United States, op. cit., p. 222; DeLima v. Bidwell, 182 U.S. 1 (1900).

161. Reid v. Covert, 354 U.S. pp. 34, 35 and fn. 63.

jury, and no trial by petit jury in Madsen. Though Mrs. Madsen could hardly raise the issue, since her contention was that she should have been tried by court-martial, the Supreme Court did dispose of it in a footnote by pointing out that the Fifth and Sixth Amendments to the Constitution have no application to "cases arising in the land or naval forces." The fact that the Court did not consider the point to be of significance in the case should set at rest any doubts that have been expressed in this respect.[162] It is interesting to note that Mr. Justice Black, who wrote one of the principal opinions in the Reid case, was the sole dissenter in Madsen v. Kinsella. In Madsen he thought that "if American citizens in present-day Germany are to be tried by the American Government they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority."[163] He apparently had courts-martial in mind, since that was Mrs. Madsen's contention.

In the light of the historical and legal precedents discussed above, it is submitted that the Federal District Court of the District of Columbia erred in its ruling on the legal issues

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162. See also Ex parte Quirin, op. cit., pp. 38-40, where it is pointed out that such military tribunals need not have a jury, since they did not have one at the time of the adoption of the Constitution and it was immaterial that one of those involved was a United States citizen (p. 20). There is no requirement of jury in territories ceded to, but not yet incorporated into, the United States (Blazac v. Puerto Rico, op. cit.) much less in foreign lands which are merely under occupation (Neeley v. Henkel, op. cit.).

163. Madsen v. Kinsella, op. cit., p. 372.

presented in the Ikeda case, supra. The USCAR Rules of Criminal Procedure are substantially identical to the Federal Rules of Criminal Procedure except that no provision is made for indictment by grand jury or for jury trial.[164] Past Supreme Court decisions do not require Executive courts to provide indictment by grand jury or trial by jury to United States nationals. However, the broad sweeping language, much of which is dicta, contained in Justice Black's opinion does cast some doubt on the continued validity of denying the right of jury trial and grand jury indictment to United States civilian citizens.

An indication of the thinking of at least one member of the Supreme Court in the trend of recent decisions can be found in a recent James Madison Lecture delivered by Chief Justice Warren (who joined Justice Black in his opinion in Reid v. Covert) at the New York University Law Center. Chief Justice Warren, in discussing the relationship of the Bill of Rights to the military establishment, after discussing Reid v. Covert among other keystone decisions stated:

> The cases I have dealt with, however, disclose what I regard as the basic elements of the approach the Court has followed with reasonable consistency. There are many other decisions that echo that approach, and there are some, to be sure, that seem incon-

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164. See JAGW 1961/1234, op. cit. Tab B. The requirement for grand jury indictment is, of course, limited by the express terms of the constitution to capital and infamous crimes. The Supreme Court has held that a jury trial is not required for petty offenses. Natal v. State of Louisiana, 139 U.S. 621 (1890); District of Columbia v. Colts, 282 U.S. 63 (1930).

> sistent with it. But I would point to Duncan v. Kahanamoke [citing "Cf. Madsen v. Kinsella"] in which the Court held, in the spirit of Milligan, that, after the Pearl Harbor Attack, civilians in the Hawaiian Islands were subject to trial only in civilian courts, once these courts were open....
>
> On the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution. While situations may arise in which deference by Court is compelling, the cases in which this has occurred demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom. Fortunately, the Court has generally been in a position to apply an exacting standard.... [emphasis supplied][165]

However, the Chief Justice acknowledges during his lecture that the question posed are all variants of "the same fundamental problem: Whether the disputed exercise of power is compatable with preservation of the freedoms intended to be insulated by the Bill of Rights." And moreover, that while the judiciary plays an important role, "it is subject to certain significant limitations, with the result that other organs of government and the people themselves must bear a most heavy responsibility." He reaffirmed the proposition, that so far as the relationship of the military to its own personnel and to those subject to the law of war is

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165. Warren, Earl, Chief Justice of Supreme Court, "The Bill of Rights and the Military," 37 N.Y. U. L. Rev. 181, 196-197 (1962). See also Black, "The Bill of Rights," 35 N.Y. U. L. Rev. 865 (1960); Brennan, "The Bill of Rights and the States," 36 N.Y. U. L. Rev. 761 (1961) for other James Madison lectures delivered at the same institution.

concerned, that the basic "hands off" attitude of the Court has been that the latter's jurisdiction is most limited.

Of course, it is virtually impossible to predict what the Supreme Court will do if the Ikeda case reaches that Court. The somewhat novel practices employed in the USCAR judicial system were given tacit if not express approval in Madsen v. Kinsella, and were considered to be advances in the jurisprudence of military occupation. At the time, it was believed that such practices could henceforth be followed with assurance in order to provide post-hostilities occupation courts that are well suited to the trial of American civilians. In view of the holding of the District Court on Ikeda's habeas corpus petition it is important to have a reaffirmation by the Supreme Court of the principles enunciated in Madsen concerning trial before nonstatutory military tribunals. With great trepidation, this writer concludes, that it seems accurate to say, that as of the present, Reid v. Covert, has not detracted from the authority of Madsen v. Kinsella. Historically, the Supreme Court, wisely it is believed, has left the responsibility with the executive branch of the Government for control over the procedure of military commissions sitting as military government or war crimes courts. The moral responsibility is indeed a heavy one, and those upon whom it rests should persist with every effort to preserve all the essentials of truly fair and rational proceedings.

International Law and the Denial of Justice.

The last point to be considered in this study is whether specific rules of procedure and evidence in the administration of

criminal and civil justice are proscribed and if so by what standard are they to be tested. It is clear that international law sets, what many Americans consider, less precise standards of justice than does "due process" of law in the United States Constitution. The civilized countries of the world vary in their technical rules. Some require juries in criminal cases, others do not. Some prefer an inquisitorial procedure, other a litigious procedure. Some, especially those utilizing juries, have rigorous rules of evidence, others leave the court a wide freedom to examine and weigh every sort of evidence. Some will not admit criminal liability unless the offense and its penalty were very precisely defined by law before the act was committed, others leave the tribunal a considerable latitude to find criminal liability and determine penalties on the basis of general definitions of offenses and principles of law.

As previously noted Chief Justice Stone in the Yamashita case, declined to hold that "due process" in the sense applicable to domestic tribunals applied to military commissions trying violations of the law of war. The competence and procedure of such tribunals were he thought, determined by international law, except as Congress had expressly declared otherwise. It would seem, therefore, that the propriety of the rules of procedure applied by military government or war crimes courts should be put to the test of international standards. Accordingly, various sources of international law should be utilized to discover the standards by which that law determines whether justice has been denied. The decisive consideration would seem to be whether trial of an accused by a

military commission deprived him of the protection to which he is entitled under international law, that is, whether judicial action produced either a violation of some specific prohibition in the Geneva Conventions discussed previously, or was in disregard of those fundamental principles of human justice recognized by civilized peoples and which are incorporated in the preamble of Hague Convention IV of 1907, supra. In all cases the deceptive cloak of a formalistic legality may be pierced to determine whether substantive rights have been violated.

It should be apparent that international law cannot apply the technicalities of any one system of municipal law but must discover the general principles underlying all civilized systems of law and the customs inherent in international practice as evidenced by conventions, diplomatic discussions, and opinions of international tribunals and text writers. Edwin Borchard, after noticing that diplomatic practice and arbitral decisions "have established the existence of an international minimum standard to which all civilized states are required to conform under penalty of responsibility," writes:

> But the existence of the standard and its service as a criterion of international responsibility in specific instances by no means give us a definition of content. Frequent reference to it may easily give rise to the erroneous inference that it is definite and definable, whereas the variability of time, place and circumstance makes it even less precise than the term "due process of law," which has also with the passage of time added substantive content to its procedural controls. The international standard is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal state would

> repudiate it or, if able, to fail to observe it. Referring to its procedural aspects, Mr. Root in 1910 characterized it as "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.[166]

Among definitions of denial of justice from the procedural aspect the following may be noted:

> In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination. /Emphasis supplied/.[167]

> Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to Courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice /Emphasis supplied/.[168]

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166. Borchard, "The Minimum Standard of the Treatment of Aliens," in Proceedings of the American Society of International Law, 61 (1939).

167. Harvard Research, Draft Convention on Jurisdiction with respect to Crime, Art. 12; 29 Am. J. Int'l. L., Supplement, 596 (1935).

168. Harvard Research in International Law, Draft Convention on Responsibility of States, Art. 9; 23 Am. J. Int'l. L., Special Supplement, 173 (1929). For another definition see Institute of International Law, 23 Am. J. Int'l. L., Special Supplement, 229 (1929).

> Everyone has the right to have his criminal and civil liabilities and his rights determined without undue delay by fair public trial by a competent tribunal before which he has had opportunity for a full hearing. The state has a duty to maintain adequate tribunals and procedures to make this right effective.
>
> Everyone who is detained has the right to immediate judicial determination of the legality of his detention. The state has a duty to provide adequate procedures to make the right effective.
>
> No one shall be convicted of crime except for violation of a law in effect at the time of the commission of the act charged as an offense, nor be subjected to a penalty greater than that applicable at the time of the commission of the offense.[169]

Commenting on international practice as evidenced by the awards of arbitral tribunals and treaties, Professor Borchard writes:

> While military law, operating in time of war only, gives military officers and courts a greater discretion in the matter of arrest, detention and imprisonment than is accorded to civil authorities in time of peace, they must nevertheless comply with the requirements of due process of law. Treaties usually provide for due process of law in the litigation, civil or criminal, to which the respective citizens of the contracting states are parties, by stipulating for free access to courts, formal charges, an opportunity to be heard, to employ counsel, to examine witnesses and evidence, and a guaranty of essential safeguards against a denial of justice [Emphasis supplied].[170]

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169. Statement of Essential Human Rights by committee representing principal cultures of the world appointed by the American Law Institute, 1944, Articles 7, 8, 9. American Law Institute, Essential Human Rights.

170. Borchard, Edwin Diplomatic Protection of Citizens Abroad, (New York: The Banks Law Publishing Co., 1916) p. 100.

It is clear, that an international standard of justice has long been recognized as binding states in their treatment of resident aliens and many conventions bind states to respect certain fundamental rights. The idea that the individual is entitled to respect for fundamental rights, accepted by the earlier writers on international law, has come under extensive consideration recently and has been accepted in the United Nations Charter, one of whose purposes is to "achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[171]

It seems to be generally recognized that international law requires that any state or group of states in exercising criminal jurisdiction over aliens not "deny justice." Authority for what international law requires in the nature of "due process" may be found in the statement of the International Military Tribunal at Nuremberg. The Tribunal commenting upon the terms of the Charter establishing its jurisdiction, procedure, and law said:

> ...The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.
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> The Signatory Powers created this Tribunal, defined the law it was to administer, and made

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171. See H. Lauterpacht, An International Bill of the Rights of Man, (New York: 1945); Q. Wright, "Human Rights and the World Order," in International Conciliation, No. 389 pp. 238 ff. (April, 1943).

> regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law /Emphasis supplied/.[172]

In essence international law requires no less and no more than that the accused be afforded a "fair trial." The Charter provided suitable procedure with this in view.[173]

The Rules of Procedure[174] adopted by the Tribunal in pursuance of Article 13 of the Charter elaborated these provisions by assuring each individual defendant a period at least thirty days before his trial began to study the indictment and prepare his case, and ample opportunity to obtain the counsel of his choice, to obtain witnesses and documents, to examine all documents submitted by the prosecution, and to address motions, applications, and other requests to the Tribunal, and assured members of accused organizations the right to be heard.

In addition to requiring that the trial be "fair," the Charter required it be "expeditious" and that the Tribunal "take strict measures" to prevent "unreasonable delay" and rule out

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172. Official Documents, International Military Tribunal, Nuremberg (Nuremberg Germany, 1947), 171, 218-219; "Judicial Decisions International Military Tribunal (Nuremberg) Judgement and Sentences, Oct. 1946, Judgement" in 41 Am. J. Int'l. L. 172, 216-217 (1947).

173. Articles 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 of the Charter in Official Documents, op. cit., pp. 13-16.

174. Rules of Procedure (Adopted 29 Oct. 1945) Ibid., pp. 19-23.

"irrelevent issues and statements." There have been critics of the trial but few have suggested any unfairness in the procedure. The Counsel of some of the defendants mildly objected to some rulings on the relevance of evidence or argument, to some limitation on the length of speeches, and to some admissions of affidavit evidence presented by the prosecution. However, the Tribunal, if anything appears to have leaned over backwards to assure the defendants an opportunity to find and present all relevant evidence, to argue all legal problems related to the case and to present motions concerning the mental and physical competence of defendants affecting their triability.

It will be recalled that Chief Justice Stone speaking for the majority of the Supreme Court in the case of In re Yamashita, held that Yamashita was given "due process of law" in his trial by military commission. But two dissenting Justices thought the admission of hearsay and opinion evidence and the haste of the proceedings giving the defense insufficient opportunity to present its case denied "due process of law." The latter charge has not been made against the Nuremberg Tribunal even though Article 19 of the Charter provided that:

> The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.[175]

In accordance with the above Article the Tribunal did not

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175. Ibid., p. 15.

apply common law rules of evidence. But, it has never been contended that those rules of evidence are required by international law to be applied by such tribunals. In this respect the Tribunal was like other international tribunals, like military commissions, and like continental European criminal courts. In the Yamashita case the Court did not aduce international practice but merely said "that the rulings on evidence and on the mode of conducting these proceeings ... are not reviewable by the courts."[176] In international law, such matters as rules governing the admission of evidence are left to the discretion of the various states. International law does not require that those technical rules on exclusion of hearsay which are peculiar to Anglo-Saxon countries be applied. Any possible complaints as to the impropriety of judicial activity in connection with allegedly irrelevant or unreliable testimony must be grounded not upon its admission, but rather upon the use which the particular judge made of it.

Likewise, international law does not demand the right of trial by jury nor indictment by grand jury. The principle of Anglo-Saxon law according to which a special jury other than that judging the crime is charged with deciding whether an accused shall be brought to trial is not so general a guaranty in different codes of criminal procedure in force with civilized nations that another method of preparing the trial could be designated as below the standard of international law.[177] The law of nations does not pretend

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176. In re Yamashita, op. cit., p. 351.

177. Award in the Salem claim (U. S. v. Egypt) 57. Department of State Arbitration Series, No. 4(3), Case of Egypt, Annex (c) 41.

to set up a system of general uniformity of judicial institutions for the administration of criminal laws throughout the world. Much variation exists and is permitted in practice between nations founded on different systems of law. The fact that there may exist wider or narrower differences in the method of organizing and administering justice, as well as varying conceptions of what constitutes "justice" itself, in no wise alters the general solution which is imposed. Thus, to give one broad illustration, conclusions with respect to the propriety of certain methods of procedure in a country based upon the civil law will have to be reached not in the light of comparisons with systems based upon Anglo-Saxon law, but with other legal systems governed by principles of civil law. International law makes allowances for the inevitable differences which will exist between countries founded upon different systems of law; but requires[178] withal a certain minimum level of justice to be observed.

It is, however, far easier to establish the existence of an international standard of "justice" than it is to define with any degree of exactitude the specific requirements which are implied in such a standard of civilized justice. As a matter of fact, the standard is not susceptible of complete and final delimitation. Nevertheless, there are certain broad, fundamental principles which states must recognize if they are to fulfill their duty of

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178. Compare Woolsey, "The Shooting of Two Mexican Students" 25 Am. J. Int'l. L. 514-516 (1931).

providing aliens with an adequatejudicial protection for their rights.[179] Some of these principles - notably those governing the nation's duties with respect to the conduct of criminal proceedings - are deserving of special emphasis at this point.

The following very general statement of the rule has been offered by Professor Borchard:

> ...Thus, for example, a violation of the rules of municipal law or procedure or of treaties, by which injustice is perpetrated or a foreigner unduly discriminated against, by the refusal to hear testimony on behalf of a defendant charged with crime ... have all been construed as denials of justice.[180]

It should, however, be clearly understood that the act of misconduct complained of must be such as to prejudice materially the alien's defense or espousal of his rights. Only then will it amount to a denial of justice. In determining whether some irregular aspect of the proceedings have resulted in a denial of justice, inevitably recourse to some concept such as "fairness" is necessary. If it is clear that an alien has been given a real opportunity to be heard, to submit evidence and, in general, to make a full and complete presentation of his case so that there is no appreciable doubt that he has enjoyed an impartial, bona fide investigation of his claims and defenses; in sum, if the alien is granted what an

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179. Freeman, Alwyn V., The International Responsibility of States for Denial of Justice (London-New York; Toronto: Longmans, Green and Co., 1938), 196 ff, 262 ff and 547 ff. See Lissitzyn, "The Meaning of Denial of Justice in International Law." 30 Am. J. Int'l. L. (1939) 632.

180. Borchard, Diplomatic Protection, op. cit., pp. 338-339.

ordinary, reasonable judge would designate as a "fair trial," then the duty of judicial protection will have been fulfilled despite whatever inconsequential irregularities may have been committed in administering the local adjective law. The judicial institution must also be one that in the eyes of international law is capable of rendering justice effectively, impartially and independently. Not only the laws creating the court, but the procedure under which it will function must provide adequate guarantees for the safeguard of personal and property rights so that the alien's defense of these interests may be effectively raised.

It is now well-established that the procedural guarantees furnished by domestic legislation must be such as to comply with certain universally recognized sanctions of civilized justice. Secretary Bayard, in the Cutting case, listed as among these sanctions: (1) the right to have the facts on which the charge of guilt was made examined by an impartial court; (2) the explanation to the accused of these facts; (3) the opportunity granted to him of counsel; (4) such delay as is necessary to prepare his case; (5) permission in all cases not capital to go at large on bail till trial; (6) the due production under oath of all evidence prejudicing the accused; (7) giving him the right to cross-examination; (8) the right to produce his own evidence in exculpation; (9) release even from temporary imprisonment in all cases where the charge is simply one of threatened breach of the peace, and where due security to keep the peace is tendered.[181] Most of these items,

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181. VI Moore, J. B. A Digest of International Law, (Washington: Government Printing Office, 1906), Sec. 201; and Case of

it may be admitted, are essential to a "fair trial." To the items listed by Secretary Bayard this writer would add ex post facto laws. Retroactive legislation converting into crimes those acts which, when committed were legally innocent are clearly prohibited. The alleged offense must be one clearly designated as such by pre-existing law, and the penalty applicable to it specified in advance. All resort to the use of analogy in the punishment of criminal offenses not expressly made criminal by the written law must be condemned under present civilized standards. This result is dictated by the fact that the maxim nullum crimen, nulla poena sine lege, is almost universally respected by modern states, and forms unquestionably one of the "general principles of law recognized by civilized nations." It represents beyond any possible doubt one of the individual guarantees which must be con-

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181. the American A.K. Cutting, Latest Notes Exchanged (1888), Washington D. C. The arrest and subsequent treatment of Cutting by Mexican judicial authorities for an alleged libel in Texas gave occasion to a series of diplomatic exchanges between the U. S. and Mexico. So far as concerns the aspect of the case which involved the procedural guarantees of fair treatment required in the prosecution of an accused alien, the claim of the United States was based upon the charge that Cutting was refused counsel and an interpreter to explain the nature of the charges brought against him; that the evidence against him was not produced under oath; that he was refused bail, and was cruelly treated in prison. Mr. Bayard seems to have stated one or two requirements which, however, conforming with principles of Anglo-Saxon law, may be regarded as doubtful under general international law practice. See Chattin case in Nielsen, Fred K., International Law Applied to Reclamations, (Washington: 1933) 247; Also Woolsey, op. cit., p. 516; Freeman, "War Crimes by Enemy Nationals Administering Justice in Occupied Territory," 41 Am. J. Int'l. L. 579, 609 (1947). Here Freeman lists acts of judicial officials considered to be a denial of justice the denial of which are classed as war crimes subjecting the judicial officials denying same to prosecution as war criminals.

sidered as indespensable to the proper administration of justice.

Based on the foregoing it is believed that the arguments of Justice Murphy and Justice Rutledge in their dissents in the Yamashita case, that the admission of depositions, affidavits, and hearsay evidence violates a fundamental principle of justice is without support in the international community. It is clear, that international tribunals have hesitated to exclude any sort of evidence and the courts in many civilized countries are similarly free in the admission of evidence leaving it to the judges to appreciate the weight that should be attached. Such evidence has been commonly admitted in military tribunals although in American courts-martial certain limitations are imposed. It is clear that the admission of such evidence does not constitute a denial of justice in international law.

This brings us to the question of whether international law requires that an enemy be given the same rights as a national tried for the same offense? Under Article 102 of the Geneva Prisoners of War Convention, 1949, supra, prisoners of war are entitled to the same procedure as would be applied to an American soldier in similar circumstances. Therefore, prisoners of war in the custody of the United States must be tried by courts-martial or military commission utilizing the procedural safeguards of the Manual for Courts-Martial.[182] There is considerable authority in

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182. See Article 85, Geneva Prisoners of War Convention, op. cit., See fn. 98, 99, and 100, supra.

support of the view that international law does require that any alien be given judicial equality with citizens. If such is the case, it is really the equivalent of saying that one of the minimum requirements of international law in this field is equality of status before the local judiciary. This rule, however, suffers a number of important exceptions.[183] The most familiar example is that relating to so-called "minor" or inconsequental irregularities in the proceedings. In the presence of a rule excluding responsibility for such irregularities, it is difficult to maintain the proposition that every violation of a local procedural provision violates international law. Now, if this be conceded, the only importance of a failure to observe a given local procedural rule would appear to lie in its evidentiary value. Nonobservance of the municipal code may be adduced as evidence to show that a denial of justice in international law has occurred, as distinguished from a possible denial of justice in municipal law to which the international community must always remain indifferent. It may be questioned, however, whether international law requires the application of this principle of equal treatment to aliens to be extended to enemies "not subject to military law" who are tried by military commissions for violations of the law of war or offenses against the military government. It would appear logical that the enemy can, apart from specific convention, claim only the international standard even if

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183. Only "unreasonable," "unfair," or "arbitrary" discriminations against aliens are forbidden. See Harvard Research Draft Convention on Responsibility of States, Art. 5; 23 Am. J. Int'l. L., Special Supplement, 147, 184 (1929); American Law Institute, Essential Human Rights, Art. 17; United Nations Charter, Art. 1, para. 3.

the national is given more.[184]

United States Municipal Law "Fundamental Rights" and "Due Process."

What is a "fair trial" in international law? Obviously, it would be inane to attempt to answer this without invoking some international standard for administering domestic justice. The judge in determining the international standard will be at a distinct loss to test the propriety of allegedly wrongful conduct unless he reviews it in the light of those practices which are condemned by the jurisprudence of his own country, of legal systems similar to that with which he is familiar, and of others which may be dissimilar but which are deemed "civilized" to the extent that a normal trial therein is regarded as sufficient to satisfy the mandates of international law. Therefore, it would appear to be appropriate to consider what are the procedural safeguards contained in the Constitution of the United States which are so ingrained in the American system of jurisprudence that they may be classified as basic or fundamental Constitutional rights.

Accordingly, a brief examination of the Constitutional safeguards[185] is necessary in order to ascertain those rights which

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184. Ibid.

185. The Constitution of the United States provides the following Constitutional rights for the protection of persons tried before a Federal Criminal Court of the United States:
(a) IV Amendment:
(1) Unreasonable search and seizure
(b) V Amendment:
(1) Indictment by Grand Jury
(2) Double Jeopardy

the Supreme Court of the United States has held as fundamental principles of justice which lie at the very base of all our civil and political institutions. The test utilized by the Supreme Court in ascertaining which rights set forth in the Federal Constitution are so fundamental that they cannot be abrogated or infringed upon was laid down in the landmark case of Palko v. Connecticut.[186] The test there established is whether the particular right is basic in a free society. The principle enunciated is that, for protection under the "due process" clause, the particular right must be "of the very essence of a scheme of ordered liberty" so that to abrogate or infringe upon it is to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." It will be observed that this test - like the international standard of justice - does not result in a fixed catalogue of fundamental rights. Both standards must necessarily be more or less variable. It would be plainly impossible to require its uniform application at all times as

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185.
(3) Self incrimination
(4) Deprivations of life, liberty or property without due process of law.

(c) VI Amendment:
(1) Speedy and public trial by impartial jury
(2) Accused to be informed of the nature and cause of the accusation.
(3) Accused to be confronted with witnesses against him.
(4) Accused to have compulsory process for obtaining witnesses in his favor.
(5) Accused to have assistance of counsel for his defense.

(d) VIII Amendment:
(1) Excessive bail shall not be required
(2) Excessive fines shall not be imposed.
(3) Cruel and unusual punishment shall not be inflicted.

186. Palko v. Connecticut 302 U.S. 319, 325 (1937).

something strict and inflexible regardless of the particular circumstances surrounding each case. The Supreme Court test could be expected to result in a flexible and progressive course of decision, the rules being laid down by the traditional method of "inclusion and exclusion." Subject to these well established limitations, the following procedural safeguards contained in the Constitution of the United States have been considered so fundamental as to be within the protection of the "due process clause" of the XIV Amendment of the Constitution:[187] (1) Criminal statute alleged to be violated must set forth specific and definite standards of guilt;[188] (2) prohibition against the enactment of ex post facto laws,[189] (3) Prohibition against bills of attainder,[190] (4) Accused must be informed of the nature and cause of the accusation and have a reasonable time to prepare a defense,[191] (5) Accused

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187. XIV Amendment: (1) No state shall deprive any person of life, liberty or property without due process of law. The argument has been repeatedly made before the Supreme Court, that every restriction on the Federal Government contained in the Bill of Rights (first eight amendments of the Constitution) is by virtue of the XIV Amendment also a restriction on the states. This view has been consistently rejected by the Supreme Court. See Adamson v. California, 332 U.S. 46 (1947); Wolf v. Colorado, 338 U.S. 25 (1949).

188. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

189. Millican v. State, 167 S.W. 2d 188, 190; 145 Tex. Cr. R. 195.

190. Cummings v. Missouri, 18 L. Ed. 356, ex parte Carland 18 L. Ed. 356.

191. As a minimum "due process" requires that an accused be given reasonable notice of the charge against him, the right to examine witnesses against him, the right to testify in his own behalf, and the right to be represented by counsel (In re Oliver, 333 U.S. 257 (1948); Snyder v. Massachusetts, 291 U.S. 97 (1934).

is to have the assistance of counsel for his defense;[192] (6) Accused is entitled to be present at trial;[193] (7) Accused is entitled to be confronted with witnesses against him;[194] (8) Accused is entitled to have compulsory process for obtaining witnesses in his favor;[195] (9) Burden of proof is on the Government in all criminal cases;[196] (10) Accused is entitled to be tried by an impartial

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192. Uveges v. Pennsylvania, 335 U. S. 437 (1948); Powell, et. al. v. Alabama, 287 U.S. 45 (1932); Mellanson v. O'Brien, 191 F.2d 963; Hamilton v. Alabama, 368 U.S. 52 (1951); Betts v. Brady, 316 U.S. 455 (1916); Gideon v. Cochrane, 370 U.S. 908 (1962), in this case the Supreme Court granted cert. and one of the questions to be considered is whether the Court's holding in the landmark case of Betts v. Brady should be reconsidered.

193. Snyder v. Massachusetts, op. cit.

194. Under American Jurisprudence the accused is not entitled to the personal appearance in court of all witnesses against him. To this extent confrontation is not part of the "due process clause." The right is confined to the guaranty of opportunity for cross-examination and does not include observation of the witnesses' demeanor by the trier of the facts. The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits being used against the accused in lieu of a personal examination and cross-examination of the witness. (Mattox v. U.S., 39 L. Ed. 409, 411 (1894)). However, the Constitution was never thought to prohibit entirely the use of extra-judicial statements (Salinger v. U. S., 71 L. Ed. 398 (1926)). Thus, the rule appears to be that subject to reasonable exceptions, the accused is entitled to meet and cross-examine in open court the witnesses against him (In re Oliver, op. cit.). Depositions may be used where the accused was present at the taking and the witness is permanently absent from the jurisdiction (West v. Louisiana, 48 L. Ed. 965).

195. Graham v. State 6 S. W. 721, 722, 50 Ark. 161; The Supreme Court has not squarely held that the "due process" clause grants this right. However, the dictum in the case of In re Oliver, supra, states that to deprive an accused of this right would violate the fundamental principles that the due process clause sought to protect.

196. Bailey v. Alabama, 55 L. Ed.191 (1911); McFarland v. American Sugar Refining Company, 241 U.S. 79 (1916).

court;[197] (11) Accused is entitled to be protected from the use of a confession obtained by torture or other illegal or improper means;[198] and (12) Cruel and unusual punishment shall not be inflicted.[199]

The Supreme Court has held that the XIV Amendment does not, have the effect of requiring the several states to conform the procedures of their state criminal trials to the precise procedure of the Federal Courts, even to the extent that the procedure of the Federal Courts is prescribed by the Federal Constitution or Bill of Rights.[200] The following rights, though enumerated in the first eight Amendments of the Federal Constitution, have been held by Supreme Court cases not to be considered so fundamental as to fall under the protection of the due process clause: (1) Right to bail pending trial;[201] (2) Indictment by Grand Jury;[202] (3) Unreasonable search and seizure; [203] (4) Trial

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197. Tumey v. Ohio, 273 U.S. 510 (1927); Moore v. Dempsey, 261 U.S. (1923).

198. Brown v. Mississippi, 297 U.S. 278 (1936); Rochin v. California, 342 U.S. 165 (1952).

199. No case could be found where the Supreme Court of the United States had decided whether a violation of this right would come under the purview of the due process clause. Beyond doubt, this right is so ingrained in American tradition as to be considered fundamental and to violate it would violate the XIV Amendment.

200. Adamson v. California, op. cit.; Bute v. Illinois, 333 U.S. 640 (1948); Williams v. New York, 337 U.S. 241 (1949).

201. Vol. 6, Am. Jur., Bail and Recognizances, §§ 11, 82.

202. The words "due process of law" in the XIV Amendment of the Constitution do not require an indictment by a Grand Jury in a prosecution by a state regardless of the nature of the offense. (Hurtado v. California 110 U.S. 516 (1884).See Ex parte Quirin, op. cit.; Hawaii v. Mankichi, op. cit.; Dorr v. United States, op. cit.; Balzac v. Puerto Rico, op. cit.; Madsen v. Kinsella, op. cit.; Johnson v. Eisentrager, op. cit.; Natal v. State of Louisiana, op. cit.; District of Columbia v. Colts, op. cit.

203. The XIV Amendment does not forbid the admission of relevant

by Jury;[204] (5) Double jeopardy;[205] (6) Self Incrimination.[206]

"Denial of Justice" and "Fundamental Rights" of "Due Process" Compared.

As a general proposition, it is believed that a comparison of the minimum requirements of international law, (or, put somewhat differently, the reasonable standards of civilized justice) and what the Supreme Court has considered to be fundamental procedural safeguards reveal a close similarity. Apart from the differences in the forms of procedure as relate to indictment by grand jury and trial by petit jury (not considered fundamental by the Supreme Court in the past) and Anglo-Saxon technical rules of evidence there is a close correlation between international justice and fundamental "due process." A comparison of the sanctions enumerated by Secretary Bayard, as supplemented by this writer, supra, and the

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203. evidence even though obtained by an unreasonable search and seizure (Wolf v. Colorado, 338 U.S. 25 (1949).

204. "The privileges and immunities of a citizen of the United States do not include the right of trial by jury in a state court for a state offense, or the right to be exempt from any trial in such case for an infamous crime, unless upon presentment by a grand jury."
Maxwell v. Bow, 176 U.S. 581 (1900). See cases cited fn. 203 supra.

205. A statute which allows the state to appeal in a criminal case and obtain a reversal and retrial for prejudicial error against the prosecution, has been held to be a technical form of double jeopardy, that does not violate those procedural rights protected by the due process clause. (Palko v. Connecticut, op. cit.,); See 51 Harvard L. Rev. Recent Cases Note "Retrial After Acquital as Denial of Due Process," 739 (1938).

206. Twining v. New Jersey, 211 U.S. 78 (1908); Adamson v. California, op. cit.

fundamental procedural safeguards laid down by the Supreme Court lend support to this proposition. Also, it appears that the Rules of Procedure, adopted by the International Military Tribunal at Nuremberg (exclusive of the differences mentioned above) meet the procedural standard of both international justice and domestic fundamental due process." These rules since they were adopted by an international organization and have the advantage of being precedent should serve as a guide in the future for military tribunals trying persons under the law of nations for alleged violations of the law of war.

In criminal proceedings, (as well as in civil), it is beyond controversy that not only the forms of law but the essential rights of the accused should be respected, it is just as equally certain that deviations from ordinary practice are insignificant when those rights remain unimparied. At most, international law requires an equality of status of the alien before military tribunals. Logical consistency would be outraged by a rule which afforded an alien (especially an enemy) greater procedural safeguards than a United States citizen can demand when tried in a State court. There is, it may be argued, no logical consistency in a rule which provides that a United States citizen has certain "fundamental" guaranties of judicial procedure but which also stipulate that foreign citizens and enemies must be accorded greater rights before domestic courts or military tribunals. It would be parodoxical to argue that aliens and enemies have rights under the Fifth Amendment not afforded to

American citizens "subject to military law," when tried by military commission or executive courts. In the final analysis, if an accused before such a tribunal, is afforded the protection of his "fundamental rights" it is difficult to see how he can logically argue that he has been denied "due process" and materially prejudiced.

No one apparently challenges the availability to the President as Commander-in-Chief of the power to provide for trial and punishment by military commission of persons charged with war crimes or crimes committed in military government situations. The method of trial alone is in issue. Some suggest that any trial conducted by a military commission must be subject to all the restrictions of the Constitution including the Fifth and Sixth Amendments. This writer finds no constitutional defect in the fact that trial before such tribunals does not provide for indictment by grand jury or trial by petit jury. These procedures have been specifically approved by the Supreme Court in a long line of decisions discussed supra. It seems a mistake to interpret the decision in Reid v. Covert, as standing for the sweeping proposition that the safeguards of Article III and the Fifth and Sixth Amendments automatically apply to the trial of American citizens by military tribunals, no matter what the circumstances. In terms of "due process" the "fundamental right" test, which is one the Supreme Court has consistently enunciated in a long series of cases, should be followed in weighing constitutional restrictions on such tribunals. There is no rigid and

abstract rule of Constitutional "due process" that requires as a condition precedent to a military commission exercising jurisdiction over American civilians abroad and enemy aliens, that it must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.

Military Tribunals and "Due Process"

In summary, "it still remains true that military tribunals have not and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."[207] It would seem obvious that it would be impossible as relates to jury trials and indictment by grand jury. A jury made up of military personnel would be tantamount to trial by a military commission. A jury composed of civilian associated with the military overseas would be a sham.

Aside from presement by grand jury and trial by jury, if military tribunals are "guided," by the rules and regulations set forth in MCM, 1951, it is submitted, that the fundamentals of "due process" and international "justice" will be assured. Speaking of the legal procedure and the safeguards now afforded accused under the UCMJ and the MCM, Justice Clark in the majority opinion in the first case of Reid v. Covert states "in addition to the

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207. United States ex rel. Toth v. Quarles, op. cit., 17 (1955).

the fundamentals of due process, it includes protection which this court has not required a State to provide and some procedures which would compare favorably with the most advanced criminal codes." He found "no constitutional defect in the fact" that there was no provision "for indictment by grand jury or trial by petit jury."[208]

Chief Justice Warren in his James Madison lecture discussed previously, indicates that he is of the opinion that military justice, under the UCMJ and the MCM, 1951, is presently being administered in accords with the demands of "due process." In the course of his lecture he quotes Chief Judge Quinn of the United States Court of Military Appeals as follows:

> /M/ilitary due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code and their weighty demands to the requirements of a fair trial. Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different.[209]

He continues:

> and the Court of Military Appeals has, itself, said unequivocally that 'the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.[210]

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208. Reid v. Covert, 351 U.S. 478, 479. As additional protections provided he cites for comparison "Art. 31 and Sections 149b, and 72b, Manual for Courts-Martial, with Adamson v. California, 332 U.S. 46; former jeopardy, Arts. 44 and 63 with Palko v. Connecticut, 302 U.S. 319; use of illegally obtained evidence, Section 152, Manual for Courts-Martial, with Wolf v. Colorado, 338 U.S. 25."

209. Warren, op. cit., p. 189. He cites Quinn "The United States Court of Military Appeals and Military Due Process," 35 St. Johns' L. Rev. 225, 232 (1961).

210. Ibid., citing United States v. Jacoby 11 U.S.C.M.A. 428, 430-431, 29 C.M.R. 244, 246-247 (1960).

On the basis of the foregoing discussion, this writer cannot agree with the sweeping proposition that a full Article III trial, with all the restrictions of the Constitution applicable, is required in every case for the trial of an American civilian (much less so for aliens and enemies) by military commission or other equivalent executive courts. The ultimate issue is one of "due process." In the words of Justice Harlan in his separate opinion in Reid v. Covert, supra, "...the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[211] In the final analysis the accused is entitled to a "fair trial" before a military commission. If the procedure followed by the military commission offers the same or as effective safeguards as that of the ordinary courts and if there is no question of impartiality, no complaint may be made, if it properly has jurisdiction. If United States military commissions follow the procedure provided for in the MCM, 1951, both "due process" and "international justice" requirements will be more than adequately complied with.

In closing, a caveat is deemed appropriate. In administering justice, the military commander and the judge advocates subordinate to him must be constantly mindful that law, order and peace can

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211. Reid v. Covert, 354 U.S. at 75.

only be maintained by two methods: either that imperialism which results from force - a Roman peace (inter arma silent leges) which means the subjugation of the vanguished by the victor, where law becomes imperial fiat - or law which has the consent of the nations united in a community in which the interest of all transcends that of any one. Such a situation represents a higher form of civilization, a situation in which reason and justice are the dominant factors. The law represents the reverse of force, the policy of reason and justice. Whether we base "the rule of law" upon "natural law," the "inherent rights of man," or upon that of "due process" the result is much the same. One important principle embodied in that compendious phrase "the rule of law" is that a military commander, like any other citizen is subject to the ordinary law. So long ago as 1678, Sir Mathew Hale said, "whatever you military men think, you shall find that you are under the civil jurisdiction." To the extent that a defendant in criminal proceeding has been shorn of the safeguards generally deemed essential to the administration of civilized justice, the action of the military commander in destroying those rights must be regarded as a violation of international law subjecting him in turn to prosecution.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

In the course of the preparation and presentation of this study, the author's views and conclusions have been stated from time to time and are implicit in some aspects of the selection, analysis, and treatment of the subject matter. Here a few concluding comments and conclusions may tie together these scattered lines of thought.

There are under the United States Constitution four types of military jurisdiction. First, there is what may be called jurisdiction under military law. Second, there is what may be denominated martial law proper. Third, is military government. Fourth, is jurisdiction over persons accused of violations of the law of war. In the United States practice military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Accordingly, military tribunals are generally classified as statutory (courts-martial, courts of inquiry, statutory boards) and nonstatutory (military commissions and provost courts) sitting as courts in the last three situations above. These law of war tribunals are executive courts. As the Supreme Court of the United States observed in the Yamashita and Ex parte Quirin cases, Congress has recognized it, by mention, as the appropriate tribunal for the trial of offenses against the law of war.

Military offenses which do not come within the jurisdiction

conferred by statute on courts-martial are tried and punished by military commissions, provost courts, military government courts, or war crimes courts. Military commissions have traditionally tried more serious violations of the laws of war and of the occupant's proclamations, laws, ordinances and directives. The Provost Courts are courts of a summary nature concerned only with minor infractions.

Military Government connotes a situation where the commander of an armed force rules a territory from which the enemy has been expelled. It is a condition of fact, based upon paramount force. Military government, though arising out of paramount force, immediately becomes a government of law, such government must certainly be ruled by law and not by men. The manner in which such an occupation is carried out is controlled by the laws of war, general international law, and certain provisions of the Hague Conventions of 1907 and the Geneva Conventions of 1949. The law of nations especially the international law of military government is an integral part of the domestic law of the United States and has been recognized and sanctioned by the Supreme Court of the United States. United States national policies and objectives requires that we observe liberal policies in our military government operations, quite aside from the legal duty to conform to international law both general and conventional. Military government fills a gap when civil governments are unable to function, performs the vital duty of restoring and preserving law and order, and should cease to exist when normal civil processes are restored.

Established doctrine regarding the relationship between the Constitution and military government asserts that the only relevant constitutional provisions are those respecting the power of the President and the Congress to wage war. Since the Constitution commits to the Executive and to Congress the exercise of the war powers in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgement and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means of resisting it.

In military government situations one part of maintaining public order is the administration of justice. To accomplish this an appropriate system of courts must be available to support the military government. Indigenous courts may be employed or military tribunals may be set up to enforce the laws, ordinances, proclamations, and directives of the occupying military force, to punish crimes against the local law, and to deal with violators of the law of war. The power of the President and of the military commanders under him to establish military tribunals in belligerent occupation situations is complete, limited only by the exigencies of service and the laws of war. Such courts may properly take cognizance of questions, military, criminal, and civil. There is no distinction in this regard between the cases of territory conquered from a foreign enemy or rescued from rebels treated as belligerents. The only limits to the military authority are those which international law and usage impose, and breaches of these are cognizable

only in the military courts. Military commissions sitting as military government or war crimes courts - assuming arguendo that the commission has jurisdiction - are not courts whose proceedings are reviewable by the civil judiciary. Correction of their errors of decision is not for the civil courts but for the military authorities alone.

Military commanders having civil affairs authority may establish courts to adjudicate existing criminal or civil law or statutory enactments based on his occupation. By United States practice in establishing nonstatutory tribunals there have usually been three categories of courts, patterned as to size, qualifications of members, jurisdiction, and limitations on maximum punishments somewhat after courts-martial. A three structure system of courts to be designated Provost Courts, Special Military Commission, and General Military Commission is deemed preferable. The system of courts established must be flexible and mobile, to a degree never dreamt of by those who plan judicial reforms at home. Grades of courts must be established suitable to the varying gravity and difficulty of the cases. An appropriate method of reporting trials and keeping records must be prepared. A system of appeal, supervision and review must be instituted.

Article 64 of the new Geneva Civilian Conventions of 1949, which is supplemental to Article 43 of the Hague Regulations, expresses a fundamental notion of the law of occupation, that the penal legislation in force must be respected by the Occupying Power.

The idea of the continuity of the legal system applies to the whole of the law - civil and penal. Article 43 of the Hague Regulations require the occupant to insure "as far as possible" public order and safety and to respect the laws in force "unless absolutely prevented." Not absolutely settled is the question whether the occupying power may lawfully change existing laws which modify enemy institutions which are incompatible with an occupants war aims or objectives. It is concluded that a belligerent occupant must be conceded the right during occupation, both before and after an enemy's complete defeat, to remold those institutions, which, if allowed to remain unchanged during occupation, would certainly rise again in a future time to menace the occupant's security. A belligerent need not choose between obliterating the enemy state or finally withdrawing from occupation of enemy territory without modifying, if he can, the enemy's war-like and war-making inclinations, ideals, and institutions.

Although military government is limited legally only by the laws of war and general international law, it is questionable whether present rules of international law are really applicable to the unique type occupation that transpired after World War II. A relatively uninhibited rule of the military during periods of occupation closely associated with actual combat is clearly authorized under international law on the basis of military necessity. But is the same type uninhibited rule applicable in full to an occupation during peacetime, where an occupation continues indefinitely after hostilities have ceased and debellatio

has been achieved? It is concluded that military government maintained long after the war has, in reality if not in theory, come to an end is without precedent in international law. And present international law is inadequate to cover the extent to which rule in a belligerent occupation apply to an occupation in peacetime.

The Geneva Civilian Conventions of 1949 impose important limitations as to the administration of punitive justice in occupied territory. Of general interest in this study are the norms of Articles 47-78 concerning occupied territory, in relation to Articles 42-56 of the Hague Regulations, and of particular interest the brief code of penal legislation and procedure contained in the Convention. Articles 65-77, inclusive, contain the specific safeguards afforded to civilians charged with crime in military government courts.

Under the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949, prisoners of war for both precapture and post capture offenses must be tried by the same type military court utilizing the same procedural safeguards as try United States personnel. In addition, the prisoner of war is afforded certain additional safeguards not afforded to members of the force of the Detaining Power.

The Geneva Conventions of 1949, beneficent as they are, abound in gaps, compromises, obscurities and somewhat nominal provisions resulting from the inability of the parties to achieve an agreed effective solution. The lawyer is confronted with the

task of incorporating, in a systematic manner, their stupendous positive achievement in military manuals, in textbooks, and in international law generally. This task, which is far from being one of mere exposition, must be accomplished in a critical spirit. Effort directed towards the clarification and expansion of the Conventions may in itself add to their authority as the most comprehensive codification of the law of war yet in existence.

In the matter of those parts of the law of war which are not covered or which are not wholly covered by the Geneva Conventions, diverse problems still require clarification. These include - to mention only a few - such questions as the implications of the principle, which has been gaining general recognition, that the law of war is binding not only upon states but also upon individuals - i.e., both upon members of the armed forces and upon civilians; the changed character of the duties of the Occupant who is now bound, in addition to ministering to his own interests and those of his armed forces, to assume an active responsibility for the welfare of the population under his control; the emergence of motorized warfare with its resulting effects upon the factual requirements of occupation and the concomitant duties of the inhabitants; the advent of new weapons such as nuclear systems and chemical and biological warfare when used against human beings; authoritative clarification of the law relating to the punishment of war crimes, in particular the regulation of the question of international criminal jurisdiction; the elucidation of the law, at present obscure, relating to the effect of the prohibition or limitation of

the right of war on the application of rules of war, in particular in hostilities waged collectively for the enforcement of international obligations; and many others. Lawyers, especially military lawyers, must continue to study, to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others.

In the case of international military commands, amendments of the conventions are called for, particularly those applicable to the custody and treatment of prisoners of war, the occupation of enemy territory, the trial of war criminals, the appropriation of enemy property, and the like. The law of war must be changed to take account of the existence of international military forces.

During military occupation, the occupying forces are, of course, not subject to the law of the conquered territory. In carrying out its military administration the occupant is totally independent of the constitution and the laws of the occupied territory. Its powers are limited only by international law and the laws and usages of war.

War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action finds no warrant in and is contrary to international law. When, therefore, we say that the belligerent inflicts punishment upon war criminals for the violation of his municipal law, we are making a statement which is correct only in the sense that the relevant rules of international law are being applied, by adoption or otherwise, as

the municipal law of the belligerent. Intrinsically, punishment is inflicted for the violation of international law.

The jurisdiction of the military commission have been recognized by all three branches of our government. Although there has never been any statute defining the exact extent of its jurisdiction, definite boundaries have been recognized by the civil courts and leading civil and military authorities. The question has been divided into four parts, jurisdiction as to time, offenses, persons and territory. The military commission may take cognizance of the following offenses: (1) Violations of the laws of war; (2) Civil crimes, which, because the civil authority is superseded by the military, and the civil courts are closed or their functions suspended, cannot be taken cognizance of by the ordinary tribunals; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the UCMJ. Many offenses which are civil offenses in time of peace become military offenses in time of war. Military commissions, in the trial of alleged violations of the law of war, may apply the provisions of international agreements and the enormous body of customary practices of war which have solidified into principles and rules of law. Four classes of persons are amenable to the jurisdiction of a Military Commission: (1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offenses in violation of the laws of war; (2) Inhabitants of enemy's country occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law;

(4) Officers and soldiers of our own army, or persons serving with it in the field who, in time of war, become chargeable with crimes or offenses not cognizable, or triable by the criminal courts or under the UCMJ.

From the point of view of international law, all persons, military and civilian, charged with having committed offenses in violation of the law of war are subject to the jurisdiction of military tribunals. Instead of being limited to the territory in which the offense was committed, this aspect of jurisdiction is determined largely by physical custody of the person accused. In essence jurisdiction is "universal."

Military tribunals have jurisdiction so long as a technical state of war continues. This includes the period of an armistice, or military occupation, up to the effective date of a treaty of peace, and may extend beyond the treaty.

The provisions of Articles 18 and 21 of the Uniform Code of Military Justice conferring jurisdiction upon courts-martial should not be construed as depriving military commissions of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such "military commissions, provost courts, or other military tribunals."

Recent United Supreme Court decisions holding that it was unconstitutional to try a civilian dependent by courts-martial overseas in time of peace have in no way detracted from the authority of the prior holding of the United States Supreme Court that it was constitutional to try a civilian dependent in areas of occupation by military commission. The results in the cases that

arose by reason of the trial of civilians by courts-martial do not control, for the courts-martial cases rest specifically on congressional power to make "Rules for the Government and Regulation of the land and naval Forces" against the safeguards of Article III and the Fifth and Sixth Amendment and not on Article II, Section 2 which is a grant of power to the President as Commander-in-Chief to deal with occupied territory.

An examination of the basic rights afforded an accused by traditional United States practice before military commissions reveal that they afforded to every accused "basic fundamental rights" which approximate generally our concept of "due process." The "fundamental right" test is the one which the United States Supreme Court has consistently enunciated in a long series of cases - dealing with claims of constitutional restrictions on executive and congressional power in terms of "due process."

Article 36 UCMJ authorizes the President to prescribe the procedure and modes of proof in cases before courts-martial, military commissions, and other military tribunals. In the absence of action taken by the President under Article 36, UCMJ to prescribe the procedure and rules of evidence to be followed by military commissions, such commissions are not governed by statutory rules. The President has not prescribed in any detail, regulations for military commissions as such. However, para. 2 of the Manual for Courts-Martial, 1951, while not mandatory in a prescriptive sense, clearly indicates that the

trial before such tribunals "will be guided" by the rules of procedure and evidence prescribed in the MCM, 1951.

In view of the decision of the United States Supreme Court in the case of United States v. Yamashita, it may be said, that insofar as persons accused of war crimes and not "subject to military law" are concerned, under practically no circumstances, will a civil court interfere with the absolute freedom of discretion as to procedure and rules of evidence granted to a legally constituted military commission acting within the proper scope of its jurisdiction. The Supreme Court decision very explicitly indicates that the Articles of War are not meant to apply to military commission when they are trying "persons not subject to military law." As to persons subject to military law the Articles are applicable when tried by military commission. The present UCMJ Articles are applicable to "persons subject to military law," including those entitled to identical treatment under the Geneva Conventions. As to persons not "subject to military law" they receive none of its protections and remain triable simply by the rules known to the common law of war and international law. The Supreme Court has consistently declined to hold that "due process" in the sense applicable to domestic tribunals applied to a tribunal established under the war powers and international law. The Supreme Court has wisely left the responsibility with the executive branch of the Government for control over the competence and procedure of military commissions.

The competence and procedure of military commissions

sitting as war crimes courts, or military government courts are determined by international law. Accordingly, the propriety of the rules of procedure applied should be put to the test of international standards. The decisive consideration would seem to be whether trial of an accused by such a military commission deprived him of the protection to which he is entitled under international law, that is, whether judicial action produced either a violation of some specific prohibition in the Geneva Convention, or was in disregard of those fundamental principles of human justice recognized by civilized peoples and which are incorporated in the preamble of Hague Convention IV of 1907.

The law of nations bind states to set up a system which is so organized and operated as to conform to certain fundamental principles generally recognized as indispensable to fair and adequate judicial protection. There is a popular misconception that international law completely lacks a sanction. The fact is that, although the military commission deals with individuals rather than states, these commissions, applying international law, have constituted one of the most effective sanctions of international law up to the present time.

International law requires only that the accused receive a "fair trial" and that he not be "denied justice." With the exception of Anglo-Saxon technical rules of evidence and the requirement for presentment and trial by jury the international standard of "denial of justice" and the domestic "fundamental rights" standard of "due process" are approximately the same. Accordingly,

it is concluded that if military commissions comply with the rules and regulations set forth in the MCM, 1951, that the fundamentals of "due process" and international "justice" will be assured.

In modern total wars, involving deep-rooted ideological conflicts, prevailing international law relative to belligerent occupation is out-dated and inadequte, especially as relates to the situation after the fighting has stopped. Given the prevailing ideological fervor, it is not impossible to envisage an occupation which would not meet the minimum standards for human rights normally demanded by international justice. However, existing general and conventional international law do not provide an adequate remedy for the denial of rights. The problem is, how international law can guarantee them their rights.

In the administration of justice by military government courts there exist one very distinct problem. Problems relative to the administration of justice is not exclusively the concern of the United States. The United States is not the only nation that might insist upon the extraterritorial application of its national legal conception. The problem is in an allied context; even where administration on the ground is in American lands, it may be proceeding in accordance with Allied arrangements for co-ordinated action. It will not promote co-ordinated Allied efforts, on which the safety of all depend, to foster the idea that American authorities, even when exercising an Allied trust, works under some vague supervision by the United States Supreme

Court. To insure that justice is administered in accord with our political traditions involves what the Court has described as "the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of foreign relations."[212]

In the field of constitutional law, some members of the Supreme Court of the United States have developed restlessness over the question now over fifty years old, Does the Constitution follow the flag? As a result of recent Supreme Court decisions, the notion that the Constitution is not operative outside the United States, has evaporated. The Supreme Court has held that governmental action abroad is performed under both the authority and the restrictions of the Constitution.[213] The Supreme Court has indicated also that court-martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant "fundamental rights."[214] Notwithstanding, it is quite clear that the Supreme Court has not changed - nor is there any indication that it is going to change - its rulings in regard to the doctrine that the Constitution places no substantive and procedural limitations on military government or war crimes courts created under the Constitutional power of the President as commander-in-chief. Cases such as those of

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212. United States v. Curtiss-Wright Corp., 299 U.S. 304, 320 (1936).

213. Burns v. Wilson, 346 U.S. 137 (1953).

214. Ibid.; Warren, "The Bill of Rights," op. cit., p. 188.

Yamashita, Madsen, and Eistentrager must be accepted as constitutional doctrine and law. The proposition is, of course, not that the Constitution is not operative everywhere as the basis for all official acts of the government of the United States, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every place over every person for every offense.

In the past, in analyzing the concept of military government and the nonstatutory judicial institution there has been a tendency to build up stereotypes of "the civil power" and "the military." This tends to confuse analysis, just as "bureaucracy," "administrative despotism," and the like promote conceptualism in the consideration of other mixed problems of government. It should be kept constantly in mind in analyzing the role of the military in our constitutional scheme of "due process" that the original intention of maintaining civil supremacy is still recognized as a basic tenent of American political philosophy. In the final analysis, it is, as it should be, that the military forcesof the United States are always subordinate to the civil authority. The other side of the coin, on the other hand, reveals another proposition to be kept in mind, that is, that the regular civil judiciary of the country cannot rightfully interfere with the military in the performance of their high, arduous, and perilous, but lawful duties. The considerations mililating against such intervention remain strong.

The number of doctrinal field manuals, phamplets and study guides dealing with the subject of military government and

the establishment, jurisdiction, organization, operation, procedure, and administration of nonstatutory military courts are excessive, overlaping, and unnecessarily duplicative. The texts do not contain a coherent and harmonious doctrine concerning the concept of military government and the juridicial character of military courts in international law.

A military government - civil affairs - situation gives rise to a host of problems concerning the civil and criminal liability of its members, the extraterritorial administration of justice, claims arising from the forces and of the individuals who compose it, and so forth. Questions of jurisdiction arise to which it is difficult to find sound and practical solutions. As one of the incidents of our present international position, whether we find ourselves acting on our own or on behalf of the United Nations, we may expect to have difficult problems of foreign jurisdiction for years to come. Consequently, there is need to explore and study the substantive and procedural law of foreign jurisdictions together with its interrelationship to domestic and international legal norms.

Many of the problems connected with belligerent occupation operations may be foreseen, and for this reason it is necessary to conduct operational planning for the occupation of prospective enemy territories. Many of the more important proclamations could be prepared during the planning stage. The medium of legislation should be the Proclamation, and the machinery of enforcement the Military Tribunal. These planned proclamations should

include a summary criminal code, setting forth the jurisdiction procedure and a list of prohibited acts and the penalties attached to them. This proclamation should provide that any offense under the Penal Code or communal ordinances of the occupied country might be tried by a military court, if the military authorities so directed. This provision would in effect incorporate the whole criminal law of the occupied country into the law of military government, but this should be a reserve power, and should not envision that military courts should normally try offenses under the foreign criminal law. In general, the general structure of the procedure of the courts should be Anglo-Saxon rather than civil or continental. The procedure of the courts should be regulated by the Theater Commander. The rules of evidence and procedure should follow those set forth in the MCM, 1951. Under certain circumstances - depending on the area occupied and the nature of the command - a concession to civil or continental practice should be made in dispensing with the technical Anglo-Saxon rules of evidence. The courts should then be given a wide discretion to hear whatever evidence they may consider relevant and to attach to all evidence such weight as they may think fit. The Nuremberg Charter and the Rules of Procedure adopted for the Nuremberg trials are international precedent and should be utilized.

Recommendations

It is recommended that a rational and wholly coherent doctrine relative to military government and an appropriate system of courts to support the military government be evolved. (There

is no need to evolve new doctrine, for nothing that the Supreme Court of the United States has decided is inconsistent with what has always been sound in principle.) This doctrine should then be set forth in one authoritative field manual and should be adhered to in other official pamphlets and guides. This doctrine should be taught by qualified instructors in the higher service schools of the Army, in order that the commanding generals and senior staff officers of the future may have an accurate conception of the law and policy of military control as it impinges upon the civil affairs of a country under belligerent occupation.

Because a military lawyer not only deals with his own municipal law, but also with local foreign law and international law the crying need for a more vital training program is being recognized by some military and government agencies as well as by an increasing number of colleges and universities. It is recommended that the Army's present "foreign area specialists program" to explore how foreign people actually live and think, work and act, as conditioned by their geographic, political, economic, and environmental and cultural inheritance be expanded and intensified. It is recommended that The Judge Advocate General continue, expand and increase the opportunity for individual study by Judge Advocates in specialized and technical subjects such as international law, comparative law, national and local governmental administration, transportation, labor, and international trade.

It is recommended that The Judge Advocate General explore the possibility of recommending the appointment of a special com-

mittee composed of jurists and military leaders of considerable eminence calling for a study designed to develop a body of law and a coherent system of justice for occupied peoples in foreign areas based upon universally recognized legal principles. The committee should give specific consideration to the organization, jurisdiction and procedure of courts administering justice in foreign areas and to the crystallization of a consistent body of legal principles readily applicable to specific cases. The system should insure the proper administration of justice, operating under substantive and procedural provisions which are consistent with international law. International law lays down certain general principles ordinarily deemed indispensable for a proper administration of justice. The minimum of protection thereby assured may be called an "international standard of justice." The content of the international standard is not fixed with anything like mathematical precision. Not only is the standard not clearly stated, nor the minimum level of civilized justice reduced to precise terms, but there is, unfortunately, no existing superior authority either to determine it or to enforce respect for it. Yet one should not on this account despair. Much of the uncertainty now existing can and will be overcome. To speed this hopeful development, crystallization of an American jus gentium based upon certain ordinary standards of justice recognized by civilized nations would be persuasive. The study recommended could be set forth in a manual for United States armed forces and would represent a significant contribution to international law.

The background against which the Hague Regulations of 1907 - supplemented by the Geneva Conventions of 1949 - are projected is that of warfare in the middle of the nineteenth century, if not earlier. Nowhere is this more evident than in the texts which purport to lay down rules for the exercise of belligerent occupation. The present rules have little to do with the real problems which now face an occupying power. New weapons, techniques and procedures have developed which are not covered by international convention. It is recommended that consideration be given to initiating a study at the highest governmental level designed to develop a code of principles for the use and development of armed forces and for the use of modern weapons and techniques. In approaching the problem it is most important that the rules pertaining to international commands be determined and defined. A code comparable to Lieber's Code but controlling twentieth century techniques and weapons should be formulated for the guidance of United States armed forces engaged in hostilities to support the rule of law in international affairs. This new code should take into account the many aspects and problems of collective enforcement action. Upon completion of the study as to what rules ought to be applied to modern warfare,a revised code of the laws of war should be formulated and printed for distribution to the armed forces of governments desiring copies. Such a code must take into consideration military necessity and changed conditions, they must reaffirm the fundamental principles and rules in closer conformity with present-day facts. The principles must be clear and unambiguous and have a political chance of being

adopted and applied. It is recognized that such rules are not legally effective when applied to enemy forces. There can be no doubt that a revision of the laws of war must take the form of international treaties, signed and ratified, so as to constitute legally binding rules. Nevertheless, the strength of Lieber's Code lay in the fact that it was promulgated by the United States for the guidance of its own forces in conducting hostilities. Such a scientific restatement at least has persuasive authority and could ultimately serve as a basis for international codification.

Unfortunately, the tendency to put the laws of war into the past tense has completed a full circle. It was fasionable during and after World War II to fully treat the laws of war in legal literature. In recent years the tendency to neglect and to ignore the laws of war have reappeared. Articles on the laws of war are greatly decreasing in number. The number of important treatises on the law of war have declined. Much of the present discussion on the laws of war is dedicated to their revision. It seems to this writer that, while revision is important, equally as important, is the task of scientific investigation to determine what the laws of war actually are. The laws of war have not yet been fully studied in their operation. The question is to determine objectively and equally far removed from wishful thinking and from prejudiced proposals whether the fundamental principles underlying the whole law of war are still in force. Total war stands like a symbol of the total crises of our society, it is not only a matter of technical problems which are only on the surface; its real roots are philosophical, ethical and religious. It is

necessary to determine whether certain norms, even if still valid, are considered as obsolete or as inapplicable because of total war and of new weapons of mass destruction. Despite the advances provided for in the revelant Geneva Convention of 1949, as relates to the law of belligerent occupation, a rethinking is required going far beyond mere revision. Accordingly, it is recommended that The Judge Advocate General, through the American Bar Association, explore the possibility of interesting some foundation or other source in financing projects which would study the enormous body of material, hardly touched and certainly not yet scientifically scrutinized relating to the law of war. Materials such as the practice of states during and after World War II, the instructions of various national high commands, records of the War Crimes trial, diplomatic negotiations, proceeding of the United Nations and other international organizations, and of the Geneva Conventions of 1949 and allied documents should be critically studies and evaluated. International law experts and military leaders of eminence not only of the United States but also those of such other areas as should be qualified to make a substantial contribution to the study contemplated should be invited to participate.

The conclusions of Nuremberg were significant in establishing that international law is neither esoteric nor helpless. Certain salutory principles were set forth in the Charter, executed by four great powers, and adhered to, in accordance with Article 5 of the Agreement by nineteen other governments of the United Nations. Aggressive war is made a

crime - "planning, preparation, initiation or waging of a war of aggression." The official position of defendants in their governments is barred as a defense. And orders of the government or of a superior do not free men from responsibility, though they may be considered in mitigation. The Judgement points out that criminal acts are committed by individuals, not by those fictitious bodies known as nations, and law, to be effective, must be applies to individuals. The time is now ripe to further consider to what extent aggressive war should be defined, further methods of waging war outlawed, penalties fixed, procedure established for the punishment of offenders and so forth. It is recommended that consideration be given at the highest governmental level, to the United States again taking the initiative to revive interest in the United Nations relative to the codification of international criminal law as previously suggested by Judge Biddle (United States Member of the International Military Tribunal) with President Truman's approval. Such an enormous undertaking should be studied and weighed by the best legal minds the world over. Should the General Assembly pursuant to Article 13 of the Charter of the United Nations ("the General Assembly shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.") consent to consider and succeed in drafting such a code of international criminal law, it should be submitted for adoption, after the most careful study and consideration, by the governments of the United Nations.

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