# MUST THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, BE APPLIED IN WAR CRIMES TRIALS?

Noel J. Cipriano
Major JAGC
1 May 1954

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## CHAPTER I

## DEVELOPMENT OF PROCEDURE IN WAR CRIMES TRIALS DURING THE TWO WORLD WARS

### A. Introduction

While the scope of this paper includes a treatment of trials of prisoners of war for pre-capture and post-capture offenses, the history to be set forth shall be limited to such developments in the trials of prisoners of war for pre-capture offenses, or war crimes, as shall be relevant to what is deemed to be the purpose of this study; namely, an indication of the present status of the law in this field and a future course to be taken under such law. A further limitation of coverage has been adopted in that the lessons to be gained from past experiences in this field are adequately covered by reference to developments during and after World War I and World War II, without adding another repetition of the earlier developments to the many reports, texts and journals devoted to the subject.

For an authoritative history of American jurisprudence in this field, the reader is referred to the opinion of the Supreme Court of the United States, in its first treatment of the subject arising out of either World Wars.[1]

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[1] U. S. ex rel. Quirin v. Cox, (1942) 317 U.S. in footnotes 9 and 10 at pp. 31-33.

It can be anticipated that world public opinion will be aroused in future wars, just as it was in the two World Wars and the recent Korean incident, so that early official declarations and actions will be taken to satisfy its demands of retribution against violators of civilized standards set by world society.[2] A brief reference to the developments aimed toward achieving the means with which to administer this retribution can serve as a precedent when a similar need is felt in the future.

## B. World War I

Early in World War I, both sides to the conflict established commissions to investigate and report upon the many allegations of brutalities and violations of the laws and customs of war, however, it was not until November 6, 1918, that one of the Allied powers, Great Britain, appointed a commission not only to inquire into breaches of the laws of war but to propose appropriate machinery to accomplish retribution therefor. As will be seen, this "eleventh hour" effort is characteristic. The imminence of the armistice

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[2] For an illustration of official assurances of such retribution, see the following: (a) During World War I, the statement of Mr. Lloyd George, prime-minister of Great Britain (Bulletin of International News, vol. 22, p. 96); (b) During World War II, see the collection contained in War and Peace Aims of the United Nations, vols. 1 and 2; and (c) During the Korean conflict, see United Nations Security Council, Document S/1860.

resulted in hasty and indecisive action so that the terms of the Armistice itself made no suitable provisions for punishment of war criminals.

At the Preliminary Peace Conference on January 25, 1919, the next notable development occurred in the establishment of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, known as the "Commission of Fifteen."[3] On March 29, 1919, this Commission reported that it had considered abundant evidence of outrages of every description "against the laws and customs of war and of the laws of humanity, and that in spite of explicit regulations, established customs, and the clear dictates of humanity, Germany and her Allies have piled outrage upon outrage."[4] The Commission then classified these breaches of the laws and customs of war into a formal list of crimes or groups of crimes represented by thirty-two classifications.[5]

In its report the Commission recommended that those accused of such violations as were listed should be tried by each belligerent in its own existing courts, military or

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[3] Bulletin of International News, vol. 22, p. 97.

[4] History of the United Nations War Crimes Commission and the Development of the Laws of War, 1948, p. 33.

[5] Ibid., pp. 34-35.

civil, rather than by a single ad hoc tribunal, to permit the application of each nation's own procedures by its own courts so that the complications and delays that would result from any single tribunal's attempt to dispose of them could be avoided. The Commission did recommend, however, that it was essential to constitute one high tribunal with judges representing all the Allied powers and with a small representative prosecution staff, to try those accused of outrages against several Allied Nations, to try heads of States, and to try certain few others. The law to be applied by this high tribunal was to be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."[6]

It is believed noteworthy to point out that the two American representatives objected to the provisions providing for trials of heads of States and providing for application of the laws of humanity. The first was considered contrary to the concept of sovereign immunity and the second was considered too vague. To avoid the issues raised by these objections, the German government was invited to prosecute and punish its nationals accused of war crimes, through the medium of its own courts. The invitation was flatly

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[6] Ibid., note 3, supra, p. 98.

refused.

Shortly thereafter, on June 28, 1919, the Versailles Treaty was executed and the principles recommended by the "Committee of Fifteen" were embodied therein, in the main, in Articles 228 to 230 which provided for trial and punishment of accused violators of the laws of war through the military courts of the adversaries.

The Germans, recognizing the confusion and difficulties resulting from a lack of preparation on the part of the Allies to implement these Articles of the Treaty, and further realizing the need of satisfying public opinion in Allied countries, passed a law conferring jurisdiction to try offenders of the laws of war upon the Supreme Court of the Reich at Leipzig. The Allies apparently grasped this step as a solution to the problem, probably feeling that through their observers, adequate supervision could be maintained to insure a judicious administration of the punishment that appeared to be so well deserved. On February 3, 1920, the Allies forwarded a list to the German government containing the names of about 900 persons who were to be tried. The ultimate collapse of the program soon became evident. The German government succeeded in persuading the Allies that it would be politically inexpedient to try so many, especially those who were national heroes, and the list was reduced to forty-five, against whom the most

serious charges had been brought.

Other factors developed which furthered the collapse. Many of those whose names appeared on this final list of forty-five disappeared or were residing in distant parts of the world, flight being the criminal's principal means of escape from punishment. To these criminals flight was completely unnecessary for the German court was unable to obtain evidence with which to prosecute them. The witnesses were scattered all over the world and were unwilling to testify before a German court. The Allied Governments tried to furnish the evidence by undertaking to collect it for the German prosecutor but the complications proved too time consuming to permit any degree of success. Witnesses were examined in their home countries before representatives of the accused and the German Government, in an effort to overcome this obstacle, but that failed as well as many other efforts.

Eventually, however, some trials were opened with the following results. Of seven persons whose prosecutions were at the request of the British, three had fled and escaped trial, one officer was completely acquitted by the court, and, although the court convicted the three remaining soldiers, they received sentences of ten months, six months and six months, respectively. One early case resulted in a conviction, probably because there was direct

testimony from German medical officers that they had seen this accused shoot wounded French prisoners in cold blood. The sentence following this conviction was one of two years imprisonment. The remainder of the early trials resulted in acquittals. Allied indignation developed from these unsatisfactory results and the various Allied observers were withdrawn from the remainder of the trials. This did not, however, put a stop to the trials which were continued with more acquittals. The German government itself was impressed with the inadequacy of these prosecutions, and it, independently, prosecuted two officers whose names had not even been included on the list of those whose prosecutions were required by the Allies. They were convicted, sentenced to four years in prison, and then were allowed to escape from their confinement. Official indignation was so great that the Allies threatened to apply sanctions against Germany to prevent its court from continuing its program of "whitewashing" war criminals. The German government and press replied with counter threats of action from its resurging army and policeforce. Thereafter, the Allied governments that had maintained an official interest in punishing war criminals abandoned it.

In June 1922, the Leipzig Court proceeded with additional trials, without Allied observers. The results did not change and acquittals continued. In December 1922,

ninety-three accused were brought to trial although there were no public hearings and the accused were not even asked to attend their own trials. Charges against 692 accused were summarily dismissed. It is statistically reported that the Leipzig Court had 901 cases referred to it of the most revolting violations of the laws and customs of war out of which 888 accused were acquitted or the charges against them were summarily dismissed. Only thirteen cases ended in convictions! However, these statistics do not completely reveal the travesty of justice, because even in the disappointingly small number of convictions, absurdly inadequate sentences were adjudged. These sentences bore very little relationship to the magnitude of the crimes for which there were convictions. Of course, these sentences proved to be token punishment, for they were not served either from official refusal to enforce them or they were avoided through means of "escapes" which were conveniently engineered by the authorities. Thereafter these escapes were publicly cheered in Germany. The World War I phase of war crimes prosecutions is probably best characterized as follows:

> The parody of justice was over. Criminals were honoured as heroes, and the German people learned that not only could crimes be committed with impunity, but that it paid to be a criminal. Future events showed the consequences of that lesson upon the

history of the world.[7]

The United Nations War Crimes Commission appointed during World War II said, of these trials, that they were begun with apparent impartiality, with the presiding judge showing a real desire to ascertain the truth and paying tribute to the objective sincerity of former victims testifying for the prosecution, however, the decisions finally showed the success of pressure of public opinion upon the Leipzig Court. Analyzing the failure further, the Commission reported the following faults prevented the successful application of Articles 228-230 of the Treaty of Versailles:

> (1) That the sanctions came too late, when public opinion no longer upheld them....The clauses concerning the punishment of war criminals should have been inserted not in the Peace Treaty but in the Armistice terms.
>
> (2) The Allies were no longer united when the war was over; it is curious to note that from the American delegation came the strongest opposition to the creation of an international court, and to the trial of Wilhelm II.
>
> (3) The world in 1919-1920 was not internationally mature to understand the consequences of a failure to ensure respect of the provisions of the Treaty. It was thought that the danger of war was averted for a long period, and the British and Americans, who had not so greatly suffered by the war, were not in favour of a severe enforcement of the clauses in question.

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[7] Ibid., note 3, supra, p. 102.

> (4) Articles 228-230 were hastily and imperfectly framed, so that it would have been impossible to carry them out. They did not mention by what law penalties should be determined, and the Allied military courts by which the accused should have been tried could not have done so, owing to lack of jurisdiction.[8]

In addition to the above-quoted reasons for the failure of the World War I program, the Commission alluded to another reason; namely, the failure to consider the circumstances under which evidence would have to be obtained and presented in order to permit a fair determination of guilt or innocence resulted in an unrealistic adherence to a set of rules of evidence clearly not designed to meet the conditions and circumstances. (Before continuing with the historical development, attention is invited to the importance of adequate rules of evidence, for reasons that will appear, hereafter.)

## C. World War II

After World War I, the nations of the world did not devote any serious effort toward development of substantive and procedural law concerned with the prosecution of offenders against the laws and customs of war, in spite of the indignation over the results of the "Leipzig Trials." This apathy has resulted in the war crimes prosecutions program

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[8] Ibid., note 4, supra, p. 52.

being likened to a leaky roof--when it is leaking it is too wet to fix it and when it is not raining it does not leak.[9] A study of the actions of the League of Nations reflects this apathy. The League's primary concern was to avoid wars however the various pacts or treaties that resulted therefrom contain no references to responsibilities of individuals thereunder for violating the peace or the laws of war.[10]

The years following World War I were not completely devoid of wars. There continued to be limited, localized conflicts,[11] but they do not appear to have presented any charges to the forum of world opinion relating to responsibilities of individuals arising out of these incidents.

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[9] Carter, The Nurnberg Trials: A Turning Point in the Enforcement of International Law, 1949, 28 Nebraska Law Review 370, at p. 373.

[10] See: The Covenant of the League of Nations; Protocol for the Pacific Settlement of International Disputes (1924); the Locarno Treaties (1925); the International Treaty for the Renunciation of War as an Instrument of National Policy (Pact of Paris of 1928); and others.

[11] The more important of these were: The Albania and Serb-Croat-Slovene State dispute in 1921; the Greek-Italian incident over the island of Corfu in 1923; the Greek-Bulgarian incident of 1925; the Chaco War between Bolivia and Paraguay in 1928; the Leticia incident between Columbia and Peru in 1932; and the Sino-Japanese war of 1931 which occupied the attention of the League of Nations until its collapse in 1939.

The charges and counter-charges arising therefrom related solely to State responsibility for acts of aggression or violations of the laws of war.

Following the Franco-Prussian war of 1870-1871, an authority[12] in the field of international law wrote the following prophetic observation:

> Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that <u>if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law.</u> In a community, as in an individual, passionate excess is followed by a reaction of lassitude and to some extent of conscious. On the whole the collective seems to exert itself in this way more surely than the individual conscience; and in things within the scope of International Law, conscience, if it works less impulsively, can at least work more freely than in home affairs. Continuing temptation ceases with the war. At any rate it is a matter of experience that times, in which International Law has been seriously disregarded, have been followed by periods in which the European conscience has done penance by putting itself under straiter obligations than those which it before acknowledged. There is no reason to suppose that things will be otherwise in the future. I therefore look forward with much misgiving to the manner in which the next great war will be waged, but <u>with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination</u>, by comparison with the rules now considered to exist.[13]

The Leipzig mockery belied the accuracy of the above-

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[12] W. E. Hall, author of <u>A Treatise on International Law</u>, the 8th edition of which was published in 1924.

[13] <u>Ibid</u>., at p. xxvi. The quotation was dated 1 August 1889.

prediction of a reaction towards increased stringency of law and improvement in the character of the rules that would develop following a period of serious disregard of international law. It required another great war before this predicted movement began, however, it did relatively early during this war. As early as October 25, 1941, even before entry of the United States in the war, President Roosevelt publicly denounced German atrocities to the world and alluded to a day of "fearful retribution."[14] Prime Minister Churchill of Great Britain, on the same day, expressed his government's accord with President Roosevelt's statement and added, "Retribution for these crimes must henceforward take its place among the major purposes of the war."[15] Other such statements followed from authorities of various countries and from many inter-governmental conferences.[16] Authoritative steps followed to transform these statements into the necessary machinery to carry out the promises contained therein. The three most notable of such steps were: The Declaration of St. James' of 13 January 1942, the Moscow Declaration of 1 November 1943, and the London Agreement of

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[14] Department of State Bulletins, V, p. 317.

[15] Bulletin of International News, vol. 18, p. 1840.

[16] Collected in Holborn's, War and Peace Aims of the United Nations, vols. 1 and 2.

8 August 1945.

The Declaration of St. James' established the Inter-Allied Commission on the Punishment of War Crimes (predecessor to the United Nations War Crimes Commissions).[17] The Moscow Declaration was that of the three major Allied Powers, purporting to speak for thirty-two United Nations, which formulated so much of the machinery as provided for return of the Germans responsible for commission of offenses in occupied territory to the scene of their crime to be judged according to the law of the country in which the crime had been committed, while reserving to the Allies the right to deal with the major criminals whose offenses had no specific location. The London Agreement incorporated separate rights the four major Allies had under international law to exercise jurisdiction over violators of the laws and customs of war. Due to the unanimity of aims and purposes, and due to the overlapping rights to act, the International Military Tribunal was created. Annexed to the Agreement was a Charter regulating the Tribunal's constitution, jurisdiction and functions. In this manner an ad hoc Tribunal was born with the punishment of war criminals as its purpose, emanating from a joint exercise of concurrent rights by several States. After the birth of the Tribunal, nineteen

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[17] Ibid., note 4, supra, pp. 89-92.

other States shared in its parentage by becoming adherents to the London Agreement.

The other ad hoc International Military Tribunal of World War II, that which tried the Japanese major war criminals had a different origin. It was created by proclamation, dated 19 January 1946, by the Supreme Commander for the Allied Powers in the Pacific as an exercise of the command entrusted to him. His specific authority for the issuance of this proclamation stemmed from the Potsdam Declaration of 26 July 1945 in which a joint declaration of the major Allies promised retribution to the Japanese war criminals. The terms of this Declaration were specifically incorporated in the surrender agreement accepted and executed by the official representatives of the defeated Japanese nation on 2 September 1945. The Charter of the Tokyo Tribunal, which was substantially similar to that of the Nuremburg Tribunal, was attached to the Supreme Commander's proclamation.

A prominent authority in the field of international law had these comments concerning the legal efficacy of the Charter of the Nuremburg Tribunal:

> It may not be easy to define the exact nature of the binding force in the sphere of conventional International Law of the Charter of the International Military Tribunal upon the States which signed it without formally accepting any obligations inter se, which adhered to it, or which participated in its affirmation by the General Assembly. However,

> International Law is not created by treaty alone. In so far as the instruments referred to above give expression to the views of the States concerned as to the applicable principles of International Law--applicable generally and not only as against the defeated enemies--they may be fairly treated as evidence of International Law and as binding upon them.[18]

Twenty-four accused were indicted to be tried by the International Military Tribunal at Nuremberg under this Charter. Twenty-two of these were actually tried, one of those indicted committed suicide and the trial of another was severed. Three of the twenty-two were acquitted of the offenses charged against them. Twelve, including Martin Bormann who was tried in absentia, were sentenced to death; three received life sentences and the four remaining received substantial prison sentences.[19] This trial lasted from 20 November 1945 to 1 October 1946. The sentences were confirmed by the Allied Control Council on 11 October 1946, and the death sentences were executed five days later, 16 October 1946.

To understand the reasons for which the United

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[18] Lauterpacht's Openheim, International Law, (1952) 7th ed., vol. II, p. 582. (Reference to affirmation by the General Assembly of the United Nations will be made elsewhere, herein.)

[19] Statistical Tables of the Nuremberg Trials, contain in Final Report to The Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10, by Telford Taylor, Brigadier General, U.S.A., Chief of Counsel for War Crimes, dated 15 August 1949, at p. 241.

States war crimes program, after the trial of the major criminals, proceeded through two different agencies, it is necessary to note the jurisdictional provisions of the Charter of the International Military Tribunal which replaced all previously existing directives as the basis of such trials. Article 6 of the Charter extended the jurisdiction to: (1) crimes against peace, (2) war crimes (stricto sensu), and (3) crimes against humanity. The first and third categories significantly exceeded the traditional concepts of war crimes. This precedent has resulted in some criticism of its principal public sponsor, Mr. Justice Jackson, who denied the ex post facto objection thereto by overly-enthusiastically stating,

> We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.[20]

The controversy over the legal validity of extending war crimes to prosecutions of these two categories of offenses has produced considerable literature, pro and con.[21]

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[20] Justice Jackson's Report to President Truman on the Legal Basis For Trial of War Criminals (1945), 19 Temple Law Quarterly 144 at p. 151; quoted also in Fratcher's American Organization for Prosecution of German War Criminals (1948), 13 Missouri Law Review 45, at p. 62.

[21] See: Fratcher, supra, note 20, at p. 62, fn 33; Koessler's American War Crimes Trials in Europe (1950) 39 Georgetown Law Journal 18-19 and Belgion, Victors' Justice (1949) at p. 150.

In July 1945, the American Joint Chiefs of Staff issued a directive requiring the United States authorities in Eurpoe to proceed with the war crimes programs.[22] This directive described the offenses to be prosecuted similar to the three categories set forth in the Charter, supra. The Charter had limited the concept of crimes against humanity to those incident to crimes against the peace or war crimes, but the directive had extended this concept to include crimes against humanity which were merely local in character. Thereafter, in December of 1945, the Control Council enacted, as law applicable in Germany, its Law No. 10[23] which incorporated the terms of the London Agreement of 8 August 1945, the Charter of the International Military Tribunal and the directive of the Joint Chiefs of Staff, supra. A plan was devised by the Theater Judge Advocate to use the Nuremberg organization for the prosecution of important crimes against peace and against humanity which was accepted and given Presidential approval.[24] When steps to hold additional

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[22] JCS 1023/10, 8 July 1945.

[23] 15 Department of State Bulletins 862 (1946).

[24] Ex. Order No. 9679, January 16, 1946; 11 Fed. Reg. 703, wherein the Nuremberg organization was authorized to proceed before U.S. military or occupational tribunals. Previously, on May 2, 1945, the Nuremberg organization had been created to proceed before an international military tribunal, in Ex. Order No. 9547, 10 Fed. Reg. 4961.

trials before the International Military Tribunals failed, United States military tribunals were established to try the remaining cases involving crimes against the peace and against humanity, through the organization at Nuremberg. An ordinance of the occupation government in the United States zone established, organized and defined the powers of these tribunals.[25] This was the machinery through which the United States discharged its responsibility under Control Council Law No. 10 to prosecute offenders against the peace and against humanity. Particular attention is invited to this distinction in the nature of the offenses tried by the military tribunal and the traditional military commission. A detailed discussion of the commission trials of violations of the laws and customs of war will follow, however, one writer, commenting on this distinction, emphasized the following:

> Thus the Army proper, as represented by the Judge Advocate General's Department, retained its traditional responsibility for enforcement of the laws and customs of war but did not assume any responsibility for prosecuting crimes against the peace, crimes against humanity or membership in criminal organizations.[26]

The United States trials at Nuremberg became known

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[25] Military Government, Germany, United States Zone, Ordinance No. 7, effective 18 October 1946.

[26] See Fratcher, supra, note 20, at p. 66.

as the "Subsequent Trials." Twenty-five experienced judges, fourteen of whom had served on the highest court of a State, plus one law school dean and four prominent practicing attorneys sat as judges on these military tribunals, as civilian justices. There were 185 individuals indicted for trial before them, but only 177 actually stood trial in the twelve cases because eight escaped through suicide. Of the 177, thirty-five were acquitted and 142 were convicted. Twenty-six were originally sentenced to death but two of these were subsequently reduced to life imprisonment. Of the 118 not condemned to death, twenty were sentenced to imprisonment for life, three to 25 years, fourteen to 20 years, twelve to 15 years, four to 12 years, nineteen to 10 years, two to 9 years, three to 8 years, twelve to 7 years, five to 6 years, six to 5 years, two to 4 years, eleven to sentences equal to or less than the time they had already spent in pre-trial confinement so that they were immediately released and five were sentenced to two and a half years or less which necessitated short terms of post-trial confinement.[27]

It is believed that the following review sufficiently presents the remainder of the picture of the United States war crimes program to meet the needs herein, because

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[27] Ibid., note 19, supra, at pp. 90-92, 241.

it also represents the machinery that was employed in the Far East trials:

> Apart from the twelve Nuremberg trials the character of which has been judicially recognized as international rather than purely American, (citing Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949): cert. denied, 338 U.S. 879 (1949), World War II war crimes trials in the American occupation zone of Germany were conducted either before military commissions or before specially appointed military government courts. Most, though not all, of these non-Nuremberg trials took place in Dachau, (Bavaria) ....Therefore, the whole group is conveniently referred to as the 'Dachau Trials.' Their great importance, overshadowed by the publicity of the spectacular Nuremberg proceedings, appears from the following statistical data of the Army:
>
> "The United States sponsored a total of approximately nine hundred war crimes trials involving over three thousand defendants. About half of these cases were tried in Germany. The second largest group is represented by the trials in Japan. There were relatively few American war crimes trials in Austria, Italy, the Philippines, China, and the Pacific Islands, respectively, with the trials in the Philippines ranging highest in number among these minor groups. From the above mentioned German defendants, 1,380 were convicted and 241 acquitted by the respective trial courts. The sentences adjudged in the same group of cases included 421 death sentences, not all of which were approved on review, and of which 255" had been executed as of 21 February 1950. "There were 194 sentences of imprisonment for life adjudged by the trial courts of which about 136 were approved."[28]

It is realized that many principles of substantive and adjective law were developed in the war crimes trials of World War II that are not mentioned herein because it is

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[28] See Koessler, note 21, <u>supra</u>, at pp. 25-26.

believed that it would be presumptious for this writer to attempt to collect and discuss them. It can only be reported that a commendable accomplishment was achieved in official compilations and by interested independent writers so that thorough reports and discussions of the law and principles to be gathered from the almost unbelievable mass of documents and reports of trials are available to the researcher.[29] One deficiency has been noted, however; namely, that the material available treats, principally and almost wholly, with the European program. It is hoped that, in time, one comprehensive treatment of the Far East program will be made available.

In view of the ominous threat of war that exists at this writing, the most significant observation to report from a study of World War II war crimes prosecutions is

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[29] Among some of which are: Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission in fifteen volumes, published for the Commission by His Majesty's Stationery Office in 1949; History of the United Nations War Crimes Commission and the Development of the Laws of War, compiled by the United Nations War Crimes Commission and also published by His Majesty's Stationery Office in 1948; International Military Tribunal Judgment in vol. XXII of the official publication of the proceedings, published at Nuremberg, Germany, concurrently with the proceedings and also published as 6 Federal Rules Decisions, p. 69 et seq.; International Military Tribunal for the Far East Judgment; Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, 15 vols. published by Supt. of Documents, Washington, D. C.

negative in nature. This is best reflected by the following report of records of trials of war criminals received by the United Nations War Crimes Commission in the four years following the end of hostilities:

| Number of Trial Records Received: | From: |
|---|---|
| 809 | United States |
| 524 | British |
| 256 | Australian |
| 254 | French |
| 30 | Netherlands |
| 24 | Polish |
| 9 | Norwegian |
| 4 | Canadian |
| 1 | Chinese [30] |

The absence of any reports of Soviet judicial prosecutions of war criminals after World War II can result in unpleasant conclusions. That there were convictions during hostilities has been published.[31] Also, their participation in the International Military Tribunals is known, but apparently their participation ceased with those two trials. They did not respond to invitations to join the United Nations War Crimes Commission nor to reciprocate when the

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[30] Law Reports of Trials of War Criminals, supra, Foreword, p. xvi.

[31] "The Krasnodar Trials" held from July 14 to July 17, 1943, in the city of Krasnodar, in the North Gaucasus, and "The Kharkov Trials" held from December 15 to December 18, 1943 in Kharkov, Ukraine, as contained in The People's Verdict, A full Report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials, published by Hutchinson & Co., Ltd.

Commission "did everything in its power to promote an interchange" of information with them.[32]

Although that portion of humanity located within the limits of the Soviet sphere of influence did not participate in the program as a whole, with no legal explanation therefor, it is deemed appropriate to consider the entire program as the most unified effort humanity has ever extended in the interests of the bar of justice. The former chief of counsels for the prosecution of the major Japanese war criminals before the International Military Tribunal in Tokyo made the following pertinent observations:

> Suffice it to say that while I was for many years in charge of all federal criminal trials in this country and later in another post had much to do with the selection of our federal judiciary, that during that time I adopted a roving role and spent much time observing and participating in federal criminal trials, and I have never observed a proceeding in our own country where the rights of the accused were more scrupulously protected by any court....(R)epresented on the bench (were) judges from the United States, United Kingdom, Russia, China, France, the Netherlands, Canada, Australia, New Zealand, India and the (then) new Philippine Republic...All of these nations sent individuals to represent them as associate prosecutors. ...So too the judgment of the court was a judgment of all these nations. I had always felt it to be abundantly clear that under such circumstances the nations participating in the prosecution, especially through their judicial representatives, were

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[32] For a discussion of the frustration of the Commission's efforts to establish relations with the Soviets, see History of the United Nations War Crimes Commission, supra, at pp. 158-159.

establishing by strong implication at least what they considered to be sound and fundamental international law.

Moreover the method of trial, the fairness to the accused, gave a new concept to the Japanese people of criminal trials as such. They had never experienced the same in their own land under their own militaristic government.[33]

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33 Joseph B. Kennan, Observations and Lessons from International Criminal Trials (1950) 17 University of Kansas City Law Review 117, at pp. 123-125.

## CHAPTER II

## RULES OF EVIDENCE APPLIED IN WORLD WAR II WAR CRIMES TRIALS

### A. Nature of Rules of Evidence Before International Courts

The legal basis for trials of war criminals and the principles of law involved in such trials have been the subject of considerable comment and discussion,[34] however, there is one aspect of the trials outlined in the preceding chapter that is deemed of such importance and future guidance that this separate chapter devoted thereto is deemed essential. Effort will now be made to emphasize the importance of a realistic and feasible set of rules of evidence for use in war crimes trials. The defeat of justice in the Leipzig trials demonstrated conclusively how impossible it is to devise an adequate program to punish war criminals applying the strict rules of evidence, especially those of Anglo-American law, which shall hereafter be referred to as "the exclusionary rules."

On January 25, 1944, Mr. Terje Wold, Minister of Justice of Norway, said,

> The form which justice must take in the prosecution of war crimes is of international concern

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[34] See references in notes 21 and 29, supra.

and the procedure to be followed must incorporate common principles whereby justice will be meted out to criminals by all the United Nations.[35]

With the exception of the major war criminals who were tried by the ad hoc International Military Tribunals, most of the war criminals were tried by various national courts who were all applying international law, either as such or as it was made to fit within municipal law. These national courts dispensing international justice assumed the role of international criminal courts. A study of the rules of evidence applicable before international tribunals will disclose considerable liberality in the admission of evidence. The rulings of such tribunals frequently reflect that they evaluate evidence without subjection to special rules of procedure, employing two freedoms, one in admitting evidence and the other in appreciating the evidence. The freedom taken in the admission of evidence, in practice, means that they will admit any evidence at all, i.e., it will go into the record and be considered by the tribunal. In practice, by freely evaluating evidence, these tribunals give the evidence admitted such weight as it deserves.[36] The national courts, having assumed the role of international

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[35] War and Peace Aims of the United Nations, vol. 2, p. 915. (Underscoring added.)

[36] Aufricht, Extrinsic Evidence in International Law, 35 Cornell Law Quarterly 327-348.

tribunals, thereafter indulged in these two freedoms. It is deemed important to describe how this was accomplished by the national courts ordinarily bound by the Anglo-American rules of evidence.

B. Rules of Evidence Before British War Crimes Courts

British Military Courts (as they were called) which tried war criminals drew their jurisdiction from municipal law through the medium of a Royal Warrant, dated 14 June 1945, Army Order 81/1945, as amended, which adopted, with some changes, the general rules of procedure applicable to trials by Field General Courts Martial. Regulation 3 of the Warrant provided that the rules of procedure applying to Field General Courts Martial, as found in the British Army Act and the Rules of Procedure, should be applied "so far as applicable" to the Military Courts trying war criminals.

According to Section 128 of the Army Act, the rules of evidence applicable to a British Court Martial were those applicable in courts of ordinary criminal jurisdiction in England, therefore the Royal Warrant should have made the technical rules of evidence applicable to Military Courts. These rules included the maxims that accused was innocent until he was proved guilty beyond a reasonable doubt, that the accused, unlike before the courts of many Continental

countries, was allowed to choose whether or not to testify under oath, just like any other witness, in which case he was subject to cross-examination, that accused could elect to make an unsworn statement, not subject to cross-examination, that examination of witnesses was primarily by counsel and not, as in Continental practice, by the President of the Court, and that certain classes of evidence were inadmissible, such as written statements when the witness could appear to testify orally. In view of the nature of war crimes trials, the practical and technical difficulties involved in producing evidence satisfying the stricter rules, and the international character of the trials, the Royal Warrant introduced certain practical relaxations of these rules. Regulation 8(i), for instance, permitted any statement or any document appearing on its face to be authentic to be considered, provided the statement or document appeared to the court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible in evidence in proceedings before a Field General Court Martial. Regulation 8 relaxed the rules to permit receipt of other specifically enumerated types of documentary evidence.

The Peleus Trial[37] can be cited as one example of

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[37] The first case tried before a British Military Court under the Royal Warrant was tried at Hamburg, Germany,

of the application of the above-mentioned Regulation 8. Inter alia, evidence consisting of affidavits made by survivors of the crew of the ship sunk by accused was admitted by the court. One such affidavit contained the deponent's account of what he had been told by one of the deceased victims prior to his death. The defense objected to the admission thereof, not to the affidavit as an ex parte statement, but to its hearsay contents. The summation of the judge advocate's discussion of this point stated that it was quite clear that such evidence was not admissible under the ordinary English rules of evidence, "but for convenience, and in view of the practical difficulties of obtaining evidence in cases such as this, the Court was granted a discretion to accept statements of this kind if it was so disposed. The only question was whether in the exercise of its discretion the Court thought it right to receive this statement." The statement was admitted by the Court, applying Regulation 8 of the Royal Warrant.[38]

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between 17 and 20 October 1945 involved Kapitanleutenant Heinz Eck and four others who were charged with having killed some members of the crew of the Greek steamship Peleus, which they had sunk on the high seas. Reported in Law Reports of Trials of War Criminals, vol. 1, p. 1.

[38] Ibid., p. 14.

C. Rules of Evidence Before United States War Crimes Courts

The rules which were applied by United States military tribunals and commissions which tried war criminals emanated from a relaxation of the strict rules of evidence that was prescribed early during World War II. This precedent was not, however, established for a trial involving a war crime, stricto sensu. It was born on 2 July 1942, in the order of the President of the United States, acting in his capacity of Commander-in-Chief of the Army and Navy, in which he appointed a military commission under the provisions of Article of War 38[39] for the trial of some captured German saboteurs.[40] This order provided:

> The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man....[41]

When the United States field commanders assumed the task of trying war criminals, orders, comparable in context to the Royal Warrant of 14 June 1945, supra, were issued.

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[39] 10 U.S.C., 1946 ed., § 1509.

[40] This trial became known as Ex parte Quirin v. Cox, 1942, (317 U.S. 1).

[41] 7 Federal Register 5103.

The following are representative of such orders: General Eisenhower's directive of 25 August 1945 regarding Military Commissions; Circular No. 114, Headquarters, Mediterranean Theater of Operations, dated 23 September 1945, subject: Regulations for the Trial of War Crimes; Headquarters, United States Armed Forces, Pacific, Regulations Governing the Trial of War Criminals, dated 24 September 1945; Headquarters, United States Armed Forces, China Theater, Regulations for the Trial of War Criminals, dated 21 January 1946; and the following additional orders or directives that were controlling in Japan: Letter Order, AG. 000.5 (5 Dec. 45) LS, General Geadquarters, Supreme Commander for the Allied Powers, dated 5 December 1945, subject: "Regulations Governing the Trials of Accused War Criminals," as amended on 27 December 1946 by another letter order, same subject; and Letter Order, Headquarters, United States Eighth Army, subject: "Rules of Procedure and Outline of Procedure for Trials of Accused War Criminals," dated 5 February 1946, as amended by letter order, same subject, dated 16 January 1947.

Following the precedent of President Roosevelt's order of 2 July 1942, quoted in part, <u>supra</u>, the United States overseas theater commanders provided specifically that the technical rules of evidence would not apply, but rather that any evidence would be admissible which, in the

opinion of the president of the commission, had any probative value to a reasonable man.[42]

Various elaborations of this liberal rule were prescribed. One such elaboration, which is representative of the others, is quoted, in part:

> (a) If a witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.
>
> (b) Any document purporting to have been signed or issued officially by any member of any allied, neutral or enemy government shall be admissible as evidence without proof of the issue or signature thereof.
>
> (c) Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.
>
> (d) Any deposition or record of any military tribunal may be admitted in evidence.
>
> (e) Any diary, letter or other document may be received in evidence as to the facts therein stated.
>
> (f) If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be produced without undue delay, a copy or translated copy of such document or other secondary

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[42] See paragraph 3 of General Eisenhower's directive of 25 August 1945, Regulation 10 of the Mediterranean Regulations of 23 September 1945, Regulation 16 of the Pacific Regulations of 24 September 1945, Regulation 5(d) of the Supreme Commander for the Allied Powers' Rules of 5 December 1945 and Regulation 16 of the China Theater Regulations of 21 January 1946.

evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.

(g) Photographs, printed and mimeographed matter, and true copies of papers are admissible without further proof.

(h) Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded to it, but not in respect of its admissibility.[43]

Regulation 5(d)(7) of the Supreme Commander for the Allied Powers' Rules, supra, with reference to the rule of admissibility of confessions without prior proof of their having been made voluntarily, varied slightly from that quoted above. It provided that it was for the commission to determine only the truth or falsity of any confessions or admissions. Regulation 5(d)(2) of these same Rules permitted commissions greater freedom in taking judicial notice of facts of common knowledge by providing that the commissions would judicially notice official government documents of any nation and the proceedings, records and findings of military or other agencies of any of the United Nations.[44]

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[43] Regulation 10 of Circular No. 114, Headquarters, Mediterranean Theater of Operations, dated 23 September 1945, subject, Regulations for the Trials of War Crimes.

[44] For a detailed presentation and analysis of the application of the relaxed rules of evidence as compared to the Anglo-American exclusionary rules, see: Koessler, American War Crimes Trials in Europe (1950), 39 Georgetown Law Journal 18, at pp. 54-55 and 69-77.

## CHAPTER III

## UNITED STATES SUPREME COURT REVIEW OF WORLD WAR II PROCEDURE

The United States Supreme Court has had occasions to review the validity of the laws, and the legality of the procedures under then existing laws, applied in the war crimes prosecution program after World War II. The opinions rendered by that Court on these occasions have become of great importance in Anglo-American jurisprudence in this field. Applicable portions of these opinions have become authoritative sources of the international law on the subject. An effort will be made now to refer to those opinions for appropriate lessons available from them.

President Roosevelt's order of 2 July 1942[45] initially relaxing the rules of evidence, *supra*, was soon subjected to attack before the Supreme Court for its failure to provide those guarantees contained in Section 2 of Article Three and the Fifth and Sixth Amendments to the Constitution. The Order withstood this attack when the Court, in its majority opinion, said,

> Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for

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[45] 7 *Federal Register* 5103.

> the determination of questions relating to admitted enemy invaders, and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that--even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to 'commissions'--the particular Articles in question (Articles of War 38, 43, 46, 50 1/2 and 70), rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission...[46]

Rule 5(d) of the Supreme Commander for the Allied Powers' Regulations for the Trial of War Criminals, supra, was subjected to attack before the Supreme Court early in 1946. In an opinion analyzing Article of War 2, as setting forth those persons who were subject to the Articles of War,[47] and Articles of War 12 and 15, as defining those persons who were subject to military law, the Court said,

> ...in order to preserve...traditional jurisdiction over enemy conbatants 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 id did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, the one of which the Articles do, and the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore

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[46] U.S. ex rel. Quirin v. Cox, 1942, 317 U.S. 1 at pp. 47-48.

[47] 10 U.S.C., 1946 ed., §§ 1471-1593.

not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38 (relating to rules of evidence), were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.[48]

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[48] Parenthesis and underscoring added. In re Yamashita, 1946, 327 U.S. 1, at p. 20.

## CHAPTER IV

## EFFECT OF THE UNIFORM CODE OF MILITARY JUSTICE UPON WORLD WAR II WAR CRIMES PROCEDURE

In the preceding chapters the field of law concerned with prosecution of war crimes was briefly traced through World War II. This law was based upon the Constitution, the common law of war, the Geneva Conventions of 1929, and then existing statutes. Since the completion of the war crimes program at the close of World War II, it can be stated, without elaboration, that two of the mentioned bases, namely, the Constitution and the common law of war, have not been altered. One of the other bases, namely, statutory law, has seen changes and it is this change that will now be discussed; possible changes in the Conventions will be the subject of the next chapter. More specifically, the Articles of War[49] which applied to trials of war criminals by United States military commanders (as distinguished from naval commanders) have been superceded by the Uniform Code of Military Justice.[50] Since the Code is implemented by the Manual for Courts-Martial, United States, 1951[51], this

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[49] §§ 1471-1593 of Title 10 of the United States Code, 1946 edition.

[50] 64 Stat. 107.

[51] Pursuant to Article 36, U.C.M.J. and Executive Order 10214.

discussion will relate to both the Code and the Manual.

Where the Manual provides for the exercise of military jurisdiction by war courts, it states:

> Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, these tribunals will be guided by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial.[52]

One discussion of this provision compares it with the corresponding provision of the preceding Manual wherein the procedure of war courts was described as "summary in nature" and as having been usually "guided by the applicable rules of procedure and of evidence prescribed for courts-martial."[53] It has been explained that this change was made in anticipation of the ratification of the Geneva Conventions of August 12, 1949, that Article 85 of the recent Convention Relative to the Treatment of Prisoners of War confers the same protections to war criminals as are prescribed for prisoners of war, and that one of these protections, in Article 102 of that Convention, requires trials of war criminals to be by the same courts and according to the same procedure as members of the armed forces of the detaining power. This explanation concludes therefrom

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[52] Manual for Courts-Martial, United States, 1951, p. 1, underscoring added.

[53] Manual for Courts-Martial, United States Army, 1949, p. 1.

that "unless we are willing to try our own personnel who commit war crimes by military commissions under a more summary procedure than that provided for courts-martial and under civil law rules of evidence--we will have to try enemy prisoners of war accused of war crimes under the same procedure as that prescribed for courts-martial."[54]

Similarly, a proposed draft of a new official publication,[55] as of this writing, contains the following comments relating to Article 102 of the recent Prisoner of War Convention:

> Interpretation. Prisoners of war, including those accused of war crimes, against whom judicial proceedings are taken are subject to the jurisdiction of United States courts-martial and military commissions and the procedural safe-guards of the Uniform Code of Military Justice to the same extent that military personnel of the United States are, by statute or by the military common law, so triable (see Arts. 2(9) and 18, 19, and 21, UCMJ).
> ANNOTATION: In re Yamashita, 327 U.S. 1 (1946), made a distinction, in trials by military commission, between proceedings in which persons are guaranteed the safe-guards of the Articles of War (i.e., the persons listed in the former AW2 as being subject to military law) and those not so protected (those not listed in AW2). At that time prisoners of war were not within the purview of AW2, but they were specifically made subject to the UCMJ in Art. 2(9) thereof. The distinction between the two types of procedure having vanished, it appears advisable to make specific reference to the fact that POWs are

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[54] Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 3.

[55] Proposed draft of a new Field Manual 27-10, Rules of Land Warfare.

tried in the same manner as military personnel.[56]

From the views quoted, it should be noted that no distinction is made in the application of the strict rules of evidence in trials of prisoners of war whether for pre-capture or post-capture offenses. This represents a complete departure from the opinion of the Supreme Court in the Yamashita case[57], supra. The basis for this substantial change in the law, as represented by the above-interpretations will be reiterated: Since the Yamashita decision, Article of War 2, which was interpreted by the Supreme Court as excluding enemy combatants from the benefits contained in the Articles of War, has been replaced by Article 2 of the Uniform Code of Military Justice, which has broadened the applicability of all of the provisions of the Code to include "Prisoners of war in custody of the armed forces"[58] as among the classes of persons subject thereto.

Anyone who will recall the shocking depradations of human life, the brutalities practiced on millions of victims and the utter disregard of property rights, exposed during the war crimes trials of only a few years ago, and who will

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[56] Ibid., p. 3-28.

[57] Ibid., note 48, supra.

[58] Paragraph 9, Article 2, Uniform Code of Military Justice 64 Stat. 109.

associate therewith the frustration of humanity's demand for retribution for such depravity that resulted at Leipzig, it becomes most difficult (if not impossible) to accept such an intent on the part of our learned legislators as is manifested by the conclusion that the change in the Uniform Code of Military Justice required application of the strict rules of evidence to war crimes trials. It necessarily follows that such an intent on the part of Congress would mean that the procedure for trying violators of the laws and customs of war applying rules of evidence prescribed by a Presidential Order,[59] applied unanimously by all American and British tribunals and commissions at the close of World War II and sanctioned under our and international law by the Supreme Court (see the preceding chapter), was being rejected for the future. This grave change, if it is any such change, must certainly be reflected in those normal sources to which the researcher can go for assistance in interpreting statutes. For that reason, a careful research was undertaken to find any existing evidence of discussions or inquiries by Congress relating to paragraph nine of Article 2 of the Code. Unfortunately, the semi-official publication furnished all judge advocates and legal officers of the armed services containing the history of the preparation

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[59] Ibid., note 41, supra, and discussion relating thereto.

of the Manual for Courts Martial, United States, 1951, discloses no enlightening discussion of this change from the provisions of the Articles of War.[60]

A detailed search of the Congressional Record[61] disclosed considerable debate and discussion over various provisions adopted, rejected or modified before adoption of the provisions contained in the Code; however, there was no question raised as to any change that might have been inherent in the inclusion of paragraph nine of Article 2. At the time the Act of 5 May 1950,[62] in which the Code was adopted, was before the legislators they had available two reports of committees which had conducted long and exhaustive hearings into the desirability of each provision of the Code. Apparently, the members of the legislature approved the contents of these committee reports relating to the proposed Article 2, paragraph 9, in view of the lack of discussion thereof.

It, therefore, becomes important to consider any and all references to the pertinent provision in this Article that might be contained in the committee reports. One of

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[60] See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, dated 19 April 1951.

[61] Volume 96. Debated in Senate, 1292, 1344, 1355, 1369, 1412, 1430. Amended and passed Senate 1446.

[62] 64 Stat. 107.

them reflects that Subcommittee No. 1 of the Committee on Armed Services of the House of Representatives was told by Professor Edmund M. Morgan, who was instrumental in the preparation of the Code, that:

> Part I of the code (which includes Article 2) concerns itself with general provisions which are usually found in modern penal laws. This part contains, in addition to definitions, the general jurisdictional provisions of military law. There is little in this part which is entirely new.[63]

Thereafter, Professor Morgan proceeded to explain his draft of provisions for the Code and to answer any inquiries relating thereto, but no further reference, direct or indirect, was made to Article 2(9) in the entire Report.

The Senate Committee that conducted hearings on the proposed Code heard a specific report relating to Article 2(9) from Professor Morgan in which he commented:

> Paragraph (9) is consistent with articles 45 and 64 of the Geneva Convention on Prisoners of War, 47 Stat. 2046, 2052 (July 27, 1929), in that the prisoners of war are subject to this code and thereby have the same right of appeal as members of the armed forces.[64]

For future reference, it is to be noted that the Senate Committee rendered the above-cited Report under date of June 10, 1949, and that Professor Morgan's comments

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[63] Underscoring added. House Report No. 491, 81st Congress, p. 601.

[64] Underscoring added. Senate Report No. 486, 81st Congress, 1st Session, p. 7.

set forth above were submitted to both the Congressional Committees before August 12, 1949, the date of adoption of the presently existing but unratified Geneva Convention Relative to the Treatment of Prisoners of War. Therefore, the legislative history of paragraph (9) of Article 2 indicates, from the Committee Reports and the Congressional Record, that although it was enacted after the diplomatic conference at Geneva, Switzerland, had adopted a new Convention relative to prisoners of war, the old Convention, of July 27, 1929, was the source of the international law to which Congress referred in legislating concerning what procedure was to apply to trials of prisoners of war.

In support of this conclusion, as distinguished from the earlier quoted contrary conclusions, reference will now be made the following annotation appearing in the Manual for Courts-Martial, United States, 1951, itself, following paragraph (9) of Article 2 of the Code:

> NOTE.--See Articles 45 to 67, inclusive, Geneva Convention of 27 July 1929 (Prisoners of War).[65]

In order to determine if Congress and the drafters of the Uniform Code of Military Justice undertook to tacitly reject what was a well established rule of international law, an analysis of the appropriate provisions of the 1929

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[65] Manual for Courts Martial, United States, 1951, p. 413.

Geneva Conventions is deemed necessary. Chapter 3 of that Convention, which has the above-cited Article 45 as its introductory article, is entitled, "Penalties Applicable to Prisoners of War."[66] Section 3 of that chapter, which has the above-cited Article 67 as its concluding article, is entitled, "Judicial Suits."[67] Included in this section is the following pertinent provision:

> Article 63. Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.[68]

It was strongly urged before the Supreme Court that this Article required that the rules of evidence prescribed for trials of members of our own armed forces should apply in the trials of war criminals. The Supreme Court rejected this argument, after analyzing the Convention and noting that Article 63 was located in the major section thereof relating to "Captivity" in which the conduct and control of prisoners of war while in captivity were prescribed. In doing so, the Court stated,

> But we think examination of Article 63 in its setting in the Convention plainly shows that it

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[66] War Department Technical Manual 27-251, Treaties Governing Land Warfare, 7 January 1944, as amended, p. 91.

[67] Ibid., p. 99.

[68] Ibid., p. 101.

> refers to sentence 'pronounced against a prisoner of war' for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.[69]

The legislative and judicial history of the meaning of the term "prisoner of war" at the time Article 2(9) was enacted makes a conclusion that the provisions of the Uniform Code of Military Justice do not apply to war criminals inescapable. To conclude that the rules of evidence and procedure contained therein and in the Manual for Courts-Martial, United States, 1951, must apply to trials for pre-capture offenses would be a grave error of law that could result in serious consequences. The view has been quoted, supra, that the provisions of the Manual were made in anticipation of ratification of the Geneva Conventions of 1949; however, it is submitted that this amounts to a usurpation of the power of Congress. If the Senate should ratify the 1949 Convention, then appropriate changes can be made, if deemed necessary, but until then, it would be illegal to refuse to apply the law as interpreted by the Supreme Court.

An analysis of some pertinent provisions of the Geneva Conventions of 1949 will be made, only "in anticipation" of their ratification since they are not, constitutionally, the law of the land.

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[69] In re Yamashita, 1946, 327 U.S. 1, at p. 21.

## CHAPTER V

## EFFECT OF THE GENEVA CONVENTIONS OF 1949 UPON WORLD WAR II WAR CRIMES PROCEDURE

It must be realized that the rules of interpretation applied to treaties cannot be the same as employed to interpret statutes. In the latter, legislative intent remains as a guide which is further subject to interpretation in light of known national conditions, policies, needs, etc. These are often expressly or impliedly considered by the legislature at the time it adopts the principles incorporated in statutes. On the other hand, it is much more difficult to interpret a treaty. If a treaty should be a bilateral one, the intent of its drafters is determined by considering what changes in the status quo, if any, were intended by the governments represented. Among the factors which must be considered to reach this determination are such expressed or implied national laws, policies, aims, requirements, etc., that bear a relationship to the subject matter of the treaty. These factors are cited to emphasize the difficulties encountered in attempting to discuss the application of the provisions contained in a treaty. These difficulties are further compounded when the discussion must anticipate judicial review of any application of the treaty because of the additional variants that can be anticipated in such

review. Consider the review of application of treaty provisions by a national court; it can be expected that a mutatis mutandis application which substantially preserves the recognizable intent upon which the treaty provisions are bottomed will meet with that court's judicial approval. Consider next a review by an international court; the interpretations reached are often vague and greatly influenced by the merits of the case as determined from the facts so that, again, a mutatis mutandis application of the provisions of the treaty will not otherwise be disturbed. Judicial precedent, therefore, would be extremely valuable in interpreting the treaty, but, as is expected, such precedent will not be available in advance of application of the treaty, so this guide is non-extant.

If the Geneva Conventions of 1949 should be ratified by the Senate and thereby become law, constitutionally, their multilateral character and the nature of the rules they prescribe add further difficulties. Their rules, in treating with conduct of individuals, are so affected by ethnological, national, moral and religious factors, that strict and detailed application thereof is deemed impossible, and even if possible, would be deemed most unrealistic. Furthermore, there are important provisions in these Conventions which also proscribe acts of state which are so "personal" to each nation in the administration of its internal affairs

that any interpretations and applications thereof which incorporate nationalistic restrictions would not only be unrealistic but would lead to grave doubts as to their legality before the bar of international justice. These observations have been included to raise a consideration of a fundamental principle of jurisprudence; namely, that it is unrealistic to recognize as positive law that which is not supported by de facto living law.[70] The delegates to the Geneva Converence in 1949 who adopted these Conventions were cautioned at the very first session:

> If our work is to be of value, we must always keep realities in view, and avoid laying down rules which cannot be applied.[71]

Despite this remark, it must be here noted that the delegates, during the entire conference, appeared to have lost sight of realities for they made little or no reference to many pertinent principles that had become incorporated into the law as a result of the war crimes program of World War II. Considering the fact that this Conference met during the final stages of the war crimes trials when they were given publicity throughout the civilized world, this

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[70] Northrop, Obstacles to a World Legal Order and Their Removal (1952) 19 Brooklyn Law Review 1.

[71] Quoting Mr. Max Petitpierre, Federal Councillor, Head of the Swiss Federal Political Department at the 1st Plenary Meeting on 21 April 1949, as contained in the transcript of the session of that day in Final Record of the Diplomatic Conference of Geneva of 1949, vol. I.

lack of reference thereto might be significant in determining the intent of the delegates. It is possible that this lack of reference to these principles resulted from a conclusion that the law in this field was completely formulated. The General Assembly of the United Nations had previously officially affirmed and, in effect, "promulgated" the legality of the Nuremberg principles as recognized principles of international law.[72]

Since the status quo in this field of law, as it existed when the Conference met, had developed from an application of the Hague Regulations of 1907 and the earlier Geneva Conventions which these 1949 Conventions supplement or replace,[73] an analysis will be presented of the pertinent provisions which introduce or appear to introduce substantial changes in the law.[74]

Among the "General Provisions" appearing in the "Penal

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[72] Resolution 95(I) of the General Assembly adopted 11 December 1946.

[73] See Articles 59 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 58 of the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 134 and 135 of the Convention Relative to the Treatment of Prisoners of War (hereafter referred to as the PW Convention) and 154 of the Convention Relative to the Protection of Civilian Persons, as contained in Department of the Army Pamphlet No. 20-150, dated October 1950.

[74] This analysis is limited to the PW Convention.

and Disciplinary Sanctions" chapter of the PW Convention, the introductory article[75] does not substantially change the earlier rules.[76] The next of the general provisions[77] is new, but it merely seeks to impose upon the Detaining Power a duty to see that leniency is applied in order to eliminate excessive use of judicial measures.

The next general provisions, which are also new, are deemed of sufficient importance to be set forth with some of the discussions relating thereto that appear in the record of the Conference:

Article 84

> A prisoner of war shall be tried only by a military court unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence allegedly to have been committed by the prisoner of war.
>
> In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

Article 85

> Prisoners of war prosecuted under the laws of the

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[75] Article 82.

[76] See Article 45 and the first paragraph of Article 46 of the 1929 PW Convention.

[77] Article 83.

> Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.[78]

Committee II of the Conference undertook the revision of the PW Convention of 1929, so the discussions relating to these articles are found in the record of its meetings. When the draft containing the provisions of Article 85 was submitted to the Committee, it was reminded that the 1929 Convention had no provisions concerning common law offenses or violations of the laws and customs of war committed by prisoners of war prior to capture. It was also explained that the initial proposal considered by the International Red Cross Conference[79] was to accord the benefits of the Convention to prisoners of war convicted or prosecuted for pre-capture crimes at least until such time as they had been formally convicted and sentenced by a regular trial; however, this Red Cross Conference had recommended that such prisoners of war should continue to enjoy the benefits of the Convention, even after conviction.

The Netherlands representative, whose government had recommended insertion of the words "which are not violations

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[78] Underscoring added. Quoted from DA Pamphlet No. 20-150, supra, pp. 117-118.

[79] This Conference was held at Stockholm, Sweden, in 1948 and had prepared the draft which was submitted to the Delegates at the 1949 Geneva Conference.

of the laws and usages of war" immediately after the words "for acts" in Article 85, pointed out that his government's proposal would preserve existing law as established by the United States Supreme Court, the "Cours de Cassation" of France, the Court of Cassation of his own country and other courts which interpreted the 1929 Convention as applying only to trials for crimes committed during captivity. He further drew attention to the departure in the proposed draft from the "very old rule of customary international law" that "he who violates the laws and customs of war could not rely on the selfsame law for his protection."[80]

The Union of Soviet Socialist Republic representative proposed the addition of the following paragraph to Article 85:

> Prisoners of war convicted of war crimes and crimes against humanity under the legislation of the Detaining Power, and in conformity with the principles of the Nuremberg Trials, shall be treated in the same way as persons serving a sentence for a criminal offense in the territory of the Detaining Power.[81]

He argued that war criminals had lost all human dignity and forfeited enjoyment of the advantages of the Convention by their own acts.

The representative from Denmark did not recognize a

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[80] Final Record, supra, vol. 2A, p. 319.

[81] Ibid.

variance in the proposed provision from any rule of international law nor that any general principle debarred persons who violated a code of law from themselves claiming protections under the same code.

The United States representative concurred in the Danish view while the United Kingdom representative agreed there should be no changes in the proposal for a different reason. His interpretation was that the article was designed to protect prisoners of war and not war criminals since it urged their prosecution after the close of hostilities (when they were no longer prisoners of war?) which would insure impartiality and safeguards.

The Soviet and French members did not accept this interpretation and the latter added his objections that he failed to see why war criminals should benefit by those advantages intended for prisoners of war or why they should enjoy better treatment than the nationals of the Detaining Power.

After reference of this matter of Article 85 to a Special Committee, the divergence between the different points of view was so great that no agreement could be reached and the issue was returned to Committee II. The debate continued in the thirtieth meeting when the Russian member insisted on the legality and advantages of his government's proposed addition. The United Kingdom member

pointed out that in his opinion a prisoner of war convicted of war crimes or crimes against humanity should not be entitled to all the benefits of the Convention, but only to the following:

> (a) Suspension of the execution of death sentences for a period of at least six months to allow for various notices and any representation by the condemned person's government it might desire to make in his behalf.
>
> (b) The right of appeal.
>
> (c) The guarantee of minimum standards of treatment (i.e., those adopted in Articles 88, 105 and 129) including supervision by the Protecting Power.
>
> (d) Right of repatriation after satisfaction of a sentence.[82]

Apparently, it was felt that the Russian proposal failed to provide the safeguards enumerated by the British member because, as some members argued, a Detaining Power might not grant its own criminals these protections since some standards of treatment of convicted criminals failed to meet the standards adopted as a minimum by all civilized countries.

Thereafter the proposal was adopted by Committee II, and ultimately, after further debate, by the entire conference as it is set forth above. Unfortunately, the extended debate over the Russian proposal distracted the

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[82] See Final Record, supra, 30th Meeting of Committee II.

delegates from the meritorious proposal of the Netherlands government.[83] Reference to the Reservations by the Signatories discloses that the following countries do not consider themselves bound by this Article so far as persons convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, of war crimes and crimes against humanity: Albania, Byelorussia, Bulgaria, Czechoslovakia, Hungary, Poland, Rumania, Ukraine and Russia. These Soviet-block nations have reserved the right to subject war criminals to the same treatment as other persons serving sentences for crimes in the Detaining Power, without restrictions from any provisions of the Convention.

The United States position with respect to this cleavage between the nations of the Soviet-block and the others is explained by one of the United States delegates who participated very actively in the debate, Brigadier General J. V. Dillon, formerly Provost Marshall General, European Theater.[84] It is pointed out that the United

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[83] Supra. Before making any definite interpretation as to the meaning of Article 85, the reader is invited to read the discussion and margin by which the votes favoring its final version resulted in its adoption. More specifically, the identity of the countries who voted against the final version and those who abstained could have a substantial effect upon the interpretation that might be determined appropriate in a given case.

[84] See: Dillon, The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War, 1950, appearing in 5 Miami Law Quarterly 40.

States favored a principle which most of those administering the affairs of prisoners of war during World War II believed was in the 1929 PW Convention. It is difficult to determine if General Dillon is referring to any experience in the trial of war criminals or to his experiences as provost marshal in confining war criminals. He acknowledges that the United States Supreme Court had interpreted the Convention differently,[85] wherein it held that the provisions thereof were not applicable to trials for pre-capture offenses and that the effect was deemed to suspend any rights as prisoners of war which war criminal suspects might have until they were cleared of suspicion. This, he explains, was contrary to the United States view that the essential guarantees of a fair trial should be insured to all prisoners of war and treatments prescribed as humane in the Convention should continue to be applicable even after conviction. The former delegate did not allege that the principles of a fair trial were not applied under United States laws and procedures to those war criminals tried in its tribunals and military commissions. The United States position was further described, by him, as favoring one judicial system for all prisoners of war whether on trial for offenses alleged to have been committed pre- or post-

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[85] Ibid., p. 58, citing "the Yamashita Case", 327 U.S. 1.

capture. As a delegate, he advanced the United States principle of immediate and forced repatriation which led to such disastrous results after World War II and which has since been repudiated.[86] He further points out that without this Article, nations would be left to their own discretion "as to the treatment of war crimes suspects" and the substitution of certainty for uncertainty as well as a humane standard in lieu of barbarism was considered necessary by the "entire conference," with the exception of Russia and her satellites.[87] This reference to "treatment" indicates his intent might not have been to "trial."

In view of the disagreement over this provision, it is extremely difficult to interpret a positive rule of law from Article 85. Taking into consideration the reservations seriously impairing the effectiveness of its future application, it is deemed advisable to adopt a mutatis mutandis application.

The remainder of the general provisions are substantially similar to those previously prescribed in the 1929 Convention.[88]

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[86] Ibid., p. 62. No explanation of his position on this point has been furnished in his article.

[87] Ibid., p. 20.

[88] Compare: 1949 Articles 87 and 88 to 1929 Articles 46, paragraphs 3 and 4, and 49, paragraph 1; and 46, paragraph 3 and 48, paragraph 1, respectively.

Following these general provisions, certain disciplinary sanctions appear which are substantially similar to previous provisions in the 1929 Convention.[89] One innovation adopted is that providing for notice of recapture of an escapee when notice of the escape had been previously rendered.[90]

The provisions relating to judicial proceedings appear next. The introductory article of this section incorporates previous rules[91] but contains the following addition:

> No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power <u>or by international law</u>, in force at the time said act was committed. (Underscoring added).

When the draft was originally submitted to the delegates, there was no reference to international law, however, the delegates deemed it essential.[92] The significance of this addition is deemed important since it reflects an intent to incorporate international law which could include

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[89] Compare: 1949 Articles 89 to paragraph 1 of 54 and 65; 90 to paragraph 1 of 47 and paragraphs 2 through 4 of 54; 91 to paragraph 2 of 50; 92 to paragraph 2 of 48 and paragraph 1 of 50; and 93 to paragraphs 1 and 2 of both 51 and 52.

[90] Article 94.

[91] Compare Article 99 to Article 61 of the 1929 PW Convention.

[92] For a discussion thereof, see <u>Final Record</u>, <u>supra</u>, vol. II B, p. 326.

the so-called Nuremberg principles.

Article 100 incorporated a new proviso requiring notice to the Protecting Power of the offenses for which a death sentence is authorized and prohibits subsequent increases of punishments to include death for offenses which did not previously include such punishment. Article 101 is substantially like the second paragraph of Article 66 of the 1929 PW Convention, except that a death sentence cannot be executed until six months after notice of its assessment has been furnished the Protecting Power; the previously prescribed period was three months.

Article 102 is set forth in full:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

These provisions were included in the 1929 Convention in Article 63, thusly:

> Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power.

The Supreme Court had decided that this article was not applicable to trials of war criminals since they were not entitled to the protections afforded prisoners of war.[93]

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[93] See the discussion thereof in <u>In re Yamashita</u>, <u>supra</u>.

However, as was seen in Article 85, supra, the 1949 Convention has extended its coverage to include prisoners of war prosecuted for acts committed prior to capture. Two very important questions present themselves; namely:

> What is intended in the Convention by the use of the word "procedure"?
>
> Do enemy combatants become prisoners of war if they are not apprehended until after active hostilities have ceased?

Unfortunately, the minutes of the Conference reflects an unanimous adoption of Article 102, without discussion,[94] or upon the mere comment that it was just like the 1929 Convention.[95] This complete silence as to the effect upon the Yamashita decision, which was three years old and of wide application in the war crimes program, by combining the new proviso in Article 85 with the old one in Article 102 raises further questions. The United States representatives made no mention of the Yamashita opinion at the Conference, but apparently they were aware of it as was noted, supra. Are we to assume that a system of trials approved by the Supreme Court and applied in more than 809 cases tried by United States authorities was silently rejected? Or, shall we assume that the use of the word "procedure" was not

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[94] See Final Record, supra, vol. 2, p. 312.

[95] Ibid., p. 495.

intended to encompass the broad connotation attributed to it in American law? Perhaps the use of the word elsewhere in the Convention will supply its meaning since the delegates did not elaborate on its use in this article. A detailed reading of the minutes of the Conference creates an impression that the protections guaranteed in judicial proceedings are those mentioned in Articles 85, 87, 88, 103, 105, 106, 108, 129 and 130, especially Article 105. In no place is any intention expressed to include or exclude in the term "procedure" any set of rules of evidence, those of the civil law system, the exclusionary Anglo-American rules or any others. A procedure was demanded which permitted a fair and impartial adjudication of guilt or innocence and which included those procedures mentioned in all of the above-cited articles. Certainly, no intention can be inferred that an accused would be required to meet the exclusionary Anglo-American rules of evidence in defending himself.

Attention is invited to the provision for a relaxed procedure in the British system of military law; namely, that prescribed for its Field General Courts Martial. It appears, therefore, that a possible interpretation of the word "procedure" could result in the United States standing alone in the application of the relatively strict and formal standards prescribed in its Manual for Courts-Martial. This

Manual makes no provision for deviation from its strict procedure under any circumstances, whether the case involves an offense committed under the relatively serene atmosphere of garrison life or one committed during the turmoil of battle or any of the abnormal and remote circumstances usually surrounding offenses against the laws and customs of war. In the last mentioned cases, the witnesses and documents necessary to reflect the facts, as they existed, cannot be paraded and submitted to the scrutiny of judges and our exacting appellate agencies years later.

The second important question raised, supra, is prompted by language used by the United States Supreme Court to refer to General Yamashita as an "enemy combatant". Such choice of words reflects a distinction in the legal status of an accused who escapes apprehension until cessation of hostilities from that of one who is captured during hostilities. The latter meets the definition:

> PRISONER OF WAR. One who has been captured in war while fighting in the army of the public enemy.[96]

To illustrate this distinction, apply the Supreme Court's term of enemy combatant to the accused before the International Military Tribunal at Nuremberg. It would apply to all except Rudolf Hess who had become and remained a

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[96] Black's Law Dictionary, Deluxe Third Edition, 1944, p. 1419.

prisoner of war from 12 May 1941 until his trial. It is not clear if the choice of words in the Conventions was intended to distinguish prisoners of war from enemy combatants thusly. Article 4B(1) refers to persons having belonged to the armed forces of the occupied country as prisoners of war, however the explanation which follows such reference indicates that the occupation intended is one occurring during hostilities. Furthermore, Article 118 provides for release of prisoners of war "without delay after the cessation of active hostilities." If the definition of the legal lexicon is accepted in interpreting the Conventions, those apprehended for trial, after cessation of active hostilities, for violating the laws and customs of war are not entitled to any protections other than those provided by international law.

By correlating the proviso in Article 85 as extending the protections of the Convention to war criminals with the provisions of the first paragraph of Article 103, a possible difficulty can be anticipated in its application. That paragraph provides:

> Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as <u>confined</u> while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offense, or if it is essential to do so in the interests of national security. <u>In no circumstances shall this</u>

confinement exceed three months.[97]

The use of the word "confinement" is clarified by a reference to the first and second paragraphs of the comparable article, 47, of the 1929 Convention. In the earlier article the term "preventive imprisonment" is used. The delegates indicated that the limitation is upon the period to which a prisoner of war may be subjected to pre-trial close confinement, that is, confinement more severe than detention to which prisoners of war are normally subjected.[98]

Article 104 substantially adopts the provisions of Article 60 of the 1929 Convention; however, Article 105 materially increases the procedural protections prescribed for trials of prisoners of war over those formerly prescribed in Article 62 of the earlier Convention. As explained earlier, Article 105 is an important one as a source of guidance as to the connotation of the word "procedure."

Articles 129 and 130, appearing as general provisions in the final Part of the Convention, are the remaining pertinent articles to be discussed. Their importance arises from the possibility that they might become the "legal bases" for future trials. They were included for the purpose of insuring respect for the Conventions and to define

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[97] Underscoring added.

[98] See discussions in the Final Record, supra, at pp. 312, 571-572 of vol. IIA.

individual responsibilities for violations thereof which was an innovation over the 1929 PW Convention which failed to denounce violations of its provisions. Special attention is invited to the final paragraph of Article 129:

> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

It would be well for the proponents of the proposition that the procedural law of the Manual for Courts-Martial, 1951, must apply to trials of prisoners of war to note that the "same procedure" requirement upon which such a proposition is based is contained in Article 102 which is <u>not</u> the subject of the references in the quoted portion of Article 129.

The final important article, 130, provides:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Since the delegates were acting <u>de novo</u> in putting "teeth" into the Convention, it might be surprising that they did not seize upon the opportunity to adopt the principles applied to violations that had occurred during World

War II through selection of those contained in the Charters of the International Military Tribunals and for those contained in the Tribunals' Judgments and decisions of other courts that had convicted war felons. But it must be remembered that a thorough reading of the voluminous record of the Conference reveals a considerable disregard of World War II experiences, therefore the results of the Conference, in Articles 129 and 130, are not so surprising. These articles were subjected to considerable debate which is now summarized.

The United States delegate, who was among those strenuously resisting efforts to define offending acts as war crimes in these two articles, stated that international law was not acceptable as a source of substantive law. He maintained this position contrary to the opinion of the United States Supreme Court in the Yamashita case, supra. He adhered to this position during the debate over the draft which had been submitted to the delegates in which such an established body of law as international penal law was ignored.

The Soviet delegate proposed the substitution of the word "crimes" for the word "breaches" where it appears in both articles. The Netherlands, United States, United Kingdom, French and Australian delegates were opposed to the word "crimes" for the following announced reasons:

firstly, because "crimes" had a different meaning in the national laws of different countries; and, secondly, because an act only becomes a crime when this act is made punishable by a penal law. In rejecting the Soviet proposal, it was stated that the Conference was "not making international penal law but (was) undertaking to insert in the national laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted in the national penal laws."[99] As late as 30 July 1949, in the 21st Plenary Meeting, the United States delegate said, "This Convention is clearly not a penal statute, and the term 'crimes' is clearly inappropriate to express violations of this Convention, which will not be crimes until they are so made by domestic penal legislation."[100]

The recognition due the provisions of these articles has been seriously affected since their adoption because the International Law Commission of the United Nations has recently departed from the limited definition in Article 130 and apparently has reverted to the World War II precedents by its definition of war crimes as all "acts in violation of the laws or customs of war."[101] No prognostication will

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[99] Final Record, supra, vol. IIB, p. 116.

[100] Ibid., p. 357.

[101] Article 2(11) Draft Code of Offenses Against the Peace and Security of Mankind, U.N. Doc. A/CN. 4/48, dated 30 July 1951.

be offered as to whether the recent definition by the International Law Commission of the United Nations or that in Article 130 will prevail.

There is one incidental exchange that can be noted in the discussions relating to this article that might be enlightening in interpreting the intent of the Convention in its use of the word "procedure." This is found in a Special Committee Report where a difficulty was noted in translating "fair and regular trial" is expressed. The United Kingdom delegate suggested changing the expression to "willfully depriving the prisoner of war (e.g. the protected person) of his rights of trial and the proper safeguards prescribed in the Convention." His suggestion was rejected because it was felt that although "deprivation of the judicial safeguards of the Convention might mean the violation of one of the Articles of the Convention,...(in the adopted text) it would not always be a grave breach if one of the Articles of the Convention was violated, as long as the accused was tried in a fair way."[102] It is submitted that the delegates were intelligent and realistic in the adoption of the provisions contained in the Convention so that an intelligent and realistic application thereof is all that is required to permit them to accomplish their purpose.

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[102] Final Record, supra, vol. IIB, p. 117.

## CHAPTER VI

## CONCLUSIONS

### A. Relating to the Application of the Geneva Conventions of 1949

Just as has been said about the International Convention on the Prevention and Punishment of the Crime of Genocide,[103] the acceptance of the Geneva Conventions by the American citizenry and their Congressional representatives as a living organ of our constitutional society is paramount if we are to advance our role as leaders in world society because by doing so we would contribute directly toward making international human rights a reality.[104] As of the Fall of 1953 twenty-four States had ratified the Conventions,[105] and four other nations had communicated declarations of adherences thereto.[106] As recently as 23 April 1954, the

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[103] Text quoted in: Schroeder, International Crime and the U. S. Constitution, (1950) p. 39.

[104] Ibid., p. 1.

[105] Albrecht, War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949, (1953), 47 Am. J.I.L. 590, in footnote 1. The twenty-four are: Austria, Belguim, Chile, Czechoslovakia, Denmark, Egypt, El Salvador, France, Guatemala, The Holy See, India, Israel, Italy, Lebanon, Liechtenstein, Luxembourg, Mexico, Monaco, Norway, Pakistan, The Philippines, Spain, Switzerland and Yugoslavia.

[106] Ibid. The four are: Japan, Jordan, San Marino and South Africa.

Supreme Soviet of the Union of Soviet Socialist Republics officially announced their ratification.[107] It can be expected that the Senate Foreign Relations Committee, which has not made a recommendation on them since former President Truman submitted them for ratification in April 1951, will take its action in the not too distant future.

Thereafter, in interpreting and applying them, we must expect the difficulty of finding a way to adopt provisions borrowed from our Anglo-American law to Continental and Slavic legal systems and reach a balance of comparative law and ingrained nationalistic concepts and modes of thought that will underly each individual State's participation in the program. From our own viewpoint, need of adjusting Anglo-American rules and methods to systematic ideas prevailing elsewhere throughout the civilized world will require much study by persons of wide knowledge of comparative law and clear grasp of the techniques of the other systems and their possibilities of integration with our own.

Another great difficulty to be expected is in learning how to reduce to a common denominator the variety of ideals to be found in the various legal systems which attempt to regulate the relations of man to man or adjusting those

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[107] See Reuters news dispatch, datelined Moscow, April 23, 1954, appearing on page 2, The Washington Post and Times Herald of Saturday, April 24, 1954.

relations and ordering standards of conduct, which is the aim of this international law to humanize international conflicts. Such ideas as "rights," etc., cannot be understood in the American constitutional sense, nor can they be understood in the Soviet sense, but, someone somehow, in establishing a base for a truly international law to treat war crimes, will devise a system. Someone will fill the role of Mr. Justice Jackson at the end of World War II.

In interpreting and applying the provisions of the 1949 PW Convention relating to judicial proceedings, the administrative side of war crimes courts must be considered because to fail to do so will result in as many yardsticks of justice as there are courts composed of membership of one nation or as there are mixed courts. There will be new situations arising continually and means of meeting them, if not sufficiently guided, will result in failure to do justice or failure to do complete justice. Of course, there will be no legislature, as such, to offer comparable guides to those furnished municipal courts, but it is believed that by appropriate preliminary work by a United Nations War Crimes Commission, ratified by the General Assembly, a definition of recognized principles can emerge.

It is wholly unreasonable to expect the administration of justice to be one hundred per cent perfect. Long established systems of administration of justice have failed

to attain that degree of perfection. To measure administration of justice by standards of an abstract legal Utopia or to assume that not adopting wholesale American legal institutions, methods and doctrines would result in failure of a future war crimes program is not merely grossly unfair but argues ignorance of the machinery of justice in most of the rest of the world.[108]

To seek a definition of recognized principles from the United Nations has been previously suggested in a recommendation, as follows:

> 1. The Secretary of Defense, through proper channels, request the United Nations to thoroughly study the problem of war crimes; that uniform rules of procedure be agreed upon for the trial of war criminals, as distinct from prisoners of war, and, as rapidly as possible, that such rules be made a part of the codes of justice of the various nations. It is believed that such rules should provide more civilian participation in war crimes cases than present procedures allow. Pending decision on this matter by the international agencies, necessary legislation should be introduced to remove any legal obstacles in the way of remedial procedural action by the United States.[109]

For future guidance in the application of the Geneva Conventions under our statutory laws, such as the Uniform Code of Military Justice, it would be well to observe the

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[108] For analagous reasoning note: Pound, Progress of the Law in China (1948), 23 Washington Law Review 345, at p. 362.

[109] Underscoring added. Malmedy Massacre Investigation, Report of Subcommittee of the Committee on Armed Services on Senate Resolution 42, (1949), 81st Cong., 1st Sess., p. 34.

developments in the presently existing controversy relating to the ratification of the Genocide Convention, supra.[110] The legal problems to be overcome in the application of the Genocide Convention are closely related to those involved in the application of the Geneva Conventions, however, the former do not have existing legislation to implement their application whereas the latter do have the provisions of the Uniform Code of Military Justice which can be utilized. Until these problems are solved, either through precedent to be established from action taken relating to the Genocide Convention or through positive legislation or official directives, it is recommended that extreme care be utilized in applying the articles of the Conventions in any way inconsistent with the precedents of World War II.

### B. Relating to the Application of the Manual for Courts-Martial, United States, 1951

During World War II, The Judge Advocate General of the Army rendered an opinion,[111] which is deemed pertinent, in which it was stated:

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[110] See, Schroeder, International Crime etc., supra, at p. 23.

[111] SPJGW 1943/3029, dated 26 February 1943 reported in II Bull. JAG 51. This opinion was in reply to a letter from The Provost Marshall General, dated 12 February 1943.

> ...a prisoner of war, charged with an act punishable by our military law (so far as that law may be applied to prisoners of war), is subject to trial by general courts-martial. This conclusion is in accord with a number of decisions by The Judge Advocate General during the first World War. (See Dig. Op. JAG 1912-40, sec. 369(5), (7).)[112]

In referring to Article 45 of the 1929 PW Convention, which is comparable to Article 82 of the 1949 PW Convention, the opinion continues:

> ...'prisoners of war shall be subject to the laws... in force in the armies of the detaining power'--can only mean that they are liable to punishment for offenses which, on the part of our own military personnel, are punishable under our Articles of War. Regardless, then, of whether the punitive articles of war extended <u>by their own terms</u> to prisoners of war, they are <u>by force of the Geneva Convention</u> extended to them. The general proposition that a prisoner of war is subject to the same military law as prevails in the army of the detaining power--either by the provisions of Article 45 of the Geneva Convention, or previously by the similar language of Article 8 of the Annex to the Hague Convention IV of 1907, or by the practice of nations at war--...[113]

The inquiry which prompted this opinion was primarily concerned with trial of interned enemy aliens and the opinion cited authority[114] for the proposition that such persons could be tried, for offenses committed within prison limits,

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[112] <u>Ibid</u>., at p. 52.

[113] <u>Ibid</u>., at p. 52. Underscoring represents italics. Numerous authorities are cited following this quotation.

[114] <u>Ibid</u>., at p. 54, citing: "250.4, June 12, 1918; Dig. Op. JAG 1912-40, sec. 369(5)."

either by a court-martial or by a commission ordered by the President. Thereafter the opinion continues:

> ...there are cogent reasons why the trial in this and like cases should be by general court-martial. This will be in exact compliance with Article 63 of the Convention....The procedure of military commissions and provost courts, on the other hand, may depart, especially as to rules of evidence and mode of review, from some of the safeguards prescribed for general courts-martial.[115]

However, the opinion, very pertinently, adds:

> To avoid any misapprehension, it should be pointed out that your inquiry and this opinion deal with the appropriate tribunal for the trial of a prisoner of war charged with committing an offense during captivity. The case of an enemy who, prior to being captured commits acts in violation of the laws of war--e.g., by torturing or murdering a prisoner--is quite a different matter. The present opinion implies no doubt that such a person, if apprehended, might be brought to trial before either a military commission or a general court-martial. (See Dig. Op. JAG 1912, p. 1067, last paragraph.)[116]

This opinion prescribed the course that was followed during and after World War II; namely, trial by courts-martial for prisoners of war charged with post-capture offenses[117] and trial by military commissions or

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[115] Ibid., at p. 54.

[116] Ibid.

[117] The following cases are examples:
CM 248793, Beyer, Seidel, Demine, Schomer and Scholz (1944). Convicted of violations of AW's 89 and 92 and sentenced to death. 50 BR 21.
CM 259228, Gauss and Straub (1944). Convicted of violations of AW 92 and sentenced to death. 50 BR 211.
CM 302791, Kaukoreit, Ackermann and Bald (1946). Convicted

tribunals for those persons charged with pre-capture offenses.[118] There have been no cases since the effective date of the Manual for Courts-Martial, United States, 1951.[119]

For reasons stated above, it is concluded that paragraph 9 of Article 2 of the Uniform Code of Military Justice is a codification of prior existing law and the Manual for Courts-Martial, United States, 1951, does not apply to trials of persons for violating the laws and customs of war committed prior to capture. It is further concluded that the Geneva Conventions of 1949, and reservations thereto, when considered with paragraph 9 of Article 2 of the Uniform Code of Military Justice, do not make the provisions of the Manual mandatory in such cases.[120]

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of violations of AW 92, sentenced to death; commuted to life imprisonment. The local surrender in the area where the offenses charged were committed occurred on 2 May 1944; the offenses were committed on 6 May 1944 and accused were processed as prisoners of war on 9 May 1944. 59 BR. CM 312330, Braun, Hossann, Heydt, Jaschko, Meyer, Meisel and Boehmer (1946). 62 BR 107.

[118] Note judicial approval in In re Yamashita, supra.

[119] Note a board of review discussion of the jurisdiction of military commissions contained in a relatively recent opinion in CM 347931, Fleming, (1951), 2 CMR 312, at p. 318; and a Court of Military Appeals discussion thereof in U. S. v. Schultz, USCMA No. 394 (1952), 4 CMR 104, at pp. 113 et seq.

[120] For appropriate directives and rules of procedure consistent with these conclusions, see: (1) As to pre-capture offenses--Letter Order AG 000.5 (28 Oct. 50) JA, General Headquarters, United Nations Command, Tokyo, Japan,

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Subject: Trial of Accused War Criminals, dated 28 October 1950 and inclosure thereto: Rules of Criminal Procedure for Military Commissions of the United Nations Command. (2) As to post-capture offenses--Articles Governing United Nations Prisoners of War and Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, revised through 17 March 1953, published by Headquarters, United Nations Command.