

# LAW OF LAND WARFARE



J. A. G. S. TEXT NO. 7

The Judge Advocate General's School

ANN ARBOR, MICHIGAN

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## FOREWORD

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This text is intended as an aid to students in The Judge Advocate General's School in the study of the Rules of Land Warfare, Field Manual 27-10. The arrangement as well as the paragraph numbers follow the Field Manual. Fundamental principles rather than the more minute details are emphasized, although divergences of interpretation and practice are indicated. Topics in the Field Manual requiring no additional discussion are omitted.

The scope of the text is limited to the following topics: basic principles of land warfare, status of persons in war, the conduct of hostilities, prisoners of war, and the sick, wounded and dead.

This text was prepared in the Civil Affairs Department of The Judge Advocate General's School.

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- Air Power - Spaight, Air Power and War Rights, 2nd ed. (1933)
- Am. J. Int. L. - The American Journal of International Law
- Baker and Crocker - The Laws of Land Warfare Concerning The Rights and Duties of Belligerents as Existing on August 1, 1914 (1918)
- Baty and Morgan - War: Its Conduct and Legal Results (1915)
- Bordwell - The Law of War Between Belligerents (1908)
- Brierly - The Law of Nations, 2nd ed. (1936)
- Davis - Davis, The Elements of International Law With an Account of its Origin, Sources and Historical Development, 4th ed. (1916), by Gordon E. Sherman
- Des Gouttes - La Convention De Geneve pour L'Amelioration Du Sort Des Blesses et Des Malades Dans Les Armees En Campagne DU 27 Juillet 1929 (1930)
- Edmonds and Oppenheim - Land Warfare, An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army (1912)
- Fenwick - International Law (1924)
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- Hyde - International Law Chiefly as Interpreted and Applied by the United States (1922)
- Lawrence - Lawrence, The Principles of International Law, 7th ed. (1923), by Percy H. Winfield
- Lauterpacht - L. Oppenheim, International Law, A Treatise, 6th ed. (1940), by H. Lauterpacht
- Moore - A Digest of International Law (1906)
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- Rasmussen - Code Des Prisonniers De Guerre, Commentaire De La Convention DU 27 Juillet 1929, Relative au Traitment Des Prisonniers De Guerre (1931)
- Spaight - War Rights on Land (1911)
- U.S.R.L.W. - United States, War Department, Office of the Chief of Staff. Rules of Land Warfare, 1914, corrected to April 15, 1917, Washington, 1917
- Walker - Pitt Cobbett, Cases on International Law, 5th ed. (1937), by Wyndham Legh Walker
- Westlake - International Law (1907)
- Winfield - The Foundations and the Future of International Law (1941)

## CHAPTER I

### BASIC RULES AND PRINCIPLES

1. General.--The laws of war are the rules respecting warfare with which, according to international law, belligerents and neutrals are bound to comply.<sup>1</sup> The rules of land warfare had their origin in the practices and usages of war which gradually grew into customs or were embodied in conventions.<sup>2</sup> Thus, the existing law is comprised of two branches--the conventional law and the customary law. In either case, its authoritativeness (i.e., its character as law) arises from the consent of nations. Express consent is given by treaties or conventions, tacit consent by habitual observance of certain rules (custom) between states.<sup>3</sup>

In dealing with customary law, two difficulties may present themselves in any given case: the difficulty of proving the particular custom and the difficulty in determining whether a particular practice has developed into a custom (i.e., has it been

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1. Edmonds and Oppenheim, par. 1.

2. The term "conventional" law is used to indicate those rules that have been embodied in treaties or conventions as distinguished from customary international law, i.e., the unwritten rules.

3. Lawrence, p. 95. See, however, Brierly, p. 40, where it is stated: "Implied consent is not a philosophically sound explanation of customary law, international or municipal; a customary rule is observed, not because it has been consented to, but because it is believed to be binding \* \* \*"

approved by the common consent of civilized nations). Whether a particular usage has been agreed to is a matter of evidence.<sup>4</sup> The test for determining whether a usage has become an obligatory custom is that it must be approved by the common consent of civilized nations.<sup>5</sup> All need not necessarily consent to create customary law if the practice be accepted generally. The dissent or assent of some states may be more authoritative than that of other states. The dissent of Switzerland with respect to an approved maritime practice would not be as important as the dissent of the United States or Great Britain.

The evidences of custom are found in:

(1) Historical documents which contain the record of international practice such as records of the foreign offices of the several states; diplomatic correspondence and state papers.

(2) The "works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."<sup>6</sup>

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4. Reg. v. Keyn, L.R., 2 Ex. D. 63, p. 154.

5. The Scotia, 14 Wall. 170.

6. Paquete, Habana and The Lola, 175 U.S. 677.

(3) Decisions of international courts and courts of arbitration.

(4) Decisions of national courts.<sup>7</sup>

2. Conventional Rules.--The conventional laws of war on land include the following international agreements:<sup>8</sup>

(1) The Geneva Conventions (Red Cross) of 1864, 1906, and 1929, which deal with the treatment of the sick and wounded.

(2) The Geneva Convention of 1929 concerning the treatment of prisoners of war.

(3) The Hague Convention of 1899 No. II, relating to the laws and customs of war on land; the actual rules were contained in regulations annexed thereto.

(4) The Hague Convention of 1907 No. IV, relating to the laws and customs of war on land; the actual rules were contained in regulations annexed thereto.

(5) The Hague Convention of 1907 No. III, relative to the opening of hostilities.

(6) The Hague Convention of 1907 No. V, respecting the rights and duties of neutral powers and persons in case of war on land.

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7. Thirty Hogsheads of Sugar v. Boyle, 9 Cranch. 191, 198.

8. The United States has ratified or adhered to all of these.

(7) The Hague Convention of 1907 No. VIII, relative to the laying of automatic submarine contact mines.

(8) The Hague Convention of 1907 No. IX, concerning bombardment by naval forces in time of war.

(9) The Hague Declaration of 1907 No. XIV, prohibiting the discharge of projectiles and explosives from balloons.

All of these agreements, with the exception of the last, bind the powers that accepted them<sup>9</sup> without limit of time. All of the above treaties may be denounced after notice. The denunciation affects the notifying power only and becomes operative after one year from the date in which the notice was given.<sup>10</sup> The Hague Conventions of 1899 and 1907, respecting the laws and customs of war on land provide that the Convention shall be binding upon the signatory powers only if all the belligerents are parties to the Convention.<sup>11</sup> Thus, they cease to be binding upon the belligerents whenever a non-signatory state, however insignificant, joins one of the belligerents.<sup>12</sup> The Geneva Conventions of

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9. Sec. I, Cir. 136, WD, May 7, 1942, states that the Hague Declaration of 1907 No. XIV, is not binding and will not be observed. See also FM 27-10, par. 27.

10. See FM 27-10, par. 5. The Geneva Conventions of 1929 do not permit such denunciation to take effect during a war in which the denouncing party is involved.

11. This clause is called a "general participation clause".

12. Garner, Vol. I, p. 18.

1929 relating to the treatment of sick and wounded and of prisoners of war provide that if a belligerent is not a party to the Convention, its provisions shall nevertheless be binding as between all belligerents who are parties thereto.<sup>13</sup>

By the Hague Conventions of 1899 and 1907, the parties agree to issue instructions to their land forces in conformity with the regulations annexed to the Conventions.<sup>14</sup>

3. Customary Rules.--The customary or unwritten law still plays an important part notwithstanding the Hague and Geneva Conventions.. It is expressly declared by the preamble to the Hague Convention of 1907 No. IV, that the populations and belligerents remain under the protection of customary law in cases not covered by the Convention. Again, where the Conventions or any particular provisions are not applicable as between the belligerents, the rules of customary law apply.<sup>15</sup>

4. Basic Principles.--a. Military Necessity. The limits set by customary and conventional law within which force may be used are governed by general principles and specific prohibitions.

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13. Lauterpacht, p. 186.

14. FM 27-10 is issued pursuant to this obligation.

15. Those provisions of a convention that are declaratory of customary law do not lose their binding force by reason of the abrogation of the convention. Hackworth, Vol. I, p. 17.

Military necessity permits a belligerent the right of using all forms of regulated violence which may bring about the complete submission of the enemy as soon as possible. The preamble of the Hague Conventions gives evidence that "military necessity has been taken into account in framing the regulations, and has not been left outside to control and limit their application".<sup>16</sup> The signatories expressly stated that the wording of the rules which were drawn up "has been inspired by the desire to diminish the evils of war so far as military necessity permits".<sup>17</sup> Military necessity as understood by the United States does not purport to indicate circumstances when a belligerent commander is free from a duty to observe the law of nations.<sup>18</sup> This view of military necessity is to be distinguished from the doctrine of military necessity (Kriegsraison) propounded by certain German writers in which the rules of war cease to operate (i.e., measures in violation of law are justifiable) when the necessity of the situation requires. This theory may be epitomized by the phrase "necessity knows no law".<sup>19</sup>

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16. Westlake, Part II, p. 57.

17. Westlake, Part II, p. 57.

18. Hyde, Vol. II, p. 301.

19. Garner, Vol. II, p. 196.

Illustrative case.--

A violation of the laws of war by a belligerent alone offers either a means of escape from extreme danger or the overpowering of the enemy. Military necessity, as understood by the overwhelming weight of opinion, does not justify such violation.<sup>20</sup>

The laws of war may be set aside in certain circumstances:

(1) Reprisals for breaches of the laws of war on the part of the enemy.<sup>21</sup>

(2) Where the prohibitory rule of law contains an express provision that it may be abrogated because of the "necessity of war". For example, Article 23(g) of the Hague Regulations<sup>22</sup> forbids the destruction or seizure of enemy property, "unless such destruction or seizure be imperatively demanded by the necessities of war".

(3) Where the rule of conduct to which the belligerents are to conform is subject to the implied assumption that the necessities of war allow compliance, e.g., Article 46 of the Hague Regulations,<sup>23</sup> which prescribes respect for private property.

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20. Lauterpacht, p. 184.

21. FM 27-10, pars. 346, 358.

22. FM 27-10, par. 313.

23. FM 27-10, par. 323.



b. Humanity. The duty of a commander is to seek out the enemy and destroy him. This principle is modified by the claims of humanity to the extent of surrendering the "use of any engine of war whose military effect is disproportioned to the suffering it entails".<sup>24</sup> The principle of humanity limits the nature of the force used, the manner in which it shall be employed, and excludes certain persons and things from its application.<sup>25</sup>

c. Chivalry is Synonymous With Military Honor. The principle of chivalry enjoins good faith and denounces bad faith or treachery.<sup>26</sup>

5. Force of Rules.--Circular 136, War Department, May 7, 1942, states that although all of the conventions set out on page VI of Field Manual 27-10 are not binding on all of the countries with which the United States is at war, they will be observed and enforced by the Army of the United States, as provided in Field Manual 27-10, excepting the \*Hague Declaration No. XIV, October 18, 1907, prohibiting the discharge of projectiles and explosives

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24. Spaight, p. 75.

25. Some examples of this principle may be found in FM 27-10, pars. 28, 32, 33, 34, 45.

26. Examples of this principle are found in FM 27-10, pars. 30, 31, 41, 233, 234.

from balloons. The latter is not binding and will not be observed by the United States.<sup>27</sup>

7. Military Jurisdiction.--<sup>28</sup> General courts-martial have concurrent jurisdiction with military commissions to try persons subject to military law for violations of the laws of war.<sup>29</sup> The fact that violations of the laws of war are not specifically listed in the punitive Articles does not deprive courts-martial of jurisdiction.<sup>30</sup> Officers, soldiers, and retainers and others connected with the Army may be tried under Article of War 96 for violations of the laws of war, either as (a) disorders and neglects to the prejudice of good order and military discipline, (b) conduct of a nature to bring discredit upon the military service, or (c) "crimes and offenses not capital". General courts-martial have power to try "any other person" (other than those subject to

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27. Cf. FM 27-10, par. 27.

28. This paragraph is limited in scope to the respective jurisdiction of courts-martial and military commissions for violations of the laws of war. The subject of military commissions generally is dealt with in "War Powers and Military Jurisdiction" by Colonel Edward H. Young, JAGD, JAGS Text No. 4, and "The Law of Martial Rule" by Lt. Col. Charles Fairman, JAGD.

29. AW 12.

30. It must be remembered that some war crimes are also common law crimes condemned by Articles of War 92 and 93. Cf. Dig. Op. JAG, 1912, p. 1071, last par.

military law) who by the law of war is subject to trial by military tribunal.<sup>31</sup> However, the American forces in Germany during World War I established military commissions and provost courts for the trial of inhabitants. No members of the American Army were tried by such courts; they were brought before courts-martial.<sup>32</sup>

Military commissions have by statute concurrent jurisdiction with courts-martial to try persons subject to military law who relieve or aid the enemy,<sup>33</sup> or are spies,<sup>34</sup> or deal in captured or abandoned property.<sup>35</sup>

Military offenses by persons subject to military law which by statute are made punishable by courts-martial may not be tried by a military commission.<sup>36</sup>

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31. AW 12. See also Colby, 17 Am. J. Int. L. 109, 112.

32. Colby, 23 Mich. L. Rev. 482, 505. The Territory of Hawaii, under martial law since the attack on Pearl Harbor, established provost courts. These courts tried military personnel for traffic violations with the approval of the commanding general and commandant of the naval district.

33. AW 81.

34. AW 82.

35. AW 80.

36. Dig. Op. JAG, 1912, p. 1069, last par.

The Articles of War, especially Article of War 15, recognize the jurisdiction of military commissions to try violators of the laws of war.<sup>37</sup> Thus, enemy persons who entered the United States for the purpose of committing sabotage are unlawful belligerents triable by military commission.<sup>38</sup>

Prisoners of war and enemy civilian internees<sup>39</sup> may be tried by general courts-martial for offenses punishable by our military law so far as that law may be applied to them. The authority of general courts-martial is found in Article of War 12, which provides in substance that such courts shall have power to try any person who by the law of war is subject to trial by military tribunals. The Prisoner of War Convention of 1929, Article 45,<sup>40</sup> providing that "prisoners of war shall be subject to the laws \* \* \* in force in the armies of the detaining power" subjects such persons to punishment for offenses which, on the part of our own

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37. Apart from statute the military commission derives its authority from the laws of war. Dig. Op. JAG, 1912, p. 1066, last par.

38. Ex parte Quirin, U.S. Sup. Ct., 87 L. Ed. 1.

39. The United States, Germany, Italy, and Japan agreed through the Swiss government, after the outbreak of the present war, that civilian nationals of the respective belligerents shall be treated according to the Geneva Convention of 1929, relative to the treatment of prisoners of war insofar as those provisions may be applied to civilians. See, also, p. 47, infra.

40. FM 27-10, par. 118.

military personnel, are punishable under the Articles of War. Regardless, then, of whether the punitive Articles of War extend by their own terms to prisoners of war, they are by force of the Geneva Convention extended to them. However, some of the punitive Articles by their nature can have no application to a prisoner of war or a civilian internee assimilated to a prisoner of war. For example, such persons are incapable of deserting the service of the United States under Article of War 58.<sup>41</sup>

Though a military commission or provost court would have jurisdiction to try prisoners of war or enemy civilian internees for offenses committed by them,<sup>42</sup> Articles 63 and 64 of the Geneva Convention<sup>43</sup> require that prisoners of war be treated on an equal basis as members of our armed forces with respect to the forum, procedure, and mode of review. These requirements make it advisable that the general court-martial be used in preference to the military commission or provost court.<sup>44</sup> Prisoners of war

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41. SPJGW 1943/3029, February 26, 1943, where it was held that a German civilian internee who assaulted a commissioned officer of the United States with a baseball bat may be charged with the offense of assault with intent to do bodily harm with a dangerous weapon under AW 93 before a general court-martial. See also p. 94, *infra*.

42. JAG 250.4, June 12, 1918; Dig. Op. JAG, 1912-40, sec. 369(5).

43. FM 27-10, pars. 136, 137.

44. SPJGW 1943/3029, February 26, 1943; see also p. 99, *et seq.*, *infra*.

who, prior to being captured, commit an act in violation of the laws of war, e.g., by torturing or murdering a prisoner, may be tried before a court-martial or military commission. Such persons are war criminals and are not entitled to the privileges accorded prisoners of war.<sup>45</sup>

## CHAPTER II

### QUALIFICATIONS OF ARMED FORCES OF BELLIGERENTS

8. General Division of Enemy Population.--Broadly speaking, the peaceful inhabitants of the enemy are immune from warlike attack so long as such inhabitants take no part in the fighting.<sup>1</sup> Thus, the law of war separates the population of the enemy into two classes: the combatants and the peaceful inhabitants.

#### Illustrative case.--

Wellington told the inhabitants of southern France in 1814 that he would not allow them to play with impunity

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45. Cf. SPJGW 1943/3029, February 26, 1943; Colby, 23 Mich. L. Rev. 482 at 487.

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#### Chapter II

1. Spaight, p. 35. "The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit," G.O. 100, art. 22.

the part of peaceful citizens and of soldiers, and bade them go join the ranks of the French armies if they wished to fight.<sup>2</sup>

9. Lawful Belligerents.--Civilians (with the exception of the levee en masse) who participate in the fighting are under the laws of war liable to punishment as war criminals.<sup>3</sup> Fighting is legitimate only for the combatant personnel of a country. Legitimate combatant personnel, on surrender or capture, are entitled to treatment as prisoners of war and incur no liability beyond detention.<sup>4</sup> Spaight has spoken of this as the "principle of combatant trade-unionism" which confines the right to participate in hostilities to the combatant personnel of a country.<sup>5</sup> As a corollary to this rule, a soldier is entitled to know when he sees an enemy citizen and before that citizen attacks him, whether that person is a lawful combatant or not. The Hague Regulations<sup>6</sup> classify lawful belligerents into three groups: (1) the army, (2) the militia and volunteer corps (not part of the army, frequently called "irregulars"), and (3) levee en masse.

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2. Spaight, p. 35.

3. FM 27-10, par. 348.

4. Hall, p. 549.

5. Air Power, p. 360.

6. FM 27-10, par. 9.

a. The Army. What forces constitute the regular army of a belligerent is a matter of municipal law. Thus, whether the militia or volunteer corps belong to the regular army is not a matter for international law but one of municipal law.<sup>7</sup> The quality of lawful belligerents attaches to all members of the regular army. The consensus seems to be that an organization would hardly be recognized as a regular army unless it was uniformed or wore permanent distinguishing marks on the dress.<sup>8</sup> Authorization by the belligerent government in some form is necessary in order that one be a member of the army of the belligerent, either by commission, enlistment, conscription, or otherwise.<sup>9</sup> The uniform, "dog tags" or discs, or identity cards are all evidences of state authorization. In World War I, on a few occasions, aviators went up in their planes without wearing their uniforms. Suppose such a flier was separated from his machine, would he be entitled to recognition as a lawful belligerent if captured by the enemy? Spaight indicates that such persons in the few recorded instances were treated as lawful

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7. Lauterpacht, p. 202.

8. Spaight, p. 110; Hall, p. 554.

9. Subjects of neutrals who are in the armed service of a belligerent are lawful combatants. Hyde, Vol. II, p. 295.



combatants and that their identity as military personnel could be established by their discs or identification cards.<sup>10</sup>

b. Irregulars. The Hague Regulations provide that the quality of lawful combatants attaches to members of militia and volunteer corps, even though they do not form part of the regular army, provided: (1) they are under the command of a responsible person, (2) they possess some distinctive mark recognizable at a distance, (3) they carry arms openly, and (4) observe the laws and customs of war. The first condition does not require that such organization be connected with the general military command or be authorized by the belligerent government.<sup>11</sup> Such forces may be raised by local initiative.<sup>12</sup> The requirement that "they be commanded by a person responsible for his subordinates" involves the idea of authority and some organization.<sup>13</sup>

The requirement for a distinctive badge is necessary in order to maintain the distinction between combatants and peaceful inhabitants. The distinctive badge need not be a uniform; but it

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10. Air Power, p. 83, et seq.

11. Hall, p. 556.

12. Bordwell, p. 231.

13. Persons who commit hostile acts, individually and severally, belonging to no organizations, are war criminals. Spaight, p. 52; see also FM 27-10, par. 348.

must be irremovable so that it may not be assumed or dropped at will.<sup>14</sup>

The condition respecting the carrying of arms openly is imposed to prevent "making use of arms for active opposition and afterwards discarding or concealing them on the approach of the enemy, and will not be satisfied by carrying concealed weapons, such as pistols, daggers, sword sticks, etc."<sup>15</sup>

Thus, it has been ruled that Home Guard are militia or volunteer corps under the Hague Regulations if they comply with the four requirements set forth in Article 1 of that treaty.<sup>16</sup> Similarly, civilian guards at army depots may lawfully be used to repel an enemy force, such as paratroops, if they conform to the four conditions of the Hague Regulations respecting "irregulars".<sup>17</sup>

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14. Spaight, p. 57; a cap or removable badge would not be sufficient, Hall, p. 555. The distance that the sign must be visible is undetermined. This requirement will be satisfied certainly if this sign is easily distinguishable by the naked eye of ordinary people at a distance at which the form of an individual can be determined. U.S.R.L.W., par. 33.

15. U.S.R.L.W., par. 34.

16. It is desirable that they be furnished with certificates of identity and enrollment in their organization. JAG 324.5, March 9, 1942.

17. SPJGW, July 3, 1942; cf. Winfield, p. 70, who takes the position that if the Home Guard has not yet been issued a uniform and wears no identifying emblem except an armband with

Illustrative case.--

A correspondent in the Daily Mail of June 19, 1917, inquired whether, if a "Hun airman" with engine trouble descended in England, it would be legitimate for a civilian to shoot him. A belligerent military airman, like every other member of a recognized belligerent force, is entitled to demand that he shall be subject to attack only by recognizable combatant personnel. He cannot be at the mercy of amateur hedge-row fighters. It is on the assumption that civilians are really civilians that they are relieved, as far as possible, of liability to direct warlike attack. Under domestic or national law, they may be doing no wrong in firing upon an enemy airman; under the laws of war they are committing an offense and are liable to severe penalties if the turn of events places them in a situation in which they can be brought to account.<sup>18</sup>

Irregular troops, complying with the four conditions heretofore stated, may lawfully, even as in the case of regular army troops, engage in guerrilla tactics.<sup>19</sup> They may operate either

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17. (Contd.) "Home Guard" stamped on it, this would be sufficient. "There is no reason to suppose that this Hague Convention was an exhaustive classification of all lawful combatants. The broad general principle is that, where States X and Y are at war with each other, an X soldier is entitled to know when he sees a Y citizen, and before that citizen attacks him, whether he is a lawful combatant or not. So long as the Y citizen satisfies that condition \* \* \* he is a lawful combatant, although he may not precisely fit into the Hague categories."

18. Air Power, p. 363.

19. Guerrilla tactics during a war are carried out by small bodies of persons who make surprise attacks to the rear of the enemy for the purpose of destroying bridges, railways, communications, convoys, etc. The tactics are those of "fighting and running away". Spaight, p. 61.

in unoccupied territory, occupied territory or in the territory of the enemy.<sup>20</sup>

c. Levee en Masse. When ordinary inhabitants of a non-occupied territory rise at the approach of an invader, and either alone or in conjunction with the regular army, attempt to beat him off, are such persons to be considered as a levee en masse or unlawful belligerents? The exception to the rule forbidding civilians from engaging in hostilities is the levee en masse. If, on the approach of the enemy, "the inhabitants of a territory, spontaneously take up arms to resist the invading troops without having time to organize themselves" in accordance with the rules applicable to militia and volunteer forces, they are regarded as belligerents if they carry arms openly and respect the laws of war. It must be stressed that this concession is made to a massed rising;<sup>21</sup> it is not applicable to a few inhabitants who commit hostile acts.<sup>22</sup> A levee en masse is sanctioned only in territory not yet invaded by the enemy; once the territory is

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20. Bordwell, p. 232.

21. Spaight, p. 52, "the character of belligerents results from the resistance of a respectable number".

22. Lawrence, p. 494, states: "It was rightly considered that masses of a popular levy extending a considerable area of country would be sufficient evidence of their own hostile character, even though no badges were worn by the individuals of whom they were composed."

invaded, although it has not ripened into occupation, a levee en masse is no longer legitimate.<sup>23</sup> A fortiori, if the territory is occupied a levee en masse is no longer legitimate.<sup>24</sup> It has been stated that a levee en masse cannot retain its combatant status if it acts on the offensive, i.e., enters enemy soil; though to do so may be its only possible effective mode of defense.<sup>25</sup>

d. Combatants and Noncombatants. The noncombatants dealt with in this article are members of the armed forces.<sup>26</sup> Non-combatants are such whose function "is ancillary to that of the fighting men and do not themselves oppose the enemy, arms in hand".<sup>27</sup> Thus, "the personnel, medical, veterinary, legal, commissary, and pay corps, as well as chaplains" are noncombatants

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23. Lauterpacht, p. 205. Territory means such part of the belligerent state as is not yet invaded. There is no requirement that each separate town or village must abstain from action until actually threatened. Spaight, p. 58.

24. Bordwell, p. 233; see FM 27-10, pars. 271-274, for distinction between invasion and occupation.

25. Bordwell, p. 141; Spaight, p. 59, comments on this question as follows: "This assumption is open to argument."

26. Sometimes the term "noncombatant" is used to refer to peaceful inhabitants of a belligerent.

27. Spaight, p. 58.

in this sense.<sup>28</sup> Such persons are subject to the same treatment as combatants except so far as protected by the Geneva Convention for the amelioration of the sick and wounded.<sup>29</sup>

12. Guerrillas.--Guerrilla war exists where after the defeat and capture of the main part of the enemy forces, the occupation of the enemy territory, and the downfall of the enemy government, the routed remnant of the defeated army carry on the hostilities by guerrilla tactics. Technically, such persons are not lawful belligerents. Two reasons are given for this view: (1) there are no longer the forces of two states in the field, and (2) there is no longer in progress a contention between armed forces.<sup>30</sup>

Illustrative case.--

On the surrender of Lee's and Johnston's armies and the collapse of the Confederacy, certain of the Confederate commanders were believed to be contemplating resistance by guerrilla tactics. The Federal authorities refused to regard such guerrilla bands as possessing belligerent status. Grant wrote to Sheridan: "If Kirby Smith [a Confederate general] holds out,

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28. Hyde, Vol. II, p. 299.

29. Lawrence, p. 375. Chaplains, the medical, nursing and administrative staff for the relief of the sick and wounded enjoy special exemptions. See FM 27-10, par. 179, et seq. For persons not directly attached to the army who follow it, see FM 27-10, par. 76b.

30. Baker and Crocker, p. 17, citing Oppenheim; Lawrence, p. 493.

without even an ostensible government to receive orders from or to report to, he and his men are not entitled to the consideration due to an acknowledged belligerent."<sup>31</sup>

### CHAPTER III

#### HOSTILITIES

14-16. Commencement of Hostilities.--A failure by a party to the Hague Convention to observe its provisions in beginning hostilities without a declaration of war or an ultimatum with conditional declaration of war, does not make the hostilities subsequently conducted any the less subject to the Hague Conventions.<sup>1</sup>

The requirement that hostilities must not commence without previous and explicit warning, either in the form of a reasoned declaration of war or an ultimatum with a conditional declaration

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31. Spaight, p. 61. Though the Federal Government refused to recognize the existence of the Confederate Government or its final disappearance under municipal law, belligerent rights were exercised both by the Federal Government and, after its recognition, by the Confederacy, over the subject and property of other states, according to the rules of war. The Federal Government also treated the members of the armed forces of the Confederacy as qualified belligerents. Moore, Vol. VII, p. 159.

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#### Chapter III

1. 26 Am. J. Int. L. 362 at 363.

of war, is based on the principle that belligerents should not be taken by surprise, treachery, or bad faith. It also established that neutrals should not be held responsible for the performance of their duties of neutrality until they have received due notice of the existence of a state of war or are in fact aware of its existence. The date of the beginning of the war may be important in determining questions of international and domestic law. For example, the moment a state of war exists diplomatic relations are broken, commercial transactions cease to be valid between enemy citizens, warships of each belligerent are entitled to visit and search vessels of any flag on the high seas, etc. Likewise, the applicability of insurance contracts may depend on the date of the beginning of war.<sup>2</sup> Where there is a declaration of war which specifically states the date of the beginning of war, the courts accept that date. In The Pedro,<sup>3</sup> the Supreme Court accepted the date of April 21, 1898, as the beginning of the Spanish-American War, this date having been set retroactively by Congress in its resolution of April 25. Where there is a declaration which does not state a date for the beginning of the war,

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2. Cf. *West v. Palmetto State Life Ins. Co.*, Sup. Ct. (N.C.), 25 S.E. (2) 475, where a life insurance policy limited insurer's liability if insured was engaged in military or naval service in time of war.

3. 175 U.S. 354.



courts have, for the purposes of municipal law, considered the date of the approval of the declaration.<sup>4</sup> Under the same circumstances, courts tend to date the war from the first act of hostilities for international law purposes.<sup>5</sup>

20-21. Treatment of Alien Enemies.--International usage has long recognized the right of a belligerent to restrain, detain, or expel alien enemies found in his territory at the outbreak of war.<sup>6</sup> The rationale is that the legal allegiance to the enemy owed by the alien enemy may cause him to assist the enemy if not restrained.<sup>7</sup>

American courts have held that the alien enemy has no rights other than those which the sovereign chooses to grant.<sup>8</sup> In the United States, the Act of July 6, 1798,<sup>9</sup> places full control of enemy aliens in the hands of the President who, when war is declared or invasion threatened, may proclaim "the manner and degree

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4. West v. Palmetto State Life Ins. Co., Sup. Ct. (N.C.), 25 S.E. (2) 47, where the court adopted the date of the approval of the joint resolution declaring war on Japan, December 8, 1941; Hudson, 39 H.L.R. 1020 at 1021.

5. The Boedes Lust, 5 C. Robinson 233.

6. Hyde, Vol. II, p. 226.

7. Garner, 12 Am. J. Int. L. 27.

8. DeLacey v. United States, 249 F. 625 at 626.

9. R.S. 4067, amended by April 16, 1918, 40 Stat. 531.

of the restraint". On February 19, 1942, the President promulgated Executive Order No. 9066 authorizing the Secretary of War and military commanders designated by him to prescribe military areas from which "any or all persons" might be excluded and within which any or all persons might be subjected to restrictions. Under the authority thus obtained, the Commander of the Western Defense Area issued a public proclamation on March 2, 1942, and announced that he would proceed with the gradual evacuation of all persons of Japanese ancestry including native born persons. Congress inferentially approved the entire evacuation procedure by the Act of March 21, 1942,<sup>10</sup> which makes violation of any restrictive orders promulgated for a military area by the Secretary of War or a military commander a misdemeanor. In Hirabayashi v. United States<sup>11</sup> the constitutionality of a curfew imposed against citizens of Japanese ancestry in the Western Defense Command was upheld in the face of an objection that the order was unconstitutional because it discriminated against citizens of Japanese ancestry in violation of the Fifth Amendment. The court ruled that such measures were a legitimate exercise of the war powers of the National Government.<sup>12</sup>

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10. Public Law 503, 56 Stat. 173.

11. No. 870, Oct. Term, 1942 (Sup. Ct.).

12. "The war power of the national government is the power to wage war successfully. It extends to every matter and

An enemy subject who is permitted to remain must not join the forces of his home state, or assist them in any way, if they occupy a part of the country in which he resides. If he does so, he is liable to be punished for treason after their withdrawal.<sup>13</sup>

26. Means of Injuring the Enemy Limited.--The principle that the right of injuring the enemy is not unlimited so far as concerns the means or instruments of destruction, resolves itself in practice into two prohibited categories: (1) those which destroy or disable by poisoning, (2) those which aggravate unnecessarily the sufferings of individuals.<sup>14</sup> Except for such means as are expressly prohibited by conventional or customary law, all means of killing and wounding are lawful whether the instrument is designed for use against a single person or large groups.<sup>15</sup>

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12. (Contd.) activity so related to war as substantially to affect its conduct and progress \* \* \* The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace the safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant." Hirabayashi v. United States, supra.

13. Lauterpacht, p. 248.

14. Air Power, p. 161.

15. Spaight, p. 77, "It is certain that the employment of a projectile capable of destroying an army at a blow would be legitimate under the actual principles of the law of war." The use of flame-throwers, etc., is legitimate.

The weapons of war that may be used legitimately are not confined to those which are openly employed; thus mines, booby traps and pits are permissible.<sup>16</sup>

Other modes of warfare are prohibited because of risk of injury to the peaceful population or neutrals, e.g., scattering of loose mines on the high seas, or because of treachery, e.g., assassination.

Illustrative case.--

- In the Russo-Japanese War, the Russians allegedly stretched live electric wire across one of their positions as a result of which an entire line of Japanese infantry assaulting the position was killed. This according to Spaight is legitimate.<sup>17</sup>

27. Hague Declaration No. XIV of October 18, 1907.--This Convention with respect to discharging explosives from balloons has not been adhered to by any of the powers in the present war and was expressly denounced by the United States.<sup>18</sup>

28-29. Poisons, Gases and Chemicals.--The Conventions with respect to the use of poison gas are as follows:

a. Declaration of The Hague, 1899, by which "the contracting Powers agree to abstain from the use of projectiles the sole

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16. Baker and Crocker, p. 113, citing Halleck.

17. Spaight, p. 77.

18. See Sec. I, Cir. 136, WD, May 7, 1942.

object of which is the diffusion of asphyxiating, or deleterious gases".<sup>19</sup> It has been doubted whether this Convention forbids the emission of gas by other means than projectiles or by projectiles which produce damage through their explosive action while at the same time emitting gases.<sup>20</sup>

b. Article 5 of the Washington Treaty of 1922 for the protection of the lives of neutrals and noncombatants at sea in time of war and to prevent "the use in war of asphyxiating, poisonous and other gases, and all analogous liquids, materials or devices". This treaty is not in force.<sup>21</sup>

c. The Geneva Protocol of 1925 contains a similar prohibition to that of the Washington Treaty and it expressly prohibits bacteriological warfare.<sup>22</sup>

Some writers have contended that the use of poison gas is forbidden by the rule of customary law which prohibits the use of poison.<sup>23</sup> Article 23(a)<sup>24</sup> prohibiting the employment of

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19. The United States is not a party to this Convention.

20. Garner, Vol. I, p. 278.

21. France failed to ratify this treaty because of its provisions relating to submarines.

22. The United States has not ratified this treaty.

23. Walker, Vol. II, p. 140; Lauterpacht, p. 273.

24. FM 27-10, par. 28.

"poison or poisoned" weapons has been the subject of conflicting interpretations. On the one hand it has been suggested that it interdicts only poisoned weapons<sup>25</sup> and contrariwise that it covers not merely poisoned arms, but food poisoning, water poisoning, and all poison fumes or gas discharged in the air.<sup>26</sup> Poisoned gases, it has been argued, like chlorine and phosgene, often cause a lingering and painful death or illness and are therefore obnoxious also to Article 23(e)<sup>27</sup> forbidding the use of materials, etc., of a nature causing unnecessary injury. Whether the use of gas also offends against Article 23(e) may depend on the nature of the gas used. It may be difficult to determine when a weapon of war becomes needlessly cruel.<sup>28</sup>

In official statements, President Roosevelt has condemned "the use of poisonous or noxious gases" and has warned the Axis that its use by them will bring prompt retaliation in kind.<sup>29</sup>

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25. Garner, Vol. I, p. 277.

26. Lawrence, p. 531.

27. FM 27-10, par. 34.

28. Walker, Vol. II, p. 140. Cf. The Washington Treaty and Geneva Protocol, condemn "other gases and all analogous liquids, materials or devices", thus prohibiting not only lethal but also non-toxic or anaesthetic gases. Air Power, p. 164.

29. Time, June 21, 1943; Facts on File, 1942, 180 H.

The diversion of the water source from the armed forces of the enemy is not forbidden. Similarly, contamination of water by methods which are apparent, such as depositing carcasses of animals, is permissible.<sup>30</sup> Non-obvious poisoning of the water supply is forbidden by this Convention. Is it lawful to poison drinking water if notice is posted informing the enemy that the water has been poisoned?<sup>31</sup> To poison all water supplies, whether with or without notice, deprives not only the enemy forces but the civilian population of the necessities of life and is illegitimate. If no civilians can be affected by the poisoning and notice is posted, Garner believes that the practice would be unobjectionable in that it would be tantamount to a diversion of the water supply.<sup>32</sup>

Bacteriological warfare, i.e., infecting the enemy with germs or bacteria, is forbidden. In addition to Article 23(a) of the Hague Regulations, the following reasons are suggested in support of such rule: (1) if civilians be affected, war is being made on

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30. Spaight, p. 84.

31. The German Commander in Southwest Africa attempted to justify such a practice in World War I. See Lawrence, p. 542.

32. Garner, Vol. I, p. 291. This view overlooks the unqualified prohibition of the Hague Convention against the use of poison. Lawrence, p. 542.

the peaceful population, (2) if the military forces of the enemy be affected, material is being employed that causes superfluous injury under Article 23(e).<sup>33</sup>

30-31. Treachery and Assassination.--"It is the essence of treachery that the offender assumes a false character by which he deceives his enemy and thereby is able to effect a hostile act, which, had he come under his true colours, he could not have done."<sup>34</sup> A person who crosses into the enemy line in disguise and kills an enemy general is an assassin whereas an individual who comes as an open enemy in uniform and does the same act is not.<sup>35</sup> It is treachery for a soldier to throw up his hands in surrender and then take up his rifle and shoot his captor.<sup>36</sup> A soldier who pretends to be disabled or dead is guilty of treachery if he then uses his rifle.<sup>37</sup> Spaight considers the following two cases as illegitimate stratagems: (1) that in which a soldier

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33. FM 27-10, par. 34; see Lawrence, p. 542.

34. Spaight, p. 87. In a broad sense the difference between treachery and legitimate ruses and stratagems is that the latter involve no breach of faith. Phillipson, p. 206.

35. Lawrence, p. 541.

36. Spaight, p. 87.

37. Baty and Morgan, p. 193.



shoots behind the cover of a wounded man, and (2) that in which troops in their advance take shelter behind a screen of civilians driven before them.<sup>38</sup>

Illustrative case.---

A press dispatch from China stated that the Japanese had broadcast an offer of reward of 10,000 yen for the capture "dead or alive" of any member of the United States Medium Bombardment Group based in China. If this report be true, it is contrary to international law. The offering of a reward for an enemy dead or alive is forbidden by law<sup>39</sup> and especially by Article 23(b) of the Hague Regulations to which Japan is a party. Such a reward is an invitation to assassination.<sup>40</sup>

32-33. Quarter.---When an enemy combatant ceases to fight and asks for mercy, he is soliciting quarter; when his life is spared and he is made prisoner, quarter is granted to him.<sup>41</sup> Thus a combatant who ceases to fight and is willing to be captured may not be killed or wounded.<sup>42</sup> Similarly, combatants disabled by sickness or wounds may not be killed.<sup>43</sup> Circumstances may exist where the giving of quarter is impracticable, for example, when

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38. Air Power, p. 146.

39. See FM 27-10, par. 31.

40. SPJGW 1943/6886, May 20.

41. Lawrence, p. 376.

42. Lauterpacht, p. 270.

43. Lauterpacht, p. 270.

it is impossible to distinguish between those who wish to surrender and those who continue to fight.<sup>44</sup> Military necessity will not justify a declaration that no quarter will be given.<sup>45</sup> However, quarter may be refused by way of reprisal in kind for the refusal of quarter by the enemy.<sup>46</sup>

Illustrative case.--

An enemy airman whose engine has stalled or his machine gun jammed, indicates that he desires to surrender. Must the opposing airman refrain from shooting the enemy down? Spaight<sup>47</sup> answers in the negative stating that normally it is impossible to accept surrender in the air.

An enemy whose aircraft has landed on territory held by the opponent may not be attacked if he does not continue to resist or try to escape for he will be captured in any event.<sup>48</sup> He may

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44. Spaight, p. 91. When the enemy continues to resist until the last moment and the granting of quarter would endanger the success of the attacking element, quarter may be refused. Phillipson, p. 204.

45. Bordwell, p. 283, states: "The need of this provision against the declaration of no quarter is even greater than against the refusal of quarter, as instances of threats to give no quarter have been more numerous than the actual refusal to give it."

46. G.O. 100, art. 61; Lauterpacht, p. 271.

47. Air Power, p. 117, et seq.

48. Air Power, p. 125.

be attacked if he continues to resist.<sup>49</sup> It is not forbidden to fire on an enemy whose machine has crashed on enemy ground.<sup>50</sup>

Enemy personnel descending in parachutes from aircraft which is disabled or out of control may not on general principle be shot if the descent is over ground held by forces hostile to the parachutist.<sup>51</sup> No established principle or clearly defined usage exists with respect to attack on an aviator who is descending to his own ground for the purpose of escaping destruction.<sup>52</sup>

34. Employment of Arms, etc., Causing Unnecessary Injury.--

The Declaration of St. Petersburg, 1868, prohibited the use of any projectile of a weight below 400 grammes (about 14 oz.), which is either explosive or charged with fulmination or inflammable substances. The Hague Declaration of 1899 prohibited "the use of bullets which expand or flatten easily in the human body,

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49. Air Power, p. 126. Resistance continues if the airman tries to burn his airplane.

50. Air Power, p. 124.

51. Air Power, p. 140. Spaight says: "One cannot say that there is any definite rule of war upon the point, but it may at least be affirmed that to attack a parachutist in circumstances in which he is certain in any case to be captured would be contrary to the principles of international law."

52. Air Power, p. 143. Cf. Art. 20, draft code of 1923 with respect to air warfare: "When an aircraft has been disabled the occupants, when endeavoring to escape by means of parachute, must not be attacked in the course of descent."

such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions". Article 23(e) of the Hague Rules, 1907,<sup>53</sup> prohibiting the employment of "arms, projectiles, or material calculated to cause unnecessary suffering" is an enactment in more general terms of the Declaration of St. Petersburg.<sup>54</sup> Though the United States is not a party to either the Declaration of 1868 or 1899, these declarations are accepted as customary law independent of the treaty provisions.<sup>55</sup> During World War I, Germany protested against the use of shotguns by the American troops based on Article 23(e)<sup>56</sup> and the complaint was repudiated by the United States.<sup>57</sup>

Article 23(e) of the Hague Regulations of 1907 does not prohibit the use of explosives contained in artillery shells or hand grenades. The prohibition against explosive and expanding bullets refers to small-arms munition.<sup>58</sup>

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53. FM 27-10, par. 34.

54. Phillipson, p. 199.

55. Air Power, p. 169; cf. SPJGW 1943/3186. The practice of nations indicates that all unjacketed lead bullets are illegal.

56. FM 27-10, par. 34.

57. Garner, Vol. I, p. 270. However, a shotgun shell having at its muzzle end a single slug scored on the sides, which, when fired into a soft target similar to human flesh, causes an exit wound as big as a saucer, would be violative of Article 23(e) of the Hague Regulations.

58. Air Power, p. 168.

36. Subjects Not to be Compelled to Take Part in Operations Against Their Own Country.--<sup>59</sup>The prohibition against compelling enemy subjects to take part in "operations of war" directed against their own country unquestionably applies to the population of occupied territory.<sup>60</sup> The terms of this article are broad enough to apply to enemy subjects found in a belligerent's own territory.<sup>61</sup> The acceptance of voluntary service on the part of the enemy subject is not prohibited.<sup>62</sup> Enemy nationals cannot be compelled to perform military service against their own country even if they have been in the service of the invader before the outbreak of war.<sup>63</sup> The line between work permitted and work

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59. See p. 80, *infra*, for additional information.

60. Holland, p. 44, where it is stated that Article 23, last par., was substituted for Article 44 of Hague Regulations of 1899; the latter expressly applied to the "population of occupied territory".

61. The fact that it does not appear in the body of the Convention but at the end of an article dealing with prohibited methods of conducting hostilities casts doubt on this view. Cf. *Porter v. Freudenburg* (1915), 1 K.B. 857.

62. Spaight, p. 144.

63. Holland, p. 44. An enemy alien who is a member of the Enlisted Reserve Corps in the Army of the United States cannot be compelled to serve in the armed forces of the United States against his own country. Par. 7e(2)(b)2, AR 615-500, Sept. 1, 1942, applies equally to enemy aliens, members of the Enlisted Reserve Corps, who are being called to active duty, and that such aliens who object in writing to service in the army may not be compelled to serve. SPJGW 1943/10738, July 28.

forbidden may be difficult to draw. A liberal construction would prohibit all acts directly and distinctly in aid of military operations.<sup>64</sup> In this view it would seem that the digging of trenches, construction of fortifications even at a distance from the front, the repairing of arms, making of munitions, the building of a road to be used exclusively for military purposes, and the construction of gun emplacements would be prohibited.<sup>65</sup> However, a belligerent may legitimately demand that the enemy nationals tend their wounded, bury their dead, repair and build roads and bridges of general utility.<sup>66</sup> Generally, the occupying army may utilize the services of enemy nationals for all its varied need except "operations of war".<sup>67</sup>

37-44. Stratagems.--"War is a conflict of wits quite as much as a conflict of arms."<sup>68</sup> Ruses are permissible provided they do not involve the violation of any express or implied

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64. Phillipson, p. 197; Spaight, p. 152. Cf. Lauterpacht, p. 345, who states that the practice of belligerents has been to distinguish between military operations and military preparations and that such work as construction of military roads, fortifications and the like behind the front is not forbidden in preparation for military operations.

65. Cf. Phillipson, p. 197.

66. Phillipson, p. 197. If the community benefits generally from the construction, the fact that the military also benefits would not be violative of this article.

67. Spaight, p. 152.

68. Lawrence, p. 538.

prohibition of the Hague Convention such as the prohibition against treachery<sup>69</sup> or the improper use of the national flag of the enemy, etc.<sup>70</sup>

Article 24 permits reconnaissance work and spying. For example, it is permissible for a belligerent to send a soldier disguised as a peasant into the enemy lines for the purpose of acquiring information.<sup>71</sup> Bribery of enemy commanders, high officials of government, persuading enemy soldiers or the civilian population of the enemy to desertion or insurrection are permissible stratagems when done openly by combatants in uniform.<sup>72</sup>

The Hague Regulations prohibit the improper use of the enemy's national flag and uniforms. Practice and law agree that these ought not to be used by a belligerent during battle.<sup>73</sup> Whether the enemy flag or uniform may be used for facilitating an approach or withdrawal is a matter of dispute. The American

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69. FM 27-10, par. 30.

70. FM 27-10, pars. 41-44; see p. 142, *infra*, for further discussion.

71. A spy who is taken in delicto by the enemy may be punished. Spaight, p. 210.

72. Air Power, pp. 292, 308. However, such acts if engaged in by a person in disguise, are illegitimate and the perpetrator is liable to be put to death as a war traitor. SPJGW 1943/12516, Sept. 15.

73. Lauterpacht, p. 335.

view,<sup>74</sup> and that of many writers on international law, is that such use is permissible if the flag or uniform be discarded before the opening of fire.<sup>75</sup> Soldiers lacking clothing who wear captured enemy clothes must place some distinctive or distinguishing mark in a conspicuous place, otherwise they may lose the privileges of lawful combatants.<sup>76</sup>

Illustrative case.--

It was reported in the New York Times, May 14, 1940, that Germany in invading Belgium dropped parachutists dressed in Belgian uniforms behind the Belgian lines. If such parachutists engaged in combat while so dressed they would not be entitled to treatment as lawful belligerents.<sup>77</sup>

A flag of truce and the Red Cross of the Geneva Convention may not be used for a stratagem.<sup>78</sup> It is the common understanding that these signs shall be used for appropriate purposes only.<sup>79</sup>

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74. FM 27-10, par. 43.

75. See 35 Am. J. Int. L. 435 for extended discussion.

76. Lawrence, p. 539.

77. Cf. FM 27-10, par. 347.

78. Lawrence, p. 538; see FM 27-10, pars. 42, 44.

79. Cf. Spaight, p. 153.



45-60. Assaults and Bombardments.--a. Assault<sup>80</sup> or bombardment, by any means whatever,<sup>81</sup> of undefended places is prohibited by the Hague Regulations. An undefended place<sup>82</sup> is not synonymous with unfortified;<sup>83</sup> for example, an unfortified place may be defended. A place occupied by combatant troops or through which such troops are passing<sup>84</sup> or in which the inhabitants take up arms to defend themselves is a defended place.<sup>85</sup> A fortified place is presumptively defended.<sup>86</sup> However, a fortified town which makes no attempt to defend itself against occupation is immune from bombardment.<sup>87</sup> The prohibition against bombarding such a place, i.e., an undefended town, is based on the assumption that an army could occupy it without firing a shot.<sup>88</sup> However,

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80. By assault is meant a surprise attack. Holland, p. 46.

81. This was intended to include discharge of projectiles from balloons and airplanes as well as by artillery. Air Power, p. 196.

82. Undefended is not defined by the regulation.

83. Lauterpacht, p. 325.

84. Spaight, p. 159.

85. Hyde, Vol. II, p. 305.

86. Cf. FM 27-10, par. 47; Spaight, p. 159, "No one can tell today whether a town is seriously fortified or not."

87. Garner, Vol. I, p. 420, et seq.; Lawrence, p. 523.

88. Westlake, Part II, p. 315, states, "The price of immunity from bombardment is that the place shall be left open for the enemy to enter."

where a military force is prevented from entering by fire from a nearby fortress or defended place, the town itself cannot be called an undefended place.<sup>89</sup> Similarly, if the military objective cannot be reached by any other means, bombardment of an undefended place is permissible. If an undefended town offers the defender a shelter to fall back on should a defended place prove untenable, the undefended town may be bombed on the plea of military necessity.<sup>90</sup> A controversial point is whether towns are defended simply because they possess ammunition, war materiel, depots, etc. Some writers assert that if no serious effort is made to safeguard them from attack, such places would not be transformed into defended places.<sup>91</sup> Spaight contends that military necessity will justify bombardment of undefended towns for the purpose of destroying military stores, factories, etc.<sup>92</sup> All belligerents during World War I bombarded such places from the air.<sup>93</sup>

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89. Spaight, p. 161.

90. Spaight, p. 160.

91. Hyde, Vol. II, p. 303; Garner, Vol. I, p. 422.

92. Spaight, p. 170.

93. Railway stations, barracks, munition and chemical works, etc., were considered as military objectives. Air Power, p. 198, et seq.; Lauterpacht, p. 325. It is clear that an otherwise undefended place loses that status if military airports are located in or near such place.

In land and naval bombardment of defended places no legal duty exists to restrict bombardment to fortifications only; on the contrary, destruction of public and private buildings is considered lawful as one of the means of impressing upon the authorities the advisability of surrender.<sup>94</sup> In such cases, the commander must so far as possible spare buildings devoted to religion, art, science and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.<sup>95</sup> A belligerent's right to bomb legitimate military targets cannot be prejudiced by establishing hospitals, etc., in dangerous proximity to such targets. If damage is incidentally caused to such a hospital it is chargeable to the belligerent who located it in a position of danger.<sup>96</sup> To enable the attacking force to spare such buildings, signs must be placed to indicate their presence and the besieger notified beforehand.<sup>97</sup>

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94. Lauterpacht, p. 328; cf. Air Power, p. 206. Some writers insist that deliberate bombardment of residential quarters is illegal. See Hall, p. 575.

95. Article 27 of the Hague Regulations, FM 27-10, par. 58, refers to civilian hospitals and not military hospitals. For military hospitals see p. 140, infra.

96. Spaight, p. 182.

97. FM 27-10, pars. 58, 59.

Air war has introduced a number of complicated and unsolved problems with respect to bombardment. Few positive and specific rules can be laid down with regard to air hostilities. Certain general principles of land warfare may, however, be applied.<sup>98</sup> Deliberate or reckless bombing of noncombatants is forbidden as is bombardment for terrorizing the civilian population.<sup>99</sup> The laws of humanity are applicable to air war.<sup>100</sup> Destruction as an end in itself or for the sole purpose of inflicting monetary loss on the enemy is forbidden.<sup>101</sup>

b. Seizure and Destruction of Property During Operations; Devastation. Article 23(g)<sup>102</sup> and Article 46<sup>103</sup> when

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98. Cf. Lauterpacht, p. 414.

99. Lauterpacht, p. 414; Phillipson, p. 177. The presence of civilians will not protect military objectives from attack merely because it is impossible to bombard them without indirectly injuring civilians. Lauterpacht, p. 415.

100. See FM 27-10, par. 4b. Cf. Air Power, p. 195, et seq., especially at p. 208, where the author in contending that law as well as practice in World War I permitted air bombing of military objectives whether in a defended place or not, states "that in some cases \* \* \* the exercise by the attacking belligerent of his right would result in damage to the civilian population altogether disproportionate to the military results achieved. In such cases, humanity demands that the belligerent should refrain from attack."

101. Spaight, p. 131.

102. FM 27-10, par. 313.

103. FM 27-10, par. 323. This latter article though included in the section of the regulations dealing with occupation applies where there is as yet no occupation. Spaight, p. 111.

read together prohibit the destruction or seizure of enemy property, public or private, unless imperatively demanded by the necessities of war. All destruction to or seizure of enemy property, public or private, for the purpose of offense or defense is legitimate whether in preparation for battle or during battle.<sup>104</sup> The term "necessities of war" or military necessity is an elastic term and is ultimately for the determination of the commander in the field.<sup>105</sup> Destruction as an end in itself is clearly outlawed.<sup>106</sup> There must be some reasonably close connection between the seizure or destruction of property and the overcoming of the enemy's army.<sup>107</sup>

Illustrative case.--

The burning of public buildings in Washington by the British in 1814 has been condemned as contrary to international law.<sup>108</sup>

The Hague Convention has made a distinction between the right of a belligerent to seize and destroy enemy property as an incident to operations, movements, or combat of the army and the

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104. Lauterpacht, p. 321.

105. Lawrence, p. 536.

106. FM 27-10, par. 324; Spaight, p. 111, et seq.

107. Spaight, p. 112; FM 27-10, par. 324.

108. Spaight, p. 112; see also Garner, Vol. I, p. 323; Lauterpacht, p. 321.

limited right of an army of occupation to make use of enemy property as an incident to the administration of enemy country.<sup>109</sup>

In the former case, military necessity will excuse the seizure or destruction of public or private property<sup>110</sup> such as railways, communications, war materiel, munitions factories, supplies and other property of direct military value to the enemy.<sup>111</sup> Similarly, non-military property may be seized or destroyed for the purposes of defense or attack.<sup>112</sup> Thus, factories, private homes or even a church, may be seized or destroyed if necessary for military operations.<sup>113</sup>

Military necessity may excuse the destruction of entire towns and cities. General Sherman in the Civil War burned Atlanta

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109. See FM 27-10, pars. 324, 325; Fenwick, p. 483.

110. Destruction of private dwellings in the line of fire is common.

111. Spaight, p. 113.

112. Lauterpacht, p. 321; Spaight, p. 114. The only exemption military necessity has made is the protection given by the Geneva Convention of 1929 to sanitary and medical units. FM 27-10, par. 179; see p. 132, *infra*, for exceptional case.

113. Lawrence, p. 535. Respect for private property does not interfere with the right of a belligerent to appropriate private property for temporary military use. FM 27-10, par. 325. The protection given to educational and religious institutions by Article 56, FM 27-10, par. 318, covers the period of military occupation and does not prevent destruction or seizure during military operations.

because he could not spare troops to hold the town and he could not afford to leave it standing in his rear to be seized by the enemy. The inhabitants were driven out of the city and it was burned to the ground.<sup>114</sup> A retreating force may destroy barracks, arms, ammunition, factories and foundries, which would, if not rendered useless, supply the enemy with the means of carrying on war.<sup>115</sup> However, it has been denied that such a force may destroy provisions in the possession of private enemy inhabitants in order to prevent the enemy from using them in the future.<sup>116</sup> The population of an area may devastate its own land in order to repel an enemy. International law does not forbid such destruction.<sup>117</sup>

61. Pillage.--See paragraph 329.

62-64. Unanchored Submarine Mines.--In World War I, the Germans scattered unanchored mines over the high seas indiscriminately.<sup>118</sup> In the present war, Germany used aircraft for the purpose of laying unanchored mines. Great Britain answered both

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114. Spaight, p. 130.

115. Spaight, p. 132.

116. Lauterpacht, p. 322; contra, Spaight, p. 138.

117. For example, Dutch who cut their dykes and let in the sea as a defense against the Spaniards. Lawrence, p. 537.

118. Garner, Vol. I, p. 329, et seq.

of these violations by reprisals in establishing war zones and permanent mine fields.<sup>119</sup>

#### CHAPTER IV

#### PRISONERS OF WAR

70-72; 76-77: Who May Become Prisoners of War.--The Convention of 1929<sup>1</sup> relating to the treatment of prisoners of war has been signed by the United States, Germany and Japan.<sup>2</sup> All categories of persons who are entitled to be treated as prisoners of war are not enumerated in the Hague Convention. The Convention does specify certain persons who are prisoners of war.<sup>3</sup>

Civilian internees. Civilian aliens found in a belligerent's own territory at the outbreak of war may be interned.<sup>4</sup> Such persons are, under the American and English practice as

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119. Lauterpacht, p. 367.

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#### Chapter IV

1. Referred to hereafter in this chapter as the Convention.
2. All of the major powers at war today have ratified or adhered to the Convention except Japan and Russia. Japan, though failing to ratify this Convention, has through the Swiss government agreed with the United States to apply its provisions on a reciprocal basis.
3. See FM 27-10, pars. 72, 76.
4. See p. 24, supra.



well as by the weight of authority under international law,<sup>5</sup> treated as prisoners of war.<sup>6</sup> The United States and the enemy governments, namely, Germany, Italy and Japan have agreed through the Swiss government to treat interned civilian alien enemies, on a reciprocal basis, at least as favorably as prisoners of war.<sup>7</sup> The internees receive food, lodging, clothing and medical care. They may not be compelled to do work other than the care of the camp without their consent. If they elect to work they receive the same pay as prisoners of war.<sup>8</sup>

When a belligerent invades enemy territory, civilian enemies generally are not subject to being interned or captured.<sup>9</sup> Under the same circumstances, civilians who assist the enemy as drivers or laborers in the construction of fortifications or as clerks in

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5. JAG 014.311, June 28, 1938; SPJGW 1943/8113, June 16.

6. "Every individual who is deprived of his liberty not for a crime, but for military reasons, has a claim to be treated as a prisoner of war." Lauterpacht, p. 299; cf. FM 27-10, par. 70. See for extended discussion, 37 Am. J. Int. L. 30.

7. See for details, United States Dept. of State Bull., Vol. VI, No. 152, p. 446, May 23, 1942.

8. 37 Am. J. Int. L. 30.

9. Cf. FM 27-10, par. 299, enjoining respect for "family honor and rights, the lives of persons", etc. See also Spaight, p. 306.

an army installation should not be made prisoners of war.<sup>10</sup> This principle is subject to the qualification that the invader may take as prisoners of war all civilians who are separated from other civilians by their importance in the enemy state<sup>11</sup> or by their usefulness to it.<sup>12</sup>

Civilians following the army. There are persons who "follow an army without directly belonging" to it and Article 81<sup>13</sup> mentions "correspondents, newspaper reporters, sutlers, contractors". However, the persons enumerated in the article are not a complete list but only examples.<sup>14</sup> Spaight lists the following as falling within this article: persons not commissioned or enlisted, but employed permanently by an army as pay-clerks, telegraph operators, engine drivers, or, generally, in any civilian capacity with an army in the field and such as are not officially employed by an

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10. Lauterpacht, p. 278. The enemy may detain them temporarily, requisition their services, or release them, but they are not to be detained as prisoners of war. Edmonds and Oppenheim, par. 58, footnote (a). The case of civilians accompanying the army in the field is dealt with hereafter.

11. FM 27-10, par. 76e, f.

12. Hall, p. 425; cf. FM 27-10, par. 76g.

13. FM 27-10, par. 76b.

14. Lawrence, p. 349.

army, but follow it for their own purposes, such as press-correspondents, sutlers, or contractors.<sup>15</sup> The difference between an ordinary prisoner of war and a civilian who follows the armed forces without directly belonging to it is that the latter, when detained, is held for military reasons other than weakening the enemy, namely, immediate release may be inconvenient or return to the camp of the enemy may result in the disclosure of information.<sup>16</sup> By reason of this difference such persons should not be subject to forced labor as is true in the case of ordinary prisoners of war.<sup>17</sup>

Civilian employees of an aircraft company serving overseas with the army air forces and supervising air mechanics are entitled to be treated as prisoners of war if in possession of a certificate.<sup>18</sup> Similarly, civil servants of a belligerent government

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15. Spaight, p. 304.

16. Bordwell, p. 245; Spaight, p. 310.

17. Spaight, p. 310; cf. SPJGW 1943/7418, June 10, where it was held that Articles 21 and 22 (FM 27-10, pars. 94, 95) of the Geneva Convention relating to "assimiles" permit the treatment and classification of civilians attached to the armed forces in the field, performing work of a character equivalent to that of officers, as officers; that the list of classifications should be communicated to the enemy.

18. SPJGW 1943/7809, June 9; cf. Cir. 33, WD, Jan. 30, 1943, which provides that individuals included in FM 27-10, par. 76b, namely civilians attached to the armed forces, will be provided with a certificate, by the local commanding officer, identifying them as noncombatants. See also sec. III, Cir. 9, WD, Jan. 14, 1942.

accompanying the armed forces into the field, such as Treasury Department agents, would be entitled to be treated as prisoners of war.<sup>19</sup> A certificate of identification is necessary to prevent the possibility of a combatant escaping in the guise of a noncombatant.<sup>20</sup> The failure of such a civilian to produce a certificate will not deprive him of the right to be treated with humanity if he be detained.<sup>21</sup> It must be remembered that the civilian is a noncombatant and if he commits acts of violence cannot claim to be treated as a prisoner of war when captured.<sup>22</sup>

Armed forces. The combatant members of a belligerent's army<sup>23</sup> as well as the noncombatant members of the army<sup>24</sup> are entitled to be treated as prisoners of war when captured.

Members of the volunteer corps<sup>25</sup> and of a levee en masse<sup>26</sup> are entitled to be treated as prisoners of war. The Geneva Convention

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19. SPJGW 1943/7335, May 26; Hyde, Vol. II, p. 345.

20. Bordwell, p. 245.

21. Lawrence, p. 350.

22. Hyde, Vol. II, p. 344; Spaight, p. 38; SPJG 383.6, March 21, 1942.

23. See p. 14, supra.

24. See p. 20, supra.

25. See p. 16, supra.

26. See p. 19, supra.

applies to persons who are captured on sea or air. The conditions of capture in such cases may render necessary departures from the Convention which must cease on arrival at a prisoners' camp.<sup>27</sup>

Subjects of neutral states. A citizen of a neutral state who is a member of the armed forces of a belligerent, a member of a volunteer corps, or a civilian attached to the army in the field<sup>28</sup> is entitled to treatment as a prisoner of war.<sup>29</sup>

73-75. Personal Safeguards Accorded Prisoners of War.--The obligation to grant treatment accorded prisoners of war to enemy individuals does not begin until resistance has ended.<sup>30</sup>

Prisoners of war are in the power of the enemy state and not the individuals or troops who capture them. Thus, the primary responsibility for the proper treatment of prisoners of war is upon the state.

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27. Air Power, p. 312.

28. SPJGW 1943/9501, July 2.

29: Cf. Spaight, p. 497. A subject of a belligerent found serving in the enemy forces is guilty of treason and, according to Edmonds and Oppenheim, par. 36, "cannot be regarded as enemies in the military sense of the term and cannot claim the privileges of the members of the armed forces of the enemy". FM 27-10, par. 11.

30. Flory, p. 39. The rule is the same for the sick and wounded, that is to say, the sick and wounded have ceased to resist. Spaight, p. 421.

The Convention modified the earlier Hague Convention by providing that prisoners of war must be treated humanely, protected against violence, insults and public curiosity. Events of World War I indicate the need of protecting a prisoner from personal violence and abuse. Incidents are recorded where in the course of transporting prisoners to internment camps they were subjected to conduct tending to render them despicable in the eyes of the civil population.<sup>31</sup> The publication of photographs of prisoners of war is not forbidden by this article merely because individuals may be identified.<sup>32</sup> However, the guiding principle that prisoners be humanely treated requires that a photograph be not of such a nature as to defame the prisoners or invade their right of privacy.<sup>33</sup>

Reprisals against prisoners of war. Reprisal in the law of warfare signifies the commission by one belligerent of what would otherwise be illegal acts of warfare in order to compel the other to refrain from breaches of the law of war.<sup>34</sup> Reprisals

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31. Hyde, Vol. II, p. 333; cf. Boer protest against British sailors who sang patriotic songs while Boer prisoners were being transported to St. Helena. Flory, p. 40.

32. FM 27-10, par. 73.

33. SPJGW 1943/11228, Aug. 7.

34. Lawrence, p. 543; Spaight, p. 462: "Reprisals are a survival of the lex talionis - an eye for an eye, etc."

are not prohibited by customary law.<sup>35</sup> The Hague Conventions do not deal with or prohibit reprisals.<sup>36</sup> However, the Convention of 1929 prohibits reprisals against prisoners of war.<sup>37</sup>

In the Geneva Conference of 1929 it was proposed that though reprisals against prisoners of war be prohibited, the legality of reprisals should be recognized in case an enemy state should mistreat the prisoners of the other side. This proposal was not adopted.<sup>38</sup>

Illustrative cases.--

a. During the Franco-German War, the Germans by way of reprisal bombarded and fired undefended open towns where their soldiers had been killed by civilian enemies who did not belong to the armed forces.<sup>39</sup>

b. Several instances were reported in World War I where Germany reputedly established prisoner of war camps in areas exposed to air attacks in reprisal for allegedly illegal acts on the part of the allies. Reprisals

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35. Lauterpacht, p. 111.

36. Lauterpacht, p. 449.

37. FM 27-10, par. 73. The language of the Convention does not preclude measures of reprisal in behalf of prisoners of war. Rasmussen, p. 19.

38. Flory, p. 44.

39. Lauterpacht, p. 447.

against prisoners of war are now prohibited by the Convention of 1929.<sup>40</sup>

c. During a small raid by British Commandos on the channel island of Sark on October 3, 1942, a Nazi officer and four soldiers were taken during the raid and were trussed. The trussing was a precaution taken during operations behind enemy lines. Germany in reprisal ordered the manacling of over 1,000 British prisoners of war mostly Canadian. German prisoners in Canada were reported handcuffed in retaliation.<sup>41</sup> These reprisals were violative of Article 2 of the Convention.

Persons and honor to be respected. Article 3 of the Convention<sup>42</sup> should be read in connection with the first paragraph of Article 9.<sup>43</sup> Prisoners of war are not criminals and must not be confined except as an indispensable measure of safety.<sup>44</sup> Of course, they are subject to confinement if they commit offenses or crimes.<sup>45</sup>

Illustrative case.--

During the Anglo-Boer War, the British protested the imprisonment of its captured troops. The Boers

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40. See Air Power, p. 335, et seq.; cf. Art. 9 of the Convention, FM 27-10, par. 82, which was expressly enacted to prevent reprisals such as given in the illustration by providing that no prisoner of war may be sent to an area where he would be exposed to the fire of the fighting zone.

41. Time, Oct. 19, 1942, p. 27; Nov. 2, 1942, p. 36.

42. FM 27-10, par. 74.

43. FM 27-10, par. 82.

44. Spaight, p. 280; Bordwell, p. 238.

45. This will be dealt with later in par. 118.



replied denying the fact, but admitted that a small number of prisoners who had committed offenses against the laws of war and were awaiting trial or had attempted escapes or were suspected of the intention of attempting to escape, had been confined in a common prison as a measure of safety, but apart from the ordinary criminals. Lord Roberts expressed satisfaction with the explanation.<sup>46</sup>

The use of dogs to maintain order and to prevent escapes in prison camps was the subject of protest by the Union to the Confederates and by the British to the German government in 1916 as subjecting prisoners of war to treatment as criminals.<sup>47</sup>

A necessary incident to the honorable status of a prisoner of war is his freedom from compulsory political indoctrination by the captor state. Thus, it would be improper to compel the attendance of prisoners of war at lectures or similar instructional activities in American history and government, democracy, etc. It is permissible to offer such instruction to prisoners of war if attendance is on a voluntary basis.<sup>48</sup>

The duty of maintenance. The duty of maintenance of prisoners of war is on the detaining state. The Convention of 1929 drew a distinction between the captor state and the detaining

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46. Spaight, p. 280.

47. Flory, p. 42; cf. American-German Berne Agreement, 1918, prohibiting use of unmuzzled dogs. 13 Am. J. Int. L. 406 at 420.

48. SPJGW 1943/4248, March 29.

state and placed the responsibility for maintenance on the latter.<sup>49</sup> Thus, where the captor state transfers prisoners of war to an allied power, the transferee (detaining state) is under an obligation to conform to the standards of the Convention.<sup>50</sup> A captor state does not divest itself of its primary obligations under treaty or international law by a transfer.<sup>51</sup> It remains responsible to the power whom the prisoners served for whatever treatment the prisoners may receive from the transferee power.<sup>52</sup>

The power in whose service a prisoner of war was at the time of capture is the power entitled to protect such prisoner. For example, Americans serving in the British armed forces captured by the Germans would be considered British prisoners.<sup>53</sup>

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49. Rasmussen, p. 14; Flory, p. 45.

50. In the absence of a treaty provision to the contrary, it is lawful for a captor state to transfer prisoners to an ally. The pay of a prisoner becomes fixed at the time of capture and would not be altered by a subsequent transfer. SPJGW 1942/3185, July 20.

51. SPJGW 1943/7203, May 21. Theoretically, every captor state is also a detaining power so long as the prisoner is within its control. The effect of the Geneva Convention is to require a detaining state that is not also a captor state to conform to the standards of the Convention.

52. SPJGW 1943/7203, May 21.

53. Flory, p. 35; cf. SPJGW 1942/6035A, December 21.

Discrimination. Differences of treatment of prisoners of war are lawful only if based on military rank, state of physical or mental health, professional qualifications, or the sex of the prisoner.<sup>54</sup> Women prisoners of war must be treated with due regard to their sex.<sup>55</sup>

Illustrative case.--

It would be improper for the captor state to accord different treatment to some prisoners of war on the basis of the willingness of such prisoners to attend lectures held by the captor state on political subjects.<sup>56</sup>

78. Must Give Name and Rank; Coercion to Obtain Military Information Prohibited.--A prisoner of war is bound to give, if questioned, his true name and rank or his serial number. The only punishment for refusal to supply such information or giving false information that may be imposed is the loss of privileges accorded to prisoners of his class.<sup>57</sup> A prisoner may not be

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54. FM 27-10, par. 75.

55. FM 27-10, par. 74; cf. The Berne Agreement U. S. - Germany, 1918<sup>7</sup>, Art. 31, which provided that female personnel, if captured, should be given every possible protection against harsh treatment or insult; they were to be suitably and decently quartered, and provided with lavatories, bathing facilities separate from male prisoners. 13 Am. J. Int. L. 406 at 421.

56. Cf. SPJGW 1943/4248, March 29.

57. Art. 9 of the Hague Convention of 1907 required that the prisoner give only his name and rank. Spaight, p. 289, states with respect to the 1907 Convention, "No mention is made

deprived of other privileges because he refuses to give other information. He may be questioned on any subject but he need not answer nor may he be coerced into giving such information.<sup>58</sup> It would be contrary to international law to force a prisoner to give military information about his own forces.<sup>59</sup>

79. Effects That May be Retained by Prisoners.<sup>60</sup> --The Convention specifically provides that a prisoner of war shall remain in possession of "all effects and objects of personal use" although the object may belong to his state. In practice<sup>61</sup> objects of personal use are understood to include gas mask, helmet, military uniforms, clothing, and kit required for personal use, although technically they may belong to his government. Objects of value, which may not be taken from a prisoner, include such articles as

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57. (Contd.) of disciplinary punishment being inflicted if he declines to do so, and presumably the effect of Article IX is to put officers and non-commissioned officers who refuse to state their names and rank on the same footing as a private."

58. Air Power, p. 340.

59. The captor may employ all humane means to obtain information from a prisoner of war. See Air Power, p. 341, et seq., for various non-forcible devices used in World War I for obtaining information such as microphones, bogus-fellow prisoners, etc.

60. See p. 127, infra.

61. Baker and Crocker, p. 44, citing U.S.R.L.W., 1914, and Edmonds and Oppenheim.

rings, watches, cigarette cases, and extra clothing.<sup>62</sup> Arms, horses, military equipment and military papers may be taken from prisoners of war. Property falling within the category of "arms, horses, military equipment and military papers" may be confiscated though private property, for example, a revolver.<sup>63</sup> Personal property not falling within the category of arms, etc., may be taken from a prisoner of war, though it would remain his property, if its possession would facilitate escape or espionage. Thus field glasses owned by a prisoner of war could be taken from him until his release from captivity.<sup>64</sup> The same rule would apply with respect to any money in possession of the prisoner, that is, money taken from him must be credited to his account and a receipt given.<sup>65</sup> On the other hand, all property belonging to the enemy state (except objects of personal use) may be confiscated by the captor state. Thus, field glasses belonging to the enemy

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62. Art. 72, G.O. 100 [1863].

63. See FM 27-10, par. 326; Air Power, p. 329.

64. Air Power, p. 329.

65. A large sum of money in the prisoner's possession might facilitate his escape. Unless the prisoner gives his consent, the money may not be converted into foreign currency. FM 27-10, par. 97; see also par. 21(2), Cir. 10, WD, Jan. 5, 1942.

state could be confiscated by the captor.<sup>66</sup> The broad language of Article 6 permitting a prisoner to retain "all effects and objects of personal use" is subject to the necessary practical limitation of available transportation facilities as well as housing facilities.<sup>67</sup>

No statutory provisions exist at this time for the settlement of claims against the United States for damages to property belonging to prisoners of war or interned enemy aliens. In case of loss or damage in such cases; the prisoner or interned alien would present his claim through diplomatic channels or petition Congress.<sup>68</sup>

80-81. Evacuation; Notification of Capture.--a. Prisoners in Places of Danger. Reprisals in advance, that is, the placing

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66. Such articles would be permissible booty and would belong to the government of the captor. See FM 27-10, par. 327; Phillipson, p. 220.

67. Thus it was held that prisoners of war need not be allowed to bring in excessive baggage. The baggage allowed under transport regulations to United States personnel affords an adequate basis for allowances to prisoners of war as a general rule. When transportation of excessive baggage is refused, an opportunity should be given to the prisoner to sell the property or to store it privately or with the army. SPJGW 1943/6501, May 12.

68. SPJGW 1942/6165, December 28, where it was also stated that "the Government is not an insurer of the property of prisoners of war or interned enemy aliens."

of prisoners of war in localities where they were peculiarly subject to being injured by hostile acts undertaken by their compatriots, were of frequent occurrence in past wars.<sup>69</sup> This practise is now definitely forbidden by Article 7 and Article 9, last paragraph.<sup>70</sup> The former enjoins evacuation from the combat zone within the shortest possible time and the latter forbids the sending back of prisoners into a region where they might be exposed to fire of a combat zone or used to give protection from bombardment to certain points by their presence.

b. Sick and Wounded. An exception to evacuation of prisoners from the combat zone is made by Article 7 in those cases where by reason of sickness or wounds the prisoners cannot be immediately evacuated. Article 25 of the Convention<sup>71</sup> is inspired by the same motive as Article 7 in providing that the sick and wounded shall not be transferred as long as their recovery might be endangered by the journey.

c. Notification of Capture. Article 8 requires belligerents through their information bureaus to notify each other as soon as possible of all captures of prisoners as well as the official addresses to which letters may be sent to such prisoners.

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69. Air Power, p. 333.

70. FM 27-10, pars. 80, 82.

71. FM 27-10, par. 98.

In case of prisoners being transferred from one camp to another, the detaining power is required to make arrangements for the forwarding of correspondence and packages to their new destination.<sup>72</sup>

Under the terms of an Executive agreement between the United States and Germany,<sup>73</sup> the German Armed Forces Information Service supplies information regarding captured members of the United States armed forces to the Swiss Legation, designated by the United States as protecting power as well as to the central information office for prisoners of war at Geneva. The Prisoners of War Information Bureau in the Office of the Provost Marshal General furnishes a like service with regard to German prisoners taken by the United States.<sup>74</sup>

82. Internment.--Prisoners of war are not criminals and must not be confined except as an indispensable measure of safety or sanitation. It is improper to place them in irons, bind them or otherwise restrain the use of their limbs.<sup>75</sup> The distinction

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72. FM 27-10, par. 99.

73. Executive Agreement series 255, 56 Stat. 1507.

74. See FM 29-5, par. 82b.

75. Cf. Treaty between Prussia and United States, 1799, Art. XXIV; Baker and Crocker, p. 47.



between internment and confinement is the difference between restriction to a specified locality and close confinement.<sup>76</sup>

a. Unhealthy Location. There is no rule of international law which forbids the transfer of prisoners of war to places far removed from their states of origin or the place of capture.<sup>77</sup>

However, the Convention does impose a duty of removing prisoners from areas where the climate is injurious for persons coming from temperate regions.<sup>78</sup>

b. Segregation of Nationalities. During World War I frequent complaints were made by the British against the German practice of mixing prisoners of war of different states of origin and races in a single camp and even in the same barracks.<sup>79</sup> The Convention merely provides that belligerents should avoid so far as possible mixing prisoners of different races or nationalities in a single camp.

83-85. Installation of Camps; Rations; Clothing. --a. Installation of Camps. In World War I prisoners were at times

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76. Holland, p. 21.

77. Flory, p. 48.

78. See Moore's Digest, Vol. VII, p. 225, for protest by United States to Great Britain for removing American citizens, prisoners of war temporarily serving in the armies of the South African Republic, to such a "notoriously insalubrious a place as the Island of Ceylon".

79. Garner, Vol. II, p. 23.

placed in empty barracks, disused factories and ships; tents, boarded and warmed, were also used.<sup>80</sup> The Convention relating to camp installations apparently refers to permanent camps. It requires that prisoners of war be lodged "in buildings or in barracks affording all possible safeguards as to hygiene and healthfulness".<sup>81</sup> The quarters must be protected from dampness, sufficiently heated and lighted. More definite standards are laid down by the Convention with respect to the total area and minimum air space of the dormitories and the bedding therein; these are to be the same as those provided for the troops at base camps of the detaining power.<sup>82</sup>

b. Rations. The Convention requires that prisoners of war be supplied with food equal in quantity and quality to that of troops of the detaining power at base camps.<sup>83</sup> In addition the Convention makes it mandatory for the detaining power to establish canteens in camps where prisoners may obtain food products

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80. Treatment of Prisoners of War, Lt. Gen. Belfield, 9 Grotius Society 131 at 139; Garner, Vol. II, p. 13.

81. Seemingly, permanent internment aboard prison ships or in tents would be contrary to the Convention.

82. The term troops at base camps means soldiers in barracks or depots located in the interior outside of the combat area. Rasmussen, p. 14.

83. See footnote 82 for definition of base camp.

and articles in ordinary use at market price. There is no obligation on the detaining power to permit prisoners to manage their own kitchens or prepare their own food, except insofar as the detaining power is required to furnish facilities to prisoners so that they may prepare for themselves food in addition to that furnished by the detaining power.<sup>84</sup> The Convention expressly permits the employment of prisoners in the kitchen if the detaining power so desires. Prisoners are permitted to receive individually postal parcels containing food and other articles.<sup>85</sup> An obligation exists on the detaining state to provide so far as possible food customarily eaten by the prisoners.<sup>86</sup>

The prohibition of the Convention<sup>87</sup> against collective disciplinary measures affecting food is but part of the more general rule prohibiting collective punishment of prisoners for individual

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84. See FM 27-10, par. 95, which provides that the management of the mess by the officers (prisoners of war) themselves should be facilitated in every way.

85. FM 27-10, par. 110. See Treatment of Prisoners of War, Lt. Gen. Belfield, 9 Grotious Society 131 at 138, who in speaking of rations given to prisoners in World War I stated: "Owing to the inadequacy of the food and clothing issued by Enemy Powers, a very large amount was sent to British prisoners from this country and without this their lot would indeed have been lamentable."

86. Flory, p. 68; Spaight, p. 277.

87. FM 27-10, par. 84.

acts.<sup>88</sup> In World War I, where individual prisoners attempted to escape, the Germans punished the entire camp by depriving all prisoners of privileges and, sometimes, the entire camp was deprived of food for twenty-four hours.<sup>89</sup>

c. Clothing. The Convention of 1929 places the duty of furnishing clothing and footwear on the detaining state and requires it to furnish replacement and repairs of such articles regularly. In addition, the prisoner of war must receive work clothes whenever the nature of work requires it. The Hague Conventions of 1899 and 1907<sup>90</sup> require the detaining power to furnish clothing to prisoners on an equal basis with its own troops. The Convention of 1929 makes no provision for a standard. Whether equality with the detaining power's own troops or one of reasonable need is the proper standard is uncertain.<sup>91</sup>

86-88. Sanitation and Medical Care.--a. Sanitation. Article 13 requires the detaining state to take all sanitation measures necessary to assure healthfulness of camps, to provide

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88. See FM 27-10, par. 119.

89. Garner, Vol. II, p. 47.

90. Art. 7.

91. Flory, p. 62, states that practice indicates that the standard is reasonable need; cf. FM 29-5, par. 83(2)c, (3). See pp. 73, et seq., infra, and p. 83, infra, for discussion of deduction of cost of maintenance from wages or pay.

camps with baths and showers so far as possible, to furnish sufficient water for the bodily cleanliness of prisoners, and installations, available day and night, conforming to sanitary rules.<sup>92</sup> In addition, prisoners of war must be permitted physical exercises and allowed to enjoy the open air. There is no duty on the detaining state to permit prisoners to walk outside the camp.<sup>93</sup>

b. Medical Care. In addition to the general injunction that the sick and wounded are to be cared for without distinction of side or nationality,<sup>94</sup> Article 14 requires that each camp have an infirmary where prisoners are to receive every attention they need; prisoners who are seriously ill or require major surgical operations are to be hospitalized in a civil or military establishment; expenses of treatment and hospitalization are to be borne by the detaining power. It is to be observed that two standards of care are stated: (1) equality with detaining power's own troops,<sup>95</sup> and, (2) the need of the prisoner of war. These are

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92. Cf. Garner, Vol. II, p. 1, et seq., for account of "plague" camps at Wittenberg, Gardelegen and Ruheleben during World War I.

93. Cf. Berne Agreement, 1918, Art. 60, between United States and Germany which permitted outside-of-the-camp exercise, to get the prisoners away from the barbed wire. 13 Am. J. Int. L. 406 at 430.

94. FM 27-10, par. 174, this article has been in practice interpreted to mean equality of treatment with the forces of detaining power. Cf. FM 29-5, par. 83(3)d.

95. FM 27-10, par. 174.

not incompatible so long as the higher of the two standards in a given case is applied by the detaining power.<sup>96</sup>

89. Religious Freedom.--This article guarantees a prisoner freedom of worship including the right to attend religious services within camp. Inversely, it impliedly prohibits the detaining power from compelling prisoners to attend the religious services of any church.<sup>97</sup> It has been stated that this article forbids the detaining state from engaging in religious propaganda which has as its aim the dissemination of ideas contrary to the prisoner's religion.<sup>98</sup> Ministers of religion, prisoners of war, are permitted to minister to their coreligionists.<sup>99</sup>

90. Recreation.--During the Civil War and in World War I, the belligerents provided recreation grounds for prisoners of war, organized classes, reading materials and other forms of recreation.<sup>100</sup> The Convention reasserts the customary rule of

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96. Cf. Flory, p. 96.

97. See Spaight, p. 316, who states that "Article XVIII [of the Hague Regulations, which is identical with the first paragraph of this article] guarantees freedom of conscience \* \* \*".

98. Flory, p. 86, quotes a delegate at the Conference of 1929 to this effect.

99. Although the Convention does not permit chaplains to be detained as prisoners of war but contemplates their return as soon as military exigency permits, they may in fact remain in the prison camps and minister to their comrades.

100. Flory, p. 85.

international law that belligerents shall encourage as much as possible intellectual recreation and sports organized by prisoners of war. Individual shipments of books to prisoners, subject to censorship by the detaining power, are permitted by the Convention.<sup>101</sup> According to a neutral YMCA Secretary who visited a prison camp in Germany, some prisoners of war are studying languages. He also stated that 50 or more prisoners at the camp were preparing for examinations; some for the University of London, the rest in commerce and law.<sup>102</sup>

91-93. Courtesy and Discipline.--Prisoners of war must salute all officers of the detaining power. Officers who are prisoners are bound to salute officers of equal or higher rank of the detaining power.<sup>103</sup> The second paragraph of Article 18 indicates that prisoners of war must also observe "the external marks of respect provided by the regulations in force in their

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101. FM 27-10, par. 112. Shipments of books by representatives of the protecting power and authorized aid societies may not be delayed on the pretext of censorship. The character of the sender is a guarantee against abuse. Rasmussen, p. 31.

102. N.Y. Times, 4-1-43.

103. See SPJGW 1943/6093, April 23, where it was stated that the detaining power could try by court-martial an officer of the United States for failing to salute a superior officer of the detaining power.

armies with regard to their nationals".<sup>104</sup> During World War I the British maintained discipline among prisoners of war by utilizing the authority of the prisoner's own senior officers and noncommissioned officers in their respective camps.<sup>105</sup>

Communication of orders, etc. Regulations, orders, etc., must be communicated to prisoners of war in a language which they can understand. The text of the Geneva Convention of 1929 relating to prisoners shall be posted, in the camp, in the mother tongue of the prisoners whenever possible.<sup>106</sup>

94-96. Pay and Maintenance of Officers and Assimiles.---a. "Assimiles". Article 21 of the Convention, which provides that "officers and assimilés" shall be treated with regard to their rank and age, does not define "assimiles". Civilians who follow the armed forces without directly belonging to it<sup>107</sup> are "assimiles". Thus, such civilians performing work of a character or

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104. Spaight, p. 286, states the German practice in the Franco-German War of 1870 as follows: "Obedience and military honours were required from prisoners, and any insubordination or want of respect, even among themselves, was punished by arrest."

105. The two grades were never detained together. Treatment of Prisoners of War, Lt. Gen. Belfield, 9 Grotius Society 131 at 143.

106. FM 27-10, par. 168.

107. FM 27-10, par. 76b.



grade equivalent to that of officers may be treated as officers.<sup>108</sup> The practice of nations in this and the last world war is in conformity with this interpretation. Thus, war correspondents with the armed forces of the United States have been assigned the rank of second lieutenant in the event of capture.<sup>109</sup> Article 21 requires the belligerents to furnish each other a list of the titles and ranks used in their respective armies and a similar list for assimilés. Certificates issued to civilians attached to the army<sup>110</sup> state whether the bearer in the event of capture will be given the rights and privileges of an officer or enlisted man. Warrant officers would come within the definition of assimilés and be entitled to treatment as officers.<sup>111</sup>

b. Officers Pay and Maintenance. Subject to special arrangements between belligerents, officers and assimilés are entitled to receive from the detaining power the same pay as officers of their rank in the service of the detaining power if not

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108. Where the nature of the work performed corresponds more nearly with that performed by noncommissioned personnel, the civilian may be classified as such. SPJGW 1943/10138, July 8.

109. See SPJGW 1943/7418, June 10, for extended discussion. See p. 136, *infra*, footnote 72.

110. See sec. VI, Cir. 33, WD, Jan. 30, 1943.

111. Cf. Rasmussen, p. 14.

in excess of the rate in their own service.<sup>112</sup> Customary law placed no such duty on the detaining state.<sup>113</sup> An officer prisoner of war is entitled to a continuation of his pay notwithstanding any subsequent confinement under conviction by a civil court for a crime committed before the war.<sup>114</sup> Officers are charged for the cost of maintenance which is debited against the pay they receive. Presumably Article 22 of the Convention limits the items of maintenance which may be deducted from an officer's pay to food and clothing. In World War I, Britain protested the German practice of requiring officers to purchase their own cutlery and drinking vessels and everything making for reasonable comfort. In some Turkish camps officers were called on to pay for their accommodations; the practice was stopped after protest. The British view was that everything really necessary should be provided by the detaining state and every luxury excluded; that these

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112. Cf. SPJGW 1943/7418, June 10. Contra, Air Power, p. 418, where it is stated that civilians taken prisoners of war would not come under Article 23 of the Convention under which "assimiles" are entitled to receive pay.

Civilian enemy aliens interned in the belligerent's own territory at the outbreak of war receive no pay except for work. See par. 4, Cir. 10, WD, Jan. 5, 1943.

113. Flory, p. 83.

114. Dig. Op. JAG, 1918, Vol. II, p. 1060. The detaining state is not bound to recognize the promotion of a prisoner of war made after his capture. SPJGW 1943/10705, August 2.

should be furnished without expense to the officer except for food, uniform and laundry.<sup>115</sup>

Administrative provisions for facilitating the application of the rules with respect to pay are included in the Convention. Thus, the belligerents are to exchange lists of ranks in order that equivalents be established; and in the absence of special agreement, the exchange rate to be adopted for pay purposes is the rate in force at the outbreak of hostilities.

In the present war the enemy belligerents by agreement, made through the Swiss government as neutral intermediary, have fixed an allowance for officers and assimilés in lieu of the pay required by the Convention. Generally this allowance is much lower than the standard of pay fixed in the Convention. Officers and assimilés are not charged for food and clothing, both items being furnished them as part of the arrangement.<sup>116</sup>

The practice of nations has been to provide separate accommodations for officers apart from enlisted personnel.<sup>117</sup> In Germany and Great Britain during World War I, officers were generally placed in different camps from enlisted personnel.<sup>118</sup>

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115. Lt. Gen. Belfield, 9 Grotius Society 131 at 138.

116. See par. 5, Cir. 10, WD, Jan. 5, 1943, for monthly allowance to officers.

117. Garner, Vol. II, p. 12.

118. Cf. FM 29-5, par. 74a(3). Differences in maintenance may be based on rank. FM 27-10, par. 75.

All disbursements of pay made to prisoners of war must be reimbursed at the end of hostilities by the state in whose army they served.<sup>119</sup>

100, 102-105. Authorized and Prohibited Work of Prisoners of War.--a. Officers and Assimiles. Officers and assimilés<sup>120</sup> receive their pay even though they do not work.<sup>121</sup> The Convention incorporates the customary rule of international law that officers and assimilés cannot be compelled to work, although they may request work compatible with their status.<sup>122</sup>

A literal reading of Article 27<sup>123</sup> of the Convention would justify the conclusion that civilian prisoners except those assimilated in rank to officers may be compelled to work. A contrary opinion has been expressed by Spaight who states that this Article is applicable only to prisoners who are members of the armed forces. In this view, civilians who are of the status of

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119. The Treaty of Versailles and the Treaty of Berlin, Aug. 1921, waived reciprocally all repayments due for maintenance of prisoners of war.

120. See p. 71, supra, for definition of "assimiles".

121. See p. 72, supra.

122. Flory, p. 71.

123. FM 27-10, par. 100.

noncommissioned officers or soldiers cannot be compelled to work.<sup>124</sup>

b. Other Prisoners of War. Prisoners of war other than officers and assimilés may be compelled to work by the detaining state.<sup>125</sup> The Convention states that able-bodied prisoners of war may be employed according to their rank and aptitude. Article 29 of the Convention<sup>126</sup> prohibits the employment of prisoners at work for which they are physically unfit. It would seem that these provisions were intended to protect prisoners from being assigned to work for which they are neither fitted in aptitude nor in physical strength.<sup>127</sup>

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124. Air Power, p. 418, citing Mr. Tennant, Under-Secretary of State for War, who stated in the House of Commons on March 1, 1916: "Civilian prisoners cannot be forced to work otherwise than in the maintenance of their camps \* \* \*" Mr. Hope stated, again, in the House on March 20, 1917: "According to international usage compulsion [to work] could not be applied to civilians as in the case of combatant prisoners."

125. Spaight, p. 281; see p. 77, *infra*, for noncommissioned officers.

126. FM 27-10, par. 102.

127. Cf. 13 Am. J. Int. L. 406 at 424, where the Berne Agreement, 1918, contained substantially the same provisions the American member of that conference said: "It is notorious that in the employment of prisoners of war at physical labor the German authorities had either purposely or carelessly put many a round peg into a square hole. Men of professional or clerical life had been forced to perform hard physical labor for which they were fitted neither in aptitude nor in muscular strength. It was to correct this abuse that we insisted on the inclusion of these words [aptitude and physical ability]."

Prisoners of war who belong to the armed forces may not be compelled to do work humiliating to their military rank or degrading in character.<sup>128</sup> For example, the employment of prisoners of war as garbage collectors for cantonments would be objectionable as work of a menial nature.<sup>129</sup>

The article of the Convention providing that noncommissioned officers shall only be required to do supervisory work unless they request remunerative work is a recognition of the practice of belligerents that noncommissioned officers shall not be required to perform manual labor in the same way as privates. In World War I an attempt was made by Germany to evade this principle by establishing separate noncommissioned officers camps and then under the guise of necessary camp work compelling these noncommissioned officers to perform all manner of manual labor.<sup>130</sup> Seemingly, noncommissioned officers may be required to do supervisory work in connection with the operation and administration

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128. Baker and Crocker, p. 51, citing Article 25, "Declaration of Brussels, and Oxford Institute".

129. SPJGW 1942/3836, Sept. 15; see also Flory, p. 72. However, prisoners of war could engage in various tasks necessary for the upkeep of their own camp including garbage collection.

130. 13 Am. J. Int. L. 406 at 423.

of the camp but may not be compelled to do other work except at their request.<sup>131</sup>

The Convention<sup>132</sup> prohibits "excessive" work being demanded of prisoners of war and fixes a maximum limit of hours beyond which prisoners may not work, namely, the working hours of the civilian population in the same area doing the same work. The time occupied in going to, and returning from work is included in the working day. Whether the lunch hour would be excluded or included in calculating the work day would depend upon the practice of the civil population in the same work in the same area.

The Convention also provides that prisoners shall be given 24 hours rest per week, preferably on Sunday.

c. Unhealthful or Dangerous Work. In World War I frequent protests were made by the belligerents that prisoners of war were being compelled to perform dangerous work or engage in unhealthy occupations.<sup>133</sup> Britain used prisoners for a variety of work including work in railroad quarries and road making. Britain did not employ prisoners in mines or swamp draining. France employed prisoners to work in quarries and cut timber. Strong protests were made by the French government to Germany of the use of prisoners in coal, salt and potash mines where the sickness, accident,

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131. SPJGW 1943/11081, August 12.

132. FM 27-10, par. 103.

133. Garner, Vol. II, p. 40. Thus Germany used large numbers of prisoners in draining swamps in northern Germany.

and death rate were high.<sup>134</sup> The Berne Agreement between the United States and Germany, 1918,<sup>135</sup> prohibited either party from working prisoners of war in mines, marshes or blasting work in quarries.<sup>136</sup>

The Convention<sup>137</sup> expressly prohibits unhealthful or dangerous work. Work in open pit mines,<sup>138</sup> underground coal mining,<sup>139</sup> and employment in logging and sawmilling<sup>140</sup> are dangerous work prohibited by the Convention according to the view of the United States. Dangerous work has been defined to be work where the prospect of disabling injury is substantially more than average.<sup>141</sup> Whether a particular employment is dangerous or unhealthful is a question of fact and reliable statistical information

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134. Garner, Vol. II, p. 41, et seq.

135. See comment by American delegate, 13 Am. J. Int. L. 406 at 424.

136. The American Delegation took the position that these were dangerous occupations.

137. FM 27-10, par. 105.

138. Open pit mining is open to sunlight as contrasted with underground mining.

139. SPJGW 1943/7350, June 18.

140. SPJGW 1943/9948, July 3, where it was held that non-dangerous work connected with the logging and sawmill industry was permissible. "Work" refers to the particular job not the industry. SPJGW 1943/10908, August 11.

141. SPJGW 1943/10908, August 11.



with respect to the incidence of accident, occupational disease, etc., are persuasive in determining the question.<sup>142</sup>

d. Kind of Work Prohibited. The Convention<sup>143</sup> enunciates a general rule that work done by prisoners shall have "no direct relation with war operations". The Convention specifically prohibits: (1) employment of prisoners in the manufacturing and transportation of arms or munitions of any kind, and, (2) their employment for transporting materiel intended for combatant units.

This article has to some extent given rise to conflicting interpretations as was the case with the corresponding article of the Hague Convention. It is evident that the term "direct relation with war operations" does not refer to the physical or geographical distance of the work from the combat zone. Articles 7<sup>144</sup> and 9<sup>145</sup> already provide that prisoners ought not to be kept in the zone of combat.<sup>146</sup> A strict interpretation of this article

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142. Cf. SPJGW 1943/7350, June 18, and SPJGW 1943/9948, July 3, where Department of Labor statistics on accident rates were used to determine whether open pit mining and logging were dangerous.

143. FM 27-10, par. 104.

144. FM 27-10, par. 80.

145. FM 27-10, par. 82.

146. Rasmussen, p. 33.

would distinguish between war operations and war preparations and only the former would be forbidden. Thus, under this view prisoners of war may be compelled to render assistance in the construction of military roads, fortifications and the like in the zone of the interior since this is only in preparation for military operations.<sup>147</sup> A literal application of the Convention would not exclude the employment of prisoners in the manufacture of war materiel other than arms and ammunition if it has no direct connection with military operations.<sup>148</sup> Thus, it has been stated that it would be permissible to employ prisoners in forests to cut trees destined for the front.<sup>149</sup> Similarly, the prohibition against employing prisoners of war for transporting materiel intended for combatant units does not prevent the transport of materiel (other than arms or ammunition) intended for noncombatants in the fighting zone.<sup>150</sup>

A more liberal interpretation would forbid all acts directly and distinctly in aid of military operations (i.e., assist in the work of attack or defense). Thus the digging of trenches, the

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147. Lauterpacht, p. 344; Rasmussen, p. 34.

148. Lauterpacht, p. 298; Rasmussen, p. 34.

149. Rasmussen, p. 34.

150. Rasmussen, p. 34.

construction of fortifications even at a distance from the front, the building of roads to be used exclusively for military purposes, the construction of gun emplacements, the making of camouflage nets to be used for camouflaging military installations, and the digging of coal in mines which supply military needs are prohibited.<sup>151</sup> If the community benefits generally from the work done by the prisoners, the fact that the military also secures a benefit will not be violative of the Convention. Thus prisoners may be employed in the construction of roads of general utility although the military also uses the road.<sup>152</sup> Similarly, prisoners may be employed in the manufacture of wood pulp though a minor part of the production is used for the making of munitions.<sup>153</sup> The employment of prisoners in soil conservation projects, agricultural work, forestry,<sup>154</sup> or in a quartermaster's laundry is permissible.<sup>155</sup>

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151. See Phillipson, p. 197; Spaight, p. 152; SPJGW 1942/1746, May 1.

152. Phillipson, p. 197.

153. SPJGW 1943/7234, June 17.

154. Flory, p. 76.

155. SPJGW 1943/10831, July 27.

This article is directed against compulsory labor of prisoners of war in the prohibited activities; the acceptance of voluntary service is not prohibited.<sup>156</sup>

107. Wages of Prisoners of War and Deductions for Maintenance.--<sup>157</sup>Under the Convention,<sup>158</sup> prisoners of war must be supplied with food and clothing, and since prisoners (other than officers) receive no pay except for work done, these items are furnished without charge to the prisoners. Prisoners receive no wages for work connected with the administration, management, and maintenance of camps.<sup>159</sup>

In the absence of agreement between the belligerents, work done for the state shall be paid for at the same rates as those in force for members of the detaining state's armed forces engaged in the same work, or, if none exists, according to a rate

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156. See Spaight, p. 144. The voluntary service of a prisoner of war in a prohibited activity is undesirable as a matter of policy. If prisoners of war are allowed to perform such work, charges may be made by the state of origin that they are doing so under duress and reprisals may be taken for such supposed violation of international law. SPJGW 1942/1900, May 9.

157. See p. 72, *supra*, for officer prisoners.

158. See FM 27-10, pars. 84, 85.

159. Cf. Dig. Op. JAG, 1912-40, Const. II, 2(4), 383.6, July 20, 1918, where it was held that under customary international law prisoners employed in the construction of barracks to be occupied by themselves must be paid.

in harmony with the work performed. The conditions of work done for others than the state, are regulated by agreement with the military authority of the detaining state.<sup>160</sup>

Where the prisoner works for the state which pays him the rate in force for military personnel of its armed forces, the duty of the detaining state has been fully discharged.<sup>161</sup> In cases where the prisoner works for the state, no deductions for the cost of maintenance are made from the earnings since prisoners are to be treated like soldiers of the detaining state and generally no such deductions would be made from the latter's pay.<sup>162</sup> Subject to the rule of equality of treatment with soldiers of the detaining state, the cost of maintenance of a prisoner of war may be deducted from his wages.<sup>163</sup>

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160. This provision requires no more than that the conditions of work should meet with the approval of the military authorities rather than a specific agreement by the military authorities and the employer of the prisoners. SPJGW 1943/9801, July 7.

161. Thus, a prisoner of war would not be entitled to the difference between the 80¢ per day received by them in working for the state and the higher rate at which such labor is valued for accounting purposes. SPJGW 1943/10831, July 27; see par. 4, Cir. 10, WD, Jan. 5, 1943, for wage allowance and money allowance.

162. Spaight, p. 284.

163. Art. 6 of the Hague Regulations of 1907. The Convention of 1929 did not repeat this rule, but it is implicit in Article 34. Flory, p. 81.

Where the prisoner works for others than the state, the Convention contains no provision specifying how much of the value of his labor must be given to the prisoner. The total amount earned by the prisoner need not be paid to him; the state may deduct the cost of maintenance from the wages earned by the prisoner.<sup>164</sup> Similarly, the state may receive the payments for the labor of the prisoners, pay the prisoners an amount equivalent to that paid prisoners working for the state (80¢ per day), and retain the balance to defray the cost of maintenance of prisoners.<sup>165</sup>

There is no obligation on the detaining state to place at the disposal of a prisoner all of the wages belonging to him. The state may withhold from the prisoner part of his earnings and credit them to his account to be paid at the end of captivity.<sup>166</sup> Surplus wages so withheld are considered part of the financial resources of a prisoner and he may transfer those funds to banks or private persons in his country of origin.<sup>167</sup>

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164. Flory, p. 81.

165. SPJGW 1943/9801, July 7.

166. FM 27-10, par. 97. .

167. FM 27-10, par. 97; MS. Comp. Gen. B-29149, Oct. 19, 1942.

See, however, Trading with the Enemy Act, Oct. 6, 1917, as amended, 55 Stat. 389, and E.O. 9193, July 6, 1942, requiring the issuance of a special license.

If the prisoner of war works for a private individual, he remains under the protection of the detaining state and the state may not relieve itself of the obligations of the Convention with respect to the prisoner, though in fact the employer may be maintaining the prisoner.<sup>168</sup>

The pay of a prisoner of war accrues from the date of capture<sup>169</sup> or if the prisoner be captured by an ally and turned over to the detaining state from the date of actual delivery of the prisoner to the detaining state.<sup>170</sup>

Work accidents. The Convention<sup>171</sup> provides that the detaining power shall allow prisoners of war who are victims of accidents in connection with their work, the same benefits extended to its own nationals doing the same kind of work according to the legislation of the detaining power. At the American delegate's suggestion that the federal nature of some governments might make the application of this provision difficult, the article was amended to provide that such governments recommend to their

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168. FM 27-10, par. 101.

169. Par. 4, Cir. 10, WD, Jan. 5, 1943.

170. SPJGW 1943/6491, April 26.

171. FM 27-10, par. 100.

legislature all proper measures for the equitable compensation of the victims.<sup>172</sup>

Prisoners of war who are injured in the employ of the United States would be eligible to receive benefits under the Federal Employers Compensation Act<sup>173</sup> in the absence of the payment of equivalent benefits by the government.<sup>174</sup> If the prisoner be not employed by the federal government but by a state, subdivision thereof, or private person, the federal government may itself undertake to make payments arising from work accidents or expressly stipulate with the employer of the prisoners for conformance with the Workmen's Compensation Law of the jurisdiction where the prisoners are employed.<sup>175</sup>

108-114. Correspondence and Parcels.--Within a period of not more than one week after his arrival at a camp every prisoner must be enabled to correspond with his family.<sup>176</sup> The detaining

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172. Flory, p. 80.

173. Sept. 7, 1916, as amended, 39 Stat. 742.

174. SPJGW 1942/412, Feb. 7. The Convention would not require payments to heirs in case of a fatal accident since by its terms the benefits are to be paid to the prisoner during captivity. SPJGW 1943/9602, July 10.

175. Of course, the obligations imposed on the detaining power by the Convention may not be shifted by contract if in fact they are not performed.

176. FM 27-10, par. 109.



state may limit the number of letters and post cards prisoners of war may send. Such letters and cards may not be delayed or retained for disciplinary purposes even though the laws of the detaining power so provide.<sup>177</sup> Of course military necessity will permit the temporary prohibition of correspondence by prisoners of war but the prohibition must be of the "shortest duration possible".<sup>178</sup> Letters to and from prisoners are liable to censorship as are books.<sup>179</sup> The Convention specifically provides that letters, money orders, and packages sent to or from prisoners of war are exempt from postal charges in the country of origin, destination, and in countries en route. Gifts and relief in kind for prisoners are exempt from customs and other duties as well as railway charges on state operated railways. Information bureaus enjoy similar franking privileges as prisoners of war.<sup>180</sup> Air mail letters and c.o.d. packages to or from prisoners of war are not entitled to the franking privilege.<sup>181</sup>

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177. Rasmussen, p. 36; cf. JAG Ops., 1918, Vol. II, p. 572, where it was held that a prisoner of war in a civil prison undergoing punishment for civil crimes should have no other privileges of correspondence than allowed other civilian prisoners.

178. FM 27-10, par. 113.

179. Books sent by protecting power and recognized aid societies may not be delayed on the pretext of censorship. FM 27-10, par. 112.

180. FM 27-10, par. 166.

181. 35 Am. J. Int. L. 365 at 368.

Mail originating in or destined to neutral territory to or from a prisoner of war is entitled to the franking privilege.<sup>182</sup>

The practice in World War I indicates that no limit was placed by detaining power on the number of letters or packages a prisoner could receive.<sup>183</sup> Generally, none of the belligerents permitted newspapers to be sent or received by mail.<sup>184</sup> It is interesting to note that the French government in World War I protested the refusal of the German government to cash money orders sent to prisoners of war as a violation of the Hague Convention.<sup>185</sup> The Convention<sup>186</sup> specifically requires that the detaining state shall provide facilities for the transmission of instruments intended for or signed by prisoners of war particularly wills and powers of attorney, and assure, in case of necessity, the authentication of prisoner's signatures.<sup>187</sup>

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182. 35 Am. J. Int. L. 365 at 368.

183. See Garner, Vol. II, p. 36; Flory, p. 104. It would seem, however, that a detaining state could limit the number of packages sent to prisoners if it unduly burdened transport facilities needed for military purposes.

184. Garner, Vol. II, p. 36.

185. Garner, Vol. II, p. 40.

186. FM 27-10, par. 114.

187. FM 27-10, par. 114.

115-117; 169-170. Protecting Power and Complaints.--It is customary for neutral governments to extend their good offices in protecting the interests of a belligerent government in the enemy state especially with respect to the inspection and supervision of relief of prisoners.<sup>188</sup> The Convention recognizes the protecting power as an important agency for securing compliance with its terms. The protecting power may in fulfilling its duties utilize its diplomatic or consular officials or may appoint, subject to approval of the belligerent in question, delegates from its own nationals or other neutral powers.<sup>189</sup>

Representatives of the protecting power or its approved delegates must be permitted to go any place, without exception, where prisoners are interned and converse with them, as a general rule without witnesses, personally or through interpreters.<sup>190</sup> The provision allowing the representatives of the protecting power to go any place would permit such representatives to visit prisons, camps, fortresses, or even the combat zone if prisoners of war are in such places.<sup>191</sup> The implied qualification in the statement

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188. Hyde, Vol. II, p. 340.

189. FM 27-10, par. 169. Non-diplomatic delegates are subject to approval of the detaining state. Rasmussen, p. 61.

190. FM 27-10, par. 169.

191. Rasmussen, p. 60. Military authorities are to be informed of such visits.

that the representative of the protecting power may as a general rule hold conversation without witnesses was intended to prevent an abuse of the private interview for purposes of espionage.<sup>192</sup>

Persons of the same nationality as the prisoners of war may take part in inspection trips made by the representative of the protecting power only by special agreement between the belligerents.<sup>193</sup>

The Convention also provides machinery for the settlement of disputes between belligerents regarding the application of the Convention.<sup>194</sup> The protecting power may suggest a meeting of representatives of the belligerents on neutral territory. The belligerents are bound to accede to proposals made to them with this object. The functions of the detaining power do not derogate from the humanitarian activities of the International Red Cross in the interest of prisoners of war.<sup>195</sup>

Articles 42, 43 and 44<sup>196</sup> confer the right on prisoners to make complaints and requests with regard to their treatment to

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192. Rasmussen, p. 60.

193. Rasmussen, p. 61.

194. FM 27-10, par. 170.

195. FM 27-10, par. 171.

196. FM 27-10, pars. 115-117.

the military authorities in whose hands they are and to the representatives of the protecting power. These requests and complaints must be transmitted immediately. Prisoners must be permitted to appoint agents, subject to approval by the detaining power, to represent them before the military authorities and the protecting power. In officer camps, the senior officer prisoner of highest rank is to be recognized as the intermediary between the camp authorities and the officers.<sup>197</sup> The Convention protects prisoners who avail themselves of the procedure by prohibiting punishment for complaints even if found to be groundless.

164-165, 171. Relief Societies.--Belligerents are required to grant relief societies for prisoners of war every facility for the performance of their work.<sup>198</sup> Such societies must be constituted in accordance with the law of their country and their representatives must give an undertaking in writing to comply with all military and administrative measures. It must be noted that the admission of representatives of relief organizations to prison camps, etc., is subordinated to military necessity and a personal permit from the military authorities must be secured.<sup>199</sup>

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197. The senior officer of the line is recognized as spokesman. SPJGW 1943/10679, July 21.

198. FM 27-10, par. 164.

199. Cf. p. 90, supra, relating to inspections by the "protecting power". Article 86, FM 27-10, par. 169, dealing with this matter contains no reference to military necessity. Rasmussen, p. 54. The provision relating to admission to camps of relief societies appears to carry no legal obligation. Flory, p. 102.

Throughout the Convention<sup>200</sup> there is implied permission given to the International Red Cross to carry out its humanitarian activities with respect to prisoners of war with the consent of the belligerents.<sup>201</sup>

163, 166. Official Information Bureau.--Every belligerent and neutral state (which detains members of the armed forces) must establish at the outbreak of hostilities, an official information bureau regarding prisoners of war in their territory.<sup>202</sup> This bureau is required to furnish a list of prisoners to the interested powers through the protecting powers and the central agency.<sup>203</sup> It is charged with the duty of replying to all inquiries with respect to prisoners of war. The bureau must keep up to date a separate record for each prisoner showing internments, transfers, paroles, repatriation, escapes, hospitalization, deaths, and other information. The bureau must forward to prisoners all letters, packages and money. In addition it must receive

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200. FM 27-10, pars. 165, 171.

201. The Convention of 1929 does not mention the Red Cross and similar organizations with respect to investigating conditions in camps and hearing complaints of prisoners, but it does not preclude the possibility of such activities. Flory, p. 107.

202. FM 27-10, par. 163.

203. See FM 27-10, par. 165, for the central agency.

and collect all objects of personal use, valuables, letters, etc., left by prisoners who have been released on parole or repatriated, or who have escaped, or died, and transmit these articles to the interested countries. These bureaus are entitled to franking privileges and free transport.<sup>204</sup>

118-140. Crimes and Offenses.--a. General. Prisoners of war are subject to the laws and regulations of the armed forces of the detaining power.<sup>205</sup> Prisoners must not be subjected to punishment other than those prescribed for the same acts by members of the armed forces of the detaining power.<sup>206</sup> Generally, prisoners of war must be treated like the soldiers of the detaining state, no better and no worse.<sup>207</sup> Despite this general rule of parity between prisoners of war and the soldiers of the detaining state, certain punishments are absolutely forbidden though permissible under the laws of the detaining power. For example, any corporal punishment, imprisonment in quarters without daylight, cruelty, collective punishment for individual acts, are absolutely forbidden.<sup>208</sup> Again, no prisoner of war may be deprived of his rank by the detaining power.<sup>209</sup>

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204. FM 27-10, par. 166; see also p. 88, supra.

205. FM 27-10, par. 118.

206. FM 27-10, par. 119.

207. See Spaight, p. 286, quoting from the German official manual.

208. FM 27-10, par. 119; Rasmussen, p. 36.

209. FM 27-10, par. 122.

A member of the armed forces of the detaining state may be guilty of military offenses which have no application to a prisoner of war. For example, a prisoner of war is incapable of "deserting the service of the United States" under Article of War 58 since he is not in the service of the United States.<sup>210</sup> Similarly, it has been doubted whether a prisoner of war who threatens a commissioned officer of the United States with a baseball bat could be convicted under Article of War 64 for "assaulting a superior officer" since the gravamen of the offense of insubordination is defiance of the military hierarchy to which the prisoner of war is a stranger.<sup>211</sup>

The Convention distinguishes between "disciplinary"<sup>212</sup> punishment and punishment resulting from "judicial" proceedings.<sup>213</sup> "Disciplinary" offenses comprehend minor offenses or derelictions not involving moral turpitude.<sup>214</sup> "Judicial" proceedings relate

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210. AW 92 and 93, denouncing common law crimes, are universally applicable. SPJGW 1943/3029, February 26.

211. Dicta, SPJGW 1943/3029, February 26; contra, Spaight, p. 286.

212. FM 27-10 uses the word "summary" interchangeably with "disciplinary".

213. See FM 27-10, par. 120.

214. SPJGW 1943/3029, February 26.



to criminal offenses punishable by military or civil tribunals.<sup>215</sup>  
The detaining power is enjoined to "exercise the greatest leniency"  
in deciding whether an infraction committed by a prisoner of war  
should be punished by disciplinary action or judicial proceed-  
ings.<sup>216</sup> A prisoner may not be punished more than once for the  
same offense or charge.<sup>217</sup> Prisoners of war who have satisfied  
the penalty imposed on them, whether judicial punishment or dis-  
ciplinary, must not be treated differently from other prisoners.<sup>218</sup>

b. Disciplinary Punishment. The Convention provides that  
the maximum single sentence for a disciplinary offense or offenses  
may not exceed 30 days.<sup>219</sup> When a new summary punishment is im-  
posed, a period of at least three days must intervene between each

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215. Flory, p. 91. See also FM 27-10, pars. 124 and 161, respec-  
tively, where the terms "crimes or offenses" and "crime or  
an offense of municipal law" are used in connection with judicial  
proceedings.

216. FM 27-10, par. 125.

217. See Rasmussen, p. 37.

218. Prisoners who have been punished as a result of attempted  
escape may be subjected to special surveillance. FM 27-10,  
par. 121.

219. See p. 98, *infra*, for further discussion. A prisoner sen-  
tenced at the same time to disciplinary punishment for  
several acts, connected or not, may not be sentenced to more than  
30 days. FM 27-10, par. 127.

of the punishments, if one of them is ten days or more.<sup>220</sup> "Arrest" is the most severe disciplinary punishment which may be imposed on a prisoner of war.<sup>221</sup> "Arrest" is used in its most general sense and in contradistinction to "judicial" imprisonment. It is the equivalent of "disciplinary detention"<sup>222</sup> and is broad enough to comprehend solitary confinement in a cell.<sup>223</sup> Any aggravation of working conditions is forbidden as a disciplinary measure.<sup>224</sup> Prisoners of war undergoing disciplinary punishment shall not receive less favorable treatment than those of equal rank in the armed forces of the detaining state under the same circumstances.<sup>225</sup>

Article 56<sup>226</sup> provides that in no case shall a prisoner of war be transferred to a penitentiary to undergo disciplinary punishment.<sup>227</sup> Prisoners undergoing disciplinary punishment must

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220. FM 27-10, par. 127.

221. FM 27-10, par. 127.

222. Rasmussen, p. 37.

223. Compliance with FM 27-10, par. 129, would be necessary. SPJGW 1943/4445, April 3. Solitary confinement will not be imposed as punishment by courts-martial. Par. 102, MCM (1928).

224. FM 27-10, par. 105.

225. FM 27-10, par. 119.

226. FM 27-10, par. 129.

227. See AW 42, which prohibits confinement in a penitentiary unless the sentence is more than one year. .

be permitted to read and write, and to send and receive letters, but money and parcels may be withheld until the expiration of the sentence.<sup>228</sup> Food restrictions as additional disciplinary punishment are allowed under the following conditions: If such restrictions are applicable to the detaining power's own soldiers<sup>229</sup> of equal rank<sup>230</sup> for the same act and then only if the health of the prisoner permits. Collective disciplinary measures affecting the food of prisoners are prohibited.<sup>231</sup>

Prisoners given disciplinary punishment may not be deprived of the prerogatives attached to their rank.<sup>232</sup>

The opinion has been expressed that disciplinary punishment may be imposed upon prisoners of war in United States custody only under Article of War 104. In this view the limitations of punishment prescribed by Article of War 104 would be applicable to prisoners of war. Thus, Article of War 104 would limit

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228. If the packages not delivered contain perishables, these shall be turned over to the camp infirmary or kitchen. FM 27-10, par. 130.

229. FM 27-10, par. 128.

230. FM 27-10, par. 119.

231. FM 27-10, par. 84.

232. FM 27-10, par. 122.

disciplinary punishment to one week's duration without confinement.<sup>233</sup>

According to the British view, the tribunals which have power to impose disciplinary punishment are courts-martial and commanders of a camp or detachment.<sup>234</sup>

In World War I, the British, in order to accord prisoners equal treatment with members of its own armed forces, imposed disciplinary punishment on officer prisoners by a military court composed of at least four officers.<sup>235</sup>

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233. SPJGW 1943/11081, August 12, 1943, where it is stated that "disciplinary punishment" as used in the Convention designates any form of punishment not imposed by a court-martial, i.e., "company punishment".

234. FM 27-10, pars. 118, 132; see Administration of Justice Among Prisoners of War by Military Courts, 1 Proceedings Australian-New Zealand Society of Int. Law 143 at 154.

235. See 9 Grotius Society 131 at 141 (1924), where General Belfield stated the difficulties encountered by the British in applying disciplinary punishment under their military code to prisoners of war in the following language: "Here, however, a fresh difficulty intervened, as the British military code admits of summary punishment of private soldiers only, whereas in foreign armies this may be inflicted on men of any rank, including officers. Summary punishments are also restricted in our service to an award of twenty-eight days' detention. The extension of our power of summary punishment of prisoners of war so as to make it conform to continental practice was out of the question, as this would have been a violation of the rule laid down in the first paragraph of this article [8] that prisoners 'shall be subject to the laws, regulations and orders in force in the Army of the State in the power of which they are'. In fact, we could comply with the second paragraph [imposing disciplinary punishment for escape] only by committing a breach of the first \* \* \* A military court, of which the President might not be under field rank, and three members, all of whom had held a commission for not less than three years, had to be assembled for the trial of anyone of higher grade [than a private]."

c. Judicial Proceedings. The Convention contains specific prohibitions which, unless confined by its terms to disciplinary punishment, are equally applicable to judicial proceedings.<sup>236</sup>

For example, the prohibition against corporal punishment or cruelty in any form.<sup>237</sup> Several general principles are laid down with respect to judicial proceedings such as the right of a prisoner to be heard in his defense,<sup>238</sup> and his right to assistance of counsel of his choice.<sup>239</sup> No prisoner may be compelled to admit his guilt.<sup>240</sup>

The Convention places a prisoner on a parity with a member of the detaining power's armed forces by providing that sentence may be pronounced only by the same courts and according to the same procedure.<sup>241</sup> This principle of equality implies that the

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236. Rasmussen, p. 39.

237. FM 27-10, par. 119; cf. AW 41 prohibiting cruel and unusual punishments, including flogging, branding, marking, or tattooing on the body.

238. FM 27-10, par. 134.

239. The detaining power is required to deliver to the protecting power, on request, a list of persons qualified to present the defense. FM 27-10, par. 135.

240. FM 27-10, par. 134.

241. FM 27-10, par. 136; cf. SPJGW 1943/3029, February 26, where it was stated prisoners of war and interned enemy aliens who are assimilated to them should be tried by general courts-martial rather than military commissions or provost courts since the latter two may depart in the rules of evidence and the mode of review from general courts-martial.

punishment of prisoners shall not be more severe than that applicable to the members of the armed forces of the detaining state for similar acts.<sup>242</sup> The prisoner is given the same right of appeal from a sentence as individuals belonging to the armed forces of the detaining power.<sup>243</sup> Other safeguards include notification of trial to the protecting power at the latest at least three weeks before the opening of the trial,<sup>244</sup> the right of representatives of the protecting power to attend the trial,<sup>245</sup> and the communication of the sentence to the protecting power immediately.<sup>246</sup> A death sentence must not be carried out before the expiration of a period of at least three months after the receipt by the protecting power of a communication setting forth in detail the nature and circumstances of the offense. No prisoner of war may be deprived of his right to complain to the

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242. Thus, the maximum table in the MCM, par. 104, being applicable to enlisted men in the Army of the United States should govern the sentence imposed on enlisted men held as prisoners of war. SPJGW 1943/3029, February 26.

243. FM 27-10, par. 137.

244. FM 27-10, par. 133.

245. The exception is the case where the trial must be secret in the interest of the safety of the state. FM 27-10, par. 135.

246. FM 27-10, par. 138.

representative of the protecting power under Article 42<sup>247</sup> by a sentence of a tribunal or otherwise.<sup>248</sup>

A person who, prior to being captured, commits an act in violation of the laws of war, is not entitled to the privileges and safeguards accorded to a prisoner of war.<sup>249</sup> However, even a captured war criminal is entitled to a trial by a competent tribunal.<sup>250</sup>

d. Escape. Escape is a very natural act which is not contrary either to military honor or to the laws of morality.<sup>251</sup> Some writers have asserted that it is the duty of a prisoner of war to escape if a favorable opportunity presents itself.<sup>252</sup> Escape has been defined as the state of a prisoner's having placed himself beyond the immediate control of public authorities of the detaining state without their consent.<sup>253</sup>

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247. FM 27-10, par. 115.

248. FM 27-10, par. 140.

249. Colby, 23 Mich. L. Rev. 482 at 487; cf. SPJGW 1943/3029, February 26.

250. FM 27-10, par. 356.

251. Baker and Crocker, p. 66, citing Jacomet "Les Lois de la Guerre Continentale".

252. Davis, p. 315.

253. Cf. German view that the prisoner's intent must be to avoid permanently the enemy control. Flory, p. 149.

If an escape is successful, it is not punishable even if the prisoner be recaptured subsequently by the detaining power. A successful escape is one in which the prisoner succeeds in re-joining his army or leaves the territory occupied by the detaining army.<sup>254</sup>

An attempt to escape or an escape (which is not successful) is an infraction of the disciplinary regulations of the detaining power and may be punished. The terms "escape" or "attempt to escape" are not defined by the Convention. By analogy to Anglo-American military law an attempt may be defined as an overt act other than mere preparation towards accomplishing the purpose to escape.<sup>255</sup> An attempt does not ripen into an escape until the prisoner has, momentarily at least, freed himself from the restraint of the camp authorities, so, if the movement toward escape is opposed, or before it is completed an immediate pursuit ensues, there will be no escape until opposition is overcome or pursuit shaken off.<sup>256</sup> Unsuccessful escapes or attempts are

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254. FM 27-10, par. 123.

255. Cf. par. 130b, MCM (1928). An attempt to escape was found where a prisoner began constructing a tunnel to be used for effecting an escape. Op. JAG, 1918, Vol. II, p. 576.

256. Cf. par. 139b, MCM (1928).



punishably only by disciplinary sentences not to exceed 30 days.<sup>257</sup>

A prisoner of war may be fired upon and, if necessary, killed to prevent his escape.<sup>258</sup> Military necessity may justify preventive

measures such as temporary confinement to frustrate a conspiracy to effect an escape.<sup>259</sup> After an attempted or accomplished es-

cape, the prisoner's co-conspirators who assisted in the escape may incur disciplinary punishment only.<sup>260</sup> A prisoner who has

escaped or attempted to escape may be subjected to special surveillance but not deprived of other rights (guaranties) granted him by the Convention.<sup>261</sup> Collective punishment for individual

acts is forbidden.<sup>262</sup> Where a prisoner commits a crime or offense in the course of an escape, the escape is not considered an ag-

gravating circumstance.<sup>263</sup> However, the crime or offense is punishable on the same basis as if committed by a member of the armed

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257. FM 27-10, pars. 124, 127; Flory, p. 153. The penalty for an attempt to escape is disciplinary punishment only. Op. JAG, 1918, Vol. II, p. 576; see p. 98, supra, for tribunals which may impose punishment.

258. Spaight, p. 287.

259. FM 27-10, par. 82; Spaight, p. 280.

260. FM 27-10, par. 124; Rasmussen, p. 41.

261. FM 27-10, par. 121.

262. FM 27-10, par. 119.

263. FM 27-10, par. 124.

forces of the detaining power.<sup>264</sup> Thus, a prisoner of war who steals clothing to effect his escape is guilty of larceny if the escape is not successful.<sup>265</sup>

Some doubt has been expressed with respect to the liability of a prisoner of war to punishment for a crime committed in connection with a successful escape. Some writers have viewed such crime as being part and parcel of the escape and since the escape is not punishable neither is the incidental crime.<sup>266</sup> The contrary opinion is that a successful escape does not wipe out the incidental crime. If the latter position is adopted, the killing of a camp guard in the course of a successful escape may be murder.<sup>267</sup>

The question has also arisen whether the status of a prisoner of war ends when the prisoner has left the control of the camp authorities and thrown off immediate pursuit, or whether it continues until he has quitted the territory of the detaining state. If the latter view be adopted, he would be guilty of murder if

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264. Rasmussen, p. 41.

265. Holls, *The Peace Conference at the Hague*, p. 147; Flory, p. 155.

266. See discussion, Flory, p. 156.

267. Flory, p. 157.

he should kill a member of the armed forces while still in the territory of that state.<sup>268</sup>

Prisoners of war who escape in civilian clothes or dressed in the uniform of the detaining power are not spies if captured before the escape becomes successful.<sup>269</sup>

A prisoner of war may not be tried under Article of War 69 for "escaping from confinement" since escape for him is not unlawful and subjects him to no more than disciplinary punishment.<sup>270</sup>

e. Concurrent Jurisdiction of Civil Courts of Criminal Jurisdiction Over Prisoners of War. Interned enemy civilians and prisoners of war who commit offenses against the criminal law of the state where they are interned may, at the discretion of the military, be turned over to the civil courts for trial.<sup>271</sup>

141-161. Release of Prisoners.--a. End of War. Article 75<sup>272</sup> directs belligerents to include provisions with respect to

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268. See Flory, p. 157.

269. Air Power, p. 84. If there are special circumstances indicating that the prisoner was engaged in espionage he could be tried as a spy.

270. SPJGW 1943/3029, February 26.

271. Schaffenius v. Goldberg (1916), 1 K.B. 284; Dig. Op. JAG, 1912, p. 1075.

272. FM 27-10, par. 161.

repatriation (i.e., the restoration of persons held as prisoners of war to the state to whom they belong) in general armistice agreements and if this be not possible, then they shall come to an agreement as soon as possible. The terms of the Armistice in World War I required the Central Powers to release allied prisoners at once without reciprocity.<sup>273</sup> German prisoners held by the Allies were released at the latest on the ratification of the peace treaties.<sup>274</sup>

The conclusion of a treaty of peace by belligerents technically terminates the status of a prisoner of war as such. However, neither customary law<sup>275</sup> nor Article 75 of the Convention requires immediate repatriation. The Convention simply requires that repatriation be effected with the least possible delay after the conclusion of peace. Until the return of the prisoner is made he remains under the discipline and supervision of the detaining power.<sup>276</sup> No prisoner of war on whom disciplinary punishment has been imposed may be kept from repatriation because he has not undergone punishment.<sup>277</sup>

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273. 13 Am. J. Int. L. Supp. 99.

274. Flory, p. 136.

275. Hall, p. 598.

276. Lauterpacht, p. 478; Hall, p. 598.

277. Cf. FM 27-10, par. 126; Rasmussen, p. 49.

Prisoners of war against whom proceedings for commission of ordinary crimes or offenses (i.e., crimes which in their nature are violations of municipal law) are pending or who are serving sentences for such crimes need not be repatriated but may be detained until the expiration of their sentences.<sup>278</sup> Prisoners of war undergoing judicial punishment<sup>279</sup> of purely military offenses not also constituting an ordinary crime or offense may not be detained after peace.<sup>280</sup> Thus, a prisoner of war who has been punished judicially for failure to salute a superior officer of the detaining power should not be retained after peace to complete his sentence.<sup>281</sup> However, it must be remembered that many violations of military law are essentially violations of municipal law, as for example, a conviction by a court-martial of a prisoner of war for stealing. Persons serving sentences for war

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278. Rasmussen, p. 50; cf. FM 27-10, par. 126.

279. FM 27-10, par. 126, relates to repatriation during the continuance of hostilities.

280. Rasmussen, p. 52. Other interpretations are possible and it may well be that a detaining power would not release a prisoner who had committed a serious military offense. At the termination of the Franco-German War in 1871 Germany held that the peace did not operate in favor of offenders against military law. Phillipson, *Termination of War and Treaties of Peace*, p. 240.

281. Cf. Rasmussen, p. 52.

crimes (i.e., violations of the laws of war) need not be repatriated on the signing of peace. All war crimes are punishable by death and the belligerent by being more lenient and imposing a lesser sentence may carry it beyond the duration of war.<sup>282</sup> This rule is especially applicable where the war crime is also a violation of the ordinary law of all countries, such as burglary, rape, etc.<sup>283</sup>

b. Return of Sick and Wounded. An obligation is imposed by Article 68 of the Convention<sup>284</sup> on the detaining power to send back prisoners of war, who are seriously sick and severely wounded, to their own country regardless of ranks and numbers. The nature of the sickness requiring direct repatriation or hospitalization in a neutral country are to be agreed upon by the belligerents. In the absence of an agreement, the detaining state may follow the model agreement<sup>285</sup> annexed to the Convention.<sup>286</sup> The Convention

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282. Lauterpacht, p. 459; contra., Hall, p. 437. Prisoners of war charged with war crimes but not yet tried and sentenced must be released unless express provisions to the contrary rebut the usual amnesty provision implied in a peace treaty. Lauterpacht, p. 476.

283. Cf. Garner, 14 Am. J. Int. L. 70 at 74.

284. FM 27-10, par. 141.

285. FM 27-10, par. 172.

286. The model agreement defines those who may be considered seriously sick or wounded. However, there is no duty on a detaining state, in the absence of agreement, to follow it. SPJGW 1943/7668, June 1.

contemplates the creation of a mixed medical commission<sup>287</sup> by agreement of the belligerents to examine prisoners of war to determine whether they ought to be repatriated.<sup>288</sup> In the absence of an agreement between belligerents creating such a commission, the general duty imposed on each detaining state to repatriate the seriously sick and wounded remains and presumably may be discharged by a unilateral selection and repatriation by the detaining state.<sup>289</sup>

In World War I the belligerents reached agreements whereby sick and wounded prisoners were transferred to neutral countries and interned there. The prisoners were selected by medical commissions composed of medical men from neutral countries.<sup>290</sup> Agreements were also reached for the repatriation of prisoners who had been in captivity not less than eighteen months and were at least forty years of age.<sup>291</sup> These repatriations were reciprocal and regardless of rank or number.<sup>292</sup>

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287. FM 27-10, par. 142.

288. SPJGW 1943/7668, June 1.

289. Prisoners who are victims of work accidents enjoy the same privileges of repatriation. FM 27-10, par. 144.

290. Garner, Vol. II, p. 55.

291. Garner, Vol. II, p. 55.

292. Flory, p. 134.

c. Exchange. Exchange is not expressly mentioned in the Convention.<sup>293</sup> An exchange results from an agreement between the belligerents whereby one of the parties releases prisoners of war in consideration of the release by the other.<sup>294</sup> The general rule for such an exchange is man for man, rank for rank, wounded for wounded, etc.<sup>295</sup> However, the exchange may be on the basis of substituted values, that is, such a number of persons of inferior rank may be substituted as equivalent for one of superior rank as may be agreed upon.<sup>296</sup> Article 72 of the Convention<sup>297</sup> contemplates the possibility of direct repatriation or interment in a neutral country of prisoners who are able-bodied but have been in captivity for a long time.

The ship which conveys prisoners of war from one belligerent port to another in pursuance of an exchange is known as a cartel ship.<sup>298</sup> A cartel ship while engaged in its special service is deemed a neutral ship and is exempt from enemy capture.<sup>299</sup>

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293. It was not expressly dealt with by the Hague Regulations.

294. Hall, p. 434. The agreement is called a Cartel.

295. FM 27-10, par. 158.

296. FM 27-10, par. 159.

297. FM 27-10, par. 145.

298. Moore's Digest, Vol. VII, p. 226.

299. Hyde, Vol. 2, p. 528.



Such a ship may not carry cargo, engage in trade or carry guns or munitions.<sup>300</sup> A cartel ship is entitled to protection both in carrying prisoners and in returning from such service.<sup>301</sup>

d. Military Service After Repatriation or Exchange. Article 74<sup>302</sup> provides that "no repatriated person may be utilized in active military service". Seemingly, the language is broad enough to include prisoners of war who are repatriated by exchange agreement. This interpretation is open to doubt since the Convention does not expressly deal with exchanges. Spaight has stated that "there seems to be no ground in custom or logic to read such a condition [i.e., not to participate in the war] into the agreement".<sup>303</sup> The Field Manual<sup>304</sup> seemingly supports Spaight's view in providing that the condition not to serve for a certain period may or may not be expressed in an exchange agreement. Article 74 would undoubtedly apply to the seriously sick and wounded

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300. Hyde, Vol. 2, p. 529.

301. Hyde, Vol. 2, p. 529; Flory, p. 133.

302. FM 27-10, par. 147.

303. Spaight, p. 304. However, the Hague Regulations which were in force when Spaight commented upon the question contained no parallel article.

304. FM 27-10, par. 158.

repatriated under the obligation imposed by the Convention,<sup>305</sup> and perhaps to able-bodied prisoners held in captivity for a long period.<sup>306</sup> This article does not prohibit all military service but only active military service. Thus, the use of a repatriated prisoner in purely noncombatant service of a humanitarian nature would not be forbidden.<sup>307</sup>

e. Parole. A parole is a promise, either written or oral, made by a prisoner of war<sup>308</sup> to the detaining state by which in consideration of certain privileges and advantages, he voluntarily pledges on his honor to pursue or refrain from pursuing a particular course of conduct.<sup>309</sup> Though it is desirable that a parole should be in writing<sup>310</sup> an oral parole is equally valid.<sup>311</sup> A prisoner may be paroled for the purpose of returning to his state

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305. FM 27-10, par. 141.

306. FM 27-10, par. 145; Lauterpacht, p. 305, footnote 5, in commenting on the repatriation of the able-bodied held in captivity for a long period states that such persons must not be employed on active military service.

307. SPJGW 1943/8113, June 16.

308. A civilian enemy internee is assimilated to a prisoner of war. Cf. SPJGW 1943/8113, June 16.

309. Hall, p. 431; Spaight, p. 290; Flory, p. 119.

310. FM 27-10, par. 149.

311. Davis, p. 318.

of origin on a pledge not to take up arms against the detaining power<sup>312</sup> or he may be permitted to remain outside of a camp without guard on his promise not to leave a specified portion of the detaining state. Other types of paroles have been used, for example, liberty to take exercise outside of the camp without guard on the promise not to escape.<sup>313</sup>

The Hague Regulation<sup>314</sup> provides that the detaining state is not required to assent to a prisoner's request to be released on parole<sup>315</sup> and no prisoner may be compelled to accept such a release. If the law of the prisoner's country allows him to do so, and if he accepts, any prisoner may be released on parole. In such case, both the prisoner of war and his government are under a duty to respect the terms of the parole.<sup>316</sup>

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312. Edmonds and Oppenheim, par. 99, quoting form of pledge used by Japanese in Russo-Japanese War.

313. Flory, p. 121.

314. FM 27-10, par. 154. The Geneva Convention of 1929 does not deal with release on parole.

315. An officer may not release a prisoner on parole without authority from his government. Flory, p. 120.

316. SPJGW 1943/8113, June 16. The Hague Regulation specifically provides the parolee's own government "is bound neither to require of nor accept \* \* \* any service incompatible with the parole given". FM 27-10, par. 148.

It is essential to the validity of a parole that the prisoner voluntarily consents or agrees to its conditions. Thus, the detaining state has no right to order to free itself of prisoners to send them back on condition of not serving again if they do not agree to the condition.<sup>317</sup> Similarly, no paroling on the battlefield is permitted or of any value<sup>318</sup> since prisoners do not have sufficient freedom of mind during action to contract such a pledge validly.<sup>319</sup>

The regulations and laws of some countries do not permit captured members of their armed forces to give their paroles<sup>320</sup> or the law of the prisoner's country may be silent on the subject. In the latter case, if the prisoner gives his parole, his country may subsequently disapprove of it. In such circumstances, the prisoner's own country is bound to permit the prisoner to return to captivity. If the former detaining state refuses to take him back, he is released from his parole.<sup>321</sup>

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317. FM 27-10, par. 152, provides in part: "No dismissal of large numbers of prisoners, with a general declaration that they are paroled is permitted or of any value".

318. FM 27-10, par. 152.

319. Baker and Crocker, p. 76, citing Jacomet.

320. The policy of the United States is to prohibit the giving of paroles by captured members of its armed forces. Sec. III, Cir. 400, WD, Dec. 10, 1942.

321. Davis, p. 318; Bordwell, p. 243; see Moore's Digest, Vol. VII, p. 229, quoting Art. 131, G.O. 100 /1863/: "If the government does not approve of the parole, the paroled officer

If the laws of a prisoner's government forbid the giving of a parole, his government is not required to recognize the parole.<sup>322</sup> Several courses are open to the prisoner's state: returning the paroled prisoner to the detaining state,<sup>323</sup> punishing the prisoner who has given his parole contrary to national law,<sup>324</sup> or disregarding the parole.<sup>325</sup> So far as the released prisoner is concerned, he has given his personal pledge and is bound to observe it.<sup>326</sup> If he is captured by the detaining state he may be punished and it is no excuse that his own government prevented him from complying with the parole.<sup>327</sup>

Noncommissioned officers and privates are not allowed to pledge themselves, except through an officer, and even officers,

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322. The Hague Regulation states that "prisoners of war may be set at liberty on parole if the laws of their country allow". FM 27-10, par. 148; see Spaight, p. 296.

323. If the detaining state refuses to accept the returned prisoner, he would be discharged since the detaining state is bound to satisfy itself that the prisoner has authority to give his parole. Spaight, p. 296.

324. Flory, p. 127.

325. Bordwell, p. 243; Spaight, p. 296; Flory, p. 126.

326. A parole given by a minor is valid and binding. United States ex rel Henderson v. Wright, 28 F. Cas. No. 16777.

327. Spaight, p. 296; Bordwell, p. 243.

so long as a superior is within reach, can only pledge themselves with his permission.<sup>328</sup> Thus, in World War I two German noncommissioned officers, who had given their parole, escaped from Norway, where they were interned, in breach of their parole and Germany declined to return them on the ground that, not being officers, they could not validly give their parole, and that the neutral authorities were at fault in asking for, and accepting, their parole.<sup>329</sup> On the other hand, some authorities contend that this rule is not one of international law but a matter for cognizance of municipal law only.<sup>330</sup> If the latter view is adopted, seemingly the parole must be respected though the released prisoner may be punished for violating the municipal law.<sup>331</sup>

Whether a commander of troops would have authority to give his parole on behalf of himself and his troops so as to bind the state and the men under his command (without their consent) is

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328. FM 27-10, pars. 150, 151; Hall, p. 431. Art. 127, G.O. 100 /1863/, characterized such paroles as void and subjected the individuals giving them to punishment as deserters. Moore's Digest, Vol. VII, p. 228.

329. Air Power, p. 346.

330. Flory, p. 125.

331. If the released prisoner's government does not approve of the parole, it may return the prisoner into captivity. See Moore's Digest, Vol. VII, p. 229; Art. 131, G.O. 100 /1863/.

not clear. General Halleck stated that paroles given by a commander for his troops were valid and within his implied powers.<sup>332</sup>

Some writers have held such paroles invalid in international law on the ground that the giving of a parole is a personal act in which the individual prisoner must concur.<sup>333</sup>

Spaight states that every parole implies the obligation not to assume any function which has a connection with military operations.<sup>334</sup> The work in which a prisoner released on parole may be employed depends on the form of the promise he has given. The usual promise is not to bear arms against the government releasing him. The promise exacted from the prisoner may be not only to abstain from acts connected with the war but from engaging in any public employment.<sup>335</sup> The promise "not to serve during the existing war unless exchanged" refers only to active service in the field against the detaining power or his allies. The pledge does not refer to service in the zone of interior such as recruiting, drilling recruits, fortifying places not besieged, quelling civil

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332. Of course it is assumed that the prisoner's state does not forbid the giving of paroles or expressly deny the commander such power. Baker and Crocker, p. 71, citing Halleck.

333. See discussion, Flory, p. 130.

334. Spaight, p. 291. British officers who were paroled by the Boers, orally and in vague terms, were employed in technical or administrative duties in the military service at home. Spaight, p. 292.

335. Hall, p. 432; Spaight, p. 291.

commotions, or to civil or diplomatic service.<sup>336</sup> The pledge "not to bear arms" does not prevent noncombatant military service in the zone of interior.<sup>337</sup>

Paroles lose their binding effect upon the conclusion of peace. Thus, a parole given that the prisoner will never fight again against the detaining state is ineffective after the peace.<sup>338</sup> A prisoner on parole without guard under a promise not to escape may terminate the parole by surrendering with a request for reinternment.<sup>339</sup> A parole is also terminated by a formal exchange of the paroled prisoner.<sup>340</sup>

A prisoner of war who has given his parole not to bear arms against the detaining state and is subsequently recaptured bearing arms against the detaining state or its allies forfeits his right to be treated as a prisoner of war.<sup>341</sup> The death penalty

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336. Hall, p. 432; Art. 130, G.O. 100 [1863], Moore's Digest, Vol. VII, p. 228.

337. SPJGW 1943/8113, June 16.

338. Hall, p. 432.

339. Flory, p. 128.

340. Flory, p. 128.

341. FM 27-10, par. 155.



may be inflicted on him<sup>342</sup> but he cannot be punished without a trial by a court.<sup>343</sup> The Hague Regulation does not deal with violators of paroles other than those recaptured bearing arms. However, a breach of parole is an offense against the laws of war and would be triable by a military court. The punishment inflicted would depend upon the nature of the promise breached.<sup>344</sup>

162-163. Death in Captivity.--The Convention<sup>345</sup> obliges the detaining state to honorably bury a prisoner of war dying in captivity, to properly mark his grave, and to respect and maintain it.<sup>346</sup> A prisoner's will is to be received and drawn up by the authorities of the detaining power in the same way as for its own soldiers. The same rule is to be observed with respect to death certificates.<sup>347</sup> Article 41<sup>348</sup> and Article 76<sup>349</sup> when read together seemingly place a duty on the detaining power to transmit

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342. Lauterpacht, p. 302.

343. Bordwell, p. 244; Flory, p. 125.

344. Davis, p. 318.

345. FM 27-10, par. 162.

346. The Hague Conventions of 1899 and 1907 required that prisoners of war should be buried in the same way as soldiers of the detaining state, due regard being paid to rank and grade. Baker and Crocker, p. 102.

347. FM 27-10, par. 162.

348. FM 27-10, par. 114.

349. FM 27-10, par. 162.

a prisoner's will to its proper destination immediately rather than after death as was the case under the Hague Convention.<sup>350</sup>

The Bureau of Information of the detaining state is charged with the duty of caring for the prisoner's personal effects and of transmitting them upon the conclusion of peace to the country interested.<sup>351</sup> The balance of wages remaining to the credit of a deceased prisoner shall be forwarded through diplomatic channels to his heirs.<sup>352</sup> The provisions of Article of War 112 with respect to the disposition of the effects of deceased persons have been applied, so far as pertinent, to the effects of deceased prisoners of war and interned alien enemies.<sup>353</sup>

## CHAPTER V

### SICK, WOUNDED AND DEAD

173-178. Sick, Wounded and Dead.--a. General Rules. The Geneva Convention of 1929<sup>1</sup> relating to the amelioration of the

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350. Cf. Rasmussen, p. 48; Flory, p. 141; cf. Dig. Op. JAG, 1912-40, Const. II, (4), 383.7, July 29, 1919.

351. FM 27-10, par. 163.

352. FM 27-10, par. 107.

353. Dig. Op. JAG, 1912-40, Const. II, (4), 383.7, July 29, 1919.

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#### Chapter V

1. FM 27-10, pars. 173-201.

condition of the sick and wounded will be referred to hereafter in this chapter as the Convention. This Convention deals primarily with the sick and wounded during the period of active combat as distinguished from their treatment during internment.<sup>2</sup> The latter phase is the subject-matter of the Geneva Convention of 1929 relative to the treatment of prisoners of war.<sup>3</sup>

The sick or wounded military personnel and other persons officially attached to the armies of the enemy must be respected, protected, and cared for, under all circumstances, without distinction of nationality, by the belligerent in whose power they are.<sup>4</sup> It is for the sick and wounded who have ceased to resist that the Convention requires respect, protection, and care.<sup>5</sup> The Convention would not extend to inhabitants or other persons not officially attached to the armies who may be accidentally wounded.<sup>6</sup> Its privileges would apply to members of a volunteer corps,<sup>7</sup> members of a levee en masse,<sup>8</sup> and persons who follow the

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2. Des Gouttes, p. 23.

3. FM 27-10, par. 70, et seq.

4. FM 27-10, par. 174.

5. Spaight, p. 421.

6. Hyde, Vol. II, p. 353, quoting U.S.R.L.W., 1917.

7. FM 27-10, par. 9a.

8. FM 27-10, par. 9b.

army without directly belonging to it.<sup>9</sup> The word "respected" means that the wounded<sup>10</sup> shall not be maltreated, intentionally injured or attacked. "Protected" implies an affirmative obligation to render aid and it includes the duty of shielding the wounded from insults and public curiosity.<sup>11</sup> The belligerent in whose power the wounded are must care for them on an equal basis with its own wounded.<sup>12</sup>

An obligation is imposed on a belligerent, who is compelled to abandon his wounded to the enemy, of leaving behind with them a portion of his medical personnel and necessary materiel to assist in caring for them.<sup>13</sup> This duty is not an absolute one but is to be discharged "so far as military exigencies permit".<sup>14</sup> If a belligerent should improperly abandon his wounded without

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9. FM 27-10, par. 76b; see Bordwell, p. 249.

10. Whenever "wounded" is used it includes "sick".

11. Des Gouttes, p. 12.

12. Des Gouttes, p. 13.

13. FM 27-10, par. 174.

14. "Necessarily the commander of the army \* \* \* must determine what the precise exigencies of the situation permit him to do with regard to leaving his medical personnel \* \* \*", U.S.R.L.W., 1917, quoted in Hyde, Vol. II, p. 353. See, however, Des Gouttes, p. 16, who contends that a commander cannot withhold his medical personnel for future use; that if he should run out of such personnel, he should appeal to the charitable zeal of the inhabitants.

medical assistance, the captor would not be discharged from his duty of rendering care and treatment.<sup>15</sup>

The sick and wounded of an army who have fallen into the hands of the enemy are prisoners of war, and, subject to the care that must be given them, are entitled to all the privileges of that status.<sup>16</sup> The Convention further provides that belligerents may make such arrangements beyond existing obligations for the benefit of wounded prisoners as they may see fit.<sup>17</sup>

After every engagement the commander in possession of the field must have search made for the wounded and dead and must take measures to protect them against robbery and ill-treatment.<sup>18</sup> This article imposes a duty to search for, collect, and protect

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15. Des Gouttes, p. 17. The retreating army is to blame if it has abandoned such large numbers of the wounded without adequate medical personnel that all efforts of the adversary cannot provide sufficiently for their treatment. Spaight, p. 426.

16. FM 27-10, par. 175. A wounded prisoner of war may be placed under surveillance. Des Gouttes, p. 21.

17. See p. 109, supra, for the obligation imposed on a belligerent to repatriate the seriously sick and wounded.

The report of the United States Delegation stated with respect to a substantially similar clause in the 1906 Convention that the "commanding generals" of the opposing armies could enter into cartels for the return of the wounded to their own lines at the close of the battle. Foreign Relations of the United States, 1906, Part II, 1548 at 1557.

18. FM 27-10, par. 176a. The former Convention did not include the term "dead".

the wounded and dead, though it does not make the occupant an insurer against all crimes on the battlefield.<sup>19</sup> The customary rule also places the duty of burying the dead on the belligerent in possession of the field.<sup>20</sup> Marauders of the dead and wounded, whether civilians or of the armed force, are to be promptly apprehended and punished by military tribunal for their offenses.<sup>21</sup>

There are times when the wounded and dead who have fallen between the opposing lines cannot be removed because tactical considerations require the continuation of fire or the prevention of enemy search parties from approaching the adversary's line and determining the state of his defense.<sup>22</sup> Hence, the Convention provides<sup>23</sup> "whenever circumstances permit", a local armistice or cessation of fire shall be arranged to permit the reciprocal search and removal of the wounded remaining between the lines.<sup>24</sup>

b. Treatment of Wounded and Dead. Article 4 of the Convention<sup>25</sup> enumerates in detail the obligations that belligerents

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19. Bordwell, p. 252.

20. Spaight, p. 431.

21. FM 27-10, par. 176b.

22. Spaight, p. 428.

23. FM 27-10, par. 176.

24. Des Gouttes, p. 29.

25. FM 27-10, par. 177a.

have with respect to enemy dead or wounded found on the battlefield.<sup>26</sup> They are required to inform each other of the sick, wounded, or dead collected or discovered, together with information which may serve as identification. In World War I, the British Prisoners of War Information Bureau in London received from its sections at base points a return stating as completely as possible, the name, rank, regiment, date, place, and cause of death, and any personal effects or belongings found in possession of the enemy dead. The return was accompanied if possible by the actual discs and effects. The lists of the dead were then forwarded to the enemy government. On the other hand, the personal effects of the enemy wounded or dead found on the battlefield were not transmitted by the Bureau to the enemy government until the conclusion of the war.<sup>27</sup>

Belligerents are under a duty to make honorable disposition of the enemy dead within their lines. Such disposition should normally be by burial, and the graves should be marked so that they may be located again and should be respected. Cremation is permissible if that is the method of disposition of the dead in

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26. See FM 27-10, pars. 162, 163, for similar provisions for prisoners of war dying during internment.

27. Prisoners of War Information Bureau in London, Rosborough, p. 25.

use in the enemy's country or if necessary for sanitary reasons. In the Russo-Japanese War, the Japanese buried the Russian dead as was the Russian custom though its own practice was to cremate the dead.<sup>28</sup> A careful examination is required prior to internment or cremation in order to verify identity and death. One half of the identity tag, or if duplicate tags are worn, one of them, is to remain attached to the body of the dead so that it may be identified if later exhumation is necessary. Burial of the dead should be in individual graves if possible.<sup>29</sup> Internment in a common grave is permissible when military exigencies require, provided the bodies are properly marked by tags or otherwise. Grave registration services are to be officially established, and belligerents shall exchange lists of graves and of the dead in their cemeteries and elsewhere at the end of hostilities.

c. Ownership of Personal Effects. By customary international law, all enemy property, public or private, which a belligerent seized on the battlefield was booty and became the property of the captor.<sup>30</sup> According to a modern authority this rule has been

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28. Spaight, p. 431. Cremation may be required for reasons of hygiene. See Spaight, p. 432, for historical example.

29. Takahashi, International Law Applied to the Russo-Japanese War, p. 149; cf. Des Gouttes, p. 34.

30. Lauterpacht, p. 310.



changed with respect to private enemy property by Article 6 of the Prisoner of War Convention of 1929<sup>31</sup> and Article 4 of the Red Cross Convention of 1929.<sup>32</sup> Under this view, all effects and objects of personal use found upon the dead, wounded, and prisoners of war are not legitimate booty and may not be confiscated unless they fall within the exceptions hereinafter stated. "Arms, horses, military equipment and military papers"<sup>33</sup> may be confiscated though they are private property.<sup>34</sup> Similarly, private means of transport used by an enemy on the battlefield such as carts and other vehicles may be confiscated.<sup>35</sup> This interpretation limits Article 4 of the Red Cross Convention of 1929, which places on belligerents the duty of collecting and sending to each other all articles of personal use found on the field of battle or the dead, by the exceptions stated in Article 6 of the Prisoners of War Convention of 1929 with respect to "arms, horses, military equipment and military papers".<sup>36</sup>

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31. FM 27-10, par. 79.

32. FM 27-10, par. 177; Lauterpacht, p. 310.

33. FM 27-10, par. 79, enumerates only "arms, etc." but saddles and stirrups and the like go with the horses, as ammunition goes with the arms. Lauterpacht, p. 314.

34. Air Power, p. 329.

35. Lauterpacht, p. 314.

36. See p. 59, supra.

Illustrative case.--

In 1918, a British officer in France possessed as his own property a leather bag of unusual shape, design and marking. In the course of military operations in France, the British forces with which the officer served, hastily abandoned a position in which they were promptly succeeded by German forces. The bag of the officer was left behind and seized by the German forces. The bag was sold to Y, a commercial traveler, who bought it in Berlin. Several years after the war the ex-officer recognized his bag on a boat from New Haven to Dieppe. The ex-officer could maintain a possessory action for the bag since he had not lost his property in it. A contrary conclusion would be justified if the bag were "military equipment".<sup>37</sup>

Public enemy property found or seized on the battlefield is still legitimate booty.<sup>38</sup> Legitimate booty belongs to the capturing state and not to the individual soldier.<sup>39</sup>

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37. It is assumed that no difficulties with respect to the effect of a bona fide purchase or of the statute of limitations exist. Manley O. Hudson, who relates the facts in 26 Am. J. Int. L. 340, reaches an opposite result. He points out that Arts. 4 and 14 of the Hague Regulations of 1899 and 1907 are limited to the protection of prisoners of war and that Art. 53 of those regulations does not apply to the conduct of an army engaged in combat but only to an army of occupation. Judge Hudson's discussion did not purport to cover the Red Cross Convention of 1929, especially Art. 4.

38. The restriction in Art. 53 of the Hague Regulations that only certain enumerated movable property belonging to the state and such other state property as may be used for military operations may be confiscated, does not apply to state property found or seized on the battlefield, but only to occupied territory.

39. SPJGW 1943/6501, May 12.

179-181. Sanitary Formations and Establishments. Sanitary formations are establishments, whether fixed or movable, which are provided by public appropriation or private charity for the treatment of the sick and wounded in time of war.<sup>40</sup> Article 6 of the Convention<sup>41</sup> requires that both mobile sanitary formations and fixed establishments belonging to the sanitary service are to be "respected", i.e., not to be fired upon; and "protected" afterwards in the discharge of their duties.<sup>42</sup> The Convention distinguishes between "fixed establishments" and "mobile sanitary units". The distinction is of importance as will be shown later.

Two conditions must coalesce in order that a sanitary unit be considered mobile: (1) it must be susceptible of being moved,<sup>43</sup> and, (2) it must accompany troops in the field.<sup>44</sup> The words "mobile sanitary formations" include by way of illustration: (1)

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40. Report of American Delegation to Second Geneva Conference, Foreign Relations, 1906, Part II, 1548 at 1555. Holland, p. 30, used the term "mobile medical units" in preference to "movable sanitary formations".

41. FM 27-10, par. 179.

42. Holland, p. 30.

43. Des Gouttes, p. 39.

44. The test, says Spaight, is whether the hospitals or ambulances actually accompany the troops, whether they move as part and parcel of the moving fighting body. Spaight, p. 437. Cf. par. 4b, AR 40-580, June 29, 1929, which states that "mobile hospitals are provided to meet the needs of troops in the field or in campaign where it is impracticable to establish fixed hospitals. They also serve as relay points in the evacuation of patients to fixed hospitals."

regimental equipment; (2) ambulance units; (3) hospital trains; (4) hospital boats; (5) Red Cross transport columns.<sup>45</sup> The United States army hospital organization is divided into two categories: (1) the mobile hospital (mobile sanitary formation) located in the combat zone, and, (2) the fixed hospital (fixed establishment) located in the zone of communications or at a base.<sup>46</sup> The types of mobile hospitals are: clearing hospitals, surgical hospitals, evacuation hospitals, and convalescent hospitals.<sup>47</sup> The fixed establishments are the station hospitals and general hospitals.<sup>48</sup> A station or general hospital, although actually movable, is a fixed establishment.<sup>49</sup> Conversely, a hospital opened permanently and in a solidly constructed building, i.e., immovable, would be a fixed establishment though located in the zone of combat.<sup>50</sup> The

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45. Hyde, Vol. II, p. 355, quoting U.S.R.L.W., 1917. This is not an exhaustive list.

46. See par. 4a, AR 40-580, June 29, 1929; cf. Spaight, p. 438.

47. See par. 2b(2), AR 40-580, June 29, 1929.

48. Par. 2b, AR 40-580, June 29, 1929.

49. Hyde, Vol. II, p. 355, quoting U.S.R.L.W., 1917; see also Holland, p. 30.

50. Des Gouttes, p. 39.

"respect" and "protection" afforded sanitary formations and establishments do not cease merely because no sick and wounded are in them at the particular time. Thus, empty ambulances which have completed their duty and are returning to their troops are to be respected and protected.<sup>51</sup>

Sanitary establishments do not have an absolute immunity under all conditions. Such establishments cannot claim immunity where they are so numerous or located in such a manner as to interfere with legitimate military operations.<sup>52</sup> Thus, in the Russo-Turkish War, the Turks complained that Russian gunners shelled hospitals in Rustchuk in 1877. This was considered unavoidable because the hospitals were located in the center of town, so that, to spare the hospitals, would mean foregoing hostilities.<sup>53</sup> Similarly, locating a hospital near munition dumps, gun batteries or in buildings of military importance such as a railway station, would deprive the establishment of immunity against the demands of military necessity.<sup>54</sup> The use of a sanitary formation for

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51. Holland, p. 30; Des Gouttes, p. 40; see p. 138, *infra*.

52. Hyde, Vol. II, p. 355.

53. Spaight, p. 182.

54. Cf. Air Power, p. 264; Spaight, p. 183.

military purposes is improper.<sup>55</sup> Such acts as sheltering combatants, carrying on espionage, storing arms and ammunition, maintaining wireless apparatus or searchlight batteries, are injurious to the enemy and deprive the sanitary formation of immunity.<sup>56</sup> However, a sanitary formation does not forfeit its protection:<sup>57</sup>

(1) because the personnel of the formation is armed and uses its arms in self defense, or in defense of the wounded;<sup>58</sup> (2) because, in the absence of armed hospital attendants the formation is guarded by an armed detachment or by sentinels;<sup>59</sup> (3) because, hand arms and munition taken from the sick and wounded and not yet turned over to the proper service are found, and (4) because there is found in the formation personnel or materiel of the veterinary service which does not integrally belong to it.<sup>60</sup>

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55. FM 27-10, par. 180.

56. Air Power, p. 265; Des Gouttes, p. 44.

57. FM 27-10, par. 181.

58. The arms may not be used against legitimate combatants, but only against marauders and the like. FM 27-10, par. 181, 4b.

59. If such detachment engaged in combat using the sanitary establishment as cover, the exemption would be forfeited.

60. This was introduced by the United States Delegation inasmuch as the veterinary service is under the control of the Medical Department in the United States Army. Des Gouttes, p. 46.

182-187. Personnel of Sanitary Formations and Establishments.--The personnel engaged exclusively<sup>61</sup> in the removal, transportation and treatment of the sick and wounded as well as with the administration of sanitary formations and establishments are entitled to be respected and protected.<sup>62</sup> The respect and protection accorded them means that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions.<sup>63</sup> Such personnel do not have complete freedom of movement in the combat zone for the purpose of collecting or removing sick and wounded. Thus, a belligerent desiring to conceal the state of his defenses from the enemy, may command approaching sanitary personnel to halt, and if they persist in approaching despite the command, may lawfully fire upon them as an extreme measure.<sup>64</sup>

Chaplains attached to the army are similarly entitled to be respected and protected.<sup>65</sup> Soldiers from other branches employed

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61. The term "exclusively" is used in contradistinction to "occasionally". Des Gouttes, p. 49.

62. FM 27-10, par. 182a. Soldiers permanently attached to sanitary formations or fixed sanitary establishments as administrators, accountants, cooks, domestics, or drivers, are entitled to the same privileges as nurses and medical officers. Des Gouttes, p. 49; cf. Edmonds and Oppenheim, par. 185, footnote (b).

63. FM 27-10, par. 182b.

64. Spaight, p. 457; Edmonds and Oppenheim, par. 199.

65. FM 27-10, par. 182a. Ministers not officially attached to the army are not entitled to the benefit of this article. Des Gouttes, p. 49.

as guards for sanitary units are treated as sanitary personnel, if they have written orders of competent authority showing such status and have not during such status acted as combatants.<sup>66</sup>

Similarly, a soldier temporarily attached as an auxiliary attendant or litter-bearer in the removal, transportation, and treatment of the wounded is treated as part of the sanitary personnel if three conditions concur: (1) prior and special instruction has been given him for the task;<sup>67</sup> (2) he has identification documents,<sup>68</sup> and, (3) he is performing sanitary functions at the time of capture.<sup>69</sup>

If sanitary personnel and those assimilated to them fall into the hands of the enemy, they are not to be treated as prisoners of war. Article 12 places a duty on the enemy not to detain them.<sup>70</sup>

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66. FM 27-10, par. 181, 4c. The lack of written orders from competent authorities will subject the soldier to treatment as a prisoner of war. Cf. Spaight, p. 440.

See, however, Des Gouttes, pp. 44, 112, 117, who contends that the deletion of Art. 9, par. 2, of the Geneva Convention of 1906, which expressly assimilated such guards to sanitary personnel, changed the former rule; that such guards when captured are prisoners of war.

67. No definite period of instruction is required though there must be special preparation for the temporary role. Des Gouttes, p. 54.

68. This is to prevent fraud from being perpetrated on the captor state. Des Gouttes, p. 53.

69. FM 27-10, par. 182. Soldiers from other branches employed as orderlies for sanitary units are treated as sanitary personnel if they have written orders of competent authority showing such status. FM 27-10, par. 181, 4c.



In the absence of an agreement to the contrary, they are to be sent back to the belligerent to whose service they are attached as soon as a way is open for their return and military exigencies permit. There may be military objections to allowing such personnel to return to their army immediately; for example, they may have acquired information which would be of value to the adversary.<sup>71</sup> Until returned, they are to continue to carry on their duties under the direction of the captor, preferably to care for the wounded of their own army. So long as they are detained, they must be given the same maintenance, quarters, pay and allowances as the corresponding personnel in the army of the enemy.<sup>72</sup> On their departure they must be allowed to take with them the effects, instruments, arms, and means of transport belonging to them.<sup>73</sup>

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71. Reasonable measures may be taken to prevent such personnel from acquiring military information by restricting their activities. FM 27-10, par. 186b.

72. FM 27-10, par. 187. The personnel of volunteer aid societies are entitled to maintenance, quarters, pay and allowances.

73. The effects, instruments, etc., which they must be allowed to take with them are such as belong to them personally and not to the state. Des Gouttes, p. 85. Sanitary personnel attached to a mobile sanitary formation would also take with them the materiel of the formation which was being returned at the same time. See p. 138, infra.

The personnel of volunteer aid societies, duly recognized and authorized by their government,<sup>74</sup> employed in the same functions as the sanitary personnel are privileged to the same extent as the permanent sanitary personnel,<sup>75</sup> provided such personnel are subject to military law and regulations.<sup>76</sup> Each belligerent must notify the other, before employing them, the names of the societies which it has authorized to render assistance to the official sanitary service of its armies.<sup>77</sup>

Sanitary personnel and those assimilated to them while temporarily detained by the enemy are, according to Spaight, subject to control of the enemy for the purposes of discipline.<sup>78</sup> Though the problem is not free from doubt, it would seem that such

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74. The American National Red Cross is the only such volunteer society authorized by the United States. See FM 27-10, par. 184.

75. FM 27-10, par. 183.

76. Personnel of the American National Red Cross are subject to military law when accompanying or serving with the armies of the United States in the field in time of war. AW 2; Dig. Op. JAG, 1912-40, sec. 359(14).

77. FM 27-10, par. 183. See FM 27-10, par. 185, as to volunteer societies of neutrals who with the prior consent of their own government and the belligerent they are serving, are placed in the same status as a belligerent's own voluntary societies.

78. Spaight, p. 446.

personnel ought to be subject to the laws and orders in force in the armies of the enemy state.<sup>79</sup>

The protection and special status given sanitary personnel are conditioned on their not acting in a hostile manner toward the enemy. A medical officer or chaplain who participates in the hostilities by leading an attack or participating in one, forfeits his immunities. Thus, if before participating in such hostilities a medical officer removed his Red Cross brassard, he would be a combatant and, if captured, a prisoner of war. However, if he engaged in hostilities while wearing the Red Cross brassard, he would be guilty of a misuse of the Red Cross emblem and could be punished as a war criminal.<sup>80</sup>

188-190. Buildings and Materiel.--Article 14<sup>81</sup> states that mobile sanitary formations<sup>82</sup> that fall into the power of the enemy shall not be deprived of their: (1) materiel,<sup>83</sup> (2) their means

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79. Cf. FM 27-10, par. 118. In the Russo-Japanese War, Russian sanitary personnel were tried by the Japanese under the Russian code and, at times, under their own code. Spaight, p. 446.

80. Edmonds and Oppenheim, pars. 186, 441-442; see also FM 27-10, par. 347.

81. FM 27-10, par. 188.

82. It is the mobile sanitary formation of the army that is referred to here.

83. Movable sanitary formations generally contain tents, bedding, ambulances, surgical instruments, medical and hospital supplies.

of transportation, and, (3) their conducting personnel (drivers).<sup>84</sup>  
These units are to retain their materiel and means of transportation "whatever may be their nature", i.e., although portions of it have been borrowed from military units or obtained by requisition from the inhabitants of the country.<sup>85</sup> Military vehicles not part of the sanitary service, i.e., not specially fitted for hospital uses, and civilian means of transport, the temporary use of which were obtained by requisition, are subject to special rules when used in the evacuation of the sick and wounded. This will be dealt with later.<sup>86</sup>

Competent military authority is authorized to make use of the mobile sanitary unit<sup>87</sup> in the care of the sick and wounded.<sup>88</sup>  
The personnel, materiel and means of transport are, so far as possible, to be returned at the same time. They must be returned to the adversary as soon as the route for their return is open

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84. Des Gouttes, p. 95.

85. Holland, p. 33; Des Gouttes, p. 95.

86. See p. 142, et seq., infra.

87. Materiel, means of transportation and the drivers are all on the same footing. Des Gouttes, p. 95.

88. In case of necessity, the capturing commander may use some of the materiel for the benefit of his own wounded. Holland, p. 33.

and military considerations permit.<sup>89</sup> Circumstances may arise in which the immediate return of the personnel is feasible but the materiel cannot be dispatched because of physical or other difficulties, e.g., heavy equipment and poor roads.<sup>90</sup>

It must be observed that the fixed establishment dealt with in this Convention is the military hospital and not a civilian hospital owned by the state. The civilian hospital is the subject matter of the Hague Regulations, Articles 27 and 56.<sup>91</sup> Fixed establishments, unlike mobile sanitary formations, are unable to pack up and accompany the army they are attached to and follow it.<sup>92</sup> When the enemy occupies the territory, the fixed establishment and its materiel are under his control and are "subject to the laws of war".<sup>93</sup> Specifically, if the establishment houses no sick and wounded, it may be seized and its materiel confiscated.<sup>94</sup> So long as the establishment contains sick and wounded, it may not be diverted from its medical purpose.<sup>95</sup> The demands of "urgent military necessity" will permit the use of

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89. FM 27-10, par. 186.

90. Des Gouttes, p. 97; cf. Spaight, p. 448.

91. FM 27-10, pars. 58, 318; Des Gouttes, p. 99.

92. Spaight, p. 448.

93. FM 27-10, par. 189.

94. Des Gouttes, p. 100.

95. Des Gouttes, p. 100.

the establishment to be diverted from medical purposes only if prior arrangements are made for the sick and wounded. Such a case of urgent military necessity would arise if the occupied territory were attacked and it became necessary to utilize the building for purposes of defense.<sup>96</sup>

The buildings and materiel of aid societies are private property<sup>97</sup> and, as such, must be respected.<sup>98</sup> It may be requisitioned only in case of urgent necessity and only after arrangements have been made for the sick and wounded. If requisitioned, payment must be made in cash or a receipt given, and the payment of the amount due is to be made as soon as possible.<sup>99</sup> Some doubt exists with respect to the treatment to be accorded materiel of aid societies found in mobile sanitary formations. One view is that such materiel is part of the sanitary formations and under Article 14<sup>100</sup> must be dealt with on the same basis as materiel of the state in such a formation, that is, returned.<sup>101</sup> The British

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96. Des Gouttes, p. 100.

97. FM 27-10, par. 190.

98. FM 27-10, par. 323.

99. FM 27-10, par. 335.

100. FM 27-10, par. 188.

101. Des Gouttes, pp. 94, 103; Renault quoted in Spaight, p. 449.

field manual in World War I viewed such materiel as private property and subject to requisition.<sup>102</sup>

191. Sanitary Transportation.--Article 17<sup>103</sup> deals with vehicles equipped for evacuation, that is, sick and wounded "in the course of conveyance".<sup>104</sup> Such vehicles, whether proceeding singly or in convoy must be treated in the same way as mobile sanitary units, subject to the rules stated hereafter. The enemy intercepting such vehicles traveling singly or in convoy may stop them and break up the convoy if required by military necessity, provided he takes charge in all cases of the sick and wounded who are in it. The enemy may use intercepted vehicles for sanitary needs exclusively and then only in the sector where they were intercepted. As soon as these vehicles are no longer required for their local mission they are to be returned in accordance with the conditions stipulated for the return of mobile sanitary formations.<sup>105</sup> A mixed convoy made up of the sick and wounded and troops is not an evacuation convoy but a troop train. Such

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102. Edmonds and Oppenheim, par. 209.

103. FM 27-10, par. 191.

104. Holland, p. 35.

105. See p. 139, et seq., supra.

a group is not privileged to fly the Red Cross flag nor is it entitled to the protection of the Convention.<sup>106</sup>

The personnel of the evacuation convoy may belong to sanitary units or volunteer aid societies;<sup>107</sup> in both cases they are to be returned and not treated as prisoners of war.<sup>108</sup> Military personnel lent for transport purposes (i.e., not belonging to the sanitary service) are entitled to be returned under the same conditions as sanitary personnel provided they are in possession of a regular order detailing them to this duty.<sup>109</sup> Civil personnel whose services have been requisitioned for the convoy are to be released unless requisitioned again by the captor.<sup>110</sup> There is the duty of restoring all means of transportation which are especially organized for evacuation and attached to the sanitary service, for example, hospital trains. In other words, if the means of transportation belongs to the sanitary service of the

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106. It is not a violation of the Convention for a belligerent to place the sick and wounded in a troop train; but it is a violation for such a train to fly the Red Cross flag. Spaight, p. 452.

107. FM 27-10, pars. 183, 185.

108. Drivers permanently attached to sanitary formations are entitled to the same treatment. See p. 134, et seq., supra.

109. It must be noted that this is a limitation on Art. 14, FM 27-10, par. 188, which requires the return of the conducting personnel of mobile sanitary formations. Des Gouttes, p. 112.

110. Holland, p. 35; see also Des Gouttes, p. 115; p. 48, supra.



enemy it should be returned.<sup>111</sup> Similarly, materiel belonging to the sanitary service for fitting up ordinary vehicles, trains and other means of transport for the evacuation of the sick and wounded, is exempt. Military means of transportation not belonging to the sanitary service but borrowed from military units are subject to capture as booty.<sup>112</sup> Generally, this latter group would comprehend means of transportation belonging to a belligerent but not especially fitted for sanitary use.<sup>113</sup>

All means of transportation obtained by requisition and used for the evacuation of the sick and wounded such as ordinary railway trains and river boats, or commercial vessels temporarily utilized for the conveyance of the sick and wounded, are subject to the general rules of international law.<sup>114</sup> Thus, by way of illustration, if the belligerent intercepting such a convoy is in occupation of enemy territory, then these means of transport may be seized by him under Article 53<sup>115</sup> or requisitioned under

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111. Holland, p. 35; for vehicles belonging to volunteer aid societies, p. 141, supra.

112. Holland, p. 36.

113. Cf. Hyde, Vol. II, p. 385.

114. FM 27-10, par. 191; Report of United States Delegation to the Geneva Conference of 1906, Foreign Relations, 1906, Part 2, p. 1557.

115. FM 27-10, par. 331.

Article 52<sup>116</sup> of the Hague Convention, or, in default of either of these methods, returned to the owners.<sup>117</sup>

Medical stores, drugs, etc., except those held by a mobile sanitary unit or a convoy of evacuation, are not protected by the Convention and are subject to confiscation as legitimate booty.<sup>118</sup>

The Convention makes no specific provision with respect to the evacuation of the sick and wounded from besieged places or fortresses. A commander of a besieged place has no war right to relieve the pressure on his resources by sending out his wounded nor does it entitle the besieger to increase that pressure by sending a convoy of wounded into the place which he is besieging.<sup>119</sup>

192. Sanitary Aircraft.--Aircraft used as a means of sanitary transportation enjoy the protection of the Convention during such time as they are reserved exclusively for the evacuation of sick and wounded and for the transportation of personnel and

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116. FM 27-10, par. 335.

117. Des Gouttes, p.115.

118. Spaight, p. 449; Edmonds and Oppenheim, par. 208. Stores, drugs, etc., part of a "fixed establishment" and necessary for the treatment of the wounded would be protected. Des Gouttes, p. 100; see also p. 140, supra.

119. Holland, p. 35.

materiel.<sup>120</sup> Sanitary aircraft must, in order to enjoy this protection be painted white and bear the distinctive sign of the Red Cross alongside of the national colors, on its upper and lower surfaces. The aircraft need not be specially designed or constructed for sanitary use. Thus, ordinary aircraft, properly painted and bearing the appropriate insignia would be entitled to protection.<sup>121</sup> Conversely, sanitary aircraft may be converted by a belligerent at a subsequent time into military aircraft by removing the distinctive markings and coloring required by the Convention.<sup>122</sup> In order to prevent sanitary aircraft from collecting intelligence, the Convention provides that in the absence of special and express permission, such aircraft may not fly over the firing line, over the zone situated in front of the major medical collecting stations, and in general over any territory under the control of the enemy.

Sanitary aircraft must comply with the enemy summons to land. A failure to comply with such a summons results in a forfeiture of the protection accorded such aircraft and its personnel.<sup>123</sup>

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120. FM 27-10, par. 192.

121. Des Gouttes, p. 125.

122. Des Gouttes, p. 125.

123. Des Gouttes, p. 132. Thus, it may be fired upon by the enemy and in case of a forced landing, its personnel may be held as prisoners of war.

If sanitary aircraft lands on enemy territory either in compliance with a summons by the enemy or accidentally, the sanitary personnel, the materiel, the sick and wounded, and the aircraft are entitled to the benefits of the Convention. In effect sanitary aircraft and its personnel are treated on the same basis as convoys of evacuation.<sup>124</sup> However, as has been stated, the sanitary aircraft need not be specially designed for sanitary use as is the case in convoys of evacuation.<sup>125</sup> The sanitary personnel, the personnel of voluntary aid societies, the military personnel charged with transportation and provided with a regular order,<sup>126</sup> civil personnel obtained by requisition, sanitary materiel and aircraft are subject to the rules applicable to convoys of evacuation.<sup>127</sup> Thus, the sanitary personnel and the personnel of voluntary aid societies are entitled to be returned.

Special provision is made for pilots, mechanics, and wireless operators of sanitary aircraft. As a condition precedent to their return, they must give an undertaking to serve only in

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124. Des Gouttes, p. 133.

125. See p. 145, supra.

126. Pilots, mechanics, and wireless operators are specially treated in Art. 18, FM 27-10, par. 192.

127. Des Gouttes, p. 133.

the sanitary service until the termination of hostilities. If a pilot, mechanic or wireless operator violated such an undertaking he, like the prisoner of war who breaches a parole, would be subject to punishment.<sup>128</sup> Except for persons who have given their pledge, there is no prohibition in the Convention against a pilot serving alternately in military and sanitary aircraft.<sup>129</sup> Of course, a pilot may not be both a sanitary pilot and a military pilot in the same flight. In the latter case, i.e., where his duties are of a mixed nature, the aircraft is not entitled to the protection of the Convention.<sup>130</sup>

Where sanitary aircraft has landed either involuntarily or in compliance with an enemy summons to land, the sick and wounded are prisoners of war as is the case when a convoy of evacuation is intercepted.<sup>131</sup> The sanitary materiel and the sanitary aircraft must be returned in accordance with Article 14.<sup>132</sup>

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128. See p. 120, supra.

129. Des Gouttes, p. 136.

130. Des Gouttes, p. 137. If such an aircraft carried the Red Cross markings it would be an abuse of the Red Cross emblem. Des Gouttes, p. 125.

131. Des Gouttes, p. 134.

132. FM 27-10, par. 188.

193-198. The Distinctive Emblem of the Red Cross.--Out of respect to Switzerland, the heraldic emblem<sup>133</sup> of Switzerland of the red cross on a white ground, formed by reversing the federal colors, is adopted as the emblem of the Red Cross.<sup>134</sup> The Convention permits the use of the red crescent, or the red lion and sun on a white field as a distinctive emblem in countries which already use these emblems. Turkey uses a red crescent and Iran the red sun.

The Red Cross emblem must be shown on flags, materiel, and brassards belonging to the sanitary service with the permission of competent military authorities.<sup>135</sup> The Red Cross flag protects hospitals and ambulances; the brassard protects individuals.<sup>136</sup> Article 22<sup>137</sup> specifically states that the Red Cross flag "may only be displayed over the sanitary formations and establishments which the convention provides shall be respected". This would exclude civil hospitals or any other buildings or

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133. "Heraldic" is used in describing the insignia to indicate that it has no religious association. Bordwell, p. 263.

134. FM 27-10, par. 193.

135. FM 27-10, par. 194. The permission is signified either by a written authorization, or by an official stamp on the sign. Edmonds and Oppenheim, par. 210.

136. Spaight, p. 457.

137. FM 27-10, par. 196.

ambulances than referred to in the Convention.<sup>138</sup> The Red Cross flag must in the case of fixed sanitary establishment be accompanied by the national flag of the belligerent, whereas in the case of the mobile formations it is optional with the belligerent to display its national flag. The sanitary formations of neutral countries<sup>139</sup> must fly with the Red Cross flag, the national flag of the belligerent to which they are attached. Such formations may also fly their own national flag during the time they are rendering service to a belligerent.<sup>140</sup> Sanitary units, belligerent or neutral, fly only the Red Cross flag while in the power of the enemy.<sup>141</sup>

The personnel entitled to wear the Red Cross brassard are the following: (1) the personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded as well as with the administration of sanitary formations and establishments, and army chaplains;<sup>142</sup> (2) the personnel of

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138. Spaight, p. 456; see also p. 140, supra.

139. FM 27-10, par. 185.

140. FM 27-10, par. 197. In such case three flags would be flown: the Red Cross flag, the belligerent's flag, and the neutral's flag. Des Gouttes, p. 171.

141. FM 27-10, par. 196.

142. Par. 1, Art. 9; FM 27-10, par. 182.

volunteer aid societies;<sup>143</sup> (3) the personnel of volunteer aid societies of a neutral country.<sup>144</sup> According to some writers, the brassards are for the sanitary personnel proper and not for those temporarily in the service of the sick and wounded such as litter-bearers or auxiliary attendants.<sup>145</sup> However, the generally accepted practice has been for those permanently assigned to sanitary formations or as chaplains to wear the Red Cross brassard at all times while in the theater of operations, and for those temporarily serving as litter-bearers or auxiliary attendants upon the sick and wounded to wear it only while so serving. The brassard is to be attached to, and not merely slipped over the left arm. It is important that the character of sanitary personnel shall not be put on and off at pleasure.<sup>146</sup> Both the permanent sanitary personnel and those employed temporarily as litter-bearers, etc.,<sup>147</sup> must be furnished with proof of identity entered either in their military handbook or by a special document.<sup>148</sup>

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143. FM 27-10, par. 183.

144. FM 27-10, par. 185.

145. Par. 2, Art. 9; FM 27-10, par. 182; par. 1, Art. 21; FM 27-10, par. 195; Des Gouttes, p. 154; Bordwell, p. 264.

146. Bordwell, p. 264; Des Gouttes, p. 155.

147. FM 27-10, par. 182.

148. FM 27-10, par. 185.



Personnel of volunteer aid societies, either of the belligerent or of a neutral state, not wearing military uniforms must be furnished by competent military authority with a certificate of identity containing their photograph and attesting to their sanitary status.<sup>149</sup> Identification documents must be uniform and of the same type in each army.<sup>150</sup> In no case may the sanitary personnel be deprived of their insignia nor of their own identification papers.<sup>151</sup>

The size of the distinctive emblem is not laid down by the Convention except in a general statement that the markings shall be plainly visible to the land, air, and sea forces of the enemy insofar as military exigency allows.<sup>152</sup> The red cross on a white ground and the words "Red Cross" or "Geneva Cross" or the other emblems mentioned in Article 19<sup>153</sup> must not be used either in

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149. FM 27-10, par. 195; see p. 149, supra, footnote 135. Personnel of volunteer aid societies wearing military uniforms are required to have a certificate of identity; a photograph would not be necessary. Des Gouttes, p. 160.

150. FM 27-10, par. 195.

151. This is to prevent a capturing power from evading the duty of returning sanitary personnel. Des Gouttes, p. 162.

152. FM 27-10, par. 196.

153. FM 27-10, par. 193.

peace or war, except to designate sanitary formations, establishments, the personnel and materiel protected by the Convention.<sup>154</sup> The Act incorporating the American National Red Cross<sup>155</sup> provided, among other things, that it shall be unlawful for any person or corporation, etc., other than the American National Red Cross to use the sign or insignia in imitation of the Red Cross for the purpose of trade or as an advertisement to induce the sale of any article.<sup>156</sup>

Voluntary aid societies<sup>157</sup> may, in conformity with their national legislation, use the distinctive emblem in connection with their humanitarian activities in time of peace. As an exception and with the specific authority of one of the national societies of the Red Cross, use may be made of the emblem of the Convention in time of peace to designate stations exclusively reserved for free treatment of the sick or wounded.<sup>158</sup>

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154. FM 27-10, par. 198.

155. Sec. 4, 33 Stat. 600; 36 U.S.C. 4.

156. Persons, etc., using the insignia for purposes of trade prior to the date of the Act were excepted from its operation.

157. FM 27-10, par. 183.

158. FM 27-10, par. 198.



A P P E N D I X

INSTRUCTIONS FOR THE GOVERNMENT OF  
ARMIES OF THE UNITED STATES IN  
THE FIELD

General Orders,  
No. 100.

WAR DEPARTMENT,  
Adjutant General's Office,  
Washington, April 24, 1863.

The following "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, LL.D., and revised by a Board of Officers, of which Major General E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

BY ORDER OF THE SECRETARY OF WAR:

E. D. TOWNSEND,  
Assistant Adjutant General.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES  
OF THE UNITED STATES IN THE FIELD

Section I

Martial Law--Military Jurisdiction--Military Necessity--  
Retaliation

1

A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its Martial Law.

2

Martial Law does not cease during the hostile occupation, except by special proclamation, ordered by the commander in

chief; or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3

Martial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4

Martial Law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not Martial Law; it is the abuse of the power which that law confers. As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity--virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5

Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed--even in the commander's own country--when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other consideration.

6

All civil and penal law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying military

power; but all the functions of the hostile government--legislative, executive, or administration--whether of a general, provincial, or local character, cease under Martial Law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

7

Martial Law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8

Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to Martial Law in cases of urgent necessity only: their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9

The functions of Ambassadors, Ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10

Martial Law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

11

The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offenses to the contrary shall be severely punished, and especially so if committed by officers.

12

Whenever feasible, Martial Law is carried out in cases of individual offenders by Military Courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13

Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial, while cases which do not come within the "Rules and Articles of War," or the jurisdiction conferred by statute or courts-martial, are tried by military commissions.

14

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the

army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16

Military necessity does not admit of cruelty--that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17

War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18

When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20

Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.



21

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

22

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

23

Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24

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

25

In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26

Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29

Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

30

Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II

Public and Private Property of the Enemy--Protection of Persons,  
and Especially of Women; of Religion, the Arts and Sciences--  
Punishment of Crimes Against the Inhabitants of Hostile  
Countries

31

A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32

A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33

It is no longer considered lawful--on the contrary, it is held to be a serious breach of the law of war--to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

34

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character--such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35

Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37

The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and churches, for temporary and military uses.

38

Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.

If the owner has not fled, the commanding officer will cause receipts be given, which may serve the spoliated owner to obtain indemnity.

39

The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their

office, and can continue it according to the circumstances arising out of the war--such as judges, administrative or police officers, officers of city or communal governments--are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40

There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41

All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42

Slavery, complicating and confounding the ideas of property (that is of a thing), and of personality (that is of humanity), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43

Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

44

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45

All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46

Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.

47

Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

SECTION III

Deserters--Prisoners of War--Hostages--Booty on the  
Battlefield

48

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

49

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

All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50

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

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

51

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

52

No belligerent has the right to declare that he will treat every captured man in arms of a levy en masse as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53

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

54

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

55

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

56

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



57

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

58

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

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

59

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

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

60

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

61

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

62

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

63

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

64

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

65

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

66

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

67

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

68

Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69

Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70

The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71

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

72

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

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

73

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

74

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

75

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

76

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

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

77

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

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

78

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

79

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

80

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

#### SECTION IV

Partisans--Armed Enemies not belonging to the Hostile  
Army--Scouts--Armed Prowlers--War-rebels

81

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

82

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

83

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

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

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

## SECTION V

### Safe-conduct--Spies--War-traitors--Captured Messengers

All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by highest military authority.

Contraventions of this rule are highly punishable.

Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It

and not by subordinate officers.

88

A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

89

If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90

A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91

The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

92

If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offense.

93

All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94

No person having been forced by the enemy to serve as guide is punishable for having done so.

95

If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

96

A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97

Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98

All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts; or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99

A messenger carrying written dispatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured, while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100

A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.



101

While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102

The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103

Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

104

A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

## SECTION VI

Exchange of Prisoners--Flags of Truce--Abuse of the Flag  
of Truce--Flags of Protection

105

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

106

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

107

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

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

108

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

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

109

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

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

110

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

111

The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112

If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113

If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114

If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115

It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.

116

Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals or protection as much as the contingencies and the necessities of the fight will permit.

117

It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118

The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious

libraries, so that their destruction may be avoided as much as possible.

## SECTION VII

### The Parole

119

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

120

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

121

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

122

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

123

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

124

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

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

125

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

126

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

127

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

128

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

129

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

130

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

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

the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131

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

132

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

133

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

134

The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.

## SECTION VIII

### Armistice--Capitulation

135

An armistice is the cessation of active hostilities for a period agreed between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136

If an armistice be declared, without conditions, it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137

An armistice may be general, and valid for all points and lines of the belligerents; or special, that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138

The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, does in no way affect the character of the armistice itself.

139

An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140

Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141

It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated the intercourse remains suspended, as during actual hostilities.

142

An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143

When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of the defense within the place during an armistice, this point should be determined by express agreement between the parties.

144

So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145

When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

146

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

147

Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case, the war is carried on without any abatement.



## SECTION IX

### Assassination

148

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

## SECTION X

### Insurrection--Civil War--Rebellion

149

Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150

Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portion of the state are contiguous to those containing the seat of government.

151

The term "rebellion" is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

152

When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgement of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgement of the revolted people as an independent power.

153

Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

154

Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155

All enemies in regular war are divided into two general classes--that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens, of the revolted portion or province, subjecting them to a stricter police than the noncombatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of them that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government has the right to decide.

Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.