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by

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SCOPE

A study of the changed rights and obligations of the occupying forces, the local population, and nationals of neutral countries under the "Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949."

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CHAPTER I

INTRODUCTION AND BACKGROUND

1. Preliminary Considerations

The law of belligerent occupation is but a small segment of that branch of International Law generally referred to as the Law of War. As is true of International Law in general, much of the Law of War has never been incorporated in any treaty or convention to which the United States is signatory, but is based upon the practices and usages of war which have gradually ripened into recognized customs with which belligerents are bound to comply.¹ There is no single document that may be referred to as the source of even a substantial part of the Law of War. The development of this branch of International Law has had a long history during which a great many traditional and customary rules have sprung up and been more or less followed, to be transformed in due course into the written law of nations through a system of law-making treaties. Beginning sometime during the latter half of the nineteenth century, international conventions representing most of the civilized nations of the world have been convened from time to time to draw up and codify those rules that it can then be generally agreed constitute the accepted standard of conduct among

¹See 15 LRTWC 5, par. 1, "Customs and Practices Accepted by Civilized Nations Generally". Material and cases cited from the Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, published by His Majesty's Stationery Office, London, will be cited as "LRTWC".

civilized nations based upon the laws of humanity and the dictates of the public conscience. But it would be a mistake to treat these treaties merely as agreements between the various signatory nations, since their true force is based upon their derivation from the general consensus of the civilized nations of the world.² Accordingly, before we take a closer look at the immediate topic with which we are to be concerned, it may help us to arrive at a clearer appreciation of the law of belligerent occupation to first consider the relationship between war itself and International Law, and to consider briefly those basic forces which through their continuous interplay and reaction one upon the other shape and reshape the particulars of the Law of War. Then, by taking a cursory glimpse at the historical development of the more important law-making treaties which are the foundations of the Law of War, we will be in a position to examine more closely the most recent post-World War II development, the four Geneva Conventions of August 12, 1949,³ and in particular the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War.

2. War and International Law

War is a condition, a fact recognized by International Law, and to some extent regulated by it. Although the outbreak of

²See 15 LRTWC, p. xii.

³For the text of these four Conventions, see Department of the Army Pamphlet No. 20-150, October, 1950. Although these conventions have not yet been ratified by the United States, it is understood this is but a question of time.

armed conflicts between private citizens is proscribed by Municipal Law, and a violation of that prohibition will be enforced by the power and authority of the State, there is no central authority above the sovereign States of the international community able to enforce a similar proscription of International Law. In fact, prior to the General Treaty for the Renunciation of War, variously referred to as the Pact of Paris or the Kellogg-Briand Pact, of August 27, 1929,⁴ it was generally contended that the institution of war was a legitimate means of self-help for giving effect to rights claimed under International Law, and contradictorily, a legitimate means of changing rights based on existing International Law where the absence of an international legislature made it necessary to adapt the law to changed conditions. Furthermore, and quite apart from these contentions, war was generally recognized as a legitimate and legal means by which one State might seek to gain political, economic, or other advantage over another. War was considered a natural function of the State and a prerogative of uncontrolled sovereignty. As a natural consequence of this state of International Law, many have viewed war and law as mutually inconsistent. It is submitted that this view tends to place too much emphasis upon the weakness of International Law as a system of enforceable law, and ignores that body of law which has arisen out of the customs and usages of war, including treaty and conventional rules, which the international community has adopted for the regulation and conduct of war.

⁴46 Stat. 2343.

However, without regard to the merits of these earlier contentions, any theoretical objection to International Law as a true system of law based upon the legality of war can no longer be maintained, since all the civilized nations of the world by adoption of the Pact of Paris have renounced the legal right to resort to war except in legitimate self-defense.⁵

3. The Law of War

a. A Definition

In recognition of the inability of the international community as presently organized to prevent resort to war, International Law accepts the outbreak of hostilities as a state of affairs which it nevertheless seeks to regulate in accordance with certain generally accepted principles. Thus, whether or not there shall eventually be developed an effective system to enforce the proscription of aggressive war contained in the Pact of Paris, there is in existence as a definitive part of the whole body of International Law a body of rules and regulations usually referred to as the Law of War, with which belligerents have customarily, or by special treaty or convention, agreed to comply should war break out between them.⁶

b. The Principles of Humanity and Chivalry

In ancient times, and throughout the Middle Ages, war was viewed as a contention between the entire populations of

⁵2 Oppenheim, International Law (7th Ed., Lauterpacht, 1952), Secs. 52fe, 52l, 53, 54. Hereafter, references to this treatise will be by sections, cited as "Lauterpacht, Sec. ____."

⁶Lauterpacht, Secs. 53, 54.

the belligerent States. In time of war, every man, woman, and child of the enemy could be killed or enslaved as it might please the captor. Prisoners of war could be killed, butchered, or offered as sacrifices to the gods. If spared, they were as a rule made slaves, and only exceptionally liberated. According to Lieber's "Instructions for the Government of Armies of the United States in the Field", issued in 1863;⁷

"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."

Only gradually, and toward the end of the Middle Ages, was the savage cruelty of antiquity moderated through the influence of Christianity and a growing concept of chivalry. Although the concept of war as a violent struggle between two States having as its purpose the overpowering of the enemy justifying the use of whatever force and violence might be required to that end remained unaltered, it generally came to be recognized that there were limits, dictated by fundamental standards of humanity, both as to the kinds and as to the degrees of violence that ought to be permissible. It is now accepted as a cornerstone of the Law of War that the use of violence in kind or degree not required for military success is criminal and deserves to be punished as such.

⁷"Instructions for the Government of Armies of the United States In the Field", prepared by Francis Lieber, LLD, issued as General Orders No. 100, War Department, Adjutant General's Office, April 24, 1863, Sec. 24. Hereafter, references to these Instructions will be cited by sections, as "Lieber, Sec. ___".

The purpose of war is not hampered by showing humane consideration to the sick and wounded, to prisoners of war, and to non-combatants. In addition, as a matter of chivalry, it is now agreed to be a breach of honor and mutual self-respect to employ arms that uselessly aggravate suffering, to refuse quarter, to slay those in the attitude of surrender, to violate a flag of truce, to employ assassins, or to use other means of calculated perfidy.⁸

c. The Principle of Individual Responsibility

Prior to World War II, a minority of writers maintained that the individual, having no locus standi before an international tribunal, only States might be held responsible for violations of International Law. The only express provisions of Hague Convention No. IV of 1907, and its annexed Regulations, with respect to its violation were those in Article 3 for the payment by States of compensation, each State being responsible for the acts of members of its armed forces. In a developed system of law, the capacity of having duties is correlated to the capacity of having rights. But in a more primitive phase of social and legal evolution, we find the slave who was subject to duties but in large part without rights. International Law is for the most part but emerging from a comparatively similar primitive stage.⁹ However, though International Law has not proceeded very far toward granting direct rights to individuals, there is a growing opposition to the traditional concept that only States may be the subjects

⁸Lauterpacht, Secs. 57, 67.

⁹Koessler, American War Crimes Trials in Europe, 39 Georgetown Law Review 81, 82 (1950).

of the law of nations. Regardless of the incapacity of the individual to enforce his rights before an international tribunal, the war crimes trials following World War II have made it abundantly clear that the individual soldier or civilian is himself criminally responsible for a violation of the Law of War, irrespective of any overall responsibility of his government. In May 1953, when British and American experts met in Cambridge, England, to consider revision of their respective manuals in the Law of War for issue to their armed forces, there was agreement that the Law of War is binding not only upon States as such but also upon individuals, whether government officials, members of the armed forces, or private citizens.¹⁰ If this were not so, the restraints of the Law of War could not be made effective. Lord Wright of Durley, in his Foreword to Volume 15, Law Reports of Trials of War Criminals, observes:¹¹

"I ought earlier to have observed that the principle of individual responsibility has until recently been regarded as heresy in some quarters, instead of being something which was obviously essential to any system of penal law. It has often been noted that the Hague Conventions do not contain any reference to personal responsibility in respect of war crimes, but all the same, as was pointed out by the Supreme Court of the United States, offenders against the laws of war have been punished. The principle of individual responsibility is a necessary condition of the establishment of a system of law; what the law does is to define that responsibility. It is not content with the formulation of moral rules. It postulates personal sanctions. The Hague Convention, though it speaks of the responsibility of nations to make compensation for breaches of the

¹⁰Report of the Cambridge Conference on the Revision of the Law of War, May 1953, Annex V, Point I, par. 1.

¹¹15 LRTWC, pp. xv-xvi.

"Regulations, does not mention the personal responsibility of those guilty of breaches, but the same answer applies to such an objection, and that is that the punishment of war criminals for breach of the rules of war has been recognized by the practice of nations and is part of the traditional law. For that, I may again refer to the decisions of the Supreme Court of the United States. *** Of course, I need not observe that that principle runs right through the series of trials which are reported in these volumes.***"

d. The Doctrine of Military Necessity

Through the centuries, the whole course of the development of the Law of War has been one of constant inter-reaction between the principles of humanity and chivalry with the requirements of military necessity. Thus it is stated in Field Manual 27-10, "Rules of Land Warfare", published by the United States War Department in October, 1940;¹²

"The principle of military necessity (is a basic principle of the law of war) under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money***"

*New
revised*

As Lieber observed in the 1863 version of this Manual:¹³

"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."

Lieber also notes at two other points that "To save the country is paramount to all other considerations" and "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are

¹²Par. 4a, FM 27-10, 1 October 1940.

¹³Lieber, Sec. 14.

"brief."¹⁴ While these principles commend themselves to the practical military mind, it is through the indiscriminate application of the justification of military necessity that most violations of the law of war arise. There is an ancient German proverb, "Kriegsraeson geht vor Kriegsmanier" (necessity in war overrules the manner of warfare), long urged by many German writers as a valid exception to any of the laws of war whenever such a violation would alone offer a means of escape from extreme peril, or assure success in overpowering the enemy. The acceptance of this doctrine would endanger the basic foundations of the Law of War. This idea has been consistently rejected by most writers in the field. The concept had its origin in times when the Law of War was less definitively expressed than is the case today, when war was regulated, if it was regulated at all, by mere usage and custom. Today, when the Law of War is to a much greater extent contained in treaty and convention, it is generally agreed that the rules and regulations contained in written and solemn covenants may be overruled by military necessity only when the rule itself expressly so provides.¹⁵ The various war crime tribunals following World War II have consistently adhered to this interpretation, holding that applicable provisions of the Hague Regulations and Geneva Conventions then in force were framed with due regard to military necessity and unless qualified by express reference thereto were to be regarded as being enforceable without regard

¹⁴Lieber, Secs. 5, 29.

¹⁵Lauterpacht, Sec. 69.

to military necessity.¹⁶ There can be little doubt that the Geneva Conventions of 1949 carried this principle forward. At the conference of British and American experts at Cambridge in 1953, referred to above, it was agreed that:¹⁷

"The rules of international law are superior to military necessity of even the most urgent nature except when provisions of law specifically provide to the contrary."

The conferees agreed that this was one of the most significant conclusions of the Nurnberg and Tokyo tribunals.¹⁸ and that its unqualified acceptance is of paramount importance in order to safeguard the effectiveness of the Law of War.

e. The Problem of Reprisals

Despite this binding character of the modern Law of War, there remains the danger, clearly revealed in two World Wars, that through the subterfuge of reprisals there may be wholesale and cynical violations. The arbitrariness with which either side, in the absence of some express conventional prohibition of their use, may resort to reprisals in response to a real or alleged act of illegitimate warfare usually results in a partial or total breakdown in observance of the Law of War. Although a reckless enemy often leaves his opponent no other means of preventing the repetition of barbarous outrage, unjust or inconsiderate retaliation removes the belligerents farther and farther from

¹⁶15 LRTWC 175, par. 7, "Military Necessity".

¹⁷Report of the Cambridge Conference on the Revision of the Law of War, May 1953, Annex V, Point I, par. 4.

¹⁸Nazi Conspiracy and Aggression, Opinion and Judgment (1947) 52; Official Transcript of the Judgment of the International Military Tribunals for the Far East (1948) pp. 24-29.

the mitigating rules of the Law of War, and by rapid steps leads them nearer to the internecine war of savages. In fact, the events of both World Wars have indicated that most acts of illegitimate warfare, if admitted at all, are claimed to be justified as measures of reprisal.¹⁹ Perhaps a growing recognition that reprisals as a means of securing legitimate warfare have proven to be self-defeating accounts for the paucity of war crimes trials arising out of the second World War concerned with illegal methods of conducting hostilities.²⁰ In perhaps the only important case of this character, that of the trial of Admiral Doenitz for the war crime of unrestricted submarine warfare, the court did not impose sentence upon him in view of the establishment by both the United States, in the Pacific, and Britain, in the Skagerrak, of so-called "operational zones" within which enemy merchant shipping was sunk on sight.²¹ The recent law on reprisals has dealt largely with those taken against prisoners of war and the inhabitants of occupied territory. Although in the Hostages Trial it was held that, subject to a number of conditions, the killing of reprisal victims or hostages in order to guarantee the peaceful conduct in the future of the population of occupied territories was legal, Article 33 of the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War now forbids reprisals against protected persons.²² Similarly,

¹⁹Lauterpacht, Secs. 247-250.

²⁰15 LRTWC 177, par. 9, "The Plea of Legitimate Reprisals".

²¹See Nazi Conspiracy and Aggression, Opinion and Judgment (1947) 138-140.

²²See 8 LRTWC 77-88.

both the Geneva Convention of 1929 and that of 1949 dealing with prisoners of war prohibit reprisals against such personnel. The British and American experts who met in Cambridge in 1953, of whom mention has previously been made, concluded that:²³

"Reprisals should be employed only if punishment of the offenders and protests to the enemy have failed to bring an end to the enemy's unlawful conduct and that consideration should be given to whether, in the particular circumstances, strict adherence to the law of war may be more efficacious than reprisals in securing the enemy's compliance with law."

f. The Changing Technology of War

(1) The Expanding Theater of War

It has been noted above that in ancient times war was regarded as a contention between the entire populations of belligerent States, but that at some time following the Middle Ages, with the rise of the age of chivalry, war came to be regarded primarily as a contest between the armed forces of the belligerents. During this period, it became customary to respect the life, liberty, and private property of the non-combatant population provided they remained peaceful and unobstructive. During the latter part of the nineteenth century, it was generally maintained on the European continent that war was a relationship of enmity only between States, and that the subjects of belligerent powers were enemies only as soldiers and not as private citizens. Although so extreme a view was never shared by Britain and the United States, technological advances in the science and practice

²³Report of the Cambridge Conference on the Revision of the Law of War, May 1953, Annex I, par. 24.

of warfare since World War I have rendered the basis for the distinction obsolete. The requirements of modern war have so greatly expanded both the number of combatants conscripted into the armed forces as well as the number of non-combatants engaged in war production that to a considerable extent the entire adult population becomes engaged in the prosecution of the war. As a direct consequence, a belligerent State's economy is rendered much more vulnerable to modern measures of economic warfare, exposing everyone to many of the hardships and privations of war. In a totalitarian regime, where the lives and property of every individual are rigidly controlled by the State in both peace and war, the distinction between a nation's armed forces and its civilians is largely artificial.²⁴ With the development of aerial warfare, it is now accepted as legitimate to bomb factories, bridges, rail lines, communications, and other resources vital to military operations or preparations, although far behind the lines of actual combat. With the arrival of the atomic age, the massive destructive radius of the hydrogen bomb, and the extreme vulnerability of the civilian population to attack, particularly when in the vicinity of a legitimate military target, the distinction between combatants and non-combatants has become a distinction without a difference. Thus the International Committee of the Red Cross, in reporting on its activities during the Second World War, points out:²⁵

²⁴Lauterpacht, Secs. 57, 57a.

²⁵Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 13-14.

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"In the first World War it had already become apparent that the protection which international law afforded civilian populations subjected to enemy occupation or otherwise directly affected by acts of war, was still wholly inadequate. The evolution in methods of warfare, the enlisting of the nations' total economic forces in the war effort, and the excesses of occupation authorities during the recent War, increased the dangers to which civilians are exposed, by placing them in no less peril than members of the fighting forces at the front."

(2) The Development of New Weapons

No doubt this increased exposure of the civilian populace to the direct impact of violence in war has intensified the current debates as to the legality of several newly developed weapons. Airpower, plus the impending perfection of guided missiles for long-range delivery, increases the importance of clarification of the legal status of several new armaments. History indicates that every new weapon is initially challenged as a violation of the Law of War. But in the usual course of events, as the passage of time permits a readjustment in offensive and defensive armament to meet the potentialities of the new device, these fears subside. If the new weapon is accepted, it will begin to be discussed largely in terms of disarmament by politicians and in terms of tactical doctrine by the military. If the international community is generally convinced that its use involves unnecessary injury or suffering, this will be exemplified by the practice of States in refraining from its use. As a practical matter, a new weapon may also fall into such disuse not so much as a consequence of humanitarian forbearance but in appreciation of the consequences of retaliation. Thus President

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Roosevelt announced in 1943 that gas would not be used by the United States unless it was first employed by our enemies.²⁶ The position of the United States on gas and bacteriological warfare is somewhat equivocal in view of the failure of the United States Senate to give its advice and consent to the Geneva Protocol of June 17, 1925, "for the prohibition of the use in war of asphyxiating, poisonous, or other gasses, and of bacteriological methods of warfare". Despite the lack of conventional provisions binding on the United States expressly declaring them illegal, these methods of warfare probably violate the customary law of war, except as reprisal in kind.²⁷ On the other hand, most of the major powers are virtually committed in an operational sense to the use of atomic weapons in any major future war. Until a practical means of international control is devised, the use of an explosive atomic weapon, even though of tremendous destructive potential, is not for that reason alone a violation of the Law of War. It has been suggested, however, that an atomic device employing only radiation would violate the proscription of poison or poisoned weapons.²⁸ Whether the blast and burn effect of an atomic explosion would be illegal in a given instance would seem to depend upon the nature of the target and the necessity for its use. The use of other incendiaries by the United States in Korea, such as tracer ammunition, flame throwers, and napalm, has been severely

²⁶1 Department of State Bulletin 507 (1943).

²⁷SPJGW 1945/164, 11 Jan. 1945. (Secret)

²⁸Lauterpacht, Sec. 116a.

criticized by the British press on the ground that they cause unnecessary suffering.²⁹ The United States has consistently maintained that such weapons may be used on targets requiring their use, but may not be employed in such a way as to cause unnecessary suffering. Thus the wanton use of tracer ammunition against personnel might be illegal, while its use against planes and tanks would be proper. As we have noted above, the doctrine of military necessity will not justify the violation of an express prohibition contained in the Law of War, unless the rule expressly so provides. But here the test itself is as to "unnecessary suffering".

4. The Law of Belligerent Occupation

a. Early Development

Thus far, by way of background, we have considered a few general principles of International Law and the Law of War. But it is our particular purpose to examine the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War to determine what changes have been made by it in the law of belligerent occupation, and in particular in the rights and obligations of the occupying forces, the local population, and nationals of neutral countries, in occupied territory. To do this, by way of additional background, we should briefly examine the course of development of the law of belligerent occupation prior to 1949, and for added clarity, distinguish those situations that are closely akin to belligerent occupation but not actually subject to the same rules and regulations of the Law of War.

²⁹See The Spectator, 18 July 1952, p. 89; The Times (London), July 1952.

Even though the occupation of the whole or even a part of the enemy's territory is to realize a most important aim of war, there is perhaps no segment of the Law of War in which more progress has been made toward the uniform acceptance and application of humanitarian standards. This may be due to the simple fact that in an occupation there is more time to consider long range objectives and policies, free from the immediate pressure of military necessity arising from combat conditions. Although by reason of occupation of the enemy's territory the Occupying Power is enabled to use the enemy's resources for military purposes, and he may hold the enemy's territory for the time being as an effective means of securing peace terms to his satisfaction, enlightened appreciation of the sociological, economic, and political problems of readjustment of the civil population to post-war conditions has led to an increasingly moderate concept of the proper objectives of belligerent occupation.

In ancient times, enemy territory and all persons and property therein were considered to belong absolutely to the Occupying Power, and accordingly they could be disposed of as that Power might see fit. General devastation was permissible, both public and private property could be appropriated without compensation of any sort, and the inhabitants might be killed, enslaved, and carried off into captivity. It was customary to require the entire populace to swear allegiance to the conqueror, and to force all able-bodied inhabitants to serve in his armed forces. For example, in the Seven Years War, Frederick II of Prussia forced thousands

of recruits from occupied Saxony into his armies. Even before the outcome of a war was decided, it was considered permissible for the Occupying Power to cede occupied territory to a third state, or otherwise exercise complete sovereignty over it. Thus Denmark, during the Northern War in 1715, sold the occupied Swedish territories of Bremen and Verden to Hanover. As we shall see, under modern rules of belligerent occupation, each of these acts is strictly proscribed.

During the latter half of the eighteenth century, however, there gradually came to be recognized a distinction between the temporary military occupation of territory and its real acquisition through conquest and subjugation. But it was not until 1844, when Heffter published his treatise, "Das Europaische Volkerrecht der Gegenwart", that the full consequences of the acceptance of such a distinction were clearly delineated as a part of the theory and practice of the law of belligerent occupation.³⁰ At the end of the nineteenth century, at the First Hague Peace Conference in 1899, the Hague Regulations, attached to the Convention of July 29, 1899 With Respect to the Laws and Customs of War on Land, revised and replaced by the similar provisions of the Hague Regulations annexed to the IVth Hague Convention of October 18, 1907 Respecting the Laws and Customs of War on Land adopted at the Second Hague Peace Conference in 1907, were adopted. The principles enacted as Section III of the Hague Regulations (Articles 42-56) - Military Authority Over the Territory of the Hostile State, even

³⁰Lauterpacht, Sec. 166.

today constitute the universally accepted foundation of the modern law of belligerent occupation. However, World War II demonstrated the inadequacy of the brief, and frequently ambiguous, text of the Hague Regulations to cope with the lawlessness and cruelties of the Axis practice of belligerent occupation. This led to the adoption of the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, to supplement, amplify, and make more precise the principles first contained in the Hague Regulations.³¹

b. Belligerent Occupation Distinguished from Subjugation or Conquest

Since the major part of the remainder of this paper is devoted to a detailed comparison of the provisions of the Hague Regulations with those of the Geneva Civilians Convention, to determine the extent of the changes effected by the latter in the law of belligerent occupation, it is appropriate at this point to do no more than indicate the fundamental principles upon which these two Conventions proceed. Thus, in the words of Lauterpacht:³²

"The principle underlying these modern rules is that, although the occupant in no wise acquires sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being military authority over it. As he thereby prevents the legitimate sovereign from exercising his authority, and claims obedience for himself from the inhabitants, he must administer the country, not only in the interest of his own military advantage, but also, at any rate so far as possible, for the public benefit of the inhabitants. Thus International Law not only gives rights to an occupant, but also imposes duties upon him."

³¹Lauterpacht, Secs. 172a, 172b.

³²Lauterpacht, Sec. 166.

While belligerent occupation is thus essentially provisional, and does not vest sovereignty in the Occupying Power, subjugation or conquest implies a transfer of sovereignty which generally takes the form of annexation and is normally effected by a treaty of peace. Subjugation takes place only when the armed contention ceases as a result of a belligerent acquiring effective possession of enemy territory, annihilating the forces of the enemy, and manifesting an intention to annex the territory - that is an intention to hold it permanently. Of course, belligerent occupation as such then ceases. However, even though the invaded sovereign is driven from the whole of his territory, and no matter how poor his prospects of expelling the invader may be, so long as he is still in the field and the armed contention continues, even though it be by allies of the Occupied Power with the aid of only nominal contingents of the troops of the Occupied Power, subjugation has not occurred. Until hostilities cease, it is unlawful for an Occupying Power to annex occupied territory or to create a new state therein.³³

c. Belligerent Occupation Distinguished from Invasion

Although anything short of complete subjugation will not transfer sovereignty, nevertheless the Occupying Power has certain rights and duties with respect to occupied territory and its population premised upon his temporary military control of the area. Hence it is essential to determine precisely when a given area is to be considered occupied. Occupation is a question of

³³JAGS Text No. 11, "Belligerent Occupation", pp. 27-29.

fact. Territory is occupied when the Occupying Power is in fact exercising authority over the area to the exclusion of the legitimate government. Organized resistance must have been overcome and the Occupying Power must have actually established an administration over the area by taking effective measures to establish law and order. How the control is maintained is immaterial. On the other hand, mere invasion is not occupation, although occupation may normally be preceded by invasion and may frequently coincide with it. Invasion is essentially a military operation and does not involve the establishment of an administration over the area invaded. Small raiding parties or flying columns, reconnaissance detachments or patrols, moving through an area cannot be said to occupy it. In occupation, the belligerent intends to remain in the occupied territory and govern it. Unless sufficient force is present, capable of maintaining the assumed exercise of authority, the area is not occupied but only invaded. Conditions will of course vary with the area concerned. In the case of a thinly populated territory a smaller force will be required to occupy it than in the case of a thickly populated country.³⁴

Although the Hague Regulations and the Geneva Civilians Convention would apply by their terms only to belligerent occupation, it has been suggested that United States policy should be to apply by analogy those parts of these rules as may be appropriate where military government activities may be required to be applied even

³⁴Lauterpacht, Sec. 167.

though invasion has not yet ripened into occupation.³⁵ Numerous writers have also maintained that, as a matter of customary law, the rights and duties of an invader with respect to persons and property are generally the same except as to those duties which devolve upon an Occupying Power as a consequence of the establishment of military government.³⁶

d. Belligerent Occupation Distinguished from Civil Affairs Administration of Friendly Territory

Finally, belligerent occupation must be distinguished from that form of administration established in friendly territory in time of war whereby a foreign government, pursuant to an agreement with the government of the area concerned or with the implied consent of that government, assumes some or all of the functions that would normally be prerogatives of that government. Such form of administration is known as "civil affairs administration". Such administration is often established in areas which are freed from enemy occupation. It is required where the legitimate government is unable or unwilling to assume full responsibility for its administration. Such an administration was exercised during World War II by the British over the liberated French colony of Madagascar, by agreement between the United Kingdom and Ethiopia over portions of the latter's territory, and by the occupants of Austria over territory considered by them to be liberated on behalf of a State with which the United States and

³⁵Par. 6.2b, FM 27-10, proposed draft 1 March 1954.

³⁶JAGS Text No. 11, "Belligerent Occupation", pp. 26-27.

other nations were never at war.³⁷ Territory subject to such administration is not considered to be occupied, although Hyde has expressed the view that the occupation of liberated territory of a co-belligerent or ally must be governed by the same rules that apply to the belligerent occupation of enemy territory.³⁸ Although the Hague Regulations and the Geneva Civilians Convention would not apply to such administration by their express terms, it has been suggested that United States policy should be to apply the law of belligerent occupation by analogy as an interim measure until a civil affairs agreement can be concluded wherever circumstances may have precluded the conclusion of a civil affairs agreement with the lawful government of allied territory recovered from enemy occupation or other territory liberated from enemy occupation.³⁹

³⁷See. Rennell, British Military Administration in Africa, 1941-47 (1948) 223; Bentwich, Legal Aspects of the Restoration of Ethiopian Sovereignty, 22 British Yearbook International Law 275, 276 (1945); CSJAGA 1949/313, 1 July 1949.

³⁸See. 3 International Law, Chiefly as Interpreted and Applied by the United States (2d Rev. Ed., 1945) 1909.

³⁹Par. 6.3A, FM 27-10, proposed draft 1 March 1954.

CHAPTER II

SOURCES OF THE LAW OF WAR

1. General

In the preceding chapter, the writer has attempted, although with extreme brevity, to afford the reader a brief glimpse of the relationship between war and law, and between International Law as a whole and the Law of War as a definitive part thereof. The principle forces which through their constant interplay and reaction one upon the other are continuously forging and hammering out the Law of War have been all too superficially suggested. So too have we quickly examined the course of development of the law of belligerent occupation, as a segment of the Law of War, and attempted to distinguish certain situations which, though closely akin to belligerent occupation, are not expressly governed by the same rules and regulations of the Law of War. A more complete discussion of these matters is not appropriate within the compass of this paper. But aside from an indication that the Law of War is to be found in the unwritten rules established by the custom and usage of civilized nations, or is set forth in a series of law-making treaties to which most of the civilized nations of the world are parties, the precise sources in which the Law of War can be found to be precisely stated have not yet been indicated. The lawyer unacquainted with the field will at first be greatly puzzled by the relative absence of law reports as precedents, and of legislative acts in which the law may be found. In the Justice Trial,

the court said:⁴⁰

"International law is not the product of statute. Its context is not static. The absence from the world of any governmental body, authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions."

In the Hostages Trial, the court listed the six commonly accepted sources of International Law:⁴¹

"The sources of International Law which are usually enumerated are (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions, and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers."

One of the most important contributions made by the campaign of war crime punishment following World War II has been the creation of a more definitive body of precedent than heretofore has existed in the field of the Law of War. But since the middle of the nineteenth century, there has been an increasing number of international agreements, conventions, and treaties, covering an ever widening field of applicability. These treaties approximate legislative enactments, and are establishing an increasingly more exact and scientific system of law.⁴² For the most part, these treaty provisions are merely the formal and specific application of general principles already to be found in unwritten law. Thus, the preamble to Hague Convention No. IV of 1907 states:⁴³

⁴⁰6 LRTWC 34-35.

⁴¹8 LRTWC 49-50.

⁴²15 LRTWC, pp. xi-xii.

⁴³36 Stat. 2279-80.

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

In United States v. Von Leeb et al⁴⁴ it was held that while certain detailed provisions of the Geneva Convention of 1929 pertaining to prisoners of war were not expressive of the unwritten international law, those articles dealing with the humanitarian treatment of prisoners of war were and as such applicable to States even though not signatory thereto. Similarly, a common article in the four Geneva Conventions of 1949 provides as to denunciation and withdrawal by any party that such action:

"shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience."

Several of these law-making treaties contain the so-called "general participation clause", such as Article 2 of Hague Convention No. IV of 1907.⁴⁵ This type of provision provides that the Convention shall be binding only if all belligerents are parties. It was thus argued during World War I that the Convention was deprived of binding force when Liberia became a belligerent in August, 1917.⁴⁶

⁴⁴11 TWC 462, 532-538 (1950). Cases cited from Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, published by the Government Printing Office will be cited as "TWC".

⁴⁵36 Stat. 2290.

⁴⁶See Lauterpacht, Sec. 69a.

Both the Nurnberg Tribunal and the International Tribunal for the Far East disregarded such objections on the ground that these conventions were to be regarded as merely declaratory of the laws and customs of war.⁴⁷ The objective of reciprocity sought by such provisions has been more effectively provided by the provision of common Article 2 of the four Geneva Conventions of 1949, which provides that:

"although one of the Powers in conflict may not be a party to the Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations."

Inasmuch as Article VI, clause 2, of the United States Constitution provides that treaties are the "supreme Law of the Land", they have equal force to that of laws enacted by Congress. The customary Law of War is equally a part of the municipal law of the United States, except as it may be contrary to a treaty, or a controlling executive or legislative act. The most familiar statement of this principle is found in the language of the United States Supreme Court in The Paquete Habana:⁴⁸

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of those, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of

⁴⁷Nazi Conspiracy and Aggression, Opinion and Judgment (1947) 83; Official Transcript of the Judgment of the International Military Tribunal for the Far East (1948) 65.

⁴⁸175 U.S. 677, 700 (1900).

"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."

2. A Resume of the Principal Law-Making Treaties

a. General

In a recent address, Dean Roscoe Pound, in a survey of the last 150 years of the development of American law, and in predicting the course of its future development, observed:⁴⁹

"Where today the law is torn between a system for a rural, agricultural, and one for an urban industrial, society, there may be an economically unified society tomorrow, just as a historically politically divided and racially divided world is becoming economically unified. *** If I interpret the present tendency aright, security and humanity, instead of completely supplanting liberty, may in a not too distant tomorrow be unified with it in some ideal of the end of law more inclusive and equal to putting order into a complex legal system. I hope it will not take so long for such an ideal to reach its final formulation as it did for the ideal which began in the sixteenth century to replace the medieval ideal taken over from antiquity. *** Economic unification of the world, which has gone on increasingly with the progress of science and invention, gives hope of an eventual political unification. *** The medieval ideal of a harmonious maintaining of the social order began to give way in the sixteenth century in a time of adventurous exploration, colonization, and individual opportunity. The ideal which gradually supplanted it got final formulation at the end of the eighteenth century as the liberty of each limited only by the like liberty of every one else - an ideal of the maximum of free individual self-assertion. *** It governed juristic thought in the nineteenth century, began to be challenged by social philosophical jurists in the last decade of that century and is slowly giving way before the service state of today. *** It has been suggested that the progress of science will ultimately bring about a condition in which there will be ample

⁴⁹Pound, American Law - Yesterday, Today, Tomorrow, Harvard Law Record, February 1955, p. 5.

"goods of existence to meet the reasonable expectations of everyone. *** But individual human expectations and demands seem to expand with the square of the distance to which science has been able to provide for them. As the means of assuring security have increased, the content of the idea of security has grown also. From claiming security against aggression men have come so far as to claim security from frustration when their ambition outruns their capacity."

The slow growth of the Law of War, from a philosophy of might makes right and victor's justice to one at least tempered by the Christian principles of humanity and chivalry, is a prime example of this evolution of legal theory. In no other branch of the law are the factors of security - security from aggression, and humanity - humanity required of the State and its military forces in dealing with the rights of the individual, more dramatically struggling for effective expression. The rapid advance of scientific knowledge, and the growth of world-wide economic unity or interdependence has awakened even the dullest political leadership to the economic chaos that is the aftermath of modern war. The following resume of the growth and development of the principal law-making treaties which constitute the modern Law of War illustrates the operation of these influences upon all the civilized nations of the world in the search for an effective means of reducing in a politically divided world the tragic waste of human and economic resources occasioned by the irresponsible conduct of hostilities.

- b. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Although there were a number of special treaties

between particular States as early as the seventeenth century, for the most part concerned with the prohibition of the killing, mutilating, or mistreating of the wounded, or exempting medical personnel from captivity, it was not until the latter half of the nineteenth century that the first important general treaty was adopted by any substantial number of the Great Powers. In 1861, one Jean Henry Dunant, a Swiss citizen of Geneva, published a pamphlet entitled, "Un Souvenir de Solferino", his eyewitness account of the Battle of Solferino in Italy in 1859. Dunant had witnessed appalling scenes of bloodshed, and his booklet gives a shocking account of the distress of the wounded left to perish on the battlefield for lack of medical assistance. He described their sufferings with such vivid effect that the subject forthwith became one of intense public interest. Dunant urged the necessity of forming permanent societies for the aid of the wounded, with the purpose of forming detachments of volunteer helpers, and suggested the adoption of an international convention for the protection of such personnel and their medical supplies from attack by the use of a single recognized emblem. His suggestions were energetically taken up by M. Gustave Moynier, President of the Societe Genevoise d'Utilite Publique, and General Dufour, Commander-in-Chief of the Swiss Army, who, together with a number of other Swiss nationals, caused an unofficial international convention to be called at Geneva in 1863. One of the principal consequences of this convention was the formation of the International Committee of the Red Cross, providing impetus for the present-day, world-wide Red Cross movement. A second consequence

was, that at the suggestion of this convention, the Swiss Government convened a Diplomatic Convention of European and American States in 1864, which resulted in the adoption of the Geneva Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field of August 12, 1864. Although this Convention was originally signed by only nine States, eventually nearly all civilized States adhered to it. As the first important general treaty dealing with the Law of War, it marked a most significant innovation in International Law. But as might well be expected, there were shortly found to be a number of imperfections and omissions in it, not the least of which was the need to adapt its principles to maritime warfare. Accordingly, four years later, a second conference was held at Geneva in 1868, at which a supplementary convention was drawn up, consisting of fourteen articles, including the adaptation of the convention to maritime warfare, but this convention failed of ratification. Another attempt was made at the Brussels International Conference in 1874, but this led to no result. It was not until the First Hague Peace Conference some thirty years after the original adoption of the Geneva Convention that further progress was made in the codification of the law and customs of war. At this conference, Switzerland was again requested to convene a Diplomatic Conference in Geneva to consider revision of the Geneva Convention of 1864. A fundamental revision of that Convention was adopted by 35 States, including all the Great Powers, on July 6, 1906. It became apparent after World War I, that further changes were required to adapt the Geneva Convention of 1906 to

conditions of modern warfare. Accordingly, a far less extensive revision of it was adopted by the representatives of 47 States, including the United States, at a Diplomatic Conference in Geneva on July 27, 1929. Pursuing their time-honored mandate, the International Committee of the Red Cross continued to press for further amendment and improvement of the Convention. A revised text of the Geneva Convention of 1929 was drafted in 1937 by a committee of international experts assembled by the Committee, and this draft was approved at the Sixteenth International Red Cross Conference in London in 1938. It was intended to place this draft on the agenda of a Diplomatic Conference that had been called by Switzerland for early 1940. However, this conference had to be adjourned upon the outbreak of World War II. Shortly after the close of hostilities, and after a series of preliminary conferences of the National Red Cross Societies and meetings of government experts, a modification of the 1937 draft, incorporating experience gained during six years of warfare on an unprecedented scale, the new Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (hereinafter referred to as the Sick and Wounded Convention) was adopted by 61 States, as one of the four Geneva Conventions of 1949 for the Protection of War Victims, at the 1949 Diplomatic Conference in Geneva. Article 59 of that Convention provides that, in relations between parties thereto, that Convention will replace the Conventions of August 22, 1864,

July 6, 1906, and July 27, 1929.⁵⁰

c. The Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea

As noted in the preceding paragraph, an attempt was made as early as 1868 to adapt the provisions of the Geneva Convention of 1864 to maritime warfare. However, it was not until the First Hague Peace Conference in 1899 that Britain withdrew her objections, and thus paved the way for the adoption of a special convention "adapting to Maritime warfare the principles of the Geneva Convention". Regarded as inadequate, it was revised and extended in 1907 at the Second Hague Peace Conference, where it became the Xth Hague Convention of October 18, 1907, and incorporated the revision of the Geneva Convention of 1864 accomplished at Geneva on July 6, 1906, referred to above. In its revised form, this Convention was duly ratified by 47 States, including the United States, and it remained in force in that form until 1949. However, changes in methods of warfare brought about by World War I, and above all the fact that the Geneva Convention of 1906 had itself been revised in 1929, made many of the provisions of the Xth Hague Convention of 1907 obsolete. Thus, it was imperative that this Convention also be revised. The International Committee of the Red Cross equally concerned itself with the revision of this Convention, and a revised text was prepared and processed in

⁵⁰Lauterpacht, Sec. 118; Red Cross Preliminary Documents, Vol. I, p. 1. Material cited from Preliminary Documents Submitted By the International Committee of the Red Cross to the Commission of Government Experts for the Study of Conventions for the Protection of War Victims, Geneva, 1947, will be cited by volume and page as "Red Cross Preliminary Documents".

the same fashion as that outlined above for its sister convention. The new Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (hereinafter referred to as the Sick and Wounded at Sea Convention) was adopted by 61 States, as one of the four Geneva Conventions of 1949 for the Protection of War Victims, at the 1949 Diplomatic Conference in Geneva. Article 58 of that Convention provides that, in relations between parties thereto, that Convention will replace the Xth Hague Convention of October 18, 1907.⁵¹

d. The Geneva Convention Relative to the Treatment of Prisoners of War

During antiquity, as we have noted above, prisoners of war were usually butchered or offered as sacrifices to the gods, and if occasionally spared were as a rule made slaves. During the Middle Ages, prisoners of war were not as frequently killed, and with the disappearance of slavery in Europe, no longer enslaved. However, they were usually treated as criminals and were made the objects of personal revenge. They were not considered to be in the power of the sovereign, but in the power of the individual soldiers who captured them. A system of ransom grew up with a definite scale dependent on the rank of the individual. Grotius reports the ransom of a private as customarily the amount of his pay for one month. By the seventeenth century, prisoners of war were considered to be in the power of the sovereign, but nevertheless

⁵¹Lauterpacht, Sec. 204; Red Cross Preliminary Documents, Vol. I, p. 47.

as late as 1780, France and England stipulated by cartel the scale of ransom for redemption of their officers and soldiers from captivity. By the eighteenth century it was generally accepted that prisoners of war should be restrained in captivity only to the extent required to prevent their return to the enemy to take up arms again, and that they should not be subjected to the type of imprisonment usually imposed as punishment for crime. The Treaty of Friendship of 1785, between Prussia and the United States was probably the first agreement to stipulate proper treatment for prisoners of war, requiring confinement in a healthy place, where they might have exercise and be kept and fed as troops. By the nineteenth century it was generally accepted that prisoners of war should be treated by the captor in a manner comparable to that given his own troops. But in 1863, when the Powers met in Geneva to consider the problems of the sick and wounded, no agreement could be reached upon any treaty stipulations as to prisoners of war. As noted above, attempts made in 1868 and again in 1874 to deal with this problem met with no result. It was not until the First Hague Peace Conference in 1899 that the first general treaty provisions dealing with prisoners of war were adopted. Chapter II (Articles 4-20) of the Hague Regulations, attached to the Convention of July 29, 1899 With Respect to the Laws and Customs of War on Land, revised and replaced by similar provisions of the Hague Regulations annexed to the IVth Hague Convention of October 18, 1907 Respecting the Laws and Customs of War on Land, adopted at the Second Hague Peace Conference in 1907, were the first few and

very general rules to be adopted. These rules rapidly proved inadequate during World War I. Accordingly, as early as 1920, the International Committee of the Red Cross undertook the preparation of an extensive revision of these provisions, and at the same Diplomatic Conference at Geneva in 1929 which produced a revision of the Convention dealing with sick and wounded personnel, the Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War, was adopted by the representatives of 47 States, including the United States. This Convention was put to its first real test during World War II, and was found to be incomplete in some respects and to lack precision in a number of important matters.⁵² At a Preliminary Conference of all National Red Cross Societies for the Study of Conventions and Various Problems Relative to the Red Cross, held at Geneva in July, 1946, the conferees reported:⁵³

"The Commission set up by the Conference to study the 1929 Convention first considered whether the latter adequately fulfilled its purpose during the recent War. Opinions on the subject were divided, some delegations making reservations as to its practical value, while the majority considered that the Convention, in spite of imperfections, had checked abuses and insured better average treatment for prisoners of war than during the War of 1914-1918, thus rendering invaluable service, especially in Europe. The Commission unanimously agreed, however, that the Convention needed revision, in view of the experience gained during the second World War."

⁵²Lauterpacht, Sec. 125; Red Cross Preliminary Documents, Vol. II, pp. i-iii.

⁵³Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross, Geneva, 1947, pp. 68-69. Hereafter, reference to this report will be cited as "Red Cross Preliminary Conference Report, 1947".

At another point, and in a separate report, the International Committee of the Red Cross observed:⁵⁴

"During the recent War (World War II), this Convention, to which 47 States were signatory, regulated the situation of a very large number of Prisoners of War, and it may be safely said that, in a general manner, it has proved extremely valuable. This fact becomes at once clear when we compare the treatment allotted to Prisoners of War belonging to States signatory to the Convention, and that of Prisoners of War whose Governments had not found it possible to adhere to the said agreement. This in no way signifies that the absence of a Convention justifies ill-treatment of Prisoners of War *** (since such persons) *** remain under the protection and authority of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience. *** Nevertheless, it may be said in a general manner that the ill-treatment of very many Prisoners of War was due, not to the Convention itself, but to its non-application."

Perhaps the main fault found with the Geneva Convention of 1929 relative to Prisoners of War was the vagueness and generality of many of its provisions. It was felt that the provisions of future Conventions should be made more precise, vagueness in wording having led to the most varied and arbitrary interpretations. With this in mind, as early as February, 1945, and before the conclusion of World War II, the International Committee of the Red Cross advised all Governments and National Red Cross Societies that it was initiating action to assemble and centralize preliminary data accumulated by it during World War II with a view to the revision of this Convention and various other treaties and agreements relative to the protection of war victims, and that it intended to convene in Geneva a series of meetings of those experts whose

⁵⁴Red Cross Preliminary Documents, Vol. II, p. i.

experience would be invaluable in revising these Conventions. Meetings of persons who had been members of the Mixed Medical Commissions under Articles 68-74 of the 1929 Convention, and of those officials of States which had either detained large numbers of Prisoners of War and Civilian Internees, or had large numbers of their nationals held in captivity, were held in Geneva in 1947. The resultant revised draft was approved at the XVIIth International Red Cross Conference at Stockholm in August, 1948, and with some further modification, the new Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereinafter referred to as The Prisoners of War Convention) was adopted by 61 States, as one of the four Geneva Conventions of 1949 for the Protection of War Victims, at the 1949 Diplomatic Conference in Geneva. Article 134 of that Convention provides that, in relations between parties thereto, that Convention will replace the Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War. Article 135 of that Convention provides that, in relations between parties thereto who are also bound by the Hague Convention Respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, the 1949 Convention shall be considered complementary to Chapter II of the Hague Regulations. A similar provision was contained in Article 89 of the 1929 Convention. With the exception of Articles 10 through 12 of the Hague Regulations, which related to release on parole, the 1929 Convention incorporated all of the Articles of the Hague Regulations to be found in Chapter II. Article 21 of the 1949

Convention actually replaces Articles 10 through 12 of the Hague Regulations, with the exception of that part of Article 12 which provides that a prisoner released on parole who is subsequently captured bearing arms forfeits his right to be treated as a prisoner of war. Article 21 of the 1949 Convention merely imposes an obligation of honor on the parolee and a duty upon the State neither to require nor to accept service incompatible with the parole.

e. Conventions Concerning the Conduct of Hostilities

Thus far we have sketched briefly the historical background of three of the four Geneva Conventions of 1949 for the Protection of War Victims, two of which deal with the protection of wounded, sick, and shipwrecked members of armed forces, and the third with prisoners of war. Before proceeding to an examination of the fourth of these Conventions, that dealing with the protection of civilians, in order to complete an orderly and chronological presentation of all of the principal law-making treaties concerning the Law of War, and because the Civilians Convention is the most recent development, with at least a part of its precedents to be found in earlier treaties we have not yet discussed, we must first glance briefly at several earlier treaties that deal primarily with the conduct of hostilities. We have seen that the Great Powers were not prepared in 1864, 1868, or 1874, to consider any general codification of the Law of War. However, as early as April 24, 1863, by General Orders 100, the United States Army published a slim pamphlet entitled "Instructions for the Government

of Armies of the United States in the Field", for use in connection with the prosecution of the Civil War. This manual, which is the predecessor of Field Manual 27-10, "Rules of Land Warfare", was prepared by Professor Francis Lieber of the Columbia College of New York, and represented the first endeavor to codify the laws of war. It is considered even today to be of great value and importance. Although it was not until the First Hague Peace Conference in 1899, more than 30 years later, that any general treaty on the subject was adopted, many of the provisions of the Hague Convention of 1899, and the IVth Hague Convention of 1907, can be traced directly to Lieber's pamphlet.⁵⁵ Perhaps the only significant general treaty dealing with the conduct of hostilities prior to 1899 was the Declaration of St. Petersburg of December 11, 1868, to which the United States was not signatory, by which seventeen States renounced the use of explosive or incendiary projectiles of a weight of less than 400 grams, or 14 ounces.⁵⁶ There were two declarations adopted at the First Hague Peace Conference in 1899, to which the United States was not a party. The first of these concerned the use of dum-dum bullets, an innovation first conceived by the British involving the use of a bullet with a hard jacket not quite covering the core so that the bullet expanded on impact. The second renounced the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gasses. It would appear, however, that the first is within the

⁵⁵Lauterpacht, Sec. 68.

⁵⁶Ibid.

prohibition of Article 23(e) of the Hague Regulations, pertaining to unnecessary suffering, and the second within the prohibition of Article 23(a), pertaining to the use of poison or poison weapons.⁵⁷ The United States did adhere to another Declaration of the First Hague Peace Conference, prohibiting for a period of five years the launching of projectiles or explosives from balloons or other kinds of aircraft. This Declaration was renewed by the XIVth Hague Convention of 1907, and extended up to the close of a third Hague Peace Conference, which due to the outbreak of World War I was never held. However, of the 27 nations that signed it, only the United States and Britain, and one or two others, had ratified it by the outbreak of World War I, and accordingly its provisions were not binding during that war and were not observed.⁵⁸ A commission was appointed at the Washington Conference of 1922 on the Limitation of Armaments, attended by the United States, Great Britain, France, Italy, and Japan, to prepare a Code of Air Warfare Rules to regulate the use of aircraft against armed forces, maritime commerce, and military objectives, and to protect the civilian population from the dangers of indiscriminate bombing. The Commission produced a set of rules in 1923, but they were never ratified. As a consequence, there is today no definitive treaty governing the use of airpower, except Article 25 of the Hague Regulations, prohibiting attack or bombardment by whatever means of undefended towns, villages, dwellings, or buildings, and the

⁵⁷Lauterpacht, Secs. 112, 113.

⁵⁸Lauterpacht, Sec. 114.

analogous provisions of the IXth Hague Convention of 1907 as to naval bombardment.⁵⁹

The most significant achievement of the First Hague Peace Conference of 1899 was the adoption of the Convention With Respect to the Laws and Customs of War on Land of July 29, 1899, as revised by the IVth Hague Convention of October 18, 1907, including the Hague Regulations annexed thereto.⁶⁰ We have already noted that Chapter II (Articles 4-20) of these regulations were the earliest source of general conventional law on the treatment of prisoners of war. We shall see that the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, discussed below, is supplementary to Section II, "Hostilities" (Articles 22-41) and Section III, "Military Authority over the Territory of the Hostile State" (Articles 42-56) of the Hague Regulations. Although the Civilians Convention generally replaces a considerable part of Section III of the Hague Regulations, Section II, which is primarily concerned with the conduct of hostilities, remains fairly intact as the most important source today of this part of the Law of War. The so-called Roerich Pact, to which only the United States and a number of the other American Republics are parties, adopted in April, 1935, does supplement those provisions of the Hague Regulations concerning the protection of

⁵⁹Lauterpacht, Sec. 214a, 214b.

⁶⁰36 Stat. 2277-2309. For convenience, hereafter, the IVth Hague Convention of 1907 and the Regulations attached thereto are referred to as the "Hague Regulations". Because frequent reference to Section III of the Hague Regulations is made throughout this paper, that portion of the Hague Regulations is attached hereto as Annex II.

artistic and scientific institutions, and historic monuments.⁶¹ With this exception, the current source of conventional law pertaining to the conduct of hostilities in land warfare is almost exclusively confined to Section II of the Hague Regulations.

At the Second Hague Peace Conference in 1907, in addition to the revision of earlier treaties which we have already discussed, there were also adopted a number of conventions dealing with maritime warfare, neutrality, and the commencement of hostilities.⁶² In the first group are the VIth Hague Convention of 1907, relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; the VIIth, relative to the conversion of Merchant Ships into Warships; the VIIIth, relative to the Laying of Automatic Submarine Contact Mines; the IXth, relative to Naval Bombardment; the Xth, relative to certain Restrictions on the Exercise of the Right of Capture in Maritime War; and the XIIth, relative to the Creation of an International Prize Court. The United States did not adhere to the VIth, VIIth, and XIIth Hague Conventions of 1907. As can be seen from their titles, these conventions are concerned for the most part with sea warfare, and are analogous to the Hague Regulations as they deal with warfare on land.

The Vth and XIIIth Hague Conventions of 1907 concern, respectively, the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and in Case of Naval War. While a protracted discussion of the problems of neutrality would have no place in this

⁶¹ 49 Stat. 3267.

⁶² See generally, 36 Stat. 2259 et seq. for those treaties in this series to which the United States was signatory.

paper, suffice it to say that the doctrine of absolute neutrality, stemming from the historic and absolute right of the State to resort to war, has been drastically weakened by the General Treaty for the Renunciation of War of August 27, 1929, discussed above. By that treaty, all the civilized nations of the world have renounced the legal right to resort to war except in legitimate self-defense, and by Articles 2(5) and 25, as well as Chapter VII, of the Charter of the United Nations no Member of the United Nations is entitled at its discretion to remain neutral in a war in which the Security Council has found a particular State guilty of a breach of the peace or an act of aggression and has called upon the Member State to declare war on the aggressor State or take military action indistinguishable from war. Consequently, in view of these obligations, it would appear that the Vth and XIIIth Hague Conventions of 1907 are, at least in theory, inoperative.⁶³

In this latter connection, it is also worth noting that the provisions of the IIIrd Hague Convention of 1907 relative to the Opening of Hostilities is equally inoperative as between members of the United Nations. The provisions of this convention as to the requirement for an ultimatum, and the necessity for a declaration of war, cannot be complied with properly if it is unlawful for a Member of the United Nations to threaten another State with the use of force. In the event of an armed attack, there would be no need for an ultimatum in the exercise of the paramount right of legitimate self-defense.⁶⁴

⁶³Lauterpacht, Sec. 292d et seq.

⁶⁴Lauterpacht, Sec. 95a.

CHAPTER III

HISTORY OF THE DEVELOPMENT OF THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

1. Introduction

In the first chapter we briefly considered the relationship between war and international law and those basic forces which shape the particulars of the law of war, including some of the characteristics of belligerent occupation which distinguish it from invasion, from subjugation or conquest, and from the government of friendly territory subject to civil affairs administration. In the second chapter the sources from which the Law of War is derived were indicated, followed by a brief resume of the growth and development of the principal law-making treaties which constitute the modern Law of War. However, inasmuch as it is the purpose of this paper to examine the changes made in the rights and obligations of the occupying forces, the local population, and nationals of neutral countries by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, a discussion of the history of the development of that Convention was omitted from the preceding chapter in order to devote the present chapter to a more detailed account.

At the outset it is important to appreciate that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War is in reality two conventions in one. The Civilians

Convention is divided into four parts, Parts I and IV containing a number of articles common to all four of the Geneva Conventions of 1949. Parts II and III, however, are quite separate and distinct from one another, cover different categories of persons, and owe their development to different historical precedents. Part II - General Protection of Populations Against Certain Consequences of War, on the one hand, is applicable to the whole of the populations of the countries in conflict, is concerned with the protection of sick and wounded non-combatants, the protection of civilian hospitals, and the establishment of safety zones. Because of its subject matter, Part II is closely related to and in part derived from the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Part III - Status and Treatment of Protected Persons, on the other hand, is not concerned with the entire populations of the countries in conflict but with the protection of those civilians who find themselves in time of conflict or occupation in the hands of a Party to the conflict of which they are not nationals. Accordingly, the great bulk of Part III is closely related to and in part derived from the Geneva Convention Relative to the Treatment of Prisoners of War. Because of these differences it has been more convenient to trace the historical development of these two main divisions of the Convention separately even though it is frequently apparent that problems considered under one heading have had a significant influence on provisions also found under the other.

2. The Historical Background of Part II

a. Protection from Bombardment

As we have seen, the XIVth Hague Convention of 1907, prohibiting the launching of projectiles or explosives from balloons or other kinds of aircraft, was not ratified in time to be effective during World War I, and accordingly its provisions were not binding during that war and were not observed. However, Article 25 of the Hague Regulations, prohibiting attack or bombardment by whatever means of undefended towns, villages, dwellings, or buildings and the analogous provisions of the IXth Hague Convention of 1907 as to naval bombardment, were adopted with the intention of protecting civilian populations outside the fighting zone against bombardment of all kinds. This introduced for the first time a new discriminative standard, that of the "military objective", into the Law of War. In all armed conflicts thereafter belligerents have relied on this principle to justify bombardments alleged to violate the law of war, disputes turning not on the question of the legality of bombing military objectives but on what kind of target constitutes such an objective. We have seen that the Washington Conference of 1922 on the Limitation of Armaments, and the Commission appointed by it to prepare a Code of Air Warfare Rules, failed to produce a draft which the Powers were willing to ratify. An International Commission of Experts, convened by the International Committee of the Red Cross, first in Brussels in 1928, and later in Rome in 1929, concluded that adequate protection could not be achieved by any technical approach

to the problem. A Commission of Legal Experts, convened on the recommendation of the Fourteenth International Red Cross Conference of 1930, concluded that only the total prohibition of bombardment from the air would insure effective protection of civil populations. However, the League of Nations, to whom the problem was presented in 1931 in connection with its deliberations on the reduction and limitation of armaments, was unable to reach an effective agreement. Losing hope of inducing Governments to agree to the total prohibition of air warfare, the International Committee of the Red Cross turned its attention to the securing of agreements for the establishment of hospital and security localities and zones limited to the protection of the sick and wounded, defenseless women, children, and the aged.⁶⁵

During World War II, in response to appeals from the International Committee of the Red Cross, both sides issued public statements and pronouncements condemning the bombardment of civil populations. Each side announced that it would respect the principles of the Law of War proscribing the infliction of unnecessary suffering on civil populations, "subject to reciprocity". Each protested infringements by the other, and justified the mounting intensity of air bombardment as a matter of reprisal. The last two years of World War II reached a degree of intensity never known before and at last became "total war". Recourse of systematic bombardment from the air, and later to such new weapons as

⁶⁵Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 681-685.

V-I and V-II rockets and the atomic bomb, brought about fundamental changes in the modern concept of warfare, both as a matter of tactics and as a matter of law.⁶⁶

b. Hospital Localities and Security Zones

Jean Henry Dunant, to whom we have referred above as the founder of the Red Cross movement, first suggested the creation of hospital and security zones nearly a century ago. During the Franco-Prussian War of 1870-71, he proposed to the Empress Eugenie the neutralization of certain towns and zones for the accommodation of the sick and wounded of the armed forces, and for non-combatant civilians, old people, and children. During the Commune rising in 1871, he endeavored to find some means of protecting women and children resident in Paris from the consequences of bombardment by Government troops, and from the explosions and fires planned by the Commune. In 1929, General Georges Saint-Paul of the French Army Medical Corps published a plan to insure better protection in war-time for children, expectant and nursing mothers, old persons, sick people and invalids, by establishing "White Zones" away from large population centers. This led to the formation at Geneva in 1931 of the Association des Lieux de Geneve, for the purpose of implementing this plan. In 1934, as the result of a recommendation of the Seventh Congress of Military Medicine and Pharmacy, a Commission of Medical and Legal Experts met in Monaco where they prepared a draft convention for hospital

⁶⁶Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 685-688.

towns and localities for sick and wounded members of the armed forces, and security towns for certain classes of the civil population. Although this led to no practical result, after a series of international meetings, a Commission of Medical and Legal Experts, convened on the recommendation of the Sixteenth International Red Cross Conference of 1938, after consideration of the Monaco draft, an earlier draft prepared by a similar commission in 1936, and two new drafts submitted by the Yugoslav and Rumanian Red Cross Societies, produced a "Draft Convention for the Institution of Hospital Localities and Zones In Time of War", usually referred to as the "1938 Draft". This draft was to have been presented to the 1940 Diplomatic Conference in Geneva, but that Conference was adjourned due to the outbreak of World War II.⁶⁷ The International Committee of the Red Cross made a number of attempts throughout the war to implement this draft, but although most responses were favorable in principle, the Allied Powers felt that it would be difficult to determine security zones in Germany which would not contribute in some way to that country's war effort, or through which would not run a line of communication constituting a potential military objective. The United States further pointed out that the use by Germany of flying and rocket bombs, which cannot be given precise aim, would deprive the Allied Powers of reciprocal advantages.⁶⁸ However, although World War II

⁶⁷Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 692-695; Red Cross Preliminary Documents, Vol. III, pp. 42-43.

⁶⁸Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 699-700.

was "total", owing less to humane considerations than to political or military measures in particular cases, such cities as Athens, Rome, and Paris were declared "open towns", in accordance with accepted traditions of land warfare where no resistance is offered to an invading army, no fortifications are built, and no armed forces are in occupation.⁶⁹ The neutralization of the Belsen concentration camp area by agreement between British and German forces shortly before capture by the British is perhaps the only example of the creation of a neutral zone in World War II.⁷⁰

c. Protection of Civilian Hospitals

Long before World War II, the inadequacy of existing conventional law for the protection of civilian hospitals had been a matter of concern. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field did not cover civilian hospitals and hence these institutions were not entitled to display the emblem of the Red Cross. Article 27 of the Hague Regulations, and the analogous provisions of Article 5 of the IXth Hague Convention, require, in sieges and bombardments that all necessary steps be taken to spare such hospitals, as far as possible, and call for their marking by a distinctive and visible sign. However, no standard emblem was ever adopted. In 1943, the Government of Ceylon adopted a red square in the center of a white one, and in 1945, Germany, Northern

⁶⁹Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 703-704.

⁷⁰In re Kramer et al (1945), 2 LRTWC 9 (1947).

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Italy, and Slovakia adopted a red square in a white circle. However, this did not afford the staffs and equipment of such civilian hospitals the same privileges and immunities granted to those of military hospitals, nor were patients undergoing treatment protected from expulsion. Several States militarized their hospitals to bring them within the protection of the Geneva Convention, but this necessitated their use, at least in part, for the sick and wounded of the armed forces even where civilian facilities were inadequate. Of course, Article 56 of the Hague Regulations, provided some protection during occupation from the confiscation, seizure, destruction, or willful damage to such institutions, by requiring that they be treated as private rather than public property, but this did not protect their supplies from requisition.⁷¹

d. Special Measures for the Protection of Children

The question of child protection has also long been a problem of special concern to the Red Cross and to such organizations as the International Union for the Protection of Children. As early as 1938, a joint Commission of these two agencies prepared a draft convention on this subject. In its report to the Commission of Government Experts convened by it in 1947, the International Committee of the Red Cross declared:⁷²

"The tragic experience of the war has emphasized the need of treaty stipulations for the protection of

⁷¹Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 708-709; Red Cross Preliminary Documents, Vol. I, pp. 79-82.

⁷²Red Cross Preliminary Documents, Vol. III, p. 45.

"children. Tens of thousands of children were separated from their parents, or were deported, forced to do compulsory work, enrolled in armed forces, and taken prisoners of war. This state of affairs is particularly distressing, for a child is not a responsible being and clearly 'neutral', owing to its years. Further, the child is the adult of tomorrow, who may have to suffer the physical and moral consequences of a youth blasted by the horrors of war."

After World War II, both the Bolivian Red Cross and the Bulgarian Red Cross prepared drafts concerning the protection of children in war-time. In view of the experience of World War II, it was urged that, in addition to the establishment of safety zones, consideration also be given to treaty stipulation affording special protection to children under fourteen, expectant mothers, and women with children under four, without regard to nationality, race or creed. Children, it was recommended, should be exempt from enrollment in the armed forces, should not be treated as enemies or interned, should be free from all penalties, reprisals, or prosecution, given priority accommodations, food, and medical attendance, and special facilities should be provided for the care and education of orphans, waifs, and strays.⁷³

e. Special Measures for the Protection of Women

Article 46 of the Hague Regulations requires respect for "family honor and rights, the lives of persons, and private property, as well as religious convictions and practice." But the experience of World War II indicated the need for more precise stipulations respecting the dignity and decency of women. As the International Committee of the Red Cross reported:⁷⁴

⁷³Red Cross Preliminary Documents, Vol. III, pp. 45-46.

⁷⁴Ibid., p. 47.

"Countless women of all ages, and even small girls were the victims of the most abominable outrages during the war. In occupied territories, very many cases of rape occurred, and unheard of brutalities were perpetrated, sometimes accompanied by mutilations. *** Thousands of women were placed in disorderly houses against their will, or were obliged to submit to the troops. When contaminated they were cast out, or sent to concentration camps or prison hospitals."

Accordingly, it was recommended that the new Convention for the protection of civilians contain stipulations prescribing unconditional respect, irrespective of nationality, race, creed, age, or social standing, for the honor, dignity, and decency of women under all circumstances.

f. Family Correspondence

From the moment war breaks out, all postal communications between enemy countries are broken off, and thousands of people are without news of one another. Despite the absence of any provision in international law, during World War II the International Committee of the Red Cross set up a "Civilian Messages Department" within the framework of the Central Prisoner of War Agency created under the Geneva Convention Relative to the Treatment of Prisoners of War. Drawing on its experience during the Spanish Civil War, the International Committee of the Red Cross devised a printed form bearing a twenty-five word written message for the transmission of news of strictly family interest. A "Civilian Message Scheme" was eventually developed that was universally adopted by the belligerents during World War II. The transmittal and censorship of these messages in both directions was accomplished through Red Cross channels. The practical

problems were even more difficult where messages needed to be transmitted between civilians in occupied and unoccupied areas of the same original country. Considerable difficulties of a financial nature arose as the entire operation was subjected to postal charges. Nevertheless, more than twenty-four million of these messages were processed during the war. Based on this experience, the International Committee of the Red Cross strongly urged that the right of correspondence between members of families separated by the events of war be recognized by treaty, that free postal facilities be granted for such messages, and that certain priorities in transmission and censoring be stipulated.⁷⁵

g. Displaced Families

A related problem also arose during World War II, that of the displaced or dispersed family. Frequently, the events of war forced large numbers of people to leave their usual residence for unknown destinations. The disruption consequent upon being torn from their homes and the breaking up of families was greatly aggravated by the impossibility of corresponding with each other for months and even years. Dispersal was not alone the consequence of deportation, evacuation, or emigration, but even occurred within the boundaries of the original state, as in the case of occupied and unoccupied France. Thousands of refugees were forced by the events of war to abandon their homes and members of the same family were compelled to separate and take flight in different directions. By April, 1944, the

⁷⁵Red Cross Preliminary Documents, Vol. III, pp. 27-28.

International Committee of the Red Cross estimated there were more than forty million of such displaced persons. In cooperation with national tracing and information bureaus of all States, the International Committee of the Red Cross began in January, 1944, to assemble a card-index file of the names and addresses of all persons inquiring for a member of their family. These were set up on "Dispersed Family Cards", distributed throughout the world. When filled out, these were cross-matched in the files maintained at Geneva and the link thus reestablished. Free postage was granted for this operation, and the function was ultimately taken over by UNRRA toward the end of 1945. In the light of this experience, the International Committee of the Red Cross recommended that any new convention for the benefit of civilians contain stipulations authorizing national and international organizations to engage in this activity in belligerent territory and occupied territory to maintain or reestablish links between members of families dispersed by war.⁷⁶

h. Extension of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field to Civilian Sick and Wounded

Both the Committee of International Experts, assembled by the International Committee of the Red Cross in 1937 to prepare a revised draft of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and the Sixteenth International Red Cross

⁷⁶Red Cross Preliminary Documents, Vol. III, pp. 48-49.

Conference in London in 1938, unanimously recommended that the benefits of that Convention be extended to sick and wounded civilians. They pointed out that by reason of the development of aerial warfare the whole of the belligerent territory is exposed to hostile action, and consequently not only civilians in the combat zone, but the entire civil population is as much liable to sustain casualties as personnel of the armed forces. However, there was considerable lack of unanimity as to the best method for accomplishing this result. There was under consideration at that time the so-called "Tokyo Draft", discussed below, intended to deal with the problems of civilians of enemy nationality in the territory of the belligerent, the "1938 Draft", referred to above, concerning the creation of hospital localities and safety zones, as well as the question of extending the Convention to civilian hospitals. One group recommended the establishment of a separate convention for civilians with a separate chapter on sick and wounded civilians. Another group recommended full extension to civilians, at the same time recognizing that, by thus outstepping the traditional domain of that Convention, the risk of increased abuse or non-application of the Convention in its enlarged field of activity might result, compromising the prestige of the Convention and its emblem. A third group recommended partial extension only to civilians who were actually wounded as the result of acts of war, and to medical personnel and equipment attending them, leaving the protection of hospitals and medical personnel and equipment used for other sick civilians

to a separate Convention and a distinctly separate set of distinguishing emblems. No resolution of the question was reached prior to World War II. In 1946, at the Preliminary Conference of National Red Cross Societies in Geneva, when the problem was again considered, the proposal to amalgamate these provisions into one convention, even to including the Xth Hague Convention of 1907 concerning sick, wounded, and shipwrecked members of armed forces at sea, was endorsed in general terms.⁷⁷ However, the following Conference of Government Experts, which met in Geneva in 1947, did not accept this recommendation, feeling that it would be preferable to deal with this problem in a separate convention for civilians.⁷⁸ Reluctantly bowing to this mandate, the International Committee of the Red Cross prepared a draft of a proposed Part II - General Protection of Populations Against Certain Consequences of War, for inclusion in a separate civilians convention, embodying each of the lessons learned from the experiences of World War II discussed above, and drawing freely upon appropriate articles taken from the Sick and Wounded Convention. This draft was submitted to the Seventeenth International Red Cross Conference in Stockholm in 1948, where it was approved with a number of modifications. This became the "Stockholm Draft", to which repeated

⁷⁷Red Cross Preliminary Conference Report, 1947, pp. 16-18, 66-67; Red Cross Preliminary Documents, Vol. I, pp. 88-89.

⁷⁸Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 1947, pp. 9-11. Hereafter, references to this report will be cited as "Red Cross Conference of Government Experts Report".

reference is made in the next chapter, which was submitted to the Diplomatic Conference in Geneva in 1949. Annex I - Draft Agreement Relating to Hospital and Safety Zones and Localities, attached to the Stockholm Draft, was based upon the "1938 Draft", discussed above. With certain further refinements and additions, which are more fully discussed in the next chapter, these documents became Part II and Annex I of the new Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, adopted by 60 States as one of the four Geneva Conventions of 1949 for the Protection of War Victims at the 1949 Diplomatic Conference in Geneva.

3. The Historical Background of Part III

a. Aliens in the Territory of a Party to the Conflict

During World Wars I and II there were no treaty provisions to prevent the tyrannies to which many aliens in the territory of a belligerent were subjected. The omission of such provisions is perhaps explained by the concept which prevailed at the time of the First and Second Hague Peace Conferences. At that time it was generally taken for granted that military operations would be largely confined to the armed forces and that the civil population enjoyed a general immunity. Thus, in 1907, a proposal that "nationals of a belligerent living in the territory of the adverse party shall not be interned" was abandoned in preparing the Hague Regulations on the ground that the principle was self-evident. With the advent of World War I this historic

concept was profoundly shaken by the general closing of all frontiers, the detention of all aliens, and the internment of civilians of enemy nationality. After World War I, the Tenth International Red Cross Conference in Geneva in 1921 recommended the study of a "Draft Convention for the Protection of Enemy Aliens and Civil Populations of Occupied Territories" presented by the International Committee of the Red Cross, along with proposals for revising the Prisoners of War Convention. However, after a number of conferences during the next eight years, in 1929 these proposals were separated and the Diplomatic Conference of that year concerned itself solely with the treatment of Prisoners of War. Despite this, the International Committee of the Red Cross continued to urge the adoption of a convention for the protection of civilians. In 1934, at the Fifteenth International Red Cross Conference in Tokyo, a "Draft Convention Concerning the Condition and the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in a Territory Occupied By It", which came generally to be known as the "Tokyo Draft", was approved. This draft was to have been presented at a Diplomatic Conference to be called by the Swiss Federal Council, but responses to invitations were slow in coming. The urgency of such a Conference seemed remote in the midst of general expectations of disarmament then current. Although sufficient acceptances had been received by 1939, the outbreak of World War II made it necessary to adjourn the

projected Diplomatic Conference of 1940.⁷⁹ In the face of the complete absence of treaty stipulations, the International Committee of the Red Cross proposed to the belligerents that they either implement the Tokyo Draft by ad hoc bilateral agreements for the duration, or in the alternative apply the provisions of the Prisoners of War Convention by analogy to civilian internees in belligerent territory. This latter alternative was more acceptable to the majority of the belligerents, and it was by this method that some 160,000 civilians belonging to more than fifty diverse nationalities interned in belligerent territory benefited from treaty guarantees equivalent to those for prisoners of war. A uniform basis for such application by analogy was supplied by acceptance by the belligerents of the principles suggested by the International Committee of the Red Cross in its Note of December 7, 1939. This memorandum expressly stipulated the application of Articles 2-6, 8-22, 25, 35-44, 60-80, and 82-88, of the Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War, which comprise almost the whole of that Convention.⁸⁰ Unfortunately, these stipulations were not applicable to those civilians who were not interned but were placed in restricted liberty or assigned residence. In those cases where the civilians concerned had sufficient independent

⁷⁹Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 567-569. Because frequent reference is made to the "Tokyo Draft" as a precursor of the Civilians Convention, and because it is available only in Red Cross publications, it is attached hereto as Annex I.

⁸⁰Ibid., pp. 569-570, 574-575.

means, or the restrictions imposed did no more than confine such persons to a given radius of their usual place of residence, with regular reports to the police, and did not interfere with the earning of a livelihood, no particular hardship resulted. But in other cases, particularly where the wage earner in a family group was interned, such persons lived under particularly distressed conditions. In many cases, such persons had their right of correspondence with the exterior or the internee cut off so that they met with increasing difficulty as to the receipt of relief supplies from the enemy State or relief organizations.⁸¹

b. The Civil Population in Occupied Territory

Although the measures outlined in the preceding paragraph alleviated in considerable degree the condition of civilians resident in the territory of the belligerent State, they afforded no protection to political detainees, hostages, deportees, and the general civil population in territory occupied by a belligerent. According to the International Committee of the Red Cross, about the only civilians left at liberty in Axis occupied territories were elderly or sick persons. Particularly abject was the case of certain special categories, such as the Jews, whom the racial laws of the Axis countries condemned to suffer tyranny, persecution, and systematic extermination; civilian workers recruited by force in occupied countries and deported to Germany; refugees and stateless persons scattered throughout

⁸¹Report of the International Committee of the Red Cross, 1939
1947, Vol. I, pp. 571, 605-606, 635-636.

the world by military operations or political events; and racial minorities expelled or evacuated from their homelands by the occupation authorities.⁸² In Volume 15 of the Law Reports of Trials of War Criminals, which volume contains an analytical digest of the preceding fourteen volumes of reported war crimes trials following World War II, the editor has classified the cases therein into sundry categories, Item 6 - "Offenses Against Inhabitants of Occupied Territories" being the most numerous. Demonstrative of the scope and variation of the Axis atrocities committed in occupied territories are the following sixteen sub-headings under Item 6:⁸³

(1) The unwarranted killing of inhabitants of occupied territories.

(2) The denial of a fair trial to inhabitants of occupied territories.

(3) Ill-treatment of inhabitants of occupied territories.

(4) Subjugation to illegal experiments.

(5) Deportation of inhabitants of occupied territories.

(6) Putting civilians to forced labor.

(7) Enforced prostitution.

(8) False imprisonment.

(9) Denunciation to the occupying authorities.

(10) Illegal recruiting into armed forces.

⁸²Report of the International Committee of the Red Cross, 1939-1947, Vol. I, pp. 570-571, 608-628, 638-639, 641-680.

⁸³15 LRTWC 113-131.

- (11) Incitement of civilians to take up arms against their own country.
- (12) Genocide.
- (13) Denationalization.
- (14) Invasion of the religious rights of inhabitants of occupied territories.
- (15) Wholesale substitution of existing courts of law.
- (16) Offenses against property.

Lord Wright of Durley, in his Foreword to Volume 15, in commenting on this part of the record observes:⁸⁴

**** protection of the inhabitants of occupied territory is of primary importance in the modern law of war. It will be seen from the cases in these volumes that a very considerable proportion of the cases protect the interests of the inhabitants of territories which were either occupied or were the scene of belligerent operations. It is impossible to secure that the innocent inhabitants of such places can be entirely removed from the dangers and the destruction and the fatalities which are inevitable in such a situation, but the whole object of this part of the Hague Convention and other similar humanitarian instruments is, as they state, to diminish the evils of war so far as military requirements permit ***. *** The long list which is to be found in Item 6 are all offences committed against inhabitants of occupied territories, and there is no doubt at all, if one studies the history of war crimes during the last war, of the terrible character of these offences and the enormous scale on which they were committed by the Axis forces. It will be noticed that in some of these offences the object is the terrorism of civilians, their ill-treatment in various ways, often most atrocious, and the exploitation of human labour, often called slave labour, which was forced in the sense that inhabitants were seized and compelled to work for the Axis powers and for that purpose taken away from their homes which, in a vast number of cases, they never saw again."

⁸⁴15 LRTWC, pp. xiii-xiv.

Maximilian Koessler, in an article, "American War Crimes Trials In Europe", appearing in the November, 1950, issue of the Georgetown Law Journal, vividly describes the appalling record of the Axis Powers in their treatment of the inhabitants of occupied territories:⁸⁵

"World War II, as conducted by Germany and Japan, has set a record in modern history of a series of most shocking atrocities. This does not refer to occasional excesses of individuals which are regrettable but unavoidable in war. Rather it refers to those crimes which were perpetrated on a grand scale in cold blood, according to policy directives issued right from the top of the government involved.

"Warfare, even if legitimate and limited to actions in pursuit of military objectives, is a shameful plight of humanity. It could be avoided if conflicts between nations would not be decided by the law of the jungle but by peaceful means similar to those applied for the settlement of conflicts between private individuals. However, a substantial number of World War II atrocities, especially those perpetrated by Germans, had not even the apparent justification of a pursuit of military objectives. They added to the evil necessarily inherent in war, the abject feature of a ruthless and cruel policy of subjugation, persecution and even extermination of 'inferior races', as Nazi arrogance had branded them.

"Tortures of a medieval kind, the performance of which would shake even the most callous visitor of a 'Grand Guignol' theater, were applied by Hitler's henchmen both for purely 'ideological' purposes and in apparent pursuit of war objectives. The infamous institution of concentration camps furnishes an illustration of the merger of non-military and military motives in some of the German war crimes and 'crimes against humanity'. Originally instruments of political terror, they became during the war also sources for the supply of slave labor. To exploit them was not repellent to German industrial concerns of world-wide reputation."

⁸⁵Koessler, American War Crimes Trials in Europe, 39 Georgetown Law Review 19-20 (1950).

The International Committee of the Red Cross, in its 1947 Report of its activities during World War II points out:⁸⁶

"The occupation of the major part of Europe, between 1940 and 1943, by the Axis Powers, put millions of civilians under the domination of one group of belligerents. When the balance between the opposing groups of belligerents became tipped on the Axis side and the principle of reciprocity was no longer a moderating influence, civilians were more and more exposed to the arbitrary methods of the occupying Authorities. The activities of the International Committee of the Red Cross in behalf of civilians were hampered by mounting difficulties. Thousands of civilians were evacuated 'for administrative reasons', deported en masse or individually, or seized as hostages. Sometimes too they were subject to internment in concentration camps 'for reasons of security', or they suffered summary execution."

Thus the experience of World War II made it clear beyond any possibility of doubt that the few and general provisions of Section III of the Hague Regulations (Articles 42-56) were completely inadequate to cope with modern war. Nearly thirty years had passed since their formulation. In the face of new technical, economic, and political methods of total war, the Hague Regulations were obsolete. Thus, the International Committee of the Red Cross commented in its 1947 Report: ⁸⁷

"The experience of the War has shown that the Hague Regulations of 1907 did not give adequate treaty protection to civilians in occupied territory. The vagueness of its clauses allowed belligerents to circumvent some of the prohibitions they contained. Situations arose which the Convention had not foreseen; gaps in stipulations prevented indispensable measures from being taken, since they had no legal foundation. Lastly, certain stipulations were violated by bellig-

⁸⁶Report of the International Committee of the Red Cross, 1939-1947, Vol. I, p. 608.

⁸⁷Red Cross Preliminary Documents, Vol. III, p. 13-14.

"erents who disregarded both the spirit and the letter of the Regulations, no sanctions having been foreseen in the event of violations. *** This led to the most deplorable abuse."

c. Extension of the Geneva Convention Relative to the Treatment of Prisoners of War to Civilians

Following the conclusion of World War II, at the Preliminary Conference of National Red Cross Societies convened at Geneva in 1946, there was unanimous agreement that prompt action should be taken to provide for the protection of civilians by international treaty. The "Tokyo Draft" was made the basis of discussion at the Conference. The Conference agreed with the recommendations of the Belgian and Yugoslav Red Cross Societies that the "Tokyo Draft" should be amended to cover not only enemy aliens, but all civilians who find themselves in time of conflict or occupation in the hands of a Party to the conflict of which they are not nationals. A further weakness of the "Tokyo Draft" was pointed out in that that draft prohibited the taking of hostages in the territory of the belligerent but failed to prohibit it in occupied territory. The Norwegian Red Cross recommended that this be corrected by an unqualified prohibition as to the taking of hostages and that all reprisals and collective punishments of civilian populations in occupied territory be forbidden. Based on World War II experience, the Norwegians also recommended that it be prohibited to prosecute civilians for acts committed prior to occupation or during any temporary interruption of occupation. Each of these recommendations was adopted by the Conference.

Those at the Conference who had had experience during World War II with the application by analogy of the Prisoners of War Convention to civilian internees observed that a number of its provisions when applied to civilians had given rise to serious difficulties, particularly those concerning labor, financial resources, and repatriation. Accordingly, the Conference recommended that separate regulations be drafted to cover the internment of civilians. The Commission set up by the Conference to study proposals for a Civilians Convention recommended that treaty provisions for the protection of civilians be amalgamated with those for prisoners of war. However, the Conference in plenary assembly rejected this recommendation, feeling that it was premature, since the study of efficient measures for the protection of civilians was at that time only in a preparatory stage.⁸⁸ Accordingly, the International Committee of the Red Cross, in reporting the following year to the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, stated:⁸⁹

"It appears difficult, at first sight, to amalgamate effectively treaty stipulations applying to Prisoners of War, regularly subject to internment, with those concerning Civilians, for whom non-internment should be the rule.

"It is obviously possible to conceive a single Convention for Prisoners of War and Civilian Internees only. We recall the fact that for many stipulations relative to the treatment of Civilian Internees reference is to be made to the POW Convention. Normally, however, such Civilian Internees ought to constitute only a small proportion of the Civilians in belligerent

⁸⁸Red Cross Preliminary Conference Report, 1947, pp. 92-94.

⁸⁹Red Cross Preliminary Documents, Vol. III, p. 51.

"hands, and the above course would have the drawback of dividing the class of Civilians into two categories, whereas the status of non-interned and interned Civilians (in belligerent territory or in occupied areas) does not always differ to any such marked degree. A great many questions arise in connection with non-interned Civilians, which it is just as urgent to settle as those relating to interned Civilians. For these reasons, the International Committee believe that it is necessary to preserve the unity of all treaty stipulations relative to Civilians."

This reasoning was adopted by the Conference of Government Experts, who drafted a proposed Civilians Convention, based upon a modified version of the "Tokyo Draft", to which they attached a number of Annexes. The most important of these was Annex D - "Regulations Relative to Civilian War Internees", derived in large measure as an adaptation of the Geneva Convention Relative to the Treatment of Prisoners of War. This draft was further modified during the summer by the International Committee of the Red Cross to incorporate a number of suggestions received from experts of Governments that had not participated in the earlier conference. One of the most important changes made by the International Committee of the Red Cross at that time was the elimination of Annex D and its incorporation in the main body of the draft. This draft was then submitted to the Seventeenth International Red Cross Conference in Stockholm in 1948, where it was approved with a number of additional modifications. This became the "Stockholm Draft", to which repeated reference is made in the next chapter, which was submitted to the Diplomatic Conference in Geneva in 1949. With certain further refinements and additions, which are more fully discussed in the next chapter,

these documents became Part III and Annexes II and III of the new Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, adopted by 60 States as one of the four Geneva Conventions of 1949 for the Protection of War Victims at the 1949 Diplomatic Conference in Geneva. Article 154 of that Convention provides that, in relations between parties thereto, that Convention will be supplementary to Sections II and III of the Hague Regulations.

4. The Historical Background of Parts I and IV

Although there are a few provisions in Parts I and IV which appear only in the Civilians Convention, most of these articles are common to each of the four Geneva Conventions of 1949. The International Committee of the Red Cross synthesized the suggestions and recommendations of all of the various conferences which we have discussed above into a document entitled, "Draft Revised or New Conventions for the Protection of War Victims", which it presented for study to the Seventeenth International Red Cross Conference at Stockholm in 1948. That report succinctly explains the origin of the common articles as follows:⁹⁰

"The International Committee of the Red Cross has thought it useful to assemble all stipulations of a general nature and to place them at the head of each of the new or revised Conventions. This procedure is logical and might facilitate later amalgamation of these Conventions, if as the Government Experts have recommended, that course is followed. This merging

⁹⁰Draft Revised or New Conventions for the Protection of War Victims, International Committee of the Red Cross, Geneva, May, 1948, p. 4.

"is a task of great difficulty, but will in any case be simplified if the general principles common to all the Conventions are brought together and expressed in identical wording. Should it be decided to draft a single Convention, the general stipulations could, after slight adaptation, be placed at the head of the text.

"With the same end in view the International Committee of the Red Cross has attempted to give to those stipulations which, in the drafts of the various Conventions, treat of similar matters, a wording identical in each case."

CHAPTER IV

ANALYSIS OF THE PROVISIONS OF THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR

1. Introduction

The first two chapters contain a short summary of a few of the basic principles of the Law of War and a brief resume of the history of the principal law-making treaties which constitute the modern Law of War. Without this minimum it would be difficult for the reader to recognize or evaluate changes made by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 in the rights and obligations of the occupying forces, the local population, and nationals of neutral countries, in occupied territory. The third chapter provides a detailed account of the history of the development of the Civilians Convention as a means of acquainting the reader with the problems and the evils which the drafters of that Convention sought to cure by its promulgation. In the light of that history much that might otherwise be obscure or ambiguous is made clear. Armed with this knowledge, it is hoped that any reader who might otherwise be inclined to cynicism or intolerance will be less likely to approach an analysis of its provisions with the preconceived idea that the Geneva Conventions attempt to set up standards for the conduct of military operations that are impractical and unrealistic.

This chapter is devoted to an analysis of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, an examination of its legislative history, and a contrast of its provisions with those of the Hague Regulations which it generally replaces, to reveal in detail the extent to which it has modified the prior Law of War. It will come as a surprise to some that the standards prescribed by the Convention do not exceed those which have been exemplified by United States custom and practice in its conduct of hostilities and occupation, and that they do not exceed those standards which this nation believes it has the right to demand of any belligerent to whom it may be opposed. Whether this Convention has any value when engaged in a war against an enemy who may choose to disregard its limitations is an academic question to which both a moral and a practical answer may be given. First, the conduct of a war of bestiality by an enemy does not condone recourse to similar or even worse measures by the opponent. Secondly, war is not fought for the simple purpose of fighting but must have an ultimate objective of a political nature. That objective will not be obtained in the face of retribution resulting from outrages against civilians. While realism demands that decent nations engaged in war with an enemy whose entire philosophy is based upon treachery and deceit must be prepared to expect anything that might advance the hostile purpose, nevertheless the negation of fundamental human rights will eventually result in social retribution. The objectives of the United States are not likely to be advanced by

stooping to courses of action which outrage civil populations.

2. Part I - General Provisions (Articles 1-12)

a. The Common Articles

With the exception of Articles 4, 5, and 6, and the last paragraph of Article 11, the articles contained in Part I are common to each of the four Geneva Conventions of 1949 For The protection of War Victims. Article 1 is the formal undertaking of the Contracting Parties to comply with the provisions of the Convention; Article 7 authorizes the Contracting Parties to make binding special agreements provided they do not adversely affect the situation of persons protected by the Convention; Article 8 forbids individual protected persons from renouncing their rights under the Convention; and Articles 9 through 12 concern the functions, powers, duties, and activities of the Protecting Power, substitutes for the Protecting Power, the International Committee of the Red Cross, and other impartial humanitarian organizations. The last paragraph of Article 11 extends the coverage of that article to nationals of a neutral State that does not have normal diplomatic relations with a belligerent, since, under the provisions of Article 4, discussed below, such persons constitute a category of protected persons not covered by the other Geneva Conventions. There is also an important difference between Article 9 and its counterpart which appears as Article 8 in each of the other three Geneva Conventions of 1949. There appears in the two Sick and Wounded Conventions only, a final sentence

authorizing the activities of the Protecting Power to be restricted "as an exceptional and temporary measure when this is rendered necessary by imperative military necessities". This sentence was deleted from both the Civilians and the Prisoners of War Conventions, by the Diplomatic Conference⁹¹ on the motion of the New Zealand delegation. As was pointed out in the debate on the motion, the Sick and Wounded Conventions had not previously contained any provision for a Protecting Power and hence the individual provisions of those Conventions were not written in the light of such a provision. However, in the case of the Civilians and Prisoners of War Conventions, provision for a Protecting Power as an impartial referee to observe and report the implementation of the Conventions in good faith was consistently regarded as of the essence. For this reason, whenever military necessity was thought to require any restriction upon the activities of the Protecting Power, such a reservation has been expressly inserted in the article concerned. Accordingly, it was agreed that this general reservation should be deleted from the Civilians and Prisoners of War Conventions to avoid weakening the effectiveness of the entire convention.

b. Situations to which the Convention is Applicable

Articles 2 and 3, which define the situations to which the Convention shall apply are worth a closer examination.

⁹¹IIB Final Record of the Diplomatic Conference of Geneva of 1949, 344-346. But see the discussion of Articles 142 and 143, page 169, below. Hereafter, references to these volumes will be by volume and page to "Final Record".

In 1937, a Commission of International Experts, convened by the International Committee of the Red Cross to consider the revision of the various Geneva Conventions, unanimously recommended that these conventions be made expressly applicable to all cases of armed conflict between States, whether or not preceded by a declaration of war. The International Committee of the Red Cross went even further in recommending that any revision of the Conventions embody not only this principle, but also stipulate that they be applied in case of civil war unless one of the parties expressly announced its intention to the contrary. It was thought that no State or insurgent body would venture to proclaim, in the face of world opinion, its intention to disregard these basic laws of humanity.⁹² Although no amendment of the Geneva Conventions was accomplished before World War II, the Conference of Government Experts, convened by the International Committee of the Red Cross in 1947 to study the revision of the Conventions in the light of the experience of World War II, strongly reiterated these recommendations in the following language:⁹³

"On attacking the problem of giving civilian populations in war time the protection to which they are entitled from a humanitarian point of view, the Conference was faced from the outset with fundamental difficulties. These arose from the fact that existing conventions and agreements provide a legal definition of the state of war, but that this definition does not always apply to situations such as have occurred in recent years and which in reality correspond to a state of war.

"In certain cases the aggressors eluded the obligation of implementing the Conventions to which they

⁹²Red Cross Preliminary Conference Report, p. 15.

⁹³Red Cross Conference of Government Experts Report, p. 270.

"were signatory, by refusing to recognize the existence of a state of war. At other times, the setting up of puppet Governments served to disguise a de facto state of war under apparently legal conditions of peace. In yet other instances, a legal state of war subsisted - since hostilities had not been brought to a conclusion by recognized legal procedure - although existing conditions were no longer, in reality, conditions of war.

"The Conference considered itself unable to make recommendations of any value unless these referred to a factual state of war, even if this state of war were defined by the Powers concerned in terms that implied no recognition of any such state. The Conference had in mind, in particular, terms like 'legitimate self-defense', 'penetration', 'protection', 'necessity for the maintenance of internal security', and 'factual armed conflicts', including civil wars. ***"

These recommendations were incorporated into a common Article 2 for all four Conventions as a part of the Stockholm Draft. As approved at Stockholm, Article 2 contained four paragraphs, the first three of which were adopted without substantial change by the Diplomatic Conference. The third paragraph of Article 2, providing for reciprocity of obligation between Contracting Parties is fully discussed in an earlier chapter.⁹⁴ The first paragraph makes the Convention apply not only to declared war but also to any armed conflict between two or more Contracting Parties even if the state of war is not recognized by one of them, while the second paragraph makes the Convention also apply to all cases of partial or total occupation of the territory of a Contracting Party even though such occupation meets with no armed resistance. Thus the Convention provides expressly what was generally believed to have been true as a matter of unwritten law although not admitted

⁹⁴See page 27, above.

by all nations. In the first place, the rules of war apply irrespective of a declaration of war. This is true since the humanitarian principles of the Law of War are as pertinent in the one case as in the other.⁹⁵ In fact, as we discussed in an earlier chapter, the effect of the Declaration of Paris, by which all civilized nations have renounced the legal right to resort to war except in legitimate self-defense, combined with those provisions of the Charter of the United Nations, which make it unlawful for a Member of the United Nations to threaten another State with the use of force and at the same time require a Member State to take military action against an aggressor State indistinguishable from war, is to make a declaration of war the exception rather than the rule. In the second place, the rule of unwritten international law concerning the applicability of the law of warfare to occupations which, though accomplished through duress, were not met with armed resistance, is apparently the same as that contained in Article 2. The Nurnberg Tribunal held the German occupation of Bohemia and Moravia to be "a military occupation covered by the rules of warfare", even though the occupation took place without active hostilities. Although that occupation was with the express consent of the Czech government, it was considered that President Hacha's acquiescence was obtained through duress.⁹⁶

The fourth paragraph of the Stockholm Draft of Article 2,

⁹⁵Report of the Cambridge Conference on the Revision of the Law of War, May 1953, Annex V, Point I, par. 5.

⁹⁶Nazi Conspiracy and Aggression, Opinion and Judgment (1947) 160.

however, was not adopted by the Diplomatic Conference. That paragraph provided:⁹⁷

"In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, subject to the adverse party likewise acting in obedience thereto. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto."

This text immediately raised a considerable discussion which revealed a wide divergence of viewpoint.⁹⁸ Question first arose as to what should be understood to be an "armed conflict not of an international character". It was agreed that this referred to civil war and not to a mere riot or disturbance caused by bandits. It was agreed that States could not be obliged as soon as rebellion arose to consider rebels as regular belligerents. But at what point suppression of rebellion should be regarded as civil war was not so easy to determine. It was first proposed that recognition of belligerency by the State in conflict, or by other States, be made the test. A second possible solution was suggested that the Convention be made applicable only when the rebellion had become organized with enough strength and coherence to represent several features of a State, - possession of an organized military force, an organized civil authority exercising de facto governmental functions over a determinate portion of the national territory, and the means of enforcing the Convention and

⁹⁷I Final Record 47.

⁹⁸II Final Record 121-129.

of complying with the laws of war. After consideration of the practical difficulties to which these tests would give rise, and in the belief that it would be dangerous to weaken the State at a time when it is confronted by disorder, anarchy, and banditry by compelling the application of Conventions intended for use in time of war in addition to normal peace-time legislation, it was decided to abandon the idea of defining objective conditions which would give rise to the application of the Convention as a whole. Accordingly, the Diplomatic Conference decided to return to the language of the Stockholm Draft as to "conflict not of an international character", but laid down for application in such cases a minimum of humanitarian rules which both Parties would be bound to respect. As redrafted, this became Article 3 of the four Geneva Conventions of 1949. Under its provisions, regardless of the juridical character of the conflict, violence to life and persons, including murder, mutilation, cruel treatment and torture, outrages upon personal dignity, including humiliating and degrading treatment, and the taking of hostages, are absolutely prohibited. A fair trial by a regularly constituted court, including all judicial guarantees recognized as indispensable by civilized peoples, is made a prerequisite to punishment. The wounded and sick must be collected and cared for.

c. The Persons to Whom the Convention is Applicable

Article 4, with one exception,⁹⁹ defines the entire range of persons protected by the Convention. For this reason,

⁹⁹See the discussion of Article 70, below.

its influence permeates the entire document. The first paragraph of that Article, which remained the same in the final draft as it was proposed in the Stockholm Draft except for deletion of reference to conflicts not of an international character, is of the broadest character:

"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals."

The remaining paragraphs of Article 4 are limitations upon the scope of that provision. The broad language of the first paragraph was adopted to make it unnecessary to make particular reference to stateless and denationalized persons. In a number of drafts antedating the Stockholm Draft an attempt was made to distinguish between nationals of an enemy country and other civilians not nationals of the belligerent State. Some of the Delegations at the Diplomatic Conference urged that the Convention return to this limitation. But in the opinion of the majority this was considered inadequate since it not only would fail to make provision for stateless or denationalized persons, but also would not account for those nationals of foreign States whom the belligerent State did not recognize, or with whom diplomatic relations had been severed, or for those persons who had themselves broken away from their country of origin. However, the second paragraph of Article 4 does make a distinction between neutrals in the territory of a belligerent and those in occupied territory. In the first case, nationals of a neutral State in belligerent territory are

"protected persons" only if that State does not maintain "normal diplomatic representation" with the belligerent State. In the second case, all nationals of neutral States in occupied territory are "protected persons". The Diplomatic Conference concluded that in the latter case, diplomatic representatives would be accredited to the Occupied State, not to the Occupying Power, and hence less effective in protecting the interests of their nationals in occupied territory. It is of course to be noted that the first sentence of the second paragraph of Article 4 requires reciprocity, so that the nationals of a State not bound by the Convention are not in any case protected by it.¹⁰⁰

The last paragraph of Article 4 removes from the category of "protected persons" under the Civilians Convention all those who are covered by the other three Geneva Conventions of 1949. Since the two Sick and Wounded Conventions deal with military personnel, we need only examine Article 4 of the Prisoners of War Convention in order to complete the picture as to which civilians are "protected persons" under the Civilians Convention. The 1929 version of the Prisoners of War Convention defined the categories of persons to whom it applies by reference to the first three Articles of the Hague Regulations. These Articles are as follows:¹⁰¹

"Article 1. The laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps fulfilling the following conditions:-

¹⁰⁰IIA Final Record 813-814
¹⁰¹26 Stat. 2295-2296.

- "1. To be commanded by a person responsible for his subordinates;
- "2. To have a fixed distinctive emblem recognizable at a distance;
- "3. To carry arms openly; and
- "4. To conduct their operations in accordance with the laws and customs of war.

"In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.

"Article 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

"Article 3. The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war."

Article 4 of the 1949 Prisoners of War Convention, after including categorically all members of the armed forces of a Party to the conflict who have fallen into the power of the enemy, and all those who are members of the militia and volunteer corps forming a part of those armed forces, then reproduces expressly instead of by means of incorporation by reference the four conditions of Article 1 of the Hague Regulations as the basis for extending the protection of that Convention to persons who may be members of any militia, volunteer corps, or organized resistance movements, operating within or without their own territory but not as a part of the armed forces, and without regard to whether the home territories are occupied. The inclusion of these so-called

"partisan" units within the protection of the Prisoners of War Convention is a most important innovation in the traditional Law of War. In addition to these military and quasi-military persons, Article 4 of the Prisoners of War Convention also extends prisoner of war status to certain categories of civilians if they fall into the power of the enemy. These include various categories of civilians accompanying the armed forces in the field, civilians composing a levee en masse in terms similar to those contained in Article 2 of the Hague Regulations, above, members of the Merchant Marine, and demobilized soldiers of the army of the Occupied Country arrested in occupied territory by the Occupying Power.¹⁰² The substance of Article 3 of the Hague Regulations, although not expressly contained in Article 4 of the new Prisoners of War Convention, is covered by reference to "members of the armed forces", there being no need to distinguish between combatant and non-combatant members. However, the debates of the Diplomatic Conference, and in particular those of the Danish Delegation, leave in doubt whether the categories of persons named in Article 4 of the Prisoners of War Convention should be regarded as exhaustive. Based on the remarks of the Danish Delegation, which were not challenged, the categories enumerated in Article 4 of the Prisoners of War Convention would not preclude affording prisoner of war status to persons who otherwise would be subject to less favorable treatment.¹⁰³

¹⁰²IIA Final Record 561-562.

¹⁰³IIB Final Record 268.

Article 5 of the Civilians Convention is a further derogation from the broad coverage of the first paragraph of Article 4 of that Convention. The first paragraph of that Article provides that whenever a "protected person" in belligerent territory is definitely suspected of or engaged in activities hostile to the security of the State, he may not claim those rights and privileges under the Convention which would if exercised be prejudicial to the security of the State. The second paragraph provides that whenever a "protected person" in occupied territory is detained as a spy or saboteur, or is under suspicion of activities hostile to the security of the Occupying Power, he shall, where absolute military security so requires, forfeit his right of communication under the Convention. But even in such cases, the third paragraph expressly preserves the right to humane treatment and a fair trial. A provision of this sort was not included in the Stockholm Draft, but the Diplomatic Conference felt such a provision should be included to prevent persons dangerous to the security of the State or Occupying Power from shielding their activities behind the safeguards of the Convention.¹⁰⁴ However, the Conference appears to have overlooked the fact that war may also be fought outside the territory of the belligerent against whom the hostile conduct is directed or occupied territory. For example, such hostile conduct might occur in territory invaded but not yet occupied. Although the Convention contains no provision for such cases, it is believed

¹⁰⁴IIA Final Record 814-815.

both logical and necessary to apply the principles of Article 5 to "protected persons" so situated.¹⁰⁵

Before concluding our consideration of Article 5 of the Civilians Convention, however, it will be necessary to return briefly to consider Article 5 of the Prisoners of War Convention, since the latter Article may well serve to provide the principal source of persons whose cases must be dealt with ultimately under Article 5 of the Civilians Convention. The last paragraph of Article 5 of the Prisoners of War Convention provides that if doubt arises as to whether a person having committed a belligerent act who has fallen into the hands of the enemy is entitled to be treated as a prisoner of war, he will be so treated until his status has been determined by a "competent tribunal". Among the categories of persons who might assert, but properly be denied, the status of prisoners of war are those members of an armed force, not escaping prisoners of war, who have deliberately concealed their status by assuming civilian dress or the uniform of the enemy; spies as defined either by Article 29 of the Hague Regulations or Article 106 of the Uniform Code of Military Justice; persons aiding the enemy in violation of Article 104 of the Uniform Code of Military Justice; persons such as guerillas and partisans who take up arms and commit hostilities without having complied with the conditions prescribed by Article 4 of the Prisoners of War Convention set forth above; and persons who, without having complied with the conditions prescribed by Article 4 of the

¹⁰⁵Par. 5.3 FM 27-10 proposed Draft of 1 March 1954.

Prisoners of War Convention for recognition as belligerents, commit hostile acts not involving the use of armed force and not within Article 29 of the Hague Regulations or Articles 104 and 106 of the Uniform Code of Military Justice, such as sabotage, destruction of communications facilities, intentional misleading of troops by guides, and liberation of prisoners of war. Thus, when such persons are determined not to be entitled to prisoner of war status, in view of the broad language of the first paragraph of Article 4 of the Civilians Convention, they come within the protection of that Convention. Were this not the case, the stipulations of Article 5 of the Civilians Convention concerning spies, saboteurs, and other persons suspected of hostile activity would be meaningless. However, this does not adversely affect the interests of the belligerent against which the hostile conduct is directed. So far as belligerent territory is concerned, Article 5 requires no more than a fair trial and humane treatment and in no way prevents punishment under domestic law, through execution, imprisonment, fines, or other penalties not cruel or unusual. In occupied territory, the power of the Occupying Power to promulgate legislation in accordance with Article 64 to protect itself against such hostile conduct is explicit, although the power to impose the death penalty, or lesser punishments on such persons is to some extent limited by Article 68, discussed below.¹⁰⁶

d. The Beginning and End of Application of the Convention

Article 6 is the last of the General Articles of
106Pars. 3.9-3.18, 5.2, 5.3 FM 27-10 proposed draft of 1 March 1954.

special interest. Here again the Diplomatic Conference departed from the Stockholm Draft. Provision for the commencement of application of the Convention at the outset of a conflict or occupation as defined in Article 2 presented no difficulties. Equally, no particular problem arises as to the ending of the application of the Convention in belligerent territory upon the general close of military operations. However, the Diplomatic Conference felt that recent events and current history made it both logical and judicious to provide for a period of readjustment in occupied territories during which the Occupying Power might gradually hand over to the authorities of the Occupied Power the various powers it exercised during full occupation. Accordingly it was provided that those provisions of the Convention that would constitute a heavy burden on the Occupying Power during the troubled period following the war will remain in force in occupied territories for only one year after the general close of military operations, while certain listed provisions necessary to protect against arbitrary acts on the part of the Occupying Power will remain in force until the conclusion of the occupation. The last paragraph of Article 6 contemplates the indefinite protection of certain persons until their release, repatriation, or reestablishment can be accomplished. Such persons, for example, might include political refugees whose repatriation cannot be accomplished because they would be subject to persecution in their own country.¹⁰⁷

¹⁰⁷IIA Final Record 815-816.

However, notwithstanding the fact that a major part of the Civilians Convention may have ceased to be applicable, the unwritten law of war and the Hague Regulations continue to extend certain fundamental safeguards to the persons and property of persons in occupied territory until the termination of any occupation having its origin in military supremacy. The question as to when the Law of War ceases to be applicable where there has been an unconditional surrender coupled with the assumption of supreme authority, as was the case of Germany under the Berlin Declaration, is highly controversial. Representative theories include the opinion that the traditional law of belligerent occupation as embodied in the Hague Regulations continues to be applicable,¹⁰⁸ that the Hague Regulations continue to limit the rights of the Occupying Power as an occupant to the necessities of occupation, but that in its capacity as the government of occupied territory the Occupying Power has normal governmental powers limited only by duties of a fiduciary nature;¹⁰⁹ that supreme authority is vested in the Occupying Power, the law of belligerent occupation as embodied in the Hague Regulations having ceased to be applicable by reason of total subjugation;¹¹⁰ and that the law of belligerent occupation as embodied in the Hague Regulations is

¹⁰⁸Brabner-Smith, Concluding the War - The Peace Settlement and Congressional Powers, 34 Virginia Law Review 553, 568 (1948); Laun, The Legal Status of Germany, 45 American Journal International Law 267 (1951).

¹⁰⁹Rheinstein, The Legal Status of Occupied Germany, 47 Michigan Law Review 23 (1948).

¹¹⁰Mann, The Present Legal Status of Germany, 1 International Law Quarterly 314 (1947); Jennings, Government in Commission, 23 British Year Book International Law 112 (1946); Lauterpacht, sec. 265a.

no longer applicable but the rules expressed therein are to be considered as guiding principles in the absence of contrary directions. This last point of view appears to be that of the Department of State and the Department of the Army.¹¹¹

3. Part II - General Protection of Populations Against Certain Consequences of War (Articles 13-26)

a. The Wider Scope of Part II

As was noted in Chapter III in our discussion of the history of the Civilians Convention, Part II is of broader application than all of the remainder of the Convention. Article 4 makes specific reference to the wider scope of Part II, as an exception to the definition of "protected persons" contained therein, by reference to the provisions of Article 13. This latter article is as follows:

"The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war."

Accordingly, these provisions are to govern certain relations between a State and its own nationals and are not limited in customary fashion to relations between a State and aliens therein or an Occupying Power and civil population of an occupied territory. For this reason, these provisions are not in entire agreement with the traditional view of the proper field of international law, but they are evidence of the gradual widening of the scope of international law to protect the fundamental rights

¹¹¹JAGA 1946/10992, 23 December 1946.

of man irrespective of sovereignty.¹¹² The resume of the history of the development of this part of the Civilians Convention set out in Chapter III above, demonstrates that the whole of Part II is a new addition to the conventional Law of War. At the same time, its provisions merely serve to further implement one of the fundamental objectives of the Law of War - to diminish the evils of war by protecting non-combatants from unnecessary suffering.

b. Voluntary and Permissive Provisions

The provisions of Articles 14, 15, and 17 are merely voluntary and permissive. Article 14 provides that, either in time of peace or after the outbreak of hostilities, the Parties to the conflict may establish in their own territory and in occupied territory hospital and safety zones and localities for the protection of the wounded, sick and aged persons, children under fifteen, expectant mothers, and the mothers of children under seven. Annex I, referred to in Article 14 as the basis for such agreements embodies the principles of the "1938 Draft" referred to above.¹¹³ A suggestion of the Netherlands Delegation that Article 14 be amended to permit a State to notify other Parties to the Convention of the establishment of such zones which after twenty days without objection would become binding, was defeated by the Diplomatic Conference.¹¹⁴ Article 15 authorizes any Party to the conflict, "either direct or through a neutral State", to propose to the adverse Party the establishment of neutralized

¹¹²IIA Final Record 816.

¹¹³See page 50, above.

¹¹⁴IIA Final Record 817.

zones in active combat areas for the shelter of wounded and sick combatants and non-combatants, and civilians who take no part in hostilities and perform no work of a military character. The record of the Diplomatic Conference makes it clear that the use of the word "direct" was intended to authorize subordinate military commanders to carry on such negotiations without necessity for resort to diplomatic channels. The use of the term "civilian persons" was intended to exclude military reserves from such zones, although wounded and sick combatants are not so excluded.¹¹⁵ Article 17 provides that the Parties to the conflict "shall endeavor" to conclude local agreements for the removal of wounded, sick, infirm and aged persons, children, and maternity cases from besieged or encircled zones, and for the passage of religious and medical personnel and supplies to sick persons. These provisions were specifically intended to relieve situations similar to those which developed during World War II where certain towns or areas held out for months and even years, such as the islands and "pockets" occupied by the German forces on the French Atlantic coast and in the Channel.¹¹⁶ In view of the notable lack of success from the time of Dunant on through World War II in securing the implementation of plans for neutralized zones, it seems doubtful that Articles 14 and 15 will achieve much success. On the other hand, Article 17 may be resorted to in cases where the capitulation of the area is not of strategic or tactical importance.

¹¹⁵ IIA Final Record 817.

¹¹⁶ Red Cross Conference of Government Experts Report, p. 15.

c. Mandatory Provisions

(1) Protection of Hospitals

Articles 18 through 22 accomplish the important objective of extending to civilian hospitals, their operating staffs, and the means of transport incident to their operation, the same protection as that granted to their military counterparts by the Sick and Wounded Conventions. This is certainly one of the most important changes effected by the Civilians Convention. Under these provisions civilian hospitals may not be made the object of attack, and persons regularly engaged in the operation of civilian hospitals shall be respected and protected. The use of the Red Cross emblem on buildings, vehicles, hospital trains, vessels, and aircraft used for sick and wounded civilians is authorized under the same conditions specified for their military counterparts. Special identity cards and armbands for medical and administrative personnel are required. To prevent abuse, the State is required, subject to the supervision of the Protecting Power, to certify those facilities and personnel eligible for such protection. The provisions of Article 19, as to what "acts harmful to the enemy" will justify discontinuance of such protection are the same as those provided by Article 17 of the Sick and Wounded Convention. Under these provisions wounded and sick civilians and members of the armed forces may be reciprocally nursed in either a civilian or military hospital, thus abolishing completely the pre-existing distinction between them. This will be particularly useful in permitting the joint use of specialized

services without forfeiting protection. The use of the word "regularly" in Article 20, as distinguished from "exclusively", was adopted by the Diplomatic Conference to permit doctors to serve private patients outside the hospital without losing their protected status. The words "engaged in the operation and administration" of such hospitals were used in Article 20 to cover the entire hospital staff and not restrict the application of the Convention to medical personnel.¹¹⁷

(2) Protection of Particular Persons

Article 16 requires "particular protection and respect" for the wounded and sick, infirm, and expectant mothers. Article 24 requires special measures for the protection of children under fifteen who have been orphaned or separated from their families by war. Articles 25 and 26 require special measures to be taken to enable civilians to transmit speedily to their families news of a strictly personal nature and to facilitate inquiries by members of families dispersed by war with the object of renewing contact. It will be recalled that the experience of World War II made each of these problems a matter of special interest to the drafters of the new Civilian Convention.¹¹⁸

(3) Relief Shipments vs. Blockade

Article 23 obliges all Contracting Parties to permit the free passage of medical and hospital supplies and objects necessary for religious worship intended for civilians, and essential foodstuffs and clothing for children under fifteen,

¹¹⁷IIA Final Record 819.
¹¹⁸See pages 52-56, above.

expectant mothers and maternity cases. This obligation, however, is made somewhat nominal by the condition that a State need not permit such free passage if it has any serious reason for believing that such shipments may be diverted, that control over them may not be effective, or that the enemy may gain a definite economic or military advantage by substituting such relief goods for goods which otherwise would be provided or produced by him. The Diplomatic Conference admitted that this left the door open to arbitrary refusals but stated that this was the best compromise that could be worked out between conflicting considerations as to the military value of a blockade as opposed to humanitarian considerations for the sick, children, and expectant mothers.¹¹⁹

3. Part III - Status and Treatment of Protected Persons (Articles 27-141)

a. Scope and Arrangement of Part III

Part III constitutes the main portion of the Convention. Two situations presenting fundamental differences are dealt with - that of aliens in the territory of a belligerent State (belligerent territory), and that of the population, national or alien, resident in a country occupied by the enemy (occupied territory). Nevertheless certain common principles govern both contingencies. Accordingly, Sections I, II, and III of Part III are - first a section containing provisions applicable to both belligerent territory and occupied territory; second a section

¹¹⁹ IIA Final Record 819-820.

containing provisions applicable only in belligerent territory; and third a section containing provisions applicable only in occupied territory. Part III also contains two more sections. Section IV lays down regulations governing the treatment of internees, in both belligerent territory and occupied territory. Section V prescribes the functions, powers, and duties of a Central Information Agency, to be established in a neutral country, and various national Information Bureaus, to be established by each of the Parties to the conflict, to maintain communications between protected persons separated by the events of war. Sections IV and V are closely related to, and largely derived from, similar provisions contained in the Prisoners of War Convention. This plan of arrangement is the same as that of the Stockholm Draft. Only minor changes were made by the Diplomatic Conference where certain articles or parts of articles were transferred or consolidated to improve the internal arrangement of Part III.

b. Section I - Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories (Articles 27-34)

These eight articles lay down the fundamental humanitarian standards which permeate the entire Convention. Although they are here stated in greater degree and particularity, these standards are the same as the minimum requirements which are required to be observed even in conflicts not of an international character, as prescribed by Article 3, discussed above. Article 27 requires that protected persons be treated humanely at all times; entitles them to respect for their persons, honor,

family rights, religious convictions and practices, manners and customs; proscribes all acts of violence against them, including threats, insults, and exposure to public curiosity; directs that women be especially protected from attacks upon their honor, rape, enforced prostitution, or indecent assault; and provides that all protected persons must be treated with the same consideration and without adverse distinction based on race, religion, or political opinion. Article 31 prohibits the use of physical or moral coercion to obtain information. Article 32 prohibits extermination, murder, torture, corporal punishment, mutilation, experimentation, or similar measures of brutality. Article 33 prohibits the punishment of protected persons for crimes not personally committed by them, including collective penalties, intimidation, terrorism, pillage, and reprisals. Article 34 prohibits the taking of hostages. These articles thus unreservedly condemn the atrocities committed by the Axis Powers during World War II against the populations of occupied countries. Although the express extension of these provisions to aliens in belligerent territory is new, in so far as occupied territory is concerned, they may be considered an amplification and clarification of Articles 44, 46, 47 and 50 of the Hague Regulations.

The absolute prohibition of the taking of hostages laid down in Article 34 has laid to rest the controversial issue as to whether hostages may be lawfully executed. Although severely criticized,¹²⁰ it was held in United States v. List et al.,¹²¹

¹²⁰Wright, The Killing of Hostages as a War Crime, 25 British Year Book International Law 296 (1948).

¹²¹11 TWC 1230, 1249 (1950).

that hostages could be taken to guarantee the peaceful conduct of the populations of occupied territories and that under certain circumstances they might be shot. The court did indicate that this should be done only as a final expedient where other measures had failed to restore order, that the populace should be notified of the taking of hostages and the specific acts that would lead to their execution, and that the number of hostages executed should not exceed in severity the offenses their execution is intended to deter. This judgment was in accord with paragraphs 358 and 359 of Field Manual 27-10, "Rules of Land Warfare". However in the Nurnberg Judgment,¹²² Re Rauter,¹²³ and United States v. Von Leeb,¹²⁴ the execution of hostages was held to be unlawful. In the Von Leeb case, however, the conditions prescribed in the List case had not been met, and hence that court found it unnecessary to approve or disapprove the holding in the List case.

The last paragraph of Article 27, though in no sense a reservation or weakening of the protection afforded by the foregoing articles, does authorize the State to impose upon protected persons those measures of control essential to its war-time security. This, the Diplomatic Conference pointed out, does not justify arbitrary action in violation of fundamental principles, but it does permit the State, subject to them, to take action necessary to insure that the protection accorded such persons is not used

¹²²Nazi Conspiracy and Aggression, Opinion and Judgment (1947) 63.

¹²³14 LRTWC 89 (1949).

¹²⁴12 TWC 462 (1950).

to endanger its vital interests.¹²⁵ Here we see again, as we did in our consideration of Article 5 above, that the drafters of the Convention were constantly alert to the necessity of avoiding unrealistic provisions which cannot be carried out in practice. In the same vein, Article 28 provides that the presence of protected persons in a given area shall not, of itself, render that area immune from military operations. Of course, if an agreement were concluded under Article 14 or 15, establishing a hospital, safety, or neutralized zone, such an agreement would override this general provision. The related questions of sending or retaining protected persons in particularly exposed areas are dealt with by Articles 35 and 49, discussed below.¹²⁶

Article 29 affirms the well-recognized principle that the State is responsible for the treatment afforded protected persons by its agents, irrespective of any individual responsibility that may be incurred. Express recognition of the principle of individual responsibility for violation of the Convention is of considerable importance in view of the argument to the contrary so frequently encountered in the war crimes trials which followed World War II, which we have discussed above.¹²⁷ While, as we shall see in connection with the discussion of Article 47, below, a State cannot do by indirection that which it is prohibited from doing directly, the Diplomatic Conference pointed out that where the courts of an Occupied Power have been permitted to continue

¹²⁵IIA Final Record 821

¹²⁶See pages 102 and 117, below.

¹²⁷See page 6, above.

to function under Article 64, also discussed below, the Occupying Power is responsible for the treatment of protected persons contrary to the Convention by the local authorities only if such local authorities are in reality no more than agents of the Occupying Power.¹²⁸

Article 30 is the extremely important provision, especially from the point of view of the individual protected person, which translates these abstract principles into enforceable rights. By its provisions protected persons must be given every facility for application to the Protecting Power, the International Committee of the Red Cross, and other appropriate relief organizations, for assistance and relief. These organizations, subject to appropriate security considerations, must be given the facilities needed to fulfill their responsibilities, must be permitted to go to all places where protected persons are, to interview them without witnesses, and to distribute relief to them and render them other assistance. The extent to which the Protecting Power may be restricted in carrying out its responsibilities under this article on the ground of military necessity would appear to be dependent upon whether the particular right sought to be enforced is expressly so qualified.¹²⁹

c. Section II - Aliens in the Territory of a Party to the Conflict (Articles 35-46)

(1) The Persons to Whom Section II is Applicable

The twelve articles which comprise this section

¹²⁸IIA Final Record 822.

¹²⁹See the discussion of Article 9, page 74, above. Compare this with the provisions of Articles 142 and 143, page 169, below.

of the Convention contain detailed provisions which in many particulars go beyond prior requirements of the customary Law of War regarding the treatment of aliens in belligerent territory.¹³⁰ Generally speaking, the persons protected by these provisions are enemy aliens. However, it will be recalled from our discussion of Article 4, above, that the Diplomatic Conference rejected the idea of limiting the application of the Convention to the regulation of relations between a belligerent State and the nationals of an enemy State because this would fail to make provision for stateless or denationalized persons, for nationals of foreign States whom the belligerent State did not recognize or with whom diplomatic relations had been severed, or for those refugees who had themselves broken away from their country of origin. Article 44, discussed below, is particularly directed toward this last category. However, it will be recalled that under the provisions of Article 4 the Convention generally is not extended to the nationals of States not bound by it, and particularly in belligerent territory is not extended to nationals of neutral States with whom the belligerent State maintains normal diplomatic relations.

In general, Articles 35 through 37 concern the problems of those aliens who wish to depart from belligerent territory at the outset or during the initial stages of war; Articles 38 through 40 define the position of those aliens who are not repatriated;

¹³⁰Lauterpacht, Sec. 100b.

and Articles 41 through 46 prescribe the measures of control over aliens not repatriated which may be taken by the belligerent State.

(2) Repatriation

Article 35 lays down the general principle that all protected persons who desire to leave belligerent territory either at the outset or during a conflict are entitled to do so unless their departure is contrary to the national interests of the belligerent State. The Stockholm Draft required the establishment of a comparatively rigid system of special courts to decide upon each application for departure. Largely at the instance of the United States delegation, this was modified to require either an appropriate court or administrative board. The Diplomatic Conference took cognizance of the fact that the concept of what may constitute a court or tribunal may vary considerably in different countries, imposing in some cases considerable delay in settling disputed cases. The Diplomatic Conference conceded that all that is really desired in such cases is that each case be impartially considered or reconsidered, not merely by a police official, but by an authority comprising several persons whose decisions are reached by majority vote.¹³¹ By way of enforcement, Article 35 requires the Detaining Power to furnish the Protecting Power the names of all persons who have been denied permission to depart and, unless reasons of security prevent it or the person concerned objects, the reasons why such permission

¹³¹IIIA Final Record 823.

has been refused.

Articles 35 and 36 contain detailed provisions for securing satisfactory conditions of departure and transport for those permitted to leave the country. They must be permitted to take with them funds reasonably necessary for the journey and a reasonable amount of their personal effects. Departures must be carried out under satisfactory conditions as regards safety, hygiene, sanitation and food. Costs from the point of exit from belligerent territory must be borne by the country of destination or that country whose nationals are benefited.

Article 37 reiterates the right of humane treatment for protected persons who may be confined pending proceedings or subject to sentence, and affords them the right to apply for permission to leave the territory upon release. As originally contained in the Stockholm Draft, this article prohibited the subjection of such persons to more stringent conditions of imprisonment due solely to the outbreak of war. However, the United States delegation pointed out that, at least in its case, this would prevent the legitimate cancellation of paroles normally authorized under peace-time conditions. Accordingly, the Diplomatic Conference agreed to retain only the requirement for humane treatment, but insisted that at least this much be retained to insure that the national hatred of enemy aliens usually inspired by the outbreak of hostilities would not lead prison authorities to subject such persons to unduly severe treatment.¹³²

¹³²IIA Final Record 823-824.

(3) Status of Non-Repatriated Aliens

Article 38 establishes the general principle that, subject to the requirements of national security, aliens shall be treated in the same way in time of war as in time of peace. In addition, Article 38 sets out five specific guarantees. Aliens shall be entitled to receive individual or collective relief from outside, to practice their religion and receive spiritual assistance from ministers of their own faith, to receive the same medical and hospital treatment as nationals of the belligerent, to move from particularly exposed areas to the same extent as nationals of the belligerent are permitted to do so, and, in the case of children under fifteen, pregnant women, and mothers of children under seven, to the same preferential treatment, if any, afforded nationals of the belligerent in such categories. The last three of these guarantees are measured by whatever standard the belligerent may adopt for its own population. The Stockholm Draft had contained provisions making it compulsory for States to adopt certain policies toward their own population in these matters. Because it was the consensus of opinion of the Diplomatic Conference that this went beyond the legitimate scope of the Convention, these provisions were transferred to this section of the Convention and redrafted so as to require only that aliens be placed on the same footing as nationals of the Detaining State. It was assumed that a State would safeguard the interests of its own citizens and would thus automatically

be required to provide similar protection for aliens.¹³³

Articles 39 and 40 are concerned with the means of subsistence and the conditions of employment to which aliens who remain in belligerent territory are entitled. Article 39 insures that, subject to security considerations, aliens are given the same opportunity as nationals of the belligerent State to find gainful employment. If the means of control and supervision over an alien adopted by the belligerent State, such as a restriction upon the employment of certain classes of aliens in war industries, prevents that alien from finding employment under reasonable conditions, the belligerent State must provide for his support and that of his dependents. In addition, Article 39 authorizes aliens to receive allowances from their home country, the Protecting Power, or appropriate relief organizations. While Article 39 is concerned primarily with the right of the alien to seek employment under reasonable conditions, Article 40, on the other hand, prescribes the conditions under which aliens may be compelled to work. The basic rule is that aliens may be compelled to work only to the same extent that nationals of the belligerent State are compelled to do so. Furthermore, enemy aliens can be compelled to work only on activities not directly related to the conduct of military operations. There was considerable discussion at the Diplomatic Conference as to whether neutral aliens should be subject to forced labor under any conditions. However, it was the view of the majority that such neutral aliens should not benefit from conditions more favorable than those applicable to the

¹³³IIA Final Record 824.

belligerent State's own nationals.¹³⁴ The balance of Article 40 specifies that working conditions, such as wages, hours, clothing and equipment, training, and accident and health compensation, must be the same as that prescribed for nationals of the belligerent State. By way of enforcement, a right of complaint to the Protecting Power respecting any infringement is expressly provided.

(4) Control of Non-Repatriated Aliens

Article 41 stipulates that whenever a belligerent State considers the measures otherwise prescribed by the Convention for the control of aliens in its territory in time of war to be inadequate, it may adopt only two additional measures of control - assigned residence or internment. While it is not entirely clear from the article itself just what the other measures of control prescribed by the Convention are, by reference to Article 38, which stipulates that, subject to the requirements of national security, aliens are to be treated in the same way in time of war as in time of peace, and by examining the Committee Report submitting this Article to the Diplomatic Conference, it appears that the ordinary penal legislation of the belligerent State applicable to such aliens in time of peace would constitute the measures of control otherwise prescribed by the Convention for their control.¹³⁵ As to the two additional measures of control, assigned residence and internment, in order to understand the

¹³⁴IIA Final Record 825.

¹³⁵IIA Final Record 825.

purpose of the second paragraph of Article 41 it is necessary to examine more closely the legislative history of the term "assigned residence". Article 41, in its earliest form as Article 14 of the "Tokyo Draft", used the term "compulsory residence".¹³⁶ As then understood, "compulsory residence" was to be distinguished from the relatively mild measure of "controlled residence". Controlled residence is the most usual form of control over aliens in war-time, normally requiring no more than that the alien remain in his usual place of residence and obtain permission before leaving it for another. It usually includes the exclusion of aliens from certain well defined zones while affording them considerable freedom in selecting a place of residence elsewhere in the country. Compulsory residence, on the other hand, is the term usually employed to describe the procedure of requiring aliens to proceed to specific, and usually remote, localities and remain there. As practiced by the Soviet Union, the situation in such localities, combined with the lack of provision for the accommodation or support of such aliens, has usually been such as to afford that country all of the advantages of internment without the responsibilities and expense. As brought forward through various drafts, the distinction between compulsory residence and controlled residence was lost, and the two were merged into the single term "assigned residence". To remedy the situation, the Diplomatic Conference adopted a United States proposal to add a second paragraph to Article 41 requiring

¹³⁶See Annex I.

the application by analogy of those standards of welfare applicable to internees under Section IV of Part III of the Convention to aliens who are required to leave their usual places of residence by virtue of a decision of the State placing them in assigned residence elsewhere.¹³⁷

Article 42 lays down the principle that neither internment nor assigned residence shall be ordered unless absolutely necessary. At the same time, provision is made whereby an alien may demand internment whenever his situation renders it necessary. Such a situation might arise either in the interest of the individual's protection, or, as we noted in Chapter III above, where the wage earner of a family group has been interned leaving his dependents without means of support. The Diplomatic Conference inserted a provision that applications for voluntary internment be submitted through the Protecting Power to prevent the Detaining Power from ordering internments en masse under the subterfuge that internment had been requested by the persons concerned.¹³⁸

Article 43 makes provision for the review of any decision placing a protected person in assigned residence or internment by an appropriate court or administrative board of the Detaining Power in terms similar to that provided under Article 35 for review of applications for departure from belligerent territory. In addition, under Article 43 once an application for review has been made, if internment or assigned residence is thereafter

¹³⁷III Final Record 126.

¹³⁸IIA Final Record 826.

maintained, there must be an automatic, periodic review of the matter at least semi-annually "with a view to the favorable amendment of the initial decision, if circumstances permit".

Article 44 was added to the Convention at the Diplomatic Conference upon the suggestion of the Israel delegation. It provides that the Detaining Power shall not treat refugees as enemy aliens exclusively on the basis of their nationality de jure of an enemy state, when in fact they do not enjoy the protection of any government.¹³⁹ This provision is of special significance in view of the experiences of World War II. In many cases, although the German Jews had been denationalized by Nazi decree, they nevertheless continued to be treated as enemy aliens by the belligerent States within whose territory they resided.¹⁴⁰ This question has arisen in the United States in a number of habeas corpus proceedings resisting internment or deportation under the Alien Enemy Act. Under the provisions of that Act, in time of war proclaimed by the President, "all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies."¹⁴¹ In the case of United States ex rel Schwarzkopf v. Uhl,¹⁴² the relator, a Jewish citizen of Austria, residing in the

¹³⁹IIA Final Record 826.

¹⁴⁰Lauterpacht, Sec. 100b.

¹⁴¹R.S. 4067, as amended (50 U.S.C. 21).

¹⁴²137 F.2d 898 (2d Cir., 1943).

United States when Germany annexed Austria in 1938, sought his release from internment on the ground that he was not an enemy alien within the statutory definition. The United States attorney relied solely on the test of citizenship in this case. The court held that an invader cannot impose its nationality upon non-residents of the subjugated country without their consent, express or tacit, and accordingly concluded Schwarzkopf was not a German citizen. It was, accordingly, unnecessary in that case to consider the effect of the Nazi decree of 1941 denationalizing all Jews residing abroad of their German citizenship. Schwarzkopf had been born in Prague and subsequently became a naturalized citizen of Austria. But in the case of United States ex rel D'Esquivia v. Uhl,¹⁴³ the relator was a Jew who had been born in Vienna of native citizen parents, but in 1920 took up permanent residence in France, married a French wife, and moved to the United States in 1939. In this case, the court held that the relator was a "native" of Austria, and remanded the case for further hearings below to determine whether the United States had recognized de facto the incorporation of Austria into the German Reich, in which case the relator would be a "native" of a hostile government, subject to internment or deportation. In a dissenting opinion,¹⁴⁴ Judge Swan pointed out that the purpose of the statute was to safeguard the security of the United States by apprehending and detaining all aliens who would be likely to entertain friendly

¹⁴³137 F.2d 903 (2d Cir., 1943).
¹⁴⁴137 F.2d 903, 907 (2d Cir., 1943).

feelings for the hostile nation. He pointed out that native-born members of the hostile nation were likely to entertain such feelings, but that a native of a conquered country who has removed himself before the conquest has no reason whatever to favor the conqueror, and consequently was not a "native" within the meaning of the statute. In the case of United States ex rel Gregoire v. Watkins,¹⁴⁵ the test of nativity was further defined. In that case the relator was an Alsatian, born in Metz while that territory was part of Germany, but which after 1918 was restored to France. The relator had legally entered the United States for permanent residence under the French quota in 1941. The court concluded that whether the alien is a "native" of a hostile government depends on whether the alien's birthplace is within the boundaries of a hostile nation at the time of the alien's arrest or internment. While Article 44 of the Convention will lay to rest such unprofitable distinctions, its provisions were not intended by the Diplomatic Conference to deny in any way the right of a State to intern any such person or subject him to any other recognized measure of control when there is any additional reason that renders necessary the taking of such action to safeguard the security of the State in time of national crisis.

Article 45 concerns the circumstances under which aliens may be transferred by the Detaining Power to another Power, provided the latter is a party to the Convention. Although the Soviet Bloc recorded a reservation against any transfer of responsibility

¹⁴⁵164 F.2d 137 (2d Cir., 1947).

for protected persons, ¹⁴⁶ Article 45 provides that responsibility for the application of the Convention will rest with the Power to whom such persons are transferred. However, Article 45 also provides that if the Power to which protected persons are transferred fails in any important respect to carry out the Convention, the Protecting Power may require the original Detaining Power to intervene to correct the situation or even to take back those that have been ill-treated. The Article expressly provides that it is not to be construed as overriding any extradition treaty in existence before the outbreak of hostilities so far as the offenses concerned may be against ordinary criminal law, nor as an obstacle to their repatriation during or after the cessation of hostilities. Article 46 completes Section II of Part III of the Convention by directing the cancellation of all restrictive measures against aliens and their property as soon as possible after the cessation of hostilities.

d. Section III - Occupied Territories
(Articles 47-78)

(1) Scope and Arrangement of Section III

The thirty-two articles which comprise this section of the Convention are concerned exclusively with occupied territory. While the general provisions of Part I are an essential foundation for all other parts of the Convention, while those of Part II concern the alleviation of the sufferings of the entire civil populations of both combatants occasioned by the

¹⁴⁶I Final Record 342 et seq.

actual conduct of hostilities and hence may apply to areas under belligerent occupation, while those which comprise Section I of Part III contain provisions of a general character applicable in both belligerent territory and occupied territory, and while at least some of those in Section II of Part III serve to explain or clarify similar provisions in Section III of Part III, all of the provisions of Section III directly concern the rights and obligations of the occupying forces, the local population, the nationals of neutral countries in occupied territory. Hence each of these thirty-two articles will require careful examination. They are to a large extent declaratory of existing Law of War, although in some instances they go beyond the Hague Regulations and supersede or supplement them as between Contracting Parties. The provisions of Section III are for the most part the result of the lawlessness and cruelties of the German practice of belligerent occupation during World War II, and as such they constitute an attempt to supplement and make more precise the inadequate provisions of Section III of the Hague Regulations.¹⁴⁷

In general, Articles 47 through 54 contain those basic guarantees which are designed to insure the humane treatment of the civil population in occupied territory; Articles 55 through 58 require the Occupying Power to provide for the subsistence, medical supplies and services, spiritual assistance, and other needs of the civil population, limiting in considerable degree the previous right of requisition; Articles 59 through 63 contain

¹⁴⁷Lauterpacht, Sec. 172a, 172b.

detailed provisions for relief schemes from abroad in case the whole or a part of the occupied territory is inadequately supplied; and Articles 64 through 78 are concerned with the administration of the criminal law by the Occupying Power and the securing of judicial safeguards for the accused.

(2) Basic Guarantees

Article 47 lays down the fundamental principle that the civilian population shall not be deprived in any way of the benefits of the Convention as the result of the occupation of any territory, either by the Occupying Power's attempt to change the institutions or government of the territory, by an agreement between the authorities of the occupied territory and the Occupying Power, or by the annexation of the whole or part of the occupied territory into that of the Occupying Power. This article bears the unmistakable impress of the experience of World War II. The demand for its coverage had its origin in the restrictive provisions of such occupational armistices as the 1940 Franco-German Agreement, the declared intent of the Nazi Government to incorporate certain "truly Nordic territory" into the Third Reich, the establishment of other territory under a political commissariat, and the designation of still other areas and their population for genocide under the most punitive form of military government. It is a well-established principle of the law of belligerent occupation that restrictions which are otherwise placed upon the authority of a belligerent government cannot be avoided by using a puppet government, central or local,

to carry out acts which would be unlawful if performed directly by the occupant. Acts induced or compelled by the Occupying Power are nonetheless its acts. However, as we mentioned above, in connection with Article 29, the extent of the responsibility of the Occupying Power for the acts of the local authority contrary to the Convention where the courts of the Occupied Power have been permitted to continue to function under Article 64 is uncertain.¹⁴⁸ The numerous instances in which Germany incorporated occupied territory into the Reich, or created new states in such areas, led the Nurnberg Tribunal to state:¹⁴⁹

"A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated these countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal, it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine should not apply to any territories occupied after the 1st of September 1939."

Thus, in the case of In re Wagner et al,¹⁵⁰ the conscription of Alsatians into the German forces as the consequence of the extension of German nationality to certain groups of such persons was considered a criminal violation of the Law of War. In the Nurnberg Subsequent Proceedings, tribunals repeatedly refused to

¹⁴⁸See page 99, above.

¹⁴⁹Nazi Conspiracy and Aggression, Opinion and Judgment (1947) 83.

¹⁵⁰3 LRTWC 23, 28 (1948).

regard areas annexed into the German Reich during the war as removed from the protection of the law of belligerent occupation.¹⁵¹

The Supreme National Tribunal of Poland in the case of In re Greiser,¹⁵² considered the incorporation by Germany of the western territories of Poland as criminal. Likewise, the Belgian Cour de Cassation regarded the purported annexation of Eupen, Malmedy, and Moresnet to be without legal effect.¹⁵³ The only attempt to modify Article 47, as it appeared in the Stockholm Draft, was one to add a proviso that the article was not to be construed as conferring upon protected persons a right to standards of living higher than those prevailing before occupation began. However, this was defeated in Committee at the Diplomatic Conference on the ground that those standards prevailing immediately before occupation might be reduced by hostilities far below the normal standards for the area even under war-time conditions.¹⁵⁴

Article 48 simply continues the right of protected persons not nationals of the Occupied Power found in occupied territory to be repatriated on the same basis as such aliens might be repatriated from belligerent territory under Article 35, discussed above. Such a provision is obviously required, since whatever system the Occupied Power theretofore may have established will

¹⁵¹In re Greifelt et al, 5 TWC 88, 147 (1950); In re Krauch et al, 8 TWC 1081, 1141, 1146 (1952).

¹⁵²Ann. Dig., 1946, n. 387.

¹⁵³Bindels v. Administration des Finances, Ann. Dig., 1947, p. 45; Bourseaux v. Krantz, Ann. Dig., 1948, p. 526; Auditeur Militaire v. Jutten, Ann. Dig., 1948, p. 527.

¹⁵⁴IIA Final Record 827.

have ceased to function upon the commencement of occupation.¹⁵⁵

The first paragraph of Article 49 prohibits individual or mass forceable transfers and deportations of civilians from occupied territory to the territory of the Occupying Power or to that of any other country, regardless of motive. Similarly the last paragraph of Article 49 prohibits the Occupying Power from transferring or deporting parts of its own population into occupied territory. These restrictions are the direct outgrowth of the general condemnation of the Nazi policy of displacement and deportation of the civil populations of occupied territory for exploitation as a manpower resource. The remaining paragraphs of Article 49 qualify the flat restriction of the first paragraph to permit the evacuation of given areas for imperative military reasons, or where the security of the population demands. Such evacuations must be limited to movements within the occupied territory, except where this would be physically impossible, as, for example in the case of an island of limited size. Whenever such transfers or evacuations are undertaken, provision must be made "to the greatest practical extent" for proper accommodations in the new locality together with satisfactory conditions for hygiene, safety, nutrition, and the maintenance of family unity. When hostilities in the area have ceased, the Occupying Power must retransfer such persons to their homes. The qualifying words, "to the greatest practical extent", were inserted by the Diplomatic Conference at the suggestion of the British delegation.

¹⁵⁵See page 102, above.

It was pointed out that without this qualification, in a fast-moving combat situation, the mandatory provisions of the Stockholm Draft might force a belligerent to keep the civil population in a dangerous area solely because of the non-availability of proper accommodations elsewhere. To facilitate enforcement, the article requires that the Protecting Power be kept advised of all transfers, but, for security reasons, notice is required only after such movements have taken place. Article 49 also provides that the Occupying Power may not detain protected persons in a particularly exposed area except where their safety requires it, or imperative military considerations demand it. The Diplomatic Conference recognized, in the first place, that circumstances might well arise where civilians would be in greater danger on the roads than if they remained in their homes, and, in the second place, that the experience of World War II clearly established the military necessity of keeping the roads clear of all except military traffic during combat operations.¹⁵⁶

Article 50 requires the continued implementation during occupation of those provisions of the Convention which provide exceptional benefits for children, expectant mothers, and the mothers of children under seven. In particular, the Occupying Power is obliged to facilitate the proper working of all institutions devoted to the care and education of children, to continue arrangements previously undertaken by the Occupied Power under Article 24 for the identification of children and the

¹⁵⁶IIA Final Record 827-828.

registration of their parentage, and to set up a special Children's Section within the Information Bureau which the Occupying Power is obliged to establish under Article 136. In addition, the Occupying Power may not hinder the continued application of any preferential measures initiated before occupation, may not change the personal status of children, and may not enlist them in formations or organizations subordinate to it.

Article 51 deals with the requisition of labor of the civil population by the Occupying Power. The Diplomatic Conference indicated that this article was intended to incorporate the provisions of Article 52 of the Hague Regulations, with some liberalization in favor of the Occupying Power.¹⁵⁷ Unlike the Hague Regulations, however, Article 51 spells out in considerable detail what work the Occupying Power may exact from the civil population and what it may not, and specifies the working conditions that must prevail. It is provided that persons not over eighteen may not be compelled to work at all, and those eighteen or over may be compulsorily employed only on work necessary either for the needs of the Army of Occupation, for the public utility services, or for the feeding, sheltering, clothing, transporting, or health of the civil population of occupied territory. Protected persons cannot be compelled to work outside of occupied territory, and they may not be mobilized into military or semi-military groups. Furthermore, compulsory measures may not be used to compel service in the armed or auxiliary services

¹⁵⁷IIA Final Record 828.

of the Occupying Power, nor may any pressure or propaganda be used to secure voluntary enlistments. In no case may protected persons be required to undertake any work connected with military operations, including the security of those installations where they may be employed. As was provided by Article 40, dealing with the compulsory labor of aliens in belligerent territory, so Article 52 provides as to compulsory labor in occupied territory that the legislation "in force" in occupied territory concerning working conditions, such as wages, hours of work, equipment, preliminary training, and protection against occupational accidents, shall continue applicable to persons compelled to work under this article. The Diplomatic Conference recognized that the Occupying Power, in appropriate circumstances which we shall discuss below in connection with Article 64, may change such legislation from time to time during occupation, and in particular that appropriate wages may be varied if prices change to an appreciable extent, but it was considered that by referring to legislation "in force" sufficient provision had been made for such changes. Whatever changes may be made, fair wages must be paid and workers assigned only to work proportionate to their physical and intellectual capacity. In this connection, the Diplomatic Conference deleted those provisions of the Stockholm Draft which prohibit compulsory work of an unhealthy or dangerous nature, although a provision of this nature was retained in the Prisoners of War Convention. This provision was deleted from the Civilians Convention in recognition of the legitimate

need of the Occupying Power to control the employment of the population in order to insure the continued functioning of the economy of the country under occupation conditions. This is, of course, a natural consequence of the duty of the Occupying Power, under Article 43 of the Hague Regulations, to "take all the measures in his power to restore and ensure, as far as possible, public order and safety, ***". Perhaps the principal difficulty which Article 51 may create will be in the voluntary recruitment of labor for labor-scarce areas, particularly as they may not be organized into semi-military units for that purpose. Article 51 may also make questionable the continued legality of the Lodge Act¹⁵⁸ and similar legislation designed to encourage the enlistment of aliens in the armed forces by the inducement of ultimate naturalization.

Article 52 is a concomitant of Article 51 and is intended to facilitate the enforcement of that article. It forbids the making of any contract or other agreement, voluntary or not, limiting or impairing the right of the worker to apply to the Protecting Power for intervention in his behalf. In addition, the article forbids the Occupying Power from taking measures designed to create unemployment or restrict employment in occupied territory so as to induce workers to work for the Occupying Power. Again, these provisions were designed to prevent the repetition of certain Nazi practices during World War II by which much need for labor was artificially created, or restrictions imposed solely

¹⁵⁸Act of June, 1950, Ch. 443, 64 Stat. 316, as amended (10 U.S.C. 621c, 621d).

to subordinate or degrade the civil population.

Article 54 deals with the particular problem of the compulsory employment of public officials or judges in occupied territory. Its provisions are not very clearly drafted.¹⁵⁹ On the one hand, it is provided that the Occupying Power may not alter the status of such officials, or apply sanctions to them or take other measures of coercion against them should they refuse to fulfill their functions for reasons of conscience. On the other hand, it is expressly provided that these prohibitions shall not prevent the application of the second paragraph of Article 51, which as we have seen lists those categories of work which the civil population may be compelled to perform. However, as a practical matter and as is expressly provided by the last sentence of Article 54, such officials may be removed from office by the Occupying Power, and of course would be should they fail to comply for any reason with the wishes of the Occupying Power. In such removal, however, the Nazi practice of subjecting such officials to all manner of indignities, coercions, reprisals, and sanctions, either to exemplify the contempt or to enforce compliance, would clearly be prohibited.

Article 53 is the only provision of the Civilians Convention concerned with the protection of property rights as distinguished from violation of the person of protected persons. It prohibits the destruction of real or personal public or private property in occupied territory except where military operations make such

¹⁵⁹Lauterpacht, Sec. 172b.

destruction absolutely necessary. It serves to eliminate any ambiguity which may have been present in the simple provision of Article 23(g) of the Hague Regulations prohibiting the destruction or seizure of the enemy's property unless imperatively demanded by the necessities of war. It is a logical extension, as well, of the provisions of Article 46 of the Hague Regulations, prohibiting the confiscation of private property, Article 47, prohibiting pillage, and Articles 53 through 56, prohibiting the waste or destruction of certain types of public real and personal property. No particular change in existing Law of War is effected by Article 53, since destruction or devastation, as an end in itself, has never been considered permissible. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army.¹⁶⁰

(3) Responsibility of Occupying Power for Supply of Occupied Territory

The next four articles constitute a radical, new departure in the law of belligerent occupation. These articles impose upon the Occupying Power a positive duty to make provision for adequate food, medical supplies and services, spiritual assistance, and other needs of the civil population. In consequence, the right of requisition in occupied territories as provided by the Hague Regulations has been substantially limited.¹⁶¹ In Article 55 are assembled all of the obligations imposed by the Convention upon the Occupying Power for the maintenance of supplies

¹⁶⁰Lauterpacht, Sec. 154.

¹⁶¹Lauterpacht, Sec. 172b.

in occupied territory. These had been somewhat scattered throughout the Stockholm Draft. The Occupying Power has the duty "to the fullest extent of the means available to it" to insure the food and medical supplies of the population, and to bring in itself necessary foodstuffs, medical stores, and other articles if the resources of the occupied territory are inadequate. The Diplomatic Conference indicated that the other articles which the Occupying Power is required to provide include "all urgently required goods which may be essential to the life of the territory". However, the Diplomatic Conference deleted that provision in the Stockholm Draft requiring the maintenance of an international standard of nutrition, since no such standards have been established.¹⁶² While the provisions of this article in total war could conceivably exceed the logistic capabilities of the belligerents, and thereby defeat its humanitarian purpose, the United States in the course of World War II expended in excess of seven billion dollars in civil aid activities involving more than two hundred million people.

Coupled with the obligation of insuring such supplies is the restriction imposed on the right of requisition by the second paragraph of Article 55. In the first place, the Occupying Power may not requisition food, medical supplies, or other articles in occupied territory except for use by occupation forces and administration personnel and in the second place such requisitions may be made only if the requirements of the civil population have

¹⁶²IIA Final Record 829-830.

been taken into account. These provisions broaden the base of Article 52 of the Hague Regulations to the extent of including the administrative personnel of an occupation force, but are considerably more strict in requiring consideration of the requirements of the civil population. Under Article 52 of the Hague Regulations it was only required that such requisitions "be in proportion to the resources of the country". However, the precise effect of taking such requirements into account is left in considerable doubt by the deliberations of the Diplomatic Conference, which defeated an amendment to permit requisitions "only if the needs of the civilian population are sufficiently covered", on the ground that "it was considered preferable to adhere to the general principles in the Hague Regulations rather than to invite violations of the Convention by laying down conditions which the circumstances of war might frequently prove to be impracticable.¹⁶³ Perhaps it was felt that the last sentence of Article 55 would insure compliance in spirit, since it is expressly stipulated that the Protecting Power, subject to imperative military requirements, may verify the state of supplies in occupied territories at any time.

Article 56 also requires the Occupying Power "to the fullest extent of the means available to it" to insure and maintain, in cooperation with national and local authorities, the medical and hospital establishments and services and the public health and hygiene, and to apply, subject to moral and ethical susceptibilities

¹⁶³IIA Final Record 830.

of the population, prophylactic and preventive measures to prevent the spread of contagious diseases and epidemics. Medical personnel must be permitted to carry out their duties, and if new hospitals are set up in occupied territory, or new personnel and transport facilities added, the Occupying Power is required to certify such personnel and facilities in order to entitle them to the protection of the Red Cross emblem under Articles 18, 20, and 21 of the Convention, discussed above.

Article 57 severely limits the right to requisition civilian hospitals and their supplies. Such requisitions may be made only for temporary use, and then only in cases of urgent necessity. Provision must be made for the civilian patients in them, and the continuing needs of the civilian population for hospitalization. In rejecting an Italian proposal to prohibit absolutely the requisition of hospital supplies, the Diplomatic Conference indicated that such supplies could be requisitioned from any surplus on hand, subject to timely replacement in due course.¹⁶⁴

In view of the anti-religious practices of totalitarian States, the Diplomatic Conference decided that a more positive and detailed provision was essential to supplement the requirement of Article 46 of the Hague Regulations requiring respect for religious convictions and practices. Article 58 requires the Occupying Power to permit ministers of religion to give spiritual assistance to the members of their religious communities in occupied territory, and requires the Occupying Power to

¹⁶⁴IIA Final Record 831; IIB Final Record 419

accept consignments of books and other articles required for their religious needs and to facilitate their distribution.

(4) Relief Shipments and Activities of Relief Societies

The next five articles, which are designed to supplement the efforts of the Occupying Power under the preceding four articles to supply the needs of the civil population in occupied territory, are equally without counterpart in the prior Law of War other than the obligation to observe humanitarian principles and practices in the administration of occupied territory. The demand for these articles arose in part from the many obstacles to this work with which the Axis powers confronted the International Committee of the Red Cross and other humanitarian agencies during World War II, and in part to important technological changes in both the methods of warfare and the economy of the belligerents that have occurred in the past century. It was particularly noticeable in World War II that the need for relief supplies increased in direct proportion both to the use of weapons capable of area destruction and the dependence of urban populations upon resources usually obtained from rural areas.

Article 59 lays down the principles which are to govern the admittance of relief supplies to occupied territory. If part or all of the population of occupied territory is inadequately supplied, the Occupying Power must agree to relief schemes from abroad and must facilitate them by all means at its disposal. Such schemes may be undertaken either by States or by impartial

humanitarian organizations. While the range of such supplies has not been limited, it has been clearly specified that they may include food, medical supplies, and clothing. All Parties to the Convention must permit the free passage of these shipments and guarantee their protection. The only qualification of these sweeping requirements is found in the last paragraph of Article 59, which gives an adverse Party granting free passage the right to search such consignments, to prescribe the time and manner of their passage, and to be reasonably satisfied through the Protecting Power that such relief shipments are to be used for the relief of the needy population and not for the benefit of the Occupying Power.

Article 60 provides that such shipments shall not be used to relieve the Occupying Power of its responsibility to produce for the needs of the civil population under Articles 55 and 56, just discussed, and in particular prohibits the diversion of relief consignments to other uses by the Occupying Power, except in cases of urgent necessity consented to by the Protecting Power. Although Article 60 makes no express reference to the provisions of Article 23, also discussed above,¹⁶⁵ it seems clear that an adverse Party would be equally entitled to prevent the free passage of relief consignments to occupied territory under Article 60 if the enemy might gain an economic or military advantage by substituting such relief goods for goods which otherwise would be provided or produced by him. However, in most cases those

¹⁶⁵See page 94, above.

who would directly benefit would be nationals of the Party adverse to the Occupying Power, or nationals of an allied or friendly Power. In addition, Article 61 gives the Protecting Power supervisory control over the distribution of such relief supplies, thus removing such supplies from the exclusive control of the Occupying Power and making it more difficult to divert them to other uses.

Article 61 also provides that such consignments shall be exempt in occupied territory from charges, taxes, or customs duties, unless such charges "are necessary in the interests of the economy of the territory". This quoted proviso raised considerable debate at the Diplomatic Conference, and was opposed by the Russian Bloc. However, it was pointed out by the New Zealand delegation that while no charges would in all likelihood be imposed upon relief supplies sent as gifts, when sent as part of a long-term arrangement involving ultimate repayment, and particularly when such consignments are to be sold to the civilian population, then if the Occupying Power were not permitted to impose customs duties and taxes on such supplies a seemingly humanitarian provision might result in the ultimate insolvency of the government.¹⁶⁶ Article 61 also provides that all Parties to the Convention shall endeavor to permit transit and transport of such consignments through their territory free of charge. The Diplomatic Conference did not believe this should be made an absolute requirement since the volume of such shipments through,

¹⁶⁶IIB Final Record 422-423.

for example, a small neutral nation might become so large as to impose an unfair burden on that nation's facilities.¹⁶⁷

Article 62 permits relief consignments to be sent to individuals and requires the Occupying Power to permit them to be received, subject to imperative reasons of security.

Finally, Article 63 provides that, subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power, the various recognized Red Cross and other relief societies shall be permitted to pursue their customary activities. The Occupying Power is expressly forbidden to require changes in the personnel or organization of such societies. These protections were also extended to non-military organizations already in existence or that may be established to maintain essential public utility services, distribute relief, and organize rescues. The Diplomatic Conference, in adding this last provision, took cognizance of the fact that such organizations were established under State arrangements in a number of occupied countries during World War II, and it was anticipated that in the event of a new conflict such organizations would have to be extended and enlarged in proportion to the increased use of new means of area destruction.¹⁶⁸

(5) Penal Legislation and Procedure

The remaining fifteen articles in Section III are concerned with the administration of the criminal law

¹⁶⁷IIA Final Record 832.

¹⁶⁸IIA Final Record 832-833.

by the Occupying Power and the securing of judicial safeguards for the accused; the first seven being concerned with the law-making authority of the Occupying Power and the last eight with penal procedure.

(a) Penal Legislation

Article 64 is the keystone provision of this portion of the Convention. The first paragraph of this Article provides that the penal laws of the occupied territory shall remain in force, except that they may be repealed or suspended by the Occupying Power where they - (1) constitute an obstacle to the application of the Convention, or (2) constitute a threat to the security of the Occupying Power. The courts of the occupied territory shall be permitted to continue to function provided they do not constitute an obstacle to the application of the Convention. The Diplomatic Conference asserted that the courts of the occupied territory could under no circumstances be considered a threat to the security of the Occupying Power.¹⁶⁹ The second paragraph of Article 64 authorizes the Occupying Power to promulgate penal provisions applicable to the civil population of occupied territory that are essential to - (1) enable the Occupying Power to fulfill its obligations under the Convention, (2) maintain orderly government, and (3) ensure the security of the Occupying Power, its personnel, property, and communications. An examination of this article in the light of the Hague Regulations reveals that, while no new law-making power has been given

¹⁶⁹IIB Final Record 424.

the Occupying Power by these provisions, neither has it imposed any new restrictions upon that authority. Article 23(h) of the Hague Regulations expressly prohibits the Occupying Power from declaring "abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of a hostile party", and Article 43 of those Regulations requires the Occupying Power to "take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". The word "safety" as used in the English translation does not adequately represent the meaning of the original French "vie publique", which properly describes the entire social and commercial life of the country.¹⁷⁰

Article 64, as finally adopted by the Diplomatic Conference, represents a compromise between the strict prohibition of all change in the penal laws and tribunals of the Occupied Power as proposed by the Stockholm Draft and the proposal of the United States delegation that such laws and courts remain unchanged only until altered by the Occupying Power. In support of its position, the United States argued that in moving into Germany the American Army had found in existence a whole series of laws and provisions based on the Nazi ideology, including in particular laws prescribing racial discrimination, which it was necessary to abrogate as incompatible with a legal system worthy of the name, and likewise the court system for administering those inhuman laws had to be

¹⁷⁰JAGS Text No. 11, The Law of Belligerent Occupation, p. 38.

suppressed. Similar measures were required to be taken by the British in Italian occupied territory. In response, however, it was pointed out that to adopt the United States amendment would abrogate the protection afforded by Article 43 of the Hague Regulations. Granting the justice of the American and British action in the particular cases, the Diplomatic Conference rejected the United States amendment because it was felt that such authority in the hands of a despotic Power would permit unlimited change of the penal legislation of the Occupied Territory. However, in order to meet the substance of the United States position, the provision that such laws might be changed and tribunals suspended as would constitute an obstacle to the application of the Convention was inserted.¹⁷¹ While it may well be doubted if the drafters of the Hague Regulations envisaged a dictatorial regime so utterly contemptuous of human rights and modern concepts of legality as that of National-Socialist Germany, it is believed that the United States and British action in Germany and Italy of abrogating and suppressing those laws and institutions which flouted and shocked elementary concepts of justice and rule of law can properly be considered as a case of absolute prevention within the meaning of Article 43 of the Hague Regulations.¹⁷² In the light of the present ideological conflict between the Free World and the Communist Regime, it is interesting to contemplate the comments of the Russian writer, Professor E. A. Korowin, in

¹⁷¹IIA Final Record 670-672, 771.

¹⁷²Lauterpacht, Sec. 172.

commenting on Article 43 of the Hague Regulations prior to
World War II: 173

"Paragraph 43 of the Hague Regulations provides that the occupant must respect the laws in force in occupied territory unless there are insurmountable obstacles. *** This is the traditional doctrine of the provisional character of occupation of war which has been sanctioned by the authority of the Hague Regulations. *** Although Russia had initiated the Brussels Conference of 1874 and although her delegate, Martens, was the author of the Declaration adopted in Brussels, the acts of the Russian troops when they occupied Turkish territory in 1877 were not at all in conformity with the classic conception of occupation as a provisional substitution of one power for another. On the contrary the Russian authorities of occupation regarded it as impossible in those parts of the Balkan Peninsula that had been freed from the Turks to keep in existence the archaic institutions and laws which had characterized Turkish domination. Immediately after the retreat of the Turkish troops they began to reorganize public administration of justice and the tax systems in a very fundamental manner in order to adapt those systems to the usual level of European legal customs of that time. Official Russian doctrine justified the attitude of the occupation authorities as follows: Since the war had been caused by the archaic and intolerable forms of Turkish domination of the Christian peoples of the Balkan Peninsula and had been waged to free that Peninsula it would be nonsensical, artificially to postpone the hour of Slavic liberation and with Russian force of arms to keep in existence those legal institutions the elimination of which had been one of the main war aims. *** The Hague Regulation which provides for the maintenance of the local legal system and which is based on the idea of a community or even identity of the social and legal organization of the warring powers seems obsolete. A new norm, namely to safeguard the maximum of social justice for the inhabitants of occupied territory, is in the process of taking shape. In conclusion it may be interesting to note that this departure from the customary system of occupation of war, if we scrutinize the Hague Convention closely, has been recognized by the same acting upon a proposal of Beernaert. (A reference to the preamble to the Hague Regulations) It was recognized

173E. A. Korowin, Internationalrechtliche Abhandlungen, Vol III, p. 134 (As found quoted in JAGS Text No. 11, The Law of Belligerent Occupation, pp. 41-43).

"that in all cases not provided for in the Hague Regulation the local population should remain under the protection of the fundamental principles of international law such as would follow from the customs recognized among civilized people, the laws of humanity, and the requisites of social conscience."

While the spirit of the rule may have been more narrow than Professor Korowin's "new norm of maximum social justice" as that test may be applied by each Occupying Power, in the face of today's 180 degree difference of opinion on the subject we are not too far from the original United States proposal that the law of the occupied territory remains in force until changed. But, however broadly an Occupying Power may construe its authority to suspend the laws and tribunals of occupied territory on the ground that they constitute an obstacle to the application of the Convention, there are a number of laws that may clearly be abrogated as a threat to the security of the Occupying Power. These would certainly include all political laws and constitutional privileges such as conscription and recruitment legislation, the right to bear arms, the right of assembly, the right to vote, the right to travel freely, and freedom of the press.¹⁷⁴ The debates at the Diplomatic Conference also make clear that the local courts might properly be suspended whenever they are corrupt or unfairly constituted, or where local judicial administration has collapsed during the hostilities preceding the occupation and the Occupying Power must set up its own courts to insure that offenses against local law are properly tried.¹⁷⁵ Basically, the legitimacy of an Occupying Power's act with relation to the suspension of the

¹⁷⁴JAGS Text No. 11, The Law of Belligerent Occupation, pp. 68-69.
¹⁷⁵IIA Final Record 833.

penal laws or courts of the occupied territory, and the promulgation of additional rules and regulations, both before and after Article 64 of the Convention, appear to rest on two underlying principles: (1) the Occupying Power's rule is provisional only and does not imply a change of sovereignty; and (2) his act must have a reasonable connection to some legitimate objective for maintaining order and safety. Changes in the fundamental institutions of the Occupied State which bear no direct relation to the Occupying Power's legitimate war objectives are an unjustifiable assumption of sovereignty. Conversely, where a reasonable connection does exist between the act of the Occupying Power and its legitimate objectives, the change is proper.¹⁷⁶

Although Article 64, therefore, can be regarded as no more than a more articulate statement of principles and limitations already imposed by the Hague Regulations, certainly the detailed provisions of the Articles which follow go beyond the previous requirements of the Law of War, principally by making the limitations upon the authority of the Occupying Power within these general principles more definite and certain or by prescribing detailed procedure with which each Party to the Convention must comply.

Thus, by Article 65, penal provisions promulgated by the Occupying Power in accordance with the authority granted by Article 64 may not come into force until published and brought to the knowledge of the inhabitants in their own language, and

¹⁷⁶JAGS Text No. 11, The Law of Belligerent Occupation, pp. 64-65.

the effect of such provisions may not be retroactive. Although not apparent on its face, it was the intention of the Diplomatic Conference by using the word "published" to require the promulgation of such laws in written form and not, for example, by an announcement over the radio or loudspeakers.¹⁷⁷

Article 66 requires the Occupying Power, in enforcing the penal provisions promulgated by it under Article 64, to try accused persons by its properly constituted, non-political military courts sitting in the occupied country, and indicates that appellate courts should preferably sit in the occupied country. While it has been argued that the use of civil courts would tend to divorce such proceedings from the traditional harshness of military courts, the Diplomatic Conference insisted upon the deletion of all reference to civil courts in Article 66 which had been contained therein in the Stockholm Draft. Among the reasons given were the fear that the setting up of civil courts in occupied territory would tend to extend to it a part of the civil legislation of the Occupying Power and that such courts would be more likely to be political in nature.¹⁷⁸ The experience of World War II indicates many instances in which the administration of civil courts by civilian personnel of an occupation administration has been so used, particularly as a first step to the annexation of occupied territory into that of the Occupying Power. It has hitherto been the view of the United States courts, and of The

¹⁷⁷IIA Final Record 833.

¹⁷⁸Ibid.

Judge Advocate General of the Army, that military government courts do not lose their character as military courts merely by reason of the presence of civilians thereon.¹⁷⁹ However, the emphasis placed by the Diplomatic Conference on the military character of such courts may provide a sufficient basis for a different result under Article 66. In fact, in its first opinion the United States Court of Appeals in Germany stated that "Our practice and procedure is that of courts operating according to the concepts of civilian courts."¹⁸⁰

While Article 67 states that courts shall apply only those provisions of law applicable "prior" to the offense, it is clear from the discussion of the Diplomatic Conference that it was intended to refer to law applicable "at the time of" the offense. The record indicates that the drafters intended to exclude laws that may have been repealed at the time the offense was committed and to prevent the retroactive application of laws enacted after the offense.¹⁸¹ The more important provisions of the article are those which require the courts to apply only those laws which are in accordance with general principles of law, in particular the principle that the penalty be proportionate to the offense, and that such courts take into consideration the fact that the accused is not a national of the Occupying Power. This latter principle is not new. It has long been required in the

¹⁷⁹Madsen v. Kinsella, 343 U.S. 341 (1952); U.S. Military Government v. Ybarbo, 1 Court of Appeals Reports (Germany) 207 (1949); JAGA 1952/1086, 25 January 1952.

¹⁸⁰United States v. Sander, 1 Court of Appeals (Germany) 1 (1948).

¹⁸¹IIA Final Record 833.

administration of penal and disciplinary sanctions against prisoners of war,¹⁸² and has been borrowed from that convention for use in Article 118 of the Civilians Convention as to the punishment of civilian internees. The Law of War, and in particular Article 45 of the Hague Regulations, recognizes that the civil population of occupied territories do not owe allegiance to the hostile Power and cannot be required to swear allegiance to the Occupying Power. However, this is not to be confused with the duty of obedience which the Occupying Power can demand and enforce from the inhabitants of occupied territory to the extent necessary for the security of its forces, for the maintenance of law and order, and for the proper administration of the country. If the basis for such obedience was no more than naked force, it would be unreasonable to expect the Occupying Power to comply with the obligations imposed by Article 43 of the Hague Regulations and Article 64 of this Convention, to ensure public order and safety, to maintain the orderly government of occupied territory, and to protect the peaceful population.¹⁸³ Accordingly, it is the duty of the inhabitants to carry on their ordinary peaceful pursuits, to behave in an absolutely peaceful manner, to take no part whatsoever in hostilities, to refrain from all injurious acts towards the troops of the Occupying Power, and to render strict obedience to the orders of the Occupying Power.¹⁸⁴

¹⁸²See Article 87, Prisoners of War Convention.

¹⁸³Lauterpacht, Sec. 162.

¹⁸⁴Pars. 297, 301, FM 27-10, 1 October 1940; par. 6.85, FM 27-10, proposed draft 1 March 1954.

However, in so far as Article 67 can be taken to apply to those tribunals of the Occupied State that the Occupying Power may permit to continue to function in accordance with Article 64, it is submitted that those courts could not apply the provisions of Article 67 that require the application of only so much of the law to which they owe their jurisdiction as may be in accordance with general principles of law, and particularly they could not apply the principle that the penalty be proportionate to the offense if it were to be maintained that the penalty prescribed by the law in question was not appropriate. The courts of the Occupied State that are permitted to continue to function must enforce the law as enacted. Otherwise, Article 67 would constitute a most exceptional attempt to make a treaty directly binding upon a municipal court notwithstanding subsequent conflicting municipal law. While it is perfectly consistent to so limit the authority of occupation courts established by the Occupying Power, particularly in the enforcement of penal legislation promulgated by the Occupying Power in accordance with Article 64, in so far as the tribunals of the Occupied State are concerned, to prevent the enforcement of those laws of the Occupied State which violate the principles of Article 67 it would be necessary to repeal or suspend them in accordance with Article 64 as constituting an obstacle to the application of the Convention.¹⁸⁵

After laying down the general principle in Article 67 that the penalty must be proportionate to the offense, Article 68

¹⁸⁵Lauterpacht, Sec. 172b (footnote 1, p. 454).

continues to prescribe further specific limitations on the punishments which may be imposed upon protected persons who commit an offense solely intended to harm the Occupying Power. It is well to bear in mind that from the very nature of things the offenses with which Article 68 is concerned will all be in contravention of laws promulgated by the Occupying Power in accordance with Article 64, since it is hardly to be expected that the municipal law would deal with offenses against an Occupying Power. While those provisions of the second paragraph of Article 68, which regulate the imposition of the death penalty for offenses against laws promulgated by the Occupying Power, are the most controversial of the entire Convention and were made the subject of reservations by the United States, Great Britain, Canada, New Zealand, The Netherlands, and Argentina,¹⁸⁶ the article as a whole has been subjected to unwarranted criticism because "it overlooks entirely punishments other than internment and imprisonment and all those offenses in which intent is immaterial".¹⁸⁷ This criticism shows a failure to appreciate that the general limitation contained in Article 67, just discussed, to the effect that "the penalty shall be proportionate to the offense", is the only limitation upon the authority of the Occupying Power to prescribe any appropriate punishment for the violation of any penal provisions promulgated by it under Article 64, except in the case of those particular types of offenses dealt with by Article 68

¹⁸⁶I Final Record 343, 346, 349, 352.

¹⁸⁷Par. 6.91c, FM 27-10, proposed draft 1 March 1954, and commentaries thereunder.

which are intended solely to harm the Occupying Power. Since the purview of Article 68 is limited to these particular types of offenses, quite naturally Article 68 contains no reference to punishments for offenses not within its intended scope. Furthermore, since Article 64 lays down the principle that the penal laws of the Occupied State shall remain in effect except where legitimately repealed or suspended by the Occupying Power, ordinarily there would be no occasion for the Occupying Power to promulgate different punishments from those already prescribed by the law of the Occupied State. Where the Occupying Power is exceptionally required to do so for the reasons just outlined in the discussion of Article 67 above, anything more flexible than the provisions of Article 67 would be hard to imagine.

What Article 68 does do is to place a limitation upon the practically unlimited discretion of the Occupying Power to prescribe appropriate punishments in certain prescribed cases. Thus, the first paragraph of Article 68 lays down the rule that the only punishment which may be imposed upon protected persons who commit offenses solely intended to harm the Occupying Power which - (1) do not constitute an attempt on the life or limb of members of the occupying forces or administration, (2) do not constitute a grave collective danger, or (3) do not seriously damage the property of the occupying forces or administration, or installations used by them, is internment or imprisonment, and the duration of such punishment must be proportionate to the offense committed. Admittedly, much may turn upon the interpre-

tation of the word "solely" is a given instance. But in view of the general purpose of the Convention, and Article 68 in particular, it seems more than clear that the phrase should be given a strict construction, limiting the operation of Article 68 to offenses arising out of hostile acts performed with the specific intent of doing injury to, or prejudicing the security of, the Occupying Power. The Diplomatic Conference indicated that the term "occupying forces" was used as indicated above to cover cases involving the persons and property of allies serving under the command of the Occupying Power. The Diplomatic Conference also explained that the reason occupation courts are expressly authorized to convert a sentence of imprisonment into one of internment for the same period is that internment is a much less rigorous regime than that of imprisonment.¹⁸⁸

The remaining three paragraphs of Article 68 place limitations upon the imposition of capital punishment. The third and last paragraphs, which, respectively, require as a condition precedent to the pronouncement of the death penalty against a protected person that the attention of the Court be particularly called to the fact that the accused is not bound by any duty of allegiance to the Occupying Power, and absolutely prohibit the pronouncement of the death penalty in any case involving a protected person under eighteen at the time of the offense, have occasioned little if any adverse comment. However, the provisions of the second paragraph are highly controversial. That

¹⁸⁸IIA Final Record 673-674, 765, 833-834.

paragraph provides that laws promulgated by the Occupying Power under Article 64 may impose the death penalty on a protected person only where that person is guilty of - (1) espionage, (2) serious acts of sabotage against military installations of the Occupying Power, or (3) intentional offenses causing the death of one or more persons, and then only if "such offenses were punishable by death under the law of the occupied territory in force before the occupation began". It is important to note that the objection of the United States and other Powers friendly to the United States was to the quoted language. Although there had been efforts in earlier sessions to enumerate the offenses that would be subject to the death penalty with greater precision, in the final Plenary Session at which the United States amendment to delete the limiting language quoted above was debated, objection was not raised to limiting capital punishment to these three categories.¹⁸⁹ In signing the Convention, the United States, Great Britain, Canada, New Zealand, The Netherlands, and Argentina, reserved only the right to impose the death penalty in these three types of cases irrespective of whether such offenses are punishable by death under the law of the occupied territory at the time the occupation begins. An examination of the debates indicates that those powers who voted against the United States amendment, other than the Russian Bloc, did so more out of differences of penological philosophy than from concern over the proper administration of occupied territory. In most of these nations,

¹⁸⁹IIB Final Record 424-431.

their law either excludes capital punishment or provides for it only in the case of the most serious offenses against the security of the State. Others, observing the extent to which Occupying Powers have in the past imported their own criminal codes into occupied territory, preferred to preserve, as far as possible, the civil and penal law of occupied territory. The Stockholm Draft presented to the Diplomatic Conference was a strong reflection of this thinking, for it consisted of a flat prohibition of the death penalty in any case not punishable by death at the outbreak of hostilities.¹⁹⁰ In support of the United States amendment, it was argued that the provision, with the limiting proviso deleted, leaves the Occupying Power the absolute minimum of freedom to deal effectively with grave acts of illegal warfare. With the proviso retained, it was asserted that the provision being unworkable in practice would defeat the purpose of the Convention and would never become one of the accepted principles of international law.¹⁹¹ The gist of the argument was as follows. The practical effect of the proviso is to prohibit the imposition of the death penalty even for the acts listed, since a country about to be invaded or occupied would only have to enact a law abolishing the death penalty. (It is to be noted that the original language of the Stockholm Draft, referring to the law in force at the outbreak of hostilities rather than that in force before occupation begins, would have obviated this difficulty.) If the

¹⁹⁰I Final Record 123.

¹⁹¹IIA Final Record 425-426.

proviso is retained, the most that persons apprehended as illegal combatants and found guilty of espionage, sabotage, or unlawful homicide could be subjected to would be imprisonment for the duration. This would result in retaliation and revenge-killings by soldiers of the Occupying Power, and would encourage illegal acts and widespread disaffection among a hostile population against the armed forces of the Occupying Power which would have to be suppressed. For these reasons, it would be impossible for the Occupying Power to observe the Convention and at the same time maintain law and order in occupied territory. Although the Diplomatic Conference finally rejected the United States amendment, within the limits of the reservations made thereto by the United States, and the other Powers noted above, it is not believed that Article 68 will create any special difficulties for an Occupying Power, nor will it necessitate any change in United States occupation policy.

Article 69 concludes the series of articles that are concerned with limitations on punishment by requiring that time spent awaiting trial or punishment shall be deducted from any period of imprisonment that may be adjudged.

Article 70 is a novel change in the Law of War. The first paragraph of that Article, originally proposed by the Norwegian Red Cross,¹⁹² forbids any prosecution or sanction against protected persons for acts committed or opinions expressed before occupation or during any temporary interruption of occupation,

¹⁹²Red Cross Preliminary Conference Report, p. 98. See page 67, above.

except those acts amounting to war crimes. An amendment to this provision was proposed by the Greek delegation, in the light of that country's experience with Nazi occupation, to counteract the possible implication of Article 70 that a mere expression of opinion not sufficient to incite a civil uprising against the Occupying Power during occupation might legitimately be made the basis of punishment. In ultimately rejecting this proposal, the Diplomatic Conference seems to have concluded that any law promulgated by the Occupying Power under Article 64 making such expressions of opinion punishable would violate that Article, and accordingly it would be better not to open the door to conjecture as to what expressions of opinion would be such as to threaten the security of the occupying forces.¹⁹³

The second paragraph of Article 70 gave the Diplomatic Conference a great deal more difficulty. This paragraph is the only provision of the Convention that deals with nationals of the Occupying Power found in occupied territory who are refugees from its jurisdiction. Such persons are not protected persons as that term is defined by Article 4.¹⁹⁴ Nevertheless, for the purposes of this Article, their status is similar to that of stateless persons who have relinquished their citizenship and ties of allegiance to the Occupying Power. The Stockholm Draft made provision only for those nationals of the Occupying Power who, before the outbreak of hostilities, sought refuge in the territory of the

¹⁹³IIB Final Record 436-438.

¹⁹⁴See the discussion as to the persons to whom the Convention is applicable, beginning at page 80, above.

Occupied State from the consequences of an offense committed outside occupied territory, and did not provide any express protection for bona fide refugees who, without having committed any offense, sought asylum outside the jurisdiction of the Occupying Power for political, religious, or other similar reasons. By adopting the substance of amendments offered by the Indian delegation, the Diplomatic Conference made clear its intention to protect such refugees from arrest, prosecution, conviction, or deportation from occupied territory.¹⁹⁵ As to those refugees who have committed an offense, Article 70 divides them into two categories. Article 70 provides no immunity whatsoever for the refugee who commits an offense after the outbreak of hostilities. On the other hand, the refugee who commits an offense "under common law" before the outbreak of hostilities may be arrested, prosecuted, convicted, or deported from occupied territory only if the offense is one which, under the law of the Occupied State as it existed before the occupation, would justify extradition in time of peace. The record of the Diplomatic Conference does not make clear precisely what was meant by the phrase "under common law" except that those ordinary criminal offenses regarded as such by all civilized nations are to be considered included. For all practical purposes, those offenses that are extraditable in time of peace are governed by treaty between the Powers concerned, while offenses occurring after the outbreak of hostilities, such as acts of a traitorous character, are so characterized by

¹⁹⁵IIB Final Record 434.

the Law of War.¹⁹⁶ The main purpose of the distinction seems to be to shield such refugees from the consequences of "political offenses" of the type not ordinarily covered by extradition treaties, if committed before the outbreak of hostilities. Just how far this might be carried is illustrated in the example cited by the Italian delegation. Thus, if a German citizen should assassinate the head of the German police, it would be regarded as a crime of a "political nature" and not extraditable under Italian law, while the murder of his wife by the same German citizen would entail extradition.¹⁹⁷ Finally, the Diplomatic Conference, in accepting an amendment proposed by the United States, made it clear that the test as to whether the offense would justify extradition in time of peace does not require actual extradition, but the accused may be brought to trial in such a case by the Occupying Power in occupied territory.¹⁹⁸ While the amnesty thus granted to certain categories of offenders is questionable, the broad category of persons protected by Article 70 appears to outweigh this disadvantage.

(b) Penal Procedure

The remaining eight articles of Section III establish a code of penal procedure that must be followed by the Occupying Power in occupied territory. While these articles have no previous counterpart in the conventional Law of War, they are, in reality, no more than a detailed implementation of the

¹⁹⁶IIB Final Record 480.

¹⁹⁷Ibid, 436.

¹⁹⁸III Final Record 142.

general principles of Article 46 of the Hague Regulations, which require respect for the lives of persons, their honor, religious convictions and practices, property, and other rights. The basic guarantees contained in these articles insure to protected persons those fundamental judicial safeguards that are essential to the fair and impartial administration of justice. Recourse in both World Wars to reprisals, the taking of hostages, and similar punitive measures which obviously went far beyond established obligations of the Law of War as to decency of treatment, the preservation of human rights, and related humanitarian standards, have made these provisions necessary. These articles may be said to establish that standard of procedure customarily associated with the concept of "due process".

Thus, Article 71 provides that no sentence may be pronounced by an occupation court except after a regular trial. Accused persons must be informed promptly, in a language they understand, of the charges against them, and brought to trial as promptly as possible. To insure the observation of these provisions, the Occupying Power must notify the Protecting Power of all proceedings against protected persons charged with offenses for which the death penalty or imprisonment for two years or more may be adjudged, and must furnish the particulars of all other proceedings upon request. The Stockholm Draft had required notice in all cases, but the Diplomatic Conference concluded this would impose an unwarranted burden on the administration of justice in occupied territory.¹⁹⁹ The required notice must be given at least

¹⁹⁹IIA Final Record 834.

three weeks in advance, must contain certain details prescribed in the last paragraph of Article 71, and trial may not proceed unless evidence of full compliance with this Article is submitted to the court.

Article 72 guarantees accused persons the right to present evidence necessary to their defense, the right to call witnesses, the right to counsel of their own choice, the right to an interpreter at all times, including the right to replace him upon request, and all other necessary facilities to prepare their defense. If the accused does not select counsel, the Occupying Power may furnish counsel with the consent of the accused, and, if the Protecting Power is not functioning, must furnish counsel in a serious case if the accused so requests.

The first paragraph of Article 73 requires that the accused be fully informed as to his right of appeal and granted whatever right of appeal may be provided by the laws applied by the court. The last paragraph provides that in cases where no right of appeal is provided by the laws applied by the court that convicted persons shall have the right to petition competent authority. In approving the addition of the last paragraph of Article 73 to the Stockholm Draft, the Diplomatic Conference explained:²⁰⁰

"The Committee have had in mind the fact that the competent authority will usually be the Military Commander in the district, and they think it right that, as in certain military legal systems, there should always be that right of petition, which, however, is very distinct from an appeal to a higher Court."

²⁰⁰IIB Final Record 439.

Article 74 is a concomitant to Article 71. Under the first paragraph of that Article, the Protecting Power has the right to attend the trial of any protected person, unless secrecy is required in the interests of the security of the Occupying Power, in which case the Protecting Power must be notified of that fact. Since, under Article 71, the Protecting Power is sent notice only of cases involving the death penalty or two or more years of imprisonment, Article 74 requires that the Protecting Power be notified of the venue and date of all sessions of courts for the trial of protected persons so that it may also be aware of trials for lesser offenses. The second paragraph of Article 74 requires that the Protecting Power be notified of the results of trial only where the death penalty or imprisonment for two or more years is adjudged. However, a record of judgments in all other cases shall be kept open for inspection by the Protecting Power. Where notice is required, the name of the place of imprisonment must be furnished. Also, where notice is required, the period allowed for appeal will not begin to run until notice is received by the Protecting Power. However, the Diplomatic Conference decided to delete that provision of the Stockholm Draft which provided that judgments would not be enforced until the expiration of the period allowed for appeal. The reason given for this was that since notice was required in all serious cases, and Article 69 requires that time spent awaiting trial or punishment must be deducted from any period of imprisonment adjudged, such a provision could only react unfavorably on

persons held in custody who were sentenced to relatively short periods of imprisonment.²⁰¹

Article 75 contains additional safeguards on the execution of the death penalty. Persons condemned to death may not be deprived of the right of petition for pardon or reprieve. No such sentence may be carried out until the expiration of six months from the receipt of notice of final judgment by the Protecting Power, or receipt of an order denying pardon or reprieve. The Diplomatic Conference did recognize the need to modify the Stockholm Draft to permit the reduction of this six months period of suspension in cases of grave emergency involving an organized threat to the security of the Occupying Power, but even in such cases the Protecting Power must be notified of such reduction and given a reasonable time to make representations to competent authority with respect to the death sentence.²⁰²

The first sentence of Article 76 requires that accused protected persons in occupied territory be detained therein, and, if convicted, that they serve their sentences in occupied territory. The Stockholm Draft contained a provision that protected persons should in no case be taken outside occupied territory. The Diplomatic Conference decided to delete this restriction to permit their appearance in appropriate cases before appellate tribunals outside occupied territory, and, where desirable, to permit special health treatment where appropriate facilities were not available in occupied territory. To the minority who objected,

²⁰¹IIA Final Record 835.

²⁰²Ibid.

it was pointed out that the requirement that sentences be served in occupied territory still contained in Article 76, coupled with the general prohibition against forceable deportation in Article 49, made adequate provision for the usual case.²⁰³ The balance of Article 76 specifies certain standard conditions to govern the imprisonment of convicted protected persons. They must be provided proper nutrition, medical care, and spiritual assistance. Women must be confined separately. Minors must be given special consideration. The Protecting Power must be permitted to visit them, and they must be permitted to receive at least one relief parcel per month.

Article 77 provides for the handing over of all imprisoned protected persons to the authorities of the liberated territory on the close of occupation. There is nothing in this Article that would prevent the conclusion of special agreements as to convicted offenders as a part of any armistice agreement, but it will prevent the practice which grew up in World War II of removing convicted persons from occupied territory for the purpose of retaining jurisdiction over them.

Article 78 prescribes the circumstances under which protected persons in occupied territory may be interned or placed in assigned residence. The first paragraph of that Article is similar to the first paragraph of Article 41, which prescribes when this may be done in the case of protected persons in belligerent territory. In each case the principle is the same. When

²⁰³IIA Final Record 835.

the war-time security of the State demands, the most a State may do is subject protected persons to assigned residence or internment, unless, of course, they are guilty of an offense against the penal laws of the State. In the discussion of Article 41 above,²⁰⁴ it will be recalled that, at the suggestion of the United States, a second paragraph was added to Article 41 requiring the application by analogy of those standards of welfare required by Section IV of Part III of the Convention, that is, the internment regulations, whenever protected persons are required to leave their usual place of residence by virtue of a decision of the State placing them in assigned residence elsewhere. That provision of Article 41 also made specific reference to the second paragraph of Article 39, under which it became the duty of the State to provide for the support of protected persons and their dependents whenever any special measures of control over them should prevent them from providing their own support. Although the last paragraph of Article 78 does not require the application by analogy of those standards of welfare required by Section IV of Part III of the Convention whenever protected persons in occupied territory are required to leave their usual place of residence by virtue of a decision of the Occupying Power placing them in assigned residence elsewhere, it does make reference to Article 39, thereby making the Occupying Power responsible for their support and that of their dependents if such assigned residence should prevent them from doing so. The second paragraph

²⁰⁴See page 107, above.

of Article 78 is similar to the first paragraph of Article 43, to the extent that in both belligerent territory and occupied territory decisions as to placing protected persons in assigned residence or internment must be made according to a regular procedure, including the right of appeal and periodic review. The differences are that protected persons in belligerent territory under Article 43 are entitled to consideration by an appropriate court or board, and to periodic review at least twice yearly, while protected persons in occupied territory under Article 78 are entitled only to consideration according to a regular procedure prescribed by the Occupying Power, and to periodic review twice yearly if possible. While the provisions as to assigned residence and internment in belligerent territory and occupied territory were made fairly parallel, the Diplomatic Conference felt that it was not possible to push the analogy between the situations of these two different types of internees any further, since the circumstances that might prompt their internment would in most instances be so entirely different as to make argument by analogy impossible.²⁰⁵

e. Section IV - Regulations for the Treatment of Internees (Articles 79-135)

(1) Scope and Arrangement of Section IV

Regulations governing the treatment of internees make up the bulk of the Convention. The fifty-seven articles in Section IV are divided into twelve chapters. The

²⁰⁵IIA Final Record 790.

first of these contains a number of general principles while the remaining chapters lay down rules to govern such matters as the places where protected persons may be interned, standards as to the food and clothing they must be furnished while interned, the conditions of hygiene and the medical attention they must receive, their right to engage in religious, intellectual and physical activities while interned, including rules as to the working conditions, hours, wages, and workmen's compensation benefits to which they are entitled if employed, procedures to govern the handling of their personal property and other financial resources, the relations of internees with the exterior, the penal and disciplinary sanctions which may be taken against them, provisions to deal with matters arising from their death, and procedures for their release from internment, repatriation and accommodation in neutral countries.

So far throughout this chapter, as we have discussed the various major divisions of the Convention, a fairly complete and detailed analysis of the individual articles of the Convention has been provided, with a particularly complete examination of Section III - Occupied Territories. Although we have repeatedly observed that this Convention is, for the most part, an amplification and implementation of the general principles contained in the Hague Regulations, it has been necessary to consider many of the individual provisions of the Convention to gain an appreciation of the nature of the rights and obligations of the occupying forces, the local population, and the nationals of neutral

powers found in occupied territory during belligerent occupation. However, so detailed an examination of Section IV does not appear to be necessary. Although Section IV of this Convention marks the first conventional law to provide regulations for the treatment of interned civilians, either in belligerent territory or occupied territory, the details of these regulations are not new. With a few exceptions, which we shall examine, the provisions of Section IV are no more than an adaptation of the familiar provisions of the Prisoners of War Convention to the situation of civilian internees. Furthermore, as we have seen,²⁰⁶ during World War II, at the suggestion of the International Committee of the Red Cross, selected provisions of the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War were successfully applied by analogy to enemy aliens in the territory of a belligerent. Thus, the important change effected by Section IV in the prior Law of War is the making of these detailed regulations, with which the reader can be presumed to be already familiar, expressly applicable to the situation of civilian internees, and particularly to those interned in occupied territory. However, in adapting the Prisoners of War Convention to the situation of civilian internees, on the one hand, a number of the provisions of that Convention were found to be inappropriate for application to civilians, and, on the other hand, a few new provisions were found to be required to cope adequately with civilian problems.

²⁰⁶See page 61, above.

(2) Provisions of the Prisoners of War Convention Omitted from the Civilians Convention

An examination of the Prisoners of War Convention reveals that the substance of every article of that Convention has been reproduced in some article of the Civilians Convention, though not necessarily in Section IV, with, of course, some appropriate changes in terminology, except those few articles that can only apply to military personnel. While the following list is not intended to be exhaustive, the following examples will illustrate this point. Thus, Article 17 of the Prisoners of War Convention, concerning the giving of name, rank, and serial number on capture, those of Article 21, which deal with parole, and those of Article 24, providing standards for transit camps used in moving prisoners of war to the rear after initial capture, have no counterpart in the Civilians Convention. Article 33 of the Prisoners of War Convention, which prescribes the duties of retained medical personnel and chaplains who are not regarded as prisoners, deals with a situation that does not arise in connection with civilian internees. The Civilians Convention also has no need for the provisions of Article 40 of the Prisoners of War Convention, pertaining to the wearing of badges of rank and decorations, Articles 43 through 45, concerning the rank of prisoners of war, Article 60, as to advances of pay by rank, Articles 91 and 94, as to the effect of successful escape, or Articles 110 through 117, providing for the repatriation of certain categories of sick and wounded prisoners. In addition, a comparison of those

provisions of the two conventions that deal with labor, and those that deal with judicial proceedings, reveal substantial differences between the two, although they are similar in many respects.

(3) New or Modified Provisions

An exhaustive treatment of each provision of Section IV of the Civilians Convention which has no counterpart in the Prisoners of War Convention does not seem worthwhile. However, the more significant of them are described in succeeding paragraphs.

(a) General Provisions and Places of Internment

Article 79 provides that protected persons may not be interned except in accordance with Articles 41, 42, and 43 (which it will be recalled lay down applicable principles and prescribe the procedure to be followed when interning protected persons in belligerent territory), or in accordance with Articles 68 and 78 (which make similar provision for the internment of protected persons in occupied territory). The last paragraph of Article 81 requires the Detaining Power to provide for the support of those dependent on an internee if such dependents are without adequate means of support or are unable to earn a living. This provision is a duplication of the protection granted the dependents of internees in belligerent territory by the second paragraph of Article 39, but it is necessary to give the same protection to the dependents of internees in occupied territory, since, as will be recalled from the discussion of Article 78 above, the provisions

of that article grant the protection of Article 39 only to the dependents of protected persons subjected to assigned residence requiring them to leave their customary residence.

In addition to the common provisions of the first paragraph of Article 82 (which are found in the last paragraph of Article 22 of the Prisoners of War Convention) which require the grouping of internees according to nationality, language, and customs, the last two paragraphs of Article 82 require that parents and children be interned as a unit, housed in the same premises, and given the necessary separate accommodations and facilities required for a proper family life. In addition, that Article provides that internees are entitled to have any of their children who have been left at liberty without parental care interned with them. There are a number of additional provisions scattered through the remainder of the internment regulations that take special account of the needs of children and expectant and nursing mothers. Extra rations are authorized by Article 89, special medical care by Article 91, schools, playgrounds, and other educational facilities by Article 94, and special repatriation consideration by Article 132.

(b) Labor of Internees

The labor of internees is dealt with by Article 95. The first paragraph lays down the fundamental principle that internees may not be compelled to do any work. This, of course, is the same as the rule of Article 49 of the Prisoners of War Convention with respect to commissioned officers and

persons of equivalent status. The second paragraph of Article 95 does provide that internees may be required to perform the work required for the administration and maintenance of the internment camp, such as work in kitchens and other domestic tasks, and especially including tasks connected with air raid precautions. Furthermore, it is expressly provided that interned medical personnel may be compelled to work in their professional capacity on behalf of their fellow internees. In order to get the proper perspective on the rules as to compulsory labor of civilian internees and prisoners of war, it is necessary to recall that civilians who are not interned may be compelled to do certain kinds of work, as prescribed by Article 40 in belligerent territory,²⁰⁷ and as prescribed by Article 51 in occupied territory.²⁰⁸ The character of this compulsory labor is essentially the same as that prescribed by Article 50 of the Prisoners of War Convention as to enlisted personnel. The last paragraph of Article 95 specifies that working conditions, medical attention, workmen's compensation, wages, and hours, be in accordance with national legislation and existing practice, and not inferior to that prevailing in the same district. Similar provisions are found in Articles 40 and 51 for non-interned civilians, and all of these provisions are roughly equivalent to those of Articles 51 and 52 of the Prisoners of War Convention. However, the provisions of Articles 54 and 62 of the Prisoners of War

²⁰⁷See page 105, above.

²⁰⁸See page 119, above.

Convention, fixing the wages of prisoners of war, are quite different. Article 95 of the Civilians Convention provides that the wages to be paid those civilian workers who voluntarily accept employment shall be determined on an equitable basis by special agreement between the internees concerned, the Detaining Power, and any private employer that may be concerned. The Diplomatic Conference indicated that this special provision was inserted in order to take into account the fact that, inasmuch as civilian internees are divested of all normal financial responsibilities for themselves and their dependents while interned, they cannot be permitted to receive standard wages.²⁰⁹

(c) Personal Property and Financial Resources

As would be expected, the provisions of Articles 97 and 98 of the Civilians Convention, concerning the personal property and financial resources of internees, are substantially different from those of Articles 58 through 68 of the Prisoners of War Convention. Generally internees are entitled to retain articles of personal use, valuables, and documents of identity. Receipts must be given for monies, checks, bonds, and other negotiable items taken from them, and upon release any balance remaining to their credit in the individual accounts established for them under Article 98 must be returned in currency. While Article 97 is designed to protect internees against abuse by officials, the Diplomatic Conference indicated that its provisions were drafted to recognize the right of the Detaining

²⁰⁹IIA Final Record 839.

Power to enact enemy property legislation from which internees cannot be shielded simply because they are interned.²¹⁰ Article 98 provides that all internees be given a regular allowance by the Detaining Power for the purchase of certain morale sustaining items, and authorizes the receipt of such allowances as the Power to which they owe allegiance, the Protecting Power, charitable organizations, or their own families may provide. In addition, internees may receive such income on their property as the law of the Detaining Power may provide. A special account is required to be opened for them into which all such sums, and wages earned, are deposited. From this account, internees may draw in those amounts necessary for their personal requirements, in amounts approved by the Detaining Power.

(d) Administration and Discipline

In general, the provisions pertaining to administration and discipline, and the disciplinary sanctions which may be imposed upon civilian internees for breach of the rules and regulations promulgated to govern internment camps, are similar to those pertaining to prisoners of war. However, Article 100 of the Civilians Convention has no counterpart in the Prisoners of War Convention. Based on the experience of World War II, a provision was inserted in the Stockholm Draft, and approved with no alteration by the Diplomatic Conference, designed to prevent the excesses practiced by the Nazis in their operation of concentration camps. Article 100 requires that the

²¹⁰IIA Final Record 839.

disciplinary regime in places of internment be consistent with humanitarian principles, and expressly stipulates that internment regulations may not impose upon internees physical exertion dangerous to health or involving physical or moral victimization, proscribes tattooing or other identification by markings on the body, and singles out for special condemnation such practices as prolonged standing and roll calls, punishment drill, and the reduction of food rations.

Judicial proceedings for criminal offenses committed during internment, as distinguished from the mere infraction of internment camp regulations, are entirely different from the penal provisions of Articles 99 through 108 of the Prisoners of War Convention. The first paragraph of Article 117 of the Civilians Convention provides that the laws in force in the territory in which civilians are interned shall be applicable to those internees who commit offenses during internment. Thus, the penal laws of the Detaining Power are applicable to civilians interned in belligerent territory, while the penal laws of the Occupied State, as modified or promulgated by the Occupying Power in accordance with Articles 64 through 76 discussed above,²¹¹ are applicable to civilians interned in occupied territory. In addition, Article 126 makes the standards of penal procedure prescribed by Articles 71 through 78, which are normally applicable only in occupied territory, applicable by analogy to proceedings against civilian internees in belligerent territory.

²¹¹See page 130 through 154, above.

(e) Relations of Internees With The Exterior

The provisions of Articles 105 through 113, concerning the relations of internees with the exterior are for the most part identical with those prescribed for prisoners of war. However, the second paragraph of Article 108 of the Civilians Convention embodies a restriction on the quantity of relief shipments to civilian internees where required by military necessity that is not found in the Prisoners of War Convention. In addition, the last three articles under this heading in the Civilians Convention have no counterpart in the Prisoners of War Convention. Articles 114 and 115 require that civilian internees be given certain special privileges for the management of their property, including leave from the place of internment in urgent cases, and where the internee is a party to proceedings in any court, the Detaining Power must notify the court of his internment and take the necessary steps to prevent prejudice of his rights by reason of internment. Article 116 provides that internees must be allowed to receive visitors at regular intervals and be granted compassionate leave to visit their homes in urgent cases such as those involving the serious illness or death of relatives.

(f) Transfer of Internees

Provisions for the transfer of internees are generally similar to those concerning the transfer of prisoners of war. However, the first paragraph of Article 127 of the Civilians Convention varies from the Prisoners of War Convention

by prescribing that internees must as a general rule be transferred by rail or other means of transport, and, where in exceptional cases transfers are to be made on foot, they may not take place unless internees are in a fit state of health and will not be exposed to excessive fatigue.

(g) Matters Concerning Deaths of Internees

The provisions of Articles 129 and 130 which pertain to matters arising out of the death of internees are reasonably equivalent to those of Articles 120 and 121 of the Prisoners of War Convention. However, as the Diplomatic Conference pointed out, the internee is, in the legal sense, a much more complicated person than the soldier, and documents pertaining to his affairs have to conform to more formalities than those pertaining to the affairs of a prisoner of war, particularly where they have to be made effective in countries other than those in which they are drawn up. Accordingly the provisions of Article 129, and the preceding Article 113 as to wills, death certificates, and other documents, are designed to insure that subsequent legal transactions based thereon are in no way hampered.²¹²

(h) Release and Repatriation

A number of the provisions of the Prisoners of War Convention relating to the repatriation of sick and wounded prisoners have no counterpart in the Civilians Convention. However, the basic principle of the second paragraph of Article 109 of the Prisoners of War Convention as to continuing endeavors

²¹²IIA Final Record 841-842, 844.

throughout hostilities to repatriate sick and wounded prisoners, or to accommodate them in neutral countries, is echoed in the second paragraph of Article 132 of the Civilians Convention, which calls for such endeavors on behalf of sick and wounded internees, children, pregnant women, and mothers with infants and young children. While both Conventions call for the prompt release and repatriation of prisoners of war and internees upon the termination of hostilities, Article 134 of the Civilians Convention also calls for the return of internees to their last place of residence, and Article 135 provides that the Detaining Power shall pay the cost of returning internees to their place of residence, or the cost of completing any journey upon which they may have been embarked when taken into custody.

f. Section V - Information Bureaus and Central Agency (Articles 136-141)

This last section of Part III of the Convention consists of only six sections. The function of these agencies is to receive and transmit information as to protected persons in the hands of adverse Parties to the conflict, and where necessary to return valuables left behind by those who have been repatriated or released, or who have escaped or died. These provisions are for the most part identical with the provisions of Articles 122 through 124 of the Prisoners of War Convention. However, Articles 137 and 140 of the Civilians Convention do contain provisions not found in the Prisoners of War Convention for the withholding of information concerning protected persons where its transmission might be detrimental either to the person concerned or his relatives. It will

be recalled that similar precautions are inserted in Articles 35 and 43, concerning the transmission of the reasons for the refusal to permit certain persons to depart from belligerent territory at the outset of hostilities and as to the reasons for the internment of persons in belligerent territory.

5. Part IV - Execution of the Convention (Articles 142-159)

a. Scope and Arrangement of Part IV

With the exception of Articles 142, 143, and 154, the articles contained in Part IV are common to each of the four Geneva Conventions of 1949 For The Protection of War Victims. The first eight articles comprise Section I - General Provisions, and the last ten articles comprise Section II - Final Provisions. Those articles found in Section I concern the organization for control and supervision of the Convention, including sanctions for its non-application. These provisions are of considerable importance and are discussed in greater detail below. However, those articles found in Section II, for the most part, deal with such technical matters as the official languages in which the treaty is established, signature, ratification, effective date, and withdrawal or denunciation, and are generally similar to the provisions of this nature usually found at the end of most international treaties. Hence, with the exception of Article 154, concerning the relationship between this Convention and the Hague Regulations which article is discussed more fully below, no further consideration of Section II is required.

b. Status of the International Committee of the Red Cross and the Protecting Powers

Although the principle of freedom of action for accredited agents of the International Committee of the Red Cross and those of other relief or religious organizations, and for delegates of the Protecting Powers, is reiterated in a number of places and in connection with several special situations throughout the Convention, this principle is given general confirmation again in Articles 142 and 143. Thus, the Detaining Power must grant representatives of the International Committee of the Red Cross and other relief or religious organizations, subject to essential security measures, all facilities for visiting protected persons, distributing relief supplies to them from any source, and for assisting internees in organizing their leisure time. Similarly, the Detaining Power must permit representatives of the Protecting Powers, subject only to temporary restrictions for reasons of imperative military necessity, to go to all places where protected persons are, particularly places of internment, detention, and work, and to interview them without witnesses and with or without an interpreter. The experience of World War II, and the many obstacles placed in the way of the representatives of both the Red Cross and the Protecting Powers, makes it important that their authority be given express recognition by international agreement.²¹³

²¹³As to restrictions upon the activities of the Protecting Power based on military necessity, compare the discussion of Article 9, on page 74, above.

c. Penal Sanctions

As we noted at the outset of this paper, because the Hague Regulations and the Geneva Conventions contained no express provisions charging an individual, as distinct from the State, with criminal responsibility for breaches of the Law of War, it was urged by a minority that only States might be held responsible for violations of international law.²¹⁴ Although, as we have seen, the war crimes trials following World War II have made it abundantly clear that the individual soldier or civilian is himself criminally responsible for a violation of the Law of War, irrespective of any overall responsibility of his government, it was felt by many at the Diplomatic Conference that express provision for the imposition of penal sanctions upon individuals guilty of violations of the Convention should be inserted in it. Accordingly, by Article 146 each High Contracting Party agrees to enact such penal legislation as may be necessary to provide effective penal sanctions for the punishment of persons committing, or ordering committed, any of the "grave breaches" of the Convention as defined in Article 147, to search for such persons and try them or turn them over to any other High Contracting Party making out a prima facie case against such a person, and to take those measures necessary to suppress acts contrary to the Convention not constituting a "grave breach" of its provisions. Such trials must be conducted in accordance with rules of procedure not less favorable to the accused than those prescribed by Articles 105 through 108 of the Prisoners of War Convention for the

²¹⁴See page 6, above.

trial of prisoners of war. There is no substantial difference between these articles and the provisions of Articles 72 through 75 of the Civilians Convention, the former having been referred to, it may be presumed, in the interest of uniformity of procedure in cases involving the breach of any one of the four Geneva Conventions of 1949. "Grave breaches" of the Convention are defined by Article 147 as: (1) willful killing; (2) torture or inhuman treatment, including biological experiments; (3) willfully causing great suffering or serious injury to body or health; (4) unlawful deportation or transfer or unlawful confinement of a protected person; (5) compelling a protected person to serve in the forces of a hostile Power; (6) willfully depriving a protected person of the rights of fair and regular trial as prescribed in the Convention; (7) taking of hostages; and (8) extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. Article 148 expressly prohibits any High Contracting Party from absolving itself or any other High Contracting Party of any liability incurred by it or another High Contracting Party for any such "grave breach" of the Convention, and Article 149 sets up an inquiry procedure for the investigation of any alleged violation of the Convention.

The list of "grave breaches" in Article 147 is not an exhaustive list of those offenses against the Law of War which may give rise to trial as war crimes. For example, the following violations of the Hague Regulations would certainly be so triable - the use of poison, including poisoned and other types of forbidden weapons,

treacherous request for quarter, maltreatment of dead bodies, firing on undefended places without military significance, abuse of or firing on a flag of truce, use of civilian clothing by troops to conceal military character in battle, bombardment of hospitals or other privileged buildings, and pillage or purposeless destruction.²¹⁵ Various war crimes trials following World War II illustrate the prosecution as war crimes of such acts as the requiring of prisoners of war or civilians to perform prohibited labor,²¹⁶ killing spies or other persons who have committed hostile acts without trial,²¹⁷ denationalization of the inhabitants of occupied territories,²¹⁸ the invasion of the religious rights of the inhabitants of occupied territories,²¹⁹ and the violation of surrender terms.²²⁰

The American and British point of view is that all such offenses are triable as violations of the Law of War, and consequently there is no necessity to enact domestic legislation to provide effective penal sanctions against persons who commit such offenses. War crimes are within the jurisdiction of general courts-martial,²²¹ military commissions, provost courts, military government courts,

²¹⁵Par. 8.10, FM 27-10, proposed draft 1 March 1954.

²¹⁶United States v. Milch, 7 LRTWC 127 (1947); Nazi Conspiracy and Aggression, Opinion and Judgment, p. 72 et seq. (1947); United States v. Krupp et al, 10 LRTWC 69 (1948); United States v. Von Leeb et al, 12 LRTWC 1 (1948).

²¹⁷In re Sandrock et al, 1 LRTWC 35 (1945); In re Buck et al, 5 LRTWC 39 (1946); In re Rohde et al, 5 LRTWC 54 (1946).

²¹⁸United States v. Greifelt et al, 12 LRTWC 1 (1948).

²¹⁹In re Guehlko, 14 LRTWC 139 (1948); In re Goeth, 7 LRTWC 1 (1946).

²²⁰Johnson v. Eisentrager, 339 U.S. 763 (1950).

²²¹JCMJ, Art. 18.

and other military tribunals of the United States,²²² as well as other international tribunals. The Supreme Court of the United States, in In re Yamashita, said:²²³

"Instead, by Article (of War) 15 (Congress) had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.***"

"We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution."

With the exception of the taking of hostages, which was not prohibited until the adoption of the Civilians Convention,²²⁴ each of the "grave breaches" listed in Article 147 was in violation of the Law of War as it existed prior to 1949.²²⁵ Accordingly, it appears that the obligations imposed by Articles 146 through 148 of the Convention are merely declaratory of the obligations of belligerents under the customary Law of War to take measures for the punishment of war crimes committed by all persons, including members of the belligerent's and our own armed forces.²²⁶

²²²UCMJ, Art. 21.

²²³327 U.S. 1, 7, 16 (1946).

²²⁴United States v. List, 8 LRTWC 34 (1948). See the discussion as to hostages on page 97, above.

²²⁵Nazi Conspiracy and Aggression, Opinion and Judgment, pp. 62-63 (1947); United States v. Brandt et al, 1 TWC 1; United States v. Milch, 7 LRTWC 27 (1947); In re Wagner, 3 LRTWC 23 (1946); In re Rath et al, 15 LRTWC 122 (1948); United States v. Altstotter et al, 6 LRTWC 1 (1947); United States v. Krupp et al, 10 LRTWC 69 (1948); United States v. Krauch et al, 10 LRTWC 1 (1948).

²²⁶Par 8.12b, FM 27-10, proposed draft 1 March 1954.

d. Relationship of the Hague Regulations to the Civilians Convention

Article 154 provides that this Convention shall be "supplementary" to Sections II and III of the Hague Regulations. This wording was most carefully chosen by the Diplomatic Conference. In commenting upon this Article in Committee, it was said:²²⁷

"That wording did not attempt to define the respective fields of the Conventions, nor to establish a hierarchy; the Conventions remain in force on an equal footing. Certain points which had been merely touched upon in the Hague Convention had been dealt with more fully and defined more exactly in the Civilians Convention. In case of divergencies in the interpretation of the two texts, the difficulty should be settled according to recognized principles of law, in particular according to the rule that a later law superseded an earlier one."

Again, in reporting the proposed Article to the full Convention, it was said:²²⁸

"This wording is cautious in that it does not attempt to indicate any limitation between the Civilians Convention and the Hague Convention, neither does it seek to establish a hierarchy; any such attempt in a field as complex as this, would be a singularly dangerous undertaking."

As we have repeatedly noted throughout the foregoing chapter, the Civilians Convention expands, defines, and clarifies matters that are for the most part founded upon accepted principles of the Law of War. Frequently matters dealt with in great detail by the Civilians Convention are barely touched upon in the Hague Regulations. On the other hand, with the exception of Part II of the

²²⁷IIA Final Record 787.

²²⁸Ibid, 846.

Civilians Convention, those rules laid down in Section II of the Hague Regulations concerning the conduct of hostilities are not much affected by anything contained in the Civilians Convention. Similarly, the Civilians Convention is for the most part concerned with the protection of persons rather than property. Consequently a number of those provisions in Section III of the Hague Regulations concerning property rights deal with matters not considered by the Civilians Convention. However, in dealing with the responsibility of the Occupying Power for the supply of occupied territory, the Civilians Convention has somewhat modified the previous right of requisition as outlined by Article 52 of the Hague Regulations. Finally, the Civilians Convention contains a number of novel provisions on relief shipments which have no previous counterpart in the Law of War. Hence, the Hague Regulations must be regarded as remaining in force and as supplemental to the Civilians Convention, superseded by it only in those cases where the earlier Convention must give way to the latter.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

1. The United States Should Ratify the Civilians Convention

a. The Declaratory Nature of the Convention

The Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War is not merely an agreement between the various nations that may be signatory to it but derives its true force from the general consensus of the civilized nations of the world. Like the Hague Regulations which it supplements, the Civilians Convention is merely the formal and specific application of general principles already to be found in unwritten International Law. If the question is ever presented to a competent tribunal, it seems certain that, even if some of its detailed provisions are not, the great bulk of the Civilians Convention will be held to be declaratory of the laws and customs of war, binding on signatory and non-signatory Powers alike. Accordingly, if the Civilians Convention is no more than a codification of the Law of War with which the United States is already bound to comply, except perhaps certain relatively minor details, then the failure of the United States Senate to ratify the Convention promptly will only provide a basis for adverse propaganda.

b. The Reciprocal Nature of the Obligation

In answer to those who urge that the United States should not bind itself to the obligations contained in the Civilians Convention before it is assured that the other great Powers will do so, aside from the declaratory nature of the Convention,

there are three specific provisions in it which assure reciprocity of obligation. The first sentence of the second paragraph of Article 4 expressly provides that nationals of a State which is not bound by the Convention are not protected by it. The last paragraph of Article 2 provides that in case one of the Parties to the conflict is not a Party to the Convention, those Powers who are shall remain bound by it in their mutual relations, and should a Party not signatory to the Convention agree to accept and apply its provisions, each Party shall be so bound. Finally, the last paragraph of Article 158 declares that even if a Party to the Convention shall denounce it and withdraw, such denunciation shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.

c. The Importance of Detailed Rules and Regulations

It is with respect to the last preceding provision that ratification and acceptance of the Civilians Convention is most important. The need for a Civilians Convention has arisen from the inadequacy of the few and general provisions of the Hague Regulations to cope with new technical, economic, and political methods of total war that have for most practical purposes obliterated the distinction between belligerent and non-belligerent -- a distinction which was a fundamental premise when the Hague Regulations were drafted in 1907. The vagueness and generality of the Hague Regulations led to the most varied

and arbitrary interpretation of them during World War II, permitting circumvention and evasion of their prohibitions at every turn. The lawlessness and cruelties of the Axis practice of belligerent occupation have made it apparent that it is essential to supplement the Hague Regulations by the adoption of clear and concise rules of procedure which spell out in detail what shall constitute compliance with the laws of humanity and the dictates of public conscience. In the absence of the Civilians Convention, no uniform standard will be possible. Acceptance of the detailed rules and regulations laid down in that Convention will establish a firm basis for the punishment of breaches of its provisions as war crimes that will not be open to attack as victor's justice.

d. The Fundamental Soundness of the Convention

Finally, and without regard to what any other Power may decide with respect to ratification of the Civilians Convention, we must not lose sight of two fundamental facts, set out at the beginning of Chapter IV, above. First, the conduct of a war of bestiality by an enemy does not condone recourse to similar or even worse measures by the opponent. Secondly, war is not fought for the simple purpose of fighting but must have an ultimate objective of a political nature. While realism demands that decent nations engaged in war with an enemy whose entire philosophy is based upon treachery and deceit must be prepared to expect anything that might advance the hostile purpose, nevertheless the negation of fundamental human rights will ultimately result in social retribution. The objectives of the United States are not likely to be advanced by stooping to

courses of action which outrage civil populations. It is the privilege of the United States to set the example and lead the way. There is nothing in the standards prescribed by the Civilians Convention that exceeds those which have been exemplified by United States custom and practice in its conduct of hostilities and occupation, nor do those standards exceed those which this nation believes it has the right to demand of any belligerent to whom it may be opposed.

2. The Civilians Convention Has Made Changes in the Law of War

a. Safety Zones and the Protection of Civilian Hospitals

Although the provisions of the Civilians Convention bear the unmistakable impress of World War II, a number of its provisions have been derived from proposals advocated even prior to World War I. It was apparent even during World War I that the protection which International Law afforded civilian populations was wholly inadequate. With the arrival of the atomic age, the massive destructive radius of the hydrogen bomb, and the extreme vulnerability of the civilian population to attack, there can no longer be any question of the urgent need for the extension of protection to civilian hospitals and medical personnel similar to that afforded their military counterparts, the need to create hospital locality and security zones, and the need to adopt special measures for the protection of women and children. While a number of the provisions of Part II of the Civilians Convention are voluntary and permissive, in that further agreements between Parties to a conflict are

required to establish safety zones, one of the most important changes effected by the Civilians Convention is the extension of conventional safeguards to civilian hospitals and civilian medical personnel. It is confidently asserted that nothing in Part II of the Civilians Convention can be objected to on the ground that its observance will obstruct the efficient prosecution of the war.

b. The Effect of Axis Occupation Policy

It was not until World War II that the need for increased protection against the excesses of occupation authorities became so dramatically apparent. It may well be doubted if the drafters of the Hague Regulations envisaged a dictatorial regime so utterly contemptuous of human rights and modern concepts of legality as that of National-Socialist Germany. It was in this sphere that she became guilty of unprecedented violations of practically all the laws of belligerent occupation. She suspended the operation of local law, subjected private and public property to a planned policy of exploitation, deported millions of persons into Germany for forced labor, subjected the entire population of occupied territories to a systematic rule of violence, brutality, and terror, and carried on a carefully planned policy of extermination of certain parts of the population through periodic raids by special detachments of the German Army and the use of gas chambers and concentration camps. Inasmuch as the campaign of war crimes trials which followed World War II have established the unquestioned illegality of these Axis

policies of occupation independent of the existence of a Civilians Convention, Part III of the Convention is clearly declaratory of the unwritten Law of War or supplementary to the Hague Regulations. Nevertheless, in supplementing the Hague Regulations by expanding them, by making them more precise, or by defining or clarifying matters barely touched on by those Regulations, or omitted from them all together, Part III of the Civilians Convention has made changes in the rights and obligations of the occupying forces, the local population, and nationals of neutral countries in occupied territory.

c. The Protecting Power and Penal Sanctions

The Hague Regulations make no provision for a Protecting Power and provide only that States make payment of compensation for the violation of its provisions. Thus one of the most important changes effected by the Civilians Convention is the establishment of the Protecting Power, expressly charged with the responsibility of observing and reporting upon the implementation of the Convention. Coupled with this are those provisions of Articles 146 through 149 which expressly make breaches of the Convention punishable as war crimes.

d. The Protection of Certain Individuals

Another innovation of importance is the granting of protected status to a broad category of persons whose position under the Law of War has heretofore been clouded and insecure. Among these are stateless and denationalized persons, neutrals of countries with which the Occupying Power does not maintain normal diplomatic relations, and even refugees from the Occupying Power found in occupied territory. A limited

protected status, extending to the guarantee of a fair trial, is extended even to persons accused as spies, saboteurs, or illegal combattants. In view of the outrages incident to Axis occupation policy, it is to be expected that the Civilians Convention would place great emphasis upon certain fundamental protections against violation of the person, including the proscription of such acts of violence as extermination, murder, torture, corporal punishment, mutilation, experimentation, and the like. But in view of the split of authority as to the legality of killing hostages which arose out of certain World War II war crimes trials, and the minority assertion that only States might be held for violation of the Law of War, the absolute prohibition against the taking of hostages, and the clear imposition of individual responsibility for violation of the provisions of the Convention, rank high among the important changes effected by its enactment.

e. The Law-Making Authority of the Occupying Power

Although less dramatic, those provisions of the Civilians Convention which define the law-making authority of the Occupying Power in occupied territory, and secure certain judicial safeguards to an accused therein, are most significant. Although Article 64 merely restates with greater precision certain accepted principles and limitations already imposed by the Hague Regulations, the detailed provisions which follow in Articles 65 through 76 spell out certain standards and procedures which assure an accused that measure of "due process" which have traditionally been considered essential to justice. It is worth noting that none of them are novel to United States

practice and procedure in its military courts except the right of the Protecting Power to hold a watching brief. It is agreed that Article 68, which places certain limitations upon the power of the Occupying Power to impose the death penalty on protected persons, as written goes ^{to} far in its attempt to preserve the law of the Occupied State. However, as modified by the reservations of the United States and other Powers friendly to this country, that article is a workable solution to a most difficult problem.

f. The Supply of Occupied Territory

The provisions of Articles 55 through 58, which impose a positive duty upon the Occupying Power to make provision for adequate food, medical supplies and services, and other needs of the civil population in occupied territory, and the related provisions of Articles 59 through 63, which require the Occupying Power to agree to and facilitate relief schemes from abroad for the population of occupied territory, are certainly the most startling innovations in the law of belligerent occupation made by the Civilians Convention. Certainly they constitute a most significant modification of the prior right of the Occupying Power to requisition the resources of occupied territory to support his war effort. Despite this, in the light of the United States traditional policy of war relief and post-war rehabilitation of war-ravaged areas, they represent a practical acceptance of the necessity of preventing the bankruptcy and destitution of conquered peoples. Whether these provisions will prove to ^{be} a great logistic burden in the event of a future all-out war of self-preservation remains to be seen. It is

certain that no nation would observe them at the expense of its own security.

g. Internment Regulations

The bulk of the Civilians Convention consists of regulations to govern the treatment of internees. Since, with a few exceptions, these provisions are derived from the Prisoners of War Convention, and they have been more or less successfully applied to civilian internees in the past, the most important change effected by them to be noted is that for the first time, and particularly in occupied territory, there is in existence a detailed set of rules and regulations to govern civilians who must be interned in the interest of the security of the State or Occupying Power.

h. Compulsory Labor

Conventional restrictions upon the use of captured enemy personnel as a labor source are usually the most criticized feature of the Geneva Conventions by military commanders. The Civilians Convention does little to change the basis of such criticism, although it does liberalize somewhat the provisions of the Hague Regulations on the subject insofar as occupied territory is concerned. Article 40 permits aliens in belligerent territory to be compelled to work to the same extent as nationals of the belligerent State are so compelled, except that enemy aliens may not be compelled to work on activities directly related to the conduct of military operations. Article 51 provides that protected persons in occupied territory may not be compelled to work outside occupied territory, may not be required to undertake work connected with

military operations, and can be compelled to work only to supply the needs of the Army of Occupation, for public utility services, or for the feeding, sheltering, clothing, transporting, or health of the civil population of occupied territory. Internees may not be compelled to work at all. Whatever the merits of such criticism may be, it must be emphasized that the Civilians Convention does not create the restriction, but merely carries it forward from the Hague Regulations in a slightly diluted form.

3. There Should be Greater Participation by the Military in the Drafting of Treaties that Codify the Law of War

A review of the legislative history of all the major law-making treaties which codify the Law of War reveals the major -- almost exclusive -- role played by the International Committee of the Red Cross in their development. Without exception the preliminary drafts of each of these treaties has been developed by committees of experts selected by the various National Red Cross Societies, finally approved at an International Convention of the Red Cross, and presented to a Diplomatic Convention, usually in Geneva, Switzerland. Examination of the Final Record of the Diplomatic Conference which adopted the 1949 Geneva Conventions reveals the sincere and continuous efforts of the diplomats to prevent the adoption of unrealistic provisions that might hamper the prosecution of the war effort, or provide a particular protected person with a shield from the consequences of activities hostile to the security of the State or Occupying Power. But there is little evidence that at any stage in their development the advice and assistance of military

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advisors has been sought or offered, although frequently such advice would undoubtedly serve to provide practical solutions for those operating problems which the military commander who must operate under them would be best equipped to provide. It would seem infinitely better to increase the military technical advisory participation in the preparation of such treaties than to wait until they are adopted to develop an interpretation of them that conforms with the realities of war.

ANNEX I

TOKYO DRAFT

Draft International Convention Concerning
The Condition and The Protection of Civilians
of Enemy Nationality In The Territory of a Belligerent
or in a Territory Occupied By It

Chapter I - Qualification of Enemy Civilian (Enemy Alien)

Art. 1 - Enemy civilians in the sense of the present Convention are persons fulfilling the two following conditions:

- (a) That of not belonging to the land, maritime or air armed forces of the belligerents, as defined by international law, and in particular by Articles 1, 2, and 3 of the Regulations attached to the Fourth Hague Convention, of October 18, 1907, concerning the Laws and Customs of War on Land;
- (b) That of being nationals of an enemy country in the territory of a belligerent, or in a territory occupied by the latter.

Chapter II - Enemy Civilians in the Territory of a Belligerent

Section I - General Provisions

Permission to Leave

Art. 2 - Subject to the provisions of Article 4, enemy civilians who may desire to leave the territory at the outset of military operations shall be granted, as rapidly as possible, the necessary authorizations, as well as all facilities compatible with such operations.

They will have the right to provide themselves with the necessary funds for their journey and to take with them at least their personal effects.

Administrative Evacuation

Art. 3 - In the event of the departure of civilians being administratively organized, they shall be conducted to the frontier of their country or of the nearest neutral country.

These repatriations shall be effected with due regard to all humanitarian considerations.

The manner of such repatriations may form the subject of special agreements between belligerents.

Detention of Civilians

Art. 4 - Only civilians falling within the following categories may be held:

- (a) Those who are eligible for immediate mobilization or mobilization within a year, under the laws of their country of origin or of the country of residence;
- (b) Those whose departure may reasonably be opposed on grounds involving the security of the Detaining Power.

In either case, appeal to the Protecting Power shall always be admitted. This Power shall have the right to demand that an inquiry be opened and the result communicated to it within three months of its request.

Detainees

Art. 5 - Those who are in preventive imprisonment or condemned to a sentence depriving them of liberty shall, on their liberation, benefit by the provisions of the present Convention.

The fact that they belong to an enemy State shall not increase the severity of the regime to which they are subjected.

Treatment of Civilians

Art. 6 - Enemy aliens who have remained in the territory, as those who have been held in application of Article 4, shall receive the treatment to which aliens are ordinarily entitled, except for measures of control or security which may be ordered, and subject to the provisions of Section III.

With those reservations, and in so far as military operations permit, they shall have the possibility of carrying on their occupations.

Art. 7 - Subject to the measures applied to the population in general, enemy civilians shall have the possibility of giving news of a strictly private character to next of kin, and of receiving such news.

With the same reservation they shall also have the possibility of receiving relief.

Recognized Relief Societies

Art. 8 - Enemy civilians shall have every facility for application to duly recognized Relief Societies, whose object is to act as intermediaries in welfare activities.

These Societies shall receive, for this purpose, all facilities from the authorities, within the limits compatible with military necessities.

Protection

Art. 9 - Enemy civilians shall be protected against measures of violence, insults and public curiosity.

Prohibitions

Art. 10 - Measures of reprisal directed against them are prohibited.

Art. 11 - The taking of hostages is forbidden.

Section II - Enemy Civilians Brought Into The Territory of a Belligerent

Newcomers

Art. 12 - Enemy civilians who for any reason may be brought into the territory of a belligerent during hostilities shall benefit by the same guarantees as those who were in the territory at the outset of military operations.

Section III - Compulsory Residence and Internment

General Principles

Art. 13 - Should a belligerent country judge the measures of control or security mentioned in Article 6 as inadequate, it may have recourse to compulsory residence or internment, in conformity with the provisions of the present Section.

Confinement

Art. 14 - As a general rule, the compulsory residence of enemy civilians in a specified district shall be preferred to their internment. In particular, those who are established in the territory of the belligerent shall, subject to the security of the State, be thus restricted.

Internment

Art. 15 - The internment of enemy civilians in fenced-in camps may only be ordered in one of the following cases:

- (a) Where civilians eligible for mobilization under the conditions set forth in Article 4(a) of the present Convention are concerned;
- (b) Where the security of the Detaining Power is involved;

exterior, subject to the measures applied to population of the occupying Power, in general. With the same reservation enemy civilians shall have the possibility of receiving relief.

- (d) Enemy civilians shall also benefit by the provisions of Article 8 of the present Convention.

Chapter IV - (no title)

Section I - Execution of the Convention

Application and Execution

Art. 20 - The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances. In the event that, in time of war, one of the belligerents should not be a party to the Convention, its provisions shall nevertheless remain obligatory between the belligerent parties thereto.

Art. 21 - The text of the present Convention and of the special Conventions foreseen in Article 3 shall be posted up in all civilian internment centers and shall be communicated, at their request, to those who are unable to consult it.

Art. 22 - The High Contracting Powers shall exchange, through the intermediary of the Swiss Federal Council, the official translations of the present Convention, as well as the laws and regulations which they may be called upon to adopt to ensure its application.

Section II - Organization of Control

Protecting Power, Delegates

Art. 23 - The High Contracting Parties recognize that the full execution of the present Convention implies the cooperation of Protecting Powers; they declare themselves ready to accept the good offices of those Powers.

To this end, the Protecting Powers may nominate delegates, apart from their diplomatic staff, among their own nationals or among the nationals of other neutral Powers. Those delegates shall be subject to the agreement of the belligerent to which their mission accredits them.

The representatives of the Protecting Power or its accepted delegates shall be authorized to visit all places of civilian internment, without exception. They shall have access to all buildings occupied by Civilian Internees and be allowed to converse with them, as a general rule without witnesses, personally or by the intermediary of interpreters.

- (c) Where the situation of the enemy civilians renders it necessary.

Separate Camps and Health Conditions

Art. 16 - Internment camps for enemy civilians shall be separate from internment camps for prisoners of war.

These camps cannot be set up in unhealthy districts, nor where the climate would be harmful to the internees' health.

Application of POW Convention

Art. 17 - Furthermore, the Convention of July 27, 1929, concerning the treatment of Prisoners of War is by analogy applicable to Civilian Internees.

The treatment of Civilian Internees shall in no case be inferior to that laid down in the said Convention.

Chapter III - Enemy Civilians in Territory Occupied by a Belligerent

Observation of the Hague Regulations

Art. 18 - The High Contracting Parties undertake to observe, as regards the condition and protection of enemy civilians in territory occupied by a belligerent, the provisions of Section III of the Regulations annexed to the Fourth Hague Convention of 1907.

Additional Provisions

Art. 19 - The High Contracting Parties further undertake to observe the following provisions:

- (a) In the event of it appearing, in an exceptional case, indispensable for an occupying Power to take hostages, the latter shall always be treated humanely. Under no pretext shall they be put to death or submitted to corporal punishments;
- (b) Deportations outside the territory of the occupied State are forbidden, unless they are evacuations intended, on account of the extension of military operations, to ensure the security of the inhabitants;
- (c) Enemy civilians shall have the possibility of giving news of a strictly private character to next of kin in the interior of occupied territory and of receiving such news. The same possibility shall be granted them for correspondence with the

The belligerents shall facilitate to the greatest possible extent the task of the representatives or of the recognized delegates of the Protecting Power. The military authorities shall be informed of their visits.

The belligerents may agree between themselves to allow persons of the same nationality as that of the Civilian Internees to participate in the journeys of inspection.

Interpretation of the Convention, Conferences

Art. 24 - In case of disagreement between belligerents concerning the application of the provisions of the present Convention, the Protecting Powers shall, as far as possible, exercise their good offices with a view to settling the difference.

To this end, each of the Protecting Powers, may in particular, propose to the belligerents concerned a meeting of their representatives, possibly on properly selected neutral territory. The belligerents shall be under the obligation to take action on the proposals made to them to this effect. The Protecting Power may, if judged desirable, submit to the approval of the Powers concerned the name of a person belonging to a neutral Power, or of a personality delegated by the International Committee of the Red Cross, who shall be called upon to participate in this meeting.

International Committee of the Red Cross

Art. 25 - The above provisions do not constitute an obstacle to the humanitarian activity which the International Committee of the Red Cross may exercise for the protection of enemy civilians, with the approval of the belligerents concerned.

Section III - Final Provisions

(The Final Provisions of the Tokyo Draft, Art. 26-33, deal with the signing, ratification, and denunciation of the Convention. They are similar to those included at the end of all International Treaties.)

ANNEX II

Extract from the Hague Regulations Annexed To
The IVth Hague Convention of October 18, 1907
Respecting the Laws and Customs of War on Land,
36 Stat. 2277, l.c. 2306-2309.

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Section III - Military Authority over the Territory of the
Hostile State.

Article 42

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Article 44

A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

Article 45

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Article 46

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Article 47

Pillage is formally forbidden.

Article 48

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Article 49

If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Article 50

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Article 51

No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors. (2307)

Article 52

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Article 53

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and,

generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 54

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made. (2308)

Article 55

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of those properties, and administer them in accordance with the rules of usufruct.

Article 56

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings. (2309)