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### Understanding War Crimes Trials

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#### Highlights-

- War crimes trials come in a few “varieties” or modalities, sometimes depending upon the circumstances and incidents and sometimes depending upon the political influences and timing.
- This article discusses historical precedent and aims to clarify the process of such trials.

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**Abstract:** War crimes trials come in a few “varieties” or modalities, sometimes depending upon the circumstances and incidents and sometimes depending upon the political influences and timing. Generally, war crimes are prosecuted either as 1) court martials (usually when committed by a member of the U.S. military, in the case of violations or offenses committed by U.S. armed forces members), 2) military commissions (established by military authority), 3) international tribunals (usually established by a victorious international coalition or alliance), or 4) an international court (usually established by an international body, such as the United Nations or by some specific treaty designed to do so). Each will be discussed here, along with some of the elements of offenses, defenses, and legal procedures.

**Keywords:** *War Crimes; Trials; Tribunals*

#### Introduction

War crimes trials come in a few “varieties” or modalities, sometimes depending upon the circumstances and incidents and sometimes depending upon the political influences and timing. Generally, war crimes are prosecuted either as 1) court martials (usually when committed by a member of the U.S. military, in the case of violations or offenses committed by U.S. armed forces members), 2) military commissions (established by military authority), 3) international tribunals (usually established by a victorious international coalition or alliance), or 4) an international court (usually established by an international body, such as the United Nations or by some specific treaty designed to do so). Each will be discussed here, along with some of the elements of offenses, defenses, and legal procedures.

The term *war crime* is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the *law of war* is a war crime. *The Laws of War* are derived from two principal sources: 1) *Lawmaking treaties or conventions*, such as **The Hague** and **Geneva Conventions** and 2) *Custom* – portions of the law of war which have not been incorporated into any treaty or convention, to which the United States is a party, but is a body of unwritten or customary law which is firmly established by the custom of nations and well defined by recognized authorities on international law.<sup>1</sup>

**The Geneva Conventions of 1949** spell out the “customary law of war.” In the case of armed conflict, not of an international character, occurring in the territory of one of the High Contracting Parties<sup>2</sup>, each party to the conflict shall be bound to apply as a minimum the following provisions: Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances, be treated humanely, without any adverse distinction found in race, color, religion or faith, sex, birth or wealth, or any other similar criteria.<sup>3</sup>

<sup>1</sup> **FM 19-20 Law Enforcement Investigations, U.S. Army**, (November 1985), p. 255.

<sup>2</sup> *High Contracting Parties* are representatives of states who have signed or ratified a treaty, regardless of where the treaty-making power resides (e.g. in a head of state, a senate, or a representative body), i.e. this is a question determinable by the constitutional law of the particular contracting state concerned. Other nations are entitled only to demand from those

The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- Violence to life and person-in particular murder of all kinds, mutilation, cruel treatment and torture.
- Taking of hostages.
- Outrages upon personal dignity-in particular, humiliating and degrading treatment.
- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by civilized peoples.
- The wounded and sick shall be collected and cared for.<sup>4</sup>

A violation of the Law of Armed Conflict (LOAC) is an act or omission that contravenes a rule of international law applicable to the conduct of hostilities or the protection of war victims. Depending on the context, violations of the law of neutrality,

with whom they contract a *de facto* capacity to bind the society that they represent. A *High Contracting Party* is held to its humanitarian obligations even if the other party to the conflict is not bound by the Geneva Conventions or is not respecting them.

<sup>3</sup> **FM 19-20 Law Enforcement Investigations, U.S. Army**, (April 1977), pp. 531-532.

<sup>4</sup> *Ibid.*

jus ad bellum, or occupation law may also be considered to be violations of LOAC.<sup>5</sup>

Each State Party to the **1949 Geneva Conventions** is obligated “to respect and to ensure respect” for the Conventions “in all circumstances” (**Common Article 1 of GWS, GWS Sea, GPW and GC**). Although this provision does not reflect an obligation to ensure implementation of the conventions by other States or parties to a conflict, the United States, as a matter of policy, often seeks to promote adherence to LOAC by others. And, a State is responsible for ensuring that its armed forces and others acting on its behalf comply with LOAC (**Hague IV art. 3; consider AP I art. 91**).<sup>6</sup>

The distinction between war and violent outlawry lies in the political nature of the decision, the undertaking by the state to wage war using its citizens and public funds. Telford Taylor, the American deputy prosecutor at the International Military Tribunal at Nuremberg, explained the distinction:

*War consist largely of acts that would be criminal if performed in time of peace – killing, wounding, kidnapping, destroying or carrying off other peoples’ property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors.*

*But the area of immunity is not unlimited, and its boundaries are marked by the laws of war. Unless the conduct in question fall within those boundaries, it does not lose the criminal character it would have*

*should it occur in peaceful circumstances. In a literal sense, therefore, the expression “war crime” is a misnomer, for it means an act that remains criminal even though committed in the course of war, because it lies outside the area of immunity prescribed by the laws of war.*<sup>7</sup>

### Investigation of War Crimes

War crimes are serious violations of LOAC that are punishable by criminal sanctions. The definition of “war crimes” often depends on the legal purpose at issue, and different definitions of “war crimes” are used. Under the **Geneva Conventions**, States have a responsibility to search for and prosecute those alleged to have committed “grave breaches,” of the Conventions. In addition, the United States interprets the penal sanction provisions of the **Geneva Conventions** (GC Arts. 146 and 147) in accordance with its longstanding practice. In order for commanders to exercise appropriate command supervision, prompt reporting and investigation of alleged war crimes and other LOAC violations are essential. These other LOAC violations may not necessarily merit characterization as “war crimes,” but the conduct may still be subject to criminal prosecution under U.S. law. In addition to obligations with respect to grave breaches, the United States is responsible for taking all measures necessary to suppress other violations of the **Geneva Conventions** (e.g., GC Art. 146).<sup>8</sup>

International law authorizes an injured State to seek redress for violations of LOAC against it (**Hague IV art. 3**). States are not limited solely to judicial redress and

<sup>5</sup> FM 6-27/MCTP 11-10C, **The Commander’s Handbook on the Law of Land Warfare** (07 August 2019).

<sup>6</sup> Ibid.

<sup>7</sup> Ryan, Allan A. **Yamashita’s Ghost: War Crimes, MacArthur’s Justice, and Command Accountability**. University Press of Kansas; Lawrence, KS: 2012. p. 1

<sup>8</sup> Ibid.

may avail themselves of the full panoply of enforcement mechanisms, including reprisals, reparation payments, diplomatic negotiations, arbitration, and voluntarily constituted claims commissions. Individuals may, in certain circumstances, also be prosecuted for LOAC violations.<sup>9</sup>

The investigation of many types of war crimes, either committed by the enemy against U.S. personnel or by U.S. personnel against the enemy, may be conducted by criminal investigators as one of several investigative resources available to the military commander. The conduct of war crimes investigations requires close coordination with the office of the staff judge advocate, who is responsible to the commander for the administration of war crime matters, and with intelligence, counter-intelligence, and investigative agencies of both the United States and of the host country.<sup>10</sup>

DOD Directive 2311.01E requires all military and U.S. civilian employees, contractors, and subcontractors assigned to or accompanying the Armed Forces to report LOAC violations (“reportable incidents”) through their chain of command (contractors must report reportable incidents to the commander of the unit they are accompanying or the installation to which they are assigned or to the Combatant Commander). Such reports may also be made through other channels, such as the military police, a judge advocate, or an inspector general. A report to these other entities, however, must be forwarded to the recipient’s chain of command. A commander who obtains information about a

reportable incident must immediately report the incident through the applicable operational chain of command. Department of Defense policy requires higher authorities receiving an initial report of any reportable incident to submit the report through command channels to the applicable combatant commander by the most expeditious means available.<sup>11</sup>

Hopefully, the individual having knowledge of the commission of a war crime will report the matter to his unit commander. But when s/he does not feel free to do so, s/he may report the matter to Military Police (MP), the provost marshal (PM), U.S. Army Criminal Investigations Command (CID), staff judge advocate (JAG), inspector general (IG) or chaplain. Some individuals may report this information through other channels, such as news media, their congressional representative, or other high level persons or agencies. Immediate response by the criminal investigator to an allegation of the commission of a war crime is essential to the conduct of the investigation and to the best interest of command discipline.<sup>12</sup>

U.S. Army CID personnel [and other military criminal investigators, e.g. OSI, NCIS, and IG] conducting war crimes investigations will establish a procedure for reporting to the USACIDC HQ [or their respective agency or command headquarters]. Because there is likely to be a language barrier, it is important that an investigative team have experienced, reliable and competent interpreters [and translators] when they are required. Interpreters must be able to convey the

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<sup>9</sup> Ibid.

<sup>10</sup> **FM 19-20 Law Enforcement Investigations, U.S. Army**, (April 1977), p. 530.

<sup>11</sup> **FM 6-27/MCTP 11-10C, The Commander’s Handbook on the Law of Land Warfare** (07 August 2019).

<sup>12</sup> Ibid.

attitude and personality of the investigators. It is desirable for a portion of the investigating team to have language fluency, then the investigators will be able to convey their own ideas and thoughts much more clearly to the interviewees. An alternative, if language-trained investigators are unavailable, is the use of U.S. interpreters, sometimes available from Military Intelligence (MI) or the supporting unit. Another alternative, but the least effective solution, is the use of a local national.<sup>13</sup>

It is also Department of Defense (DOD) Policy to maintain effective working relationships with the Department of Justice (DOJ) in the investigation and prosecution of crimes involving DOD programs, operations and personnel, including the investigation of some alleged violations of LOAC.<sup>14</sup>

#### **Treaty Rules on Civil and Criminal Liability: Status of Forces Agreements**

Status of Forces Agreement (SOFA) generally cover both civil and criminal jurisdiction involving U.S. personnel and dependents. Traditionally, if injury or death to persons or property damage are caused by the U.S. or by military or civilian personnel while they are engaged in the performance of their official duties, the incident is handled (investigated and adjudicated) by the host country. The host country will pay the injured or damaged person(s) and the U.S. will reimburse the host country for 75% of amount paid on the claim. This has been to prevent U.S. personnel from being taken before a foreign court and forced to pay for damages caused by their official actions.

But, when the damage is caused by actions outside of official duties, the injured person may either 1) bring a civil suit in the

foreign court against the U.S. person who caused the injury or 2) file an administrative claim against the U.S., rather than suing the U.S. person. In the latter case, the U.S. will investigate and adjudicate the claim and pay the injured person.

Armed forces serving in foreign countries (sovereign nation states) usually do so under a Status of Forces Agreement (SOFA), which grants that guest nation state the right to exercise authority over criminal acts committed within the territory of the host nation state by members of its forces. This is a modification of the traditional international norm that each state has exclusive jurisdiction within its own territory. The SOFA provides that when an act violates the law of *only one* nation state, that state has exclusive jurisdiction, i.e. the sole authority to punish the actor. When the act violates the law of *both* states, a formula is set out to determine which state has *primary jurisdiction* (first right to punish) and which has *secondary jurisdiction* (the right to punish if primary jurisdiction is waived).

SOFAs usually provide that a nation state with primary jurisdiction may consider requests by a nation state with secondary jurisdiction to allow it to punish the offender, a waiver of jurisdiction by the primary jurisdiction. Further, the sending (guest) nation state is given the initial right to determine whether an act occurred within the performance of the offender's official duties, which often determines which nation state has primary jurisdiction. The SOFA provides that the sending (guest) nation state will have primary jurisdiction for criminal offenses committed by sending (guest) personnel, "while in the performance of official duties," giving the guest the right to punish the offense rather than the host. It has

<sup>13</sup> FM 19-20 Law Enforcement Investigations, U.S.

Army, (April 1977), p. 533.

<sup>14</sup> Ibid.

consistently been U.S. policy to request the host country to waive its jurisdiction, while the U.S. rarely waives such right. Finally, the SOFA enumerates or specifies basic rights to guarantee a fair and just trial of accused persons.

Sometimes a dependent of a service member is involved. Dependents traditionally have had no protection under treaty rules and have been subject to the authority and jurisdiction of the foreign courts for their actions that cause civil injury or damage and criminal offenses. In *Reid v. Covert*,<sup>15</sup> the U.S. Supreme Court said, “In the light of these as well as other constitutional provisions, and the historical background in which they were formed, military trial of civilians is inconsistent with both the ‘letter and spirit of the constitution.’” The Court also agreed with *Madsen v. Kinsella*,<sup>16</sup> and Colonel Winthrop (an expert on military jurisdiction) that “a statute cannot be framed by which a civilian can be lawfully be made amenable to the military jurisdiction in time of peace.” However, the right to try civilians in occupied territory by military courts was not affected.

### The Laws of War

Centuries of warfare between various nations have resulted in “unwritten laws and rules” governing the conduct of war, which are known as the “*Customary Law of War*.” The purpose of such “customary laws and rules” is to allow military forces to accomplish its mission without causing unnecessary suffering or destruction, i.e. to limit suffering and destruction to military targets and provide for humane treatment for person who are “taken out of the fight.”

Over the past 100-150 years, however, nation states have also adopted specific rules concerning the treatment of persons who fall into the hands of military

forces. Again, such rules are for the purpose of preventing unnecessary destruction or suffering and to provide captured person with fundamental human rights, regardless of their prior conduct or beliefs. President Abraham Lincoln, for example, issued General Order 100, during the Civil War, which provided for humane treatment of captured enemy soldiers. This order was written by Dr. Francis Lieber and became known as the *Lieber Code*.

Subsequently, *The Hague Conventions of 1907* and *The Geneva Conventions of 1949* represent international efforts to reduce certain basic concepts of the *law of war* to written form. These Conventions do not replace the customary (unwritten) rules of war, but supplement and reinforce them as a body of law. The United States has signed both The Hague and Geneva Conventions. **The Hague Conventions** specifies:

- 1) prohibitions on targets (the kinds of targets that may be attacked and the weapons that may be used);
- 2) illegal tricks and methods (e.g. improperly identifying buildings as hospitals and protected areas and using them for military purposes, pretending to surrender to facilitate an attack, and other tactics that destroy the basis for restoring peace short of the complete destruction of one side or the other);
- 3) prohibitions on weapons (arms, materials, or projectiles calculated to cause unnecessary suffering);
- 4) enemy populations – two general classes under the law of land warfare: a) protected persons and b) unprotected persons.

*Protected persons* include prisoners of war, chaplains, medical personnel, and

<sup>15</sup> *Reid v. Covert*, 354 U.S. 1, 22 (1957).

<sup>16</sup> *Madsen v. Kinsella*, 343 U.S. 341 (1952).

civilians who abstain from the fighting (non-combatant civilians, whether the population of the enemy state, an ally, or a state in whose borders fighting takes place, but does not have forces engaged in the conflict).

These include: *prisoners of war (combatants)* and *prisoners of war (non-combatants)*.

*Prisoners of war (combatants)* are members of armed forces, regular militia or volunteer units, lawful irregular partisan or guerilla units, and levee en masse (inhabitants of non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading force, without having had time to form themselves into regular units and carry arms openly and respect the laws of war).

*Prisoners of war (non-combatants)* are individuals who accompany the armed forces without being members thereof, such as war correspondents, supply contractors, members of labor units, technical representatives, and units responsible for the welfare of the armed forces.

**Unprotected persons** include spies and guerillas or other persons who commit hostile acts or engage in fighting without complying with the conditions prescribed by the law of war for recognition as legally organized resistance units.

**The Geneva Conventions** specifies or provides for five areas:

- 1) *Humane treatment of non-combatants.* The customary law of war and the **Geneva Conventions of 1949** establish rules governing treatment of noncombatants, prisoners of war, sick and wounded, and other detained civilians. These rules are embodied in the general, simple principle of “*treat all prisoners of war, civilians, and other detained personnel humanely.*”
- 2) *Humane treatment of Prisoners of War.* No one may be harmed or killed who has fallen into the hands of an enemy. This applies to “*spies,*” but all captured persons are entitled to be treated as prisoners of war until their actual status is determined. (Combat soldiers do not determine the status of captured persons; this classification is determined at collection points).
- 3) *Humane treatment of Civilians.* Under **Article 27 of the Geneva Convention (Relative to the Protection of Civilian Persons in time of war)**, the civilian population of a country in conflict is entitled to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They must be protected from acts or threats of violence and against insults and public curiosity. Women should especially be protected against attacks upon their honor, rape, prostitution, and other forms of sexual assault. U.S. soldiers may be punished under the **Uniform Code of Military Justice (UCMJ)** for such crimes (rape may carry a death penalty) and pillaging under **UCMJ Article 103.**
- 4) *Illegal means or methods of interrogation (prohibited).* Prisoners of war are in protective custody and cannot be harmed. They may not be denied food or medical treatment. They may not be tortured for information.
- 5) *Criminal violations of the Law of War.* Acts which violate the law of war may result in prosecution for wars crimes, including, but not limited to murder, torture, inhumane treatment, improper destruction of property, poisoning wells or streams, using poisoned or otherwise forbidden arms or ammunition, pretending to surrender as a trick, violation of surrender terms, mutilation of dead bodies, abuse of or firing on a

flag of truce, misuse of the Red Cross emblem, use of civilian clothing to conceal military identity during battle, improper use of privileged buildings for military purposes, firing on locations which are undefended and without military significance (such as churches and hospitals), pillaging, looting, or purposeless burning of homes, taking and keeping a captured enemy soldier's personal property, compelling civilians to perform prohibited labor (e.g. carrying mortars), compelling prisoners of war to perform prohibited labor (e.g. removing or digging defensive positions), killing spies or other captured persons who have committed hostile acts without a proper trial, using POWs as a "point man" on patrols, etc. (every violation of the law of war is technically a war crime).

### **Responsibility of the Commander, Criminal Orders, and Individual Responsibility**

Those personnel who commit a war crime may be held individually responsible. In addition to the individual, others may be held responsible, such as 1) the commander, 2) those who aided and abetted an offense, 3) those who conspired with them to commit the crime, and 4) even those who conspire to commit a war crime that does not occur. Other theories of criminal responsibility under international law include 1) joint criminal enterprise responsibility, 2) command responsibility, and 3) responsibility for planning, instigating, or ordering the crime. Under the UCMJ, a person who aids, abets, counsels, commands, or procures the commission of

an offense may be punishable (UCMJ, Art. 77).<sup>17</sup>

Any person who commits an act that constitutes a crime under international law, who aids, abets, or counsels such a crime, or orders the commission of, conspires to commit, or attempts to commit such a crime is responsible for the crime and is liable to punishment. Even if the act is not punishable as a crime in the person's own State, the individual is not relieved from criminal responsibility under international law. A person acting pursuant to an order of their government or of a superior is not relieved from responsibility under international law for acts that constitute a crime under international law, provided it was possible in fact for the person to make a moral choice.<sup>18</sup>

Under certain circumstances the legal responsibility for the commission of war crimes may be placed on a military commander. However, the person who actually commits a crime is subject to punishment, even acting pursuant to the orders of a superior. Acting under superior orders is not a defense to criminal charges when the order is clearly a criminal act. An order to commit a criminal act is a criminal order and there is a duty to disobey it.

Commanders have a duty to maintain order and discipline within their command and to ensure compliance with applicable law by those under their command or control. Commanders, therefore, may be liable for the criminal acts of their subordinates or other persons subject to their control, even if the commander did not directly participate in the underlying offenses. In order for the commander to be liable, however, the commander's personal dereliction must have contributed to or failed to prevent the offense. The

<sup>17</sup> FM 6-27/MCTP 11-10C, *The Commander's Handbook on the Law of Land Warfare* (07 August 2019).

<sup>18</sup> *Ibid.*

commander is required to take necessary and reasonable measures to ensure that their subordinates do not commit violations of LOAC.<sup>19</sup>

Historically, war crimes generally included *all crimes* that were punishable during armed conflict, regardless of whether the crimes were violations of LOAC. For example, espionage and other offenses committed by captured enemy personnel, that were not prohibited by LOAC, but were punishable by a belligerent State, were also characterized as “war crimes.” However, “war crimes” *now* generally refers only to *serious violations of LOAC*. For example, the **War Crimes Act, 18 U.S.C. § 2441**, defines “war crime” to include certain serious LOAC violations.<sup>20</sup>

The *Geneva Conventions* characterize certain breaches as “grave,” including: 1) willful killing of protected persons, 2) engaging in torture or inhuman treatment, such as biological experiments, 3) willfully causing great suffering or serious injury to body or health, 4) unlawfully deporting, transferring, or confining 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, 7) taking of hostages, and 8) causing extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (GWS Art. 50; GWS Sea Art. 51; GPW Art. 130; GC Art. 147; AP I Art. 85). Under the *Geneva Conventions*, “grave breaches” involve violations against the person or property of persons specifically protected by the four conventions. Though not binding on the United States, under *Additional Protocol I* to the *Geneva Conventions*, the concept of a “grave breach” is expanded to include

violations against civilian persons and property generally. As a matter of international law, the grave breach regime (with its obligation to search for and prosecute) only applies in an international armed conflict, as defined by *Common Article 2* of the *Geneva Conventions* (GWS Art. 2, GWS Sea Art. 2, GPW Art. 2 and GC Art. 2).<sup>21</sup>

Other LOAC violations that are punishable and may be serious enough to merit characterization as “war crimes” include, but are not limited to: 1) using poisonous weapons or weapons calculated to cause unnecessary suffering, 2) attack or bombardment of undefended cities, towns or villages, 3) pillage of public or private property, 4) maltreatment of dead bodies, 5) poisoning of wells or streams, 6) resorting to perfidy (e.g., using a white flag to conduct an attack treacherously), 7) abusing or intentionally firing on a flag of truce, 8) intentionally targeting protected places, objects, or protected persons (HR Art. 23a, 23g, 25, 28, 47; **War Crimes Act, 18 U.S.C. §2441**; AP I art. 85).<sup>22</sup>

*Common Article 3* provides minimum standards that parties to a conflict are bound to apply in a non-international armed conflict, and its standards are widely considered to apply to all armed conflicts. It explicitly prohibits violence to life and person for those taking no active part in hostilities and protects them from 1) murder, 2) mutilation, 3) cruel treatment, 4) torture, 5) being taken hostages, 6) outrages upon personal dignity (e.g. humiliating and degrading treatment, and 7) sentences passed and executions carried out without a judgment pronounced by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples (GWS Art. 3, GWS Sea

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

Art. 3, GPW Art. 3 and GC Art. 3). Conduct that violates *Common Article 3* can be punished by a State competent to exercise jurisdiction with respect to that conduct.

While nothing in *Common Article 3* specifically requires that States impose individual criminal liability for violation of its standards, other treaties and domestic statutes do make reference to Common Article 3 in defining what constitutes a “war crime,” for example, in the United States, the **War Crimes Act and the Military Commissions Act of 2006** criminalize certain violations of Common Article 3 (e.g., **18 U.S.C. § 2441(c)(3) (War Crimes Act, as amended by the Military Commissions Act of 2006)**).<sup>23</sup>

#### **Prosecution in U.S. Federal Courts**

In addition to Courts Martial, Military Commissions, and International Tribunals, prosecutions can occur under U.S. domestic law for certain violations of LOAC. The **War Crimes Act** authorizes the prosecution of individuals for certain war crimes, whether such crimes are committed inside or outside the United States, if the *victim* or the *perpetrator* is either a) a U.S. national or b) a member of the U.S. Armed Forces (**18 U.S.C. §2441**). Other laws criminalize acts of torture, attempts to commit torture, and conspiracy to commit torture outside the United States when the offender is a U.S. national or is located within the United States (**18 U.S.C. §2340A**).<sup>24</sup>

Other provisions allow for the prosecution of 1) Genocide (**18 U.S.C. §1091**), 2) Murder or manslaughter of foreign officials, official guests, or

internationally protected persons (**18 U.S.C. §1116**), 3) Piracy (**18 U.S.C. §§1651-1661**), 4) Terrorism and material support to terrorists (**18 U.S.C. §§2331-2339D**), and 5) various acts involving biological weapons, chemical weapons, weapons of mass destruction, or nuclear weapons (**18 U.S.C. §§175, 229, 832, 2332a**). Some of these provisions limit their application to offenses committed within the United States or by or against citizens of the United States, while others, such as piracy, apply regardless of the location of the offense or the nationality of the offender or victim(s).<sup>25</sup>

*The Military Extraterritorial Jurisdiction Act of 2000 (MEJA)* is a venue statute that allows the U.S. government to prosecute individuals who commit certain offenses outside the United States either while employed by or accompanying the U.S. Armed Forces outside the United States or while a member of the U.S. Armed Forces subject to the UCMJ.<sup>26</sup>

#### **Courts Martial: Offenses by Members of U.S. Armed Forces**

The United States has an obligation to take all measures necessary to prevent acts contrary to the **Geneva Conventions**. Violations of LOAC that are not sufficiently serious are generally not characterized as “war crimes,” but may typically be prosecuted under a State’s domestic law or through administrative measures. In the United States, this may include referring charges to a court-martial under the **Uniform Code of Military Justice (UCMJ) (10 U.S.C. §§ 801–946)** (using the procedure under the Executive Order **Manual of Courts Martial**<sup>27</sup>) or taking

<sup>23</sup> Ibid.

<sup>24</sup> **FM 6-27/MCTP 11-10C, The Commander’s Handbook on the Law of Land Warfare** (07 August 2019).

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> The *Manual for Courts-Martial* (MCM) is the official guide to the conduct of *courts-martial* in the United States military. An Executive Order (EO) of the President of the United States, the **MCM** details

other actions, such as imposing non-judicial punishment or initiating prosecution before a civilian court, if appropriate.

Persons who are subject to the UCMJ include members of the Active and Reserve Components of the U.S. Armed Forces, POWs in the custody of the United States, and in time of declared war or contingency operations, persons serving with or accompanying the Armed Forces in the field (UCMJ Art. 2; **10 U.S.C. §802**). The UCMJ applies in all places and can be enforced against individuals subject to the UCMJ even if they have committed crimes outside the United States. Courts-martial can be and often are convened outside the territorial limits of the United States by employing military judges and other qualified military personnel. U.S. practice has long been to charge war crimes as offenses under the UCMJ rather than as separate “war crimes” offenses.<sup>28</sup>

#### **Military Commissions: Military Authority**

The first war crimes trial after World War II took place in Manila. The accused man was General Tomoyuki Yamashita, commander of the Japanese army in the Philippines in the final year of the war, a year marked by terrible atrocities committed by Japanese troops in Manila and elsewhere in the islands. Yamashita was arraigned in Manila on 08 October 1945, five weeks after Japan’s surrender in Tokyo. General Douglas MacArthur accused Yamashita of the crime of “failure to control his troops.” Five American generals, only one of them with any legal training, were appointed as a military commission to hear the evidence

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and expands on the military law established in the statute **Uniform Code of Military Justice** (UCMJ).

<sup>28</sup> **FM 6-27/MCTP 11-10C, The Commander’s Handbook on the Law of Land Warfare** (07 August 2019).

and render a verdict on 123 separate counts describing ghastly murders, tortures, rapes, arson, and other crimes. After five weeks of testimony, much of it in the anguished words of the victims themselves, the commission convicted Yamashita and ordered him executed. On 23 February 1946, on a scaffold in the predawn darkness near Manila, a hangman placed a noose around Yamashita’s neck and he dropped to his death.<sup>29</sup>

Yamashita was “a dignified and thoughtful man who earned the respect and even admiration of the American military lawyers who defended him vigorously at the trial.” Had Yamashita ordered these appalling crimes, his conviction and execution would be clearly warranted. But this element was disputed, his defense asserting that he did not order such acts. He adamantly and consistently maintained that he had not ordered these crimes and that he had, in fact, ordered his subordinate commanders to abandon Manila as the American army approached and to retreat to the hills where he himself had already fled, hoping to hold off MacArthur’s forces long enough to allow Japan to prepare its homeland defenses against inevitable invasion. The evidence seemed to support his account.<sup>30</sup>

The **doctrine of command responsibility** (or **command accountability**) was born in that Manila trial in 1945, but it has been added to the **Geneva Conventions**. It has come to dominate several major trials in the international tribunal for the former Yugoslavia, and it has been adopted by the International

<sup>29</sup> Ryan, Allan A. *Yamashita’s Ghost: War Crimes, MacArthur’s Justice, and Command Accountability*. University Press of Kansas; Lawrence, KS: 2012. p. xiii.

<sup>30</sup> *Ibid.* pp. xiii - xiv

Criminal Court established in 2002, but it is a result of the trial that MacArthur ordered for Yamashita in 1945.<sup>31</sup>

Military commissions have been used by the United States and other States to prosecute enemy belligerents for violations of the law of war and for acts of unprivileged belligerency. Military commissions have also been used for the trial of offenses under U.S. law where local courts were not open and functioning, such as when martial law applies, and for the trial of violations of occupation ordinances. Generally, courts-martial may be used in lieu of military commissions to try POWs in U.S. military custody (**GPW Art. 102; UCMJ art. 2(a)(9)**). Military commissions are used to try others, including alien unprivileged belligerents, for LOAC violations and other offenses. Procedures for military commissions are similar to those for general courts-martial under the UCMJ (e.g. **10 U.S.C. § 948b(c); Manual for Military Commissions (MMC)**). Under the MCA, thirty-two substantive crimes are triable by military commission (**10 U.S.C. §950t**). The jurisdiction of military commissions under the MCA is limited to individuals who are alien unprivileged enemy belligerents (**10 U.S.C. §948c**). The term “unprivileged enemy belligerent” refers to an individual (other than a privileged belligerent) who: 1) has engaged in hostilities against the United States or its coalition partners, 2) has purposefully and materially supported hostilities against the United States or its coalition partners, or 3) [acted] as a part of al Qaeda at the time of the alleged offense under the MCA (**10 U.S.C. §948a(7)**).<sup>32</sup>

<sup>31</sup> Ibid. p. xiv

<sup>32</sup> **FM 6-27/MCTP 11-10C, The Commander’s Handbook on the Law of Land Warfare** (07 August 2019).

After Yamashita’s conviction, his lawyers took the extraordinary step of asking the Supreme Court of the United States (SCOTUS) to hear his appeal, and that Court, taking an equally extraordinary step, agreed to do so (*In re Yamashita*, 327 U.S. 1 (1946)). It upheld the conviction, over the impassioned dissents of two of its members, who wrote eloquent opinions, in what remains today its only decision on the responsibility of a military commander for the actions of his troops and the first time in that Court’s history an opinion on the concept of international human rights. Some observers have opined that the precedent established in *In re Yamashita* has been “both troublesome and embarrassing” for the United States in that, had it been adhered to in the 1960s and 1970s, it might well have justified the trial and conviction of American generals of the Vietnam War.<sup>33</sup> (See also, *Ex Parte Quirin*, 317 U.S. 1 (1942)).

For hundreds of years of warfare, commanders have been not only the leaders of their troops but their judges as well, handing out punishments for misbehavior and crimes, displacing the civil law and domestic judges. The military commission that would sit in judgment of Tomoyuki Yamashita in 1945 would be the first tribunal to try anyone for war crimes following the end of World War II. But it had its ancestors and would have descendants long after the deaths of the man who created it [MacArthur] and the man who was judged by it [Yamashita].<sup>34</sup>

In 1775, the Provisional Congress of Massachusetts Bay enacted the first American code of military law, which was

<sup>33</sup> Ryan, Allan A. *Yamashita’s Ghost: War Crimes, MacArthur’s Justice, and Command Accountability*. University Press of Kansas; Lawrence, KS: 2012. p. xiv

<sup>34</sup> Ibid. p. 50

soon copied by the Continental Congress for the Continental Army. These legal codes, called **Articles of War**, were to survive in one form or another until the middle of the twentieth century and defined the offenses for which soldiers could be tried and punished (disrespect for officers, refusal to obey an order, dueling, sleeping on post, mutiny, “profane cursing,” etc.) and required that the more severe punishments be meted out not by the commanding officer but by military courts, known as courts-martial. Military officers made up the members of a court and the members of the court-martial were bound by their oath to “well and truly try and determine” guilt or innocence according to the duly enacted articles, and to do so “without partiality, favor or affection, and if any doubt shall arise, which is not explained by said articles, according to your conscience, [to] the best of your understanding, and the custom of war in the like cases.” Charges were drawn up according to the legislature’s articles and the accused soldier was informed of the charges against him and was allowed to present a defense. Basic principles of due process provided that: 1) witnesses could be summoned and were to testify under oath, 2) the accused was entitled to present witnesses on his own behalf, and 3) the accused was to be presumed innocent until proven guilty by the evidence.<sup>35</sup>

Military courts have never been part of the federal court system created by the **Article III** of the U.S. Constitution. There were no permanent courts; commanders convened courts-martial as and when needed, selected the members, preferred the charges, and reviewed the results. The members of the courts who passed judgment and sentence were rarely lawyers. Defense counsel were not routinely provided to the

accused, and when they were they often were not lawyers either. It was a closed system: there was no appeal to civil courts and no judicial review. “The court-martial is only an instrumentality of the executive power, having no relation or connection in law with the judicial establishments of the country,” according to the 1920 edition of William Winthrop’s *Military Law and Precedents*, the leading military-justice treatise of its time. But this system of courts-martial was limited in two important ways: 1) the courts could adjudicate only those offenses defined in the **Articles of War**, which typically did not include murder, assault, rape, thievery, or other civilian (“common-law”) crimes and 2) courts-martial had jurisdiction only over American soldiers and sailors, not over civilians or enemy soldiers.<sup>36</sup>

Commissions performed the judicial function of adjudicating guilt or innocence, but they were not courts. Civilians were brought before commissions for crimes against the army (e.g. theft or assault) and enemy soldiers for spying and war crimes (e.g. mistreatment of civilians or assaults upon their guards if they had been taken prisoner). Commissions did not displace courts-martial, but served a different function. There was no law, no manual, and no rules of procedure for commissions, though sometimes commanders adapted court-martial procedures for them and at other times they did not bother.<sup>37</sup>

The “father of American military commissions” was General Winfield Scott, during the U.S. occupation of northern Mexico in 1846-1848. Scott was concerned, with good reason, that undisciplined American soldiers engaging in thievery and rape would enrage the Mexicans and make his task of pacification more difficult. The

<sup>35</sup> Ibid. pp. 50-51

<sup>36</sup> Ibid. pp. 51-52

<sup>37</sup> Ibid. pp. 52-53

**Articles of War** did not provide any court for the trial or punishment of murder, rape, theft, etc., regardless of who committed them or against whom they were committed. He asked Congress to exercise its authority to regulate the armed forces by enacting additional articles for those civil offenses. A Senate chairman told him that this would not be necessary because he already had the authority he needed under the commander's right to punish such crimes "when an army is prosecuting hostilities in an enemy's country." Thus, Scott issued a general order proclaiming martial law in occupied Mexico, applicable to Mexican civilians and American soldiers alike, characterized as "an addition to the written military code, prescribed by Congress in the rules and articles of war." He specified the crimes – murder, theft, poisoning, rape – that would come under the jurisdiction of military commissions and that these commissions should be governed "as nearly as practicable" by the existing **Articles of War**.<sup>38</sup>

During the Civil War, military commissions proliferated – over 4,000 proceedings in all. President Lincoln gave his commanders considerable authority to convene them to try citizens who expressed sympathy for the Southern cause or dissatisfaction with Lincoln's administration. Lincoln considered such men rebels, traitors, and disloyalists. American citizens convicted by such tribunals sought recourse to the federal courts through *habeas corpus* – the right to have the legality of one's imprisonment reviewed by a federal court. Lincoln responded by suspending *habeas corpus*.<sup>39</sup>

But Union commanders did not limit the commissions to civilian dissidents. General Henry Halleck, commander of the

Union armies, a lawyer himself, and a noted authority on international law, ordered that commissions be convened to try "insurgents and marauding predatory and guerilla bands," who were "by the laws of war regarded as no more nor less than murderers, robbers and thieves" destroying railroads, burning bridges, and torching farms and homes – in short, war criminals. By "laws of war," Halleck meant not the **Articles of War** or any other written code or formal law but, customary international law that had originated in medieval Europe and accumulated over the centuries. Among these "rules and principles" is the principle that armies should fight armies and not civilians, and that civilians in turn should leave the fighting to armies and not engage in it themselves.<sup>40</sup>

"Persons acting independently," wrote Winthrop, "who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the sacking of towns, from motives mostly of personal profit or revenge" are not protected by the laws of war but are "treated as criminals and outlaws, not entitled upon capture to be held as prisoners of war, but liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by military commission." And there were dozens of such cases during the Civil War, for homicide and destruction of property.<sup>41</sup>

The proliferation of commissions during the Civil War led Congress to exercise its constitutional authority to regulate the armed forces brought common crimes within the jurisdiction of courts-martial and military commissions. Spies against the United States were made triable by commissions and courts-martial. The

<sup>38</sup> Ibid. p. 53

<sup>39</sup> Ibid. p. 54

<sup>40</sup> Ibid. p. 54

<sup>41</sup> Ibid. pp. 54-55

duties of the army's Judge Advocate General were extended to include reviewing the proceedings of military commissions and courts-martial. Commissions were to be convened only for cases that could not be tried by a court-martial or by a regular sitting civilian. Although Congress did not give commissions their own standard procedures, the familiar principles of court-martial procedure were to be followed as much as practicable, though this was declined or ignored by MacArthur more than 80 years later.<sup>42</sup>

### **International Tribunals: Coalition and Alliance Trials**

Several times since the beginning of the 20th century, 1) war crimes, 2) crimes against humanity, 3) genocide, and 4) crimes against peace were prosecuted by special international tribunals. These tribunals were established to address crimes committed during specific periods or in connection with specific conflicts, applying international law, including the **Geneva Conventions** and their **Additional Protocols**, as well as the **HRICR**. The statute governing each tribunal typically stipulates the specific types of crimes addressed by the tribunal and the standards for culpability. The decisions of these tribunals do not bind the United States and its courts. Their decisions, however, provide useful examples of the application of international law.<sup>43</sup>

An example of a special international tribunal, created by Great Britain, France, the United States, and the Union of Soviet Socialist Republics, was the International Military Tribunal (IMT). This tribunal conducted the landmark Trial of Major War Criminals, with 21 Axis defendants, in

Nuremberg, Germany, from November 1945 to October 1946. Another post-war tribunal was established in Tokyo to try war criminals in the Pacific Theater of World War II. The jurisprudence of the ICTY, established by the UN Security Council in 1993, also provides numerous examples of war crimes prosecutions.<sup>44</sup> The two most commonly known tribunals were the *International Military Tribunal (IMT)* and the *International Military Tribunal for the Far East (IMTFE)*.

### ***International Military Tribunal for the Far East (IMTFE)***

**The International Military Tribunal for the Far East**, also known as the **Tokyo Trial** or the **Tokyo War Crimes Tribunal**, was a military trial convened on April 29, 1946, to try the leaders of the Empire of Japan for joint conspiracy to start and wage war, conventional war crimes and crimes against humanity.

Japan was on the verge of defeat, and its high command knew it. The objective was no longer to repel the Americans from the Western Pacific but to stall the U.S. Advance while fortifying the homeland against invasion. Japan could seek a negotiated settlement that would preserve its sovereignty and its emperor. Key to this plan was a "decisive victory" that would force the United States to reappraise the cost in blood and treasure of unconditional surrender. Japan desperately needed to convince the United States that an invasion of the home islands could not succeed at any price the Americans would be willing to pay, and thus force them to negotiate terms of surrender.<sup>45</sup>

<sup>42</sup> Ibid. p. 55

<sup>43</sup> FM 6-27/MCTP 11-10C, *The Commander's Handbook on the Law of Land Warfare* (07 August 2019).

<sup>44</sup> Ibid.

<sup>45</sup> Ryan, Allan A. *Yamashita's Ghost: War Crimes, MacArthur's Justice, and Command Accountability*.

On 19 January 1946 a “special proclamation” and “charter” established the *International Military Tribunal for the Far East (IMTFE)* (Treaties and Other International Acts series 1589), signed by General of the Army Douglas MacArthur, Supreme Commander for the Allied Powers. The special proclamation stated, in relevant part:

Whereas, the Governments of the Allied Powers at war with Japan on the 26<sup>th</sup> July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;...<sup>46</sup> Whereas, by the Instrument of Surrender of Japan executed at Tokyo Bay, on the 2<sup>nd</sup> September 1945,<sup>47</sup> the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government, accepted the terms set for in such Declaration at Potsdam;...<sup>48</sup> Whereas, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state Japan is made subject to the Supreme Commander for the Allied Powers,

who is authorized to take such steps as he deems proper to effectuate the terms of surrender;...<sup>49</sup>

Whereas, the undersigned [MacArthur] has been designated by the Allied Powers as Supreme Commander of the Allied Powers to carry into effect the general surrender of the Japanese armed forces;...<sup>50</sup>

Whereas, the Governments of the United States, Great Britain, and Russia at the Moscow Conference, 26<sup>th</sup> December 1945,<sup>51</sup> having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for implementation of the Terms of Surrender.<sup>52</sup>

Having made such Proclamation, General MacArthur ordered three Articles as provisions in the Proclamation:

**Article 1.** There shall be established an International Military Tribunal for the Far East for the Trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.<sup>53</sup>

**Article 2.** The Constitution, jurisdiction and functions of this Tribunal are those set forth

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University Press of Kansas; Lawrence, KS: 2012. Pp. 31-32

<sup>46</sup> International Military Tribunal for the Far East Special Proclamation and Charter (19 January 1946). *Ante*, vol. 3, p. 1205.

<sup>47</sup> International Military Tribunal for the Far East Special Proclamation and Charter (19 January 1946). EAS 493, *Ante*, vol. 3. P. 1251.

<sup>48</sup> International Military Tribunal for the Far East Special Proclamation and Charter (19 January 1946).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> International Military Tribunal for the Far East Special Proclamation and Charter (19 January 1946). TIAS 1555, *ante*, vol. 3, p. 1341.

<sup>52</sup> International Military Tribunal for the Far East Special Proclamation and Charter (19 January 1946).

<sup>53</sup> International Military Tribunal for the Far East Special Proclamation and Charter (19 January 1946).

in the Charter of the International Military Tribunal for the Far East, approved by me this day.<sup>54</sup>

**Article 3.** Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.<sup>55</sup>

Article 3 is particularly interesting and relevant, as it specifically cleared the way for past, present, and future military commission trials, such as the previously held Yamashita trial. This established additional authority and precedent for such military commissions.

The Charter of the International Military Tribunal for the Far East included several sections with several Articles.

*Section I Constitution of the Tribunal* – Article 1 Tribunal Established, Article 2 Members (five to nine members appointed by the Supreme Commander), Article 3 Officers and secretariat, and Article 4 Quorum and Voting.<sup>56</sup>

*Section II Jurisdiction and General Provisions* – Article 5 Jurisdiction Over Persons and Offenses (Crimes Against Peace, Conventional Crimes, and Crimes Against Humanity), Article 6 Responsibility of Accused, Article 7 Rules of Procedure (drafted by the Tribunal), and Article 8 Counsel (prosecution).<sup>57</sup>

*Section III Fair Trial for Accused* – Article 9 Procedure for Fair Trial (Indictment, Hearing, Language, Counsel for Accused, Evidence for Defense, and Production of Evidence for the Defense) and

Article 10 Applications and Motions before Trial.<sup>58</sup>

*Section IV Powers of Tribunal and Conduct of Trial* – Article 11 Powers (summon witnesses, interrogate accused and permit comment on refusals to answer any question, production of documents and evidence, require oaths, affirmations, or customary declarations in the country of the witness, appoint officers), Article 12 Conduct of Trial (“expeditious hearing”), Article 13 Evidence (admissibility, relevance, specific evidence admissible, judicial notice, and records, exhibits and documents, Article 14 Place of Trial, and Article 15 Course of Trial Proceedings.<sup>59</sup>

*Section V Judgment and Sentence* - Article 16 Penalty (including death), Article 17 Judgment and Review – “The judgement will be announced in open court and will give the reasons on which it is based.”<sup>60</sup>

**Section III Fair Trial for Accused, Article 9 Procedure for Fair Trial**, is particularly enlightening on the trial procedures applied by the International Military Tribunal for the Far East in its war crimes trials. Its provided for six requirements. *Indictment* consisting of a “plain, concise and adequate statement of each offense charged.” *Hearing* giving the accused the right to give “any explanation relevant to the charges...” *Language* requirements that the trial and related proceedings be conducted in both English and the language of the accused. *Counsel for the Accused* – since Counsel for the investigation and prosecution was provided for in Section II, Article 8, Counsel for the accused was provided for here, requiring

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Charter of the International Military Tribunal for the Far East, 19 January 1946 APO 500 (General Orders No. 1).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

that “Each accused shall be represented by counsel of his own selection, subject to disapproval of such counsel at any time by the Tribunal.” *Evidence for Defense* giving the accused and/or his counsel the right to present evidence at the trial “in support of his defense, and to examine any witness called by the prosecution...” *Production of Evidence for the Defense* allowing an accused to “apply in writing to the Tribunal for the production of witnesses or of documents.”<sup>61</sup>

**Section IV Powers of Tribunal and Conduct of Trial, Article 13 Evidence**, is equally informative, having five main points. *Admissibility* stated that “The Tribunal shall not be bound by technical rules of evidence. ...and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.” *Relevance* required the Tribunal to be informed “of the nature of any evidence before it is offered in order to rule upon the relevance.” *Special evidence admissible* provided specifically for the admissibility of documents, regardless of its security classification, and without proof of its issuance or signature, reports of the International Red Cross, doctors and medical personnel, investigators and intelligence officers, affidavits, depositions, and signed statements, diaries, letters, and other documents, a copies or secondary evidence of originals were not available. *Judicial notice* of facts of common knowledge. *Records, Exhibits, and Documents* (including transcripts) were required to be filed with the General Secretary of the Tribunal as part of the Record.<sup>62</sup>

Of the 5,700 Japanese individuals indicted for Class B war crimes: 984 were sentenced to

death, 475 received life sentences, 2,944 were given limited prison terms, 1,018 were acquitted, and 279 were never brought to trial or not sentenced. Japan’s Emperor, Hirohito, escaped prosecution because President Harry S. Truman believed that administration of a defeated Japan would be facilitated if the emperor appeared to be cooperating with the occupying Allied powers. After the war, the new constitution, drafted by the United States, transformed Japan into a constitutional monarchy so that sovereignty lay with the people instead of the emperor. Hirohito died in Tokyo on January 7, 1989. After Hirohito's death, the critical historians say that Hirohito wielded more power than previously believed, and he was actively involved in the decision to launch the war. His son, Akihito, succeeded him. Naruhito is the current Emperor of Japan. He acceded to the Chrysanthemum Throne upon the abdication of his father, Emperor Emeritus Akihito on 01 May 2019.

Of the Japanese command, one defendant, Shūmei Ōkawa, was found mentally unfit for trial and the charges were dropped. Two defendants, Yōsuke Matsuoka and Osami Nagano, died of natural causes during the trial. Six defendants were sentenced to death by hanging for war crimes, crimes against humanity, and crimes against peace (Class A, Class B and Class C):

- General Kenji Doihara, chief of the intelligence services in Manchukuo
- Kōki Hirota, prime minister (later foreign minister)
- General Seishirō Itagaki, war minister
- General Heitarō Kimura, commander, Burma Area Army
- Lieutenant General Akira Mutō, chief of staff, 14th Area Army

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

- General Hideki Tōjō, commander, Kwantung Army (later prime minister)<sup>63</sup>

One defendant was sentenced to death by hanging for war crimes and crimes against humanity (Class B and Class C): General Iwane Matsui, commander, Shanghai Expeditionary Force and Central China Area Army. The condemned defendants were executed at Sugamo Prison in Ikebukuro on 23 December 1948.<sup>64</sup>

Sixteen defendants were sentenced to life imprisonment. Three (Koiso, Shiratori, and Umezu) died in prison, while the other thirteen were paroled between 1954 and 1956:

- General Sadao Araki, war minister
- Colonel Kingorō Hashimoto, major instigator of the second Sino-Japanese War
- Field Marshal Shunroku Hata, war minister
- Baron Kiichirō Hiranuma, prime minister
- Naoki Hoshino, Chief Cabinet Secretary
- Okinori Kaya, Minister of Finance
- Marquis Kōichi Kido, Lord Keeper of the Privy Seal
- General Kuniaki Koiso, governor of Korea, later prime minister
- General Jirō Minami, commander, Kwantung Army
- Admiral Takazumi Oka, naval minister
- Lieutenant General Hiroshi Ōshima, Ambassador to Germany

- General Kenryō Satō, chief of the Military Affairs Bureau
- Admiral Shigetarō Shimada, naval minister
- Toshio Shiratori, Ambassador to Italy
- Lieutenant General Teiichi Suzuki, president of the Cabinet Planning Board
- General Yoshijirō Umezu, war minister and Chief of the Army General Staff
- Foreign minister Shigenori Tōgō was sentenced to 20 years imprisonment (he died in prison in 1949)
- Foreign minister Mamoru Shigemitsu was sentenced to 7 years. He later served as Foreign Minister and as Deputy Prime Minister of post-war Japan.<sup>65</sup>

The verdict and sentences of the tribunal were confirmed by MacArthur on 24 November 1948, two days after a perfunctory meeting with members of the Allied Control Commission for Japan, who acted as the local representatives of the nations of the Far Eastern Commission. Six of those representatives made no recommendations for clemency. Australia, Canada, India, and the Netherlands were willing to see the general make some reductions in sentences. He chose not to do so. The issue of clemency was thereafter to disturb Japanese relations with the Allied powers until the late 1950s, when a majority of the Allied powers agreed to release the last of the convicted major war criminals from captivity.<sup>66</sup>

<sup>63</sup> Wilson, Sandra; Cribb, Robert; Trefalt, Beatrice; Aszkielowicz, Dean (2017). *Japanese War Criminals: the Politics of Justice after the Second World War*. New York: Columbia University Press.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

***International Military Tribunal:  
Nuremberg***

Washington, April 1945: A phone call from the White House to the Supreme Court started the chain of events that would become the Nuremberg Trials or **International Military Tribunal (IMT)**. Samuel Rosenman, speechwriter and confidant of President Franklin D. Roosevelt, was called Associate Justice Robert H. Jackson and asked if Rosenman might stop by to meet about something best discussed confidentially in Jackson's chambers. Rosenman's call came barely two weeks after the death of FDR, whose successor was Harry S. Truman.<sup>67</sup>

When the two men met, they talked for a time about the death of the president. Then Rosenman, speaking in the rolling cadences that evoked the speeches he had written for Roosevelt, came to the point. He had been in England with Churchill, just three days before FDR died, to discuss what was to be done with the Nazi leaders when the war in Europe ended. In Churchill's last meeting with Stalin, Churchill had remarked that whenever they captured one of the Nazi "bigwigs," he ought to be summarily shot. Stalin responded sanctimoniously, "In the Soviet Union, we never execute anyone without a trial." Churchill replied, "Of course, of course. We should give them a trial first."<sup>68</sup>

Rosenman said that he was not sure what the president had really wanted (still meaning Roosevelt), recalling that FDR had also leaned toward summarily shooting the Nazi leaders. But, Rosenman had argued, if it was a crime for the Germans to shoot people without a trial while at war, why was

it less a crime for the Allies to do so when the war was over? At the last Yalta conference, FDR, Churchill, and Stalin had all gone on record as favoring the law. There would be war crimes trial and Rosenman said that Harry Truman wanted Bob Jackson to prosecute for the United States, explaining that Truman had not forgotten Jackson's earlier reputation as formidable prosecutor.<sup>69</sup>

On 18 October, at the first public session of the International Military Tribunal (IMT) in Berlin, the prosecutors presented an indictment in four counts charging twenty-four defendants and seven organizations with conspiracy to wage aggressive war, breaches of international peace, violations of the rules of warfare, and wholesale crimes against humanity.<sup>70</sup>

On 21 November 1945, Justice Jackson arose to present the opening statement in the case on behalf of the United States.<sup>71</sup>

MAY IT PLEASE YOUR  
HONORS,

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is

<sup>67</sup> Persico, Joseph E. *Nuremberg: Infamy on Trial*. Penguin Group; New York, NY: 1994. p. 7

<sup>68</sup> Ibid. pp. 7-8

<sup>69</sup> Ibid. p. 8

<sup>70</sup> Jackson, Robert H. *The Case Against the Nazi War Criminals*. Alfred A. Knopf, New York, NY: 1946. p. xi

<sup>71</sup> Ibid. p. xiii

one of the most significant tributes that Power has ever paid to Reason.<sup>72</sup>

### *The Three Basic Types of Offenses*

During negotiations in London there was extensive discussion and often disagreement about the crimes to be tried. In the end **Article 6** of the Charter declared that three kinds of offenses were crimes within the jurisdiction of the Tribunal – 1) Crimes against Peace, 2) War Crimes, and 3) Crimes against Humanity. Since the Charter’s definition of these crimes was often the subject of argument in the Trial, they are quoted here verbatim.<sup>73</sup>

**Crimes against Peace** was defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy for the accomplishment of any of the foregoing.”<sup>74</sup>

**War Crimes** was defined as “violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population or of in occupied territory, murder or ill-treatment of prisoners of war or persons on the high seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>75</sup>

**Crimes against Humanity** was defined as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>76</sup>

Following proposals urged by Justice Jackson, **Article 6** of the Charter also provided that “Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plans.” Under the provisions of the Charter the official position of a defendant did not free him from responsibility or mitigate punishment. Acting pursuant to a superior order could be considered in mitigation.<sup>77</sup>

### *Fair Trial for Defendants*

There was a separate section in the Charter on “Fair Trial for Defendants,” which contained a number of specific requirements that: 1) there be an *indictment*<sup>78</sup> stating full particulars of the alleged offenses, 2) in any preliminary examination or trial of a defendant he should have the right to give any explanation relevant to the charges made against him, 3)

<sup>72</sup> Ibid. p. 3

<sup>73</sup> Sprecher, Drexel A. *Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account, Volume I*. University Press of America; New York, NY: 1999. p. 46

<sup>74</sup> Ibid.

<sup>75</sup> Ibid. p. 47

<sup>76</sup> Ibid.

<sup>77</sup> Ibid. p. 47

<sup>78</sup> Like an *indictment*, an *information* is a formal charging document that describes the criminal charges against a person and the factual basis for those charges. Unlike an indictment, however, an *information* does not require a grand jury's vote.

a defendant could conduct his own defense or have the assistance of defense counsel, 4) he have the right to cross-examine prosecution witnesses, and 5) he could present evidence on his own behalf (Section IV). These procedures generally followed the adversarial system of Anglo-American practice. A later provision gave each defendant the right to make a statement to the Tribunal without cross-examination at the end of the Trial (**Article 24(j)**).<sup>79</sup>

The Tribunal was not bound by the technical rules of evidence. It was directed to confine the Trial to an expeditious hearing, to rule out irrelevant issues, to deal summarily with any contumacy [stubborn refusal to obey or comply with authority, especially a court order or summons], and to draw up rules for its procedure. The Judgement of the Tribunal was to give the reasons upon which it was based.<sup>80</sup>

A number of important developments concerning the Defense took place before the Prosecution rested its case. These include: 1) the arguments of the Defense Counsel during the preliminary hearings on the competency of several of the defendants, 2) the cross-examination of the Prosecution witnesses, 3) the arguments during the special arguments on the accused organizations, 4) the early applications to the Tribunal for witnesses and documents, and 5) the preparations outside of court for later submissions to the Tribunal. The principal Defense case began after the Prosecution rested its case on 04 March 1946.<sup>81</sup>

The Defense case lasted nearly twice as long as the case submitted by all four delegations of the Prosecution. With some

interruptions, the Defense case lasted nearly six months, from 04 March 1946 to 31 August 1946. Its coverage takes up eleven volumes of the twenty one printed volumes devoted to the daily record of the Trial.<sup>82</sup>

#### *Most Common Defenses*

The defendants presented nine (9) broad categories of defenses

1. The Nazi leaders responsible for most of the alleged offenses are dead, namely Hitler, Himmler, Bormann, Goebbels, and Heydrich.
2. I lacked knowledge. Strict secrecy was imposed in a highly compartmentalized state. I learned of the grave crimes only after I came to Nuremberg.
3. Conspiracy is not possible in a highly compartmentalized, authoritarian state.
4. I acted under superior orders. The penalties for disobedience were extreme.
5. The acts charged against me were acts of a sovereign state. These acts should not be subjected to criminal penalties by the *ex post facto* judgment [retroactively changes the legal consequences of actions] of representatives of the victor nations.
6. “Tu Quoque” [the appeal to hypocrisy which intends to discredit the opponent’s argument by attacking the opponent’s own behavior as being inconsistent with the argument’s conclusion] – the Allied Powers also committed atrocities, such as the mass bombings which killed hundreds of thousands of innocent people.

<sup>79</sup> Ibid. p. 48

<sup>80</sup> Ibid

<sup>81</sup> Sprecher, Drexel A. *Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account, Volume II.*

University Press of America; New York, NY: 1999. P. 714-715.

<sup>82</sup> Ibid. p. 714

7. The Jews had acquired disproportionate influence. I favored limiting their rights and some expulsion but never extermination.
8. Hitler deceived me about his intentions just as he deceived many Allied leaders.
9. Within my limited authority I attempted to prevent or limit wrongdoing.<sup>83</sup>

Admiral Erich Raeder continued to insist that his defense made him “not guilty” of the accusations against him. He said:

*In the Nuremberg trials later, I was to be accused of preparing for aggressive war – an accusation which, I am sure no one credits any more. All I did was what any responsible officer is required to do. When the German Government, as represented by Hitler, considered that national policy required a fleet that no opponent could ignore, it was the task of the Navy to plan the type of fleet that would best implement that policy.<sup>84</sup>*

Of the men who really held power during the Third Reich, very few ever reached the dock at Nuremberg; the most prominent among the defendants was Reichsmarschall Herman Göring. Adolph Hitler, Führer, Reich Chancellor and Supreme Commander of the Armed Forces and of the Army; Heinrich Himmler, S.S. Reichsführer, Reich Minister of the Interior,

Chief of the German Police and Commander-in-Chief of the Reserve Army; and Dr. Joseph Goebbels, Reich Minister for Public Enlightenment and Propaganda, had taken their own lives and could therefore not be called to account. Reichsleiter Martin Bormann, Head of the Party Chancellery and *eminence grise*<sup>85</sup> of the Third Reich, had been ‘missing, presumed dead’ since 1<sup>st</sup> May 1945.<sup>86</sup>

The International Military Tribunal at Nuremberg, representing the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, charged Field-Marshal Wilhelm Keitel, the former Chief of the Armed Forces High Command, with having participated in a conspiracy, with having committed crimes against peace, war crimes and crimes against humanity, or alternatively with having ‘authorized’ or ‘directed’ such crimes. He was accused of complicity in the murder and ill-treatment of civilian populations in occupied territories, and of ordering their deportation as slave laborers; he was accused of having ordered the executions of hostages, and the persecution of specific sections of the population for political, racial or religious reasons. An additional charge against Keitel and his twenty co-defendants was the accusation of having looted public and private property.<sup>87</sup>

On 1<sup>st</sup> October, 1946, the International Military Tribunal found Keitel

<sup>83</sup> Sprecher, Drexel A. *Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account, Volume II*. University Press of America; New York, NY: 1999. pp. 717-718

<sup>84</sup> Drexel, Henry W. *Erich Raeder: Grand Admiral*. Da Capo Press (United States Naval Institute); Annapolis, MD: 1960. pp. 271-272

<sup>85</sup> *Grey eminence* is a powerful decision-maker or adviser who operates “behind the scenes”, or in a non-public or unofficial capacity.

<sup>86</sup> Gorlitz, Walter. *The Memoirs of Field-Marshal Wilhelm Keitel*. Cooper Square Press; New York, NY: 1961. p. 241

<sup>87</sup> *Ibid.*

guilty on all four counts of the indictment: 1) conspiracy to wage a war of aggression, 2) waging a war of aggression, 3) war crimes, and 4) crimes against humanity. He was sentenced to death by hanging, and his sentence was executed on 16<sup>th</sup> October, 1946.<sup>88</sup>

The legal basis for such a trial had been established by the London Charter of 08 August 1945 for the “Prosecution and Punishment of the Major War Criminals of the European Axis,” an Agreement drawn up as a result of lengthy and complex preliminary talks. The charter itself represented an important violation of one of the western world’s fundamental legal doctrines: *nulla poene sine lege*. Legal doctrine on one hand and the demands for the expiation (atonement or making amends or reparation for guilt or wrongdoing) of the terrible crimes against justice on the other seemed to be difficult to reconcile. But the National Socialist’ (Nazi’s) war methods had involved such violations of international law that they demanded requital (compensation, or retaliation) even if the legal basis for such requital had first to be fashioned *post facto* (after the fact or retroactively). The real weakness in the Nuremberg Tribunal was that only the victors were sitting in judgment upon the war crimes of only the vanquished.<sup>89</sup>

Today, the availability of legal *defenses to charges of war crimes* may depend on the specific jurisdiction and forum in which charges are brought. Individuals being tried by a U.S. court-martial for war crimes (for violations of the UCMJ, violations of other Federal law, or LOAC violations) may assert legal defenses

available under the UCMJ (RCM 916; MMC pt. II, Rule 916). The following general or affirmative defenses may negate criminal responsibility under general principles of criminal law and war crimes, but commanders should request competent and current legal advice.<sup>90</sup>

- **Justification** – a death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.
- **Self-Defense** – generally requires the accused to demonstrate an apprehension, on reasonable grounds, that death or bodily harm was about to be wrongfully inflicted and that the force used by the accused was necessary for protection against such death or bodily harm (RCM 916(e)). The plea of self-defense has been recognized in war crimes trials under much the same circumstances as in trials held under ordinary criminal law (see MMC pt. II, Rule 916(e)).
- **Accident** – death, injury, or damage that occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner. This defense is not available when the act that caused the death, injury, or damage was a negligent act (RCM 916(f); MMC pt. II, Rule 916(f)).
- **Ignorance or Mistake of Fact** – it is generally a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be

<sup>88</sup> Ibid. p. 269

<sup>89</sup> Gorlitz, Walter. *The Memoirs of Field-Marshal Wilhelm Keitel*. Cooper Square Press; New York, NY: 1961. p. 242

<sup>90</sup> FM 6-27/MCTP 11-10C, *The Commander’s Handbook on the Law of Land Warfare* (07 August 2019).

guilty of the offense (RCM 916(j); MMC pt. II, Rule 916(j)).<sup>91</sup>

### International Courts

**The International Court of Justice (ICJ)** is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court is located at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York (United States of America). The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. The Court is composed of 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. It is assisted by a Registry, its administrative organ and its official languages are English and French.<sup>92</sup>

**The International Criminal Court ("The ICC" or "The Court")** is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>93</sup>

In 1998, 120 Nations at a Diplomatic Conference in Rome voted to approve the final text of the **Rome Statute**, adopting a treaty that establishes an International

Criminal Court (ICC). The Rome Statute went into effect on July 1, 2002. Although the United States did not vote in favor of the treaty and has indicated that it does not intend to become a party to the Rome Statute, the U.S. delegation contributed significantly to its development, including the drafting of the elements of crimes and the inclusion of fundamental due process protections.<sup>94</sup>

Unlike tribunals that were established for specific conflicts, the ICC, which is located in The Hague, is intended to apply to situations after the establishment of the ICC. The Rome Statute provides that the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern" and "shall be complementary to national criminal jurisdictions" (**Rome Statute Art. 1**). The principle that the ICC's jurisdiction is "complementary" means that the ICC should not investigate or prosecute allegations when a State is or has already genuinely done so. The Rome Statute provides that the ICC has jurisdiction with respect to 1) the crime of genocide, 2) crimes against humanity, 3) war crimes, and 4) the crime of aggression.<sup>95</sup>

The Rome Statute generally only confers jurisdiction on the ICC when 1) the accused is a national of a Rome Statute Party, 2) the conduct occurs on the territory of a Rome Statute Party, or 3) the conduct occurs in a situation that has been referred to the ICC by the UN Security Council. The ICC will not prosecute an individual when a State has exercised or is in the process of

<sup>91</sup> Ibid.

<sup>92</sup> <https://www.icj-cij.org/en/court>

<sup>93</sup> <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>

<sup>93</sup> **FM 6-27/MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare** (07 August 2019).

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

exercising jurisdiction over the matter, unless that State is unwilling or unable to genuinely investigate or prosecute the case (**Rome Statute Art. 17**). While the ICC purports to exercise jurisdiction over non-State Parties to the Rome Statute, the United States has a longstanding and continuing objection to any assertion of jurisdiction by the ICC with respect to nationals of States not Party to the Rome Statute in the absence of consent from such States or a referral by the Security Council. The U.S. Government has negotiated SOFAs and other agreements with many countries, which under a provision of the **Rome Statute (Art. 98)** clarify that U.S. personnel may not be turned over to the ICC by those countries absent U.S. consent. In multinational operations or peace operations, U.S. personnel may be asked to cooperate with ICC prosecutors who are investigating allegations of genocide, crimes against humanity, or war crimes. (See also, the **American Service Members' Protection Act**).<sup>96</sup>

### **Conclusion**

War crimes trials come in a few “varieties” or modalities, sometimes depending upon the circumstances and incidents and sometimes depending upon the political influences and timing. Understanding the laws and procedures, which are not every day occurrences, can be complicated. But the historic examples presented here, along with substantive and procedural law, can make understanding this process more clear.

Generally, war crimes are prosecuted either as 1) court martials (usually when committed by a member of the U.S. military, in the case of violations or offenses committed by U.S. armed forces members), 2) military commissions (established by military authority), 3) international tribunals (usually established by a victorious

international collation or alliance), or 4) an international court (usually established by an international body, such as the United Nations or by some specific treaty designed to do so).

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<sup>96</sup> Ibid.

## Major Law of Armed Conflict Treaties and Their Status<sup>97</sup>

### Law of Armed Conflict *Treaties* to Which the *United States is a Party*:

- Washington Convention Regarding the Rights of Neutrals at Sea of October 31, 1854 (10 Stat. 1105, TS 300, 11 Bevans 1214).
- Hague Convention for the Exemption of Hospital Ships, in Time of War, from the Payment of all Dues and Taxes Imposed for the Benefit of the State of December 21, 1904 (35 Stat. 1854, TS 459, 1 Bevans 430).
- Hague Convention III of October 18, 1907, Relative to the Opening of Hostilities (36 Stat. 2259, Treaty Series 538).
- Hague Convention IV of October 18, 1907, Respecting the Laws and Customs of War on Land (36 Stat. 2277, TS 539) (Hague IV), and the Annex thereto, entitled Regulations Respecting the Laws and Customs of War on Land (36 Stat. 2295, TS 539) (HR).
- Hague Convention V of October 18, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (36 Stat. 2310, TS 540) (Hague V).
- Hague Convention VIII of October 18, 1907, Relative to the Laying of Automatic Submarine Contact Mines (36 Stat. 2322, TS 541, 1 Bevans 669) (Hague VIII).
- Hague Convention IX of October 18, 1907, Concerning Bombardment by Naval Forces in Time of War (36 Stat. 2351, TS 542) (Hague IX).
- Hague Convention XI of October 18, 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (36 Stat. 2396, TS 544, 1 Bevans 711) (Hague XI).
- Hague Convention XIII of October 18, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War (36 Stat. 2415, TS 545, 1 Bevans 723) (Hague XIII).

- Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of April 22, 1930 (3 Bevans 298) (London Protocol).
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (6 UST 3114, T.I.A.S. 3362, 75 UNTS 31) (GWS).
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (6 UST 3217, T.I.A.S. 3363, 75 UNTS 85) (GWS Sea).
- Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (6 UST 3216, T.I.A.S. 3364, 75 UNTS 135) (GPW).
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (6 UST 3516, T.I.A.S. 3365, 75 UNTS 287) (GC).
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (249 UNTS 240) (1954 Hague Cultural Property Convention).
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of October 10, 1980, its Protocols I, II, III, IV, and V, its Amended Protocol II, and its extended scope of application (1342 UNTS 137) (CCW).
- Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, May 25, 2000 (Optional Protocol on Children in Armed Conflict).
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), December 8, 2005 (AP III).

<sup>97</sup> FM 6-27/MCTP 11-10C, *The Commander's*

*Handbook on the Law of Land Warfare* (07 August 2019).

**Arms Control Agreements to Which the United States Is a Party That Are of Direct Relevance to the Law of Armed Conflict:**

- Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925 (26 UST 571, T.I.A.S. 8061, 94 LNTS 65) (1925 Geneva Gas Protocol).
- Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of April 10, 1972 (26 UST 583, T.I.A.S. 8062, 1015 UNTS 163) (BWC).
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 18, 1977 (31 UST 333, TIAS 9614) (ENMOD Convention).
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of January 13, 1993 (CWC).

**Law of Armed Conflict Treaties Signed but Not Ratified by the United States:**

- Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 8, 1977 (AP I).
- Protocol (II) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977 (AP II).

**Law of Armed Conflict or Relevant Arms Control Treaties to Which the United States Is Neither a Signatory Nor a Party:**

- Hague Declaration (IV, 3) Concerning Expanding Bullets of July 29, 1899.
- Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities of October 18, 1907.

- Hague Convention VII Relating to the Conversion of Merchant Ships into Warships of October 18, 1907.
- First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954.
- Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of AntiPersonnel Mines and on Their Destruction of September 18, 1997.
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of March 26, 1999.
- Convention on Cluster Munitions of May 30, 2008.
- Rome Statute of the International Criminal Court of July 17, 1988 (Rome Statute)

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- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949.
- Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949.
- Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929.
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 27 July 1929.
- Hague Convention No. III Relative to the Opening of Hostilities, 18 October 1907.
- Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October 1907.
- Annex to Hague Convention No. IV, 18 October 1907, embodying the Regulations

<sup>98</sup> FM 27-10; 1956.

Respecting the Laws and Customs of War on Land.

- Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907.
- Hague Convention No. IX concerning Bombardment by Naval Forces in Time of War, 18 October 1907.
- Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907.
- Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, 15 April 1935.
- Uniform Code of Military Justice (64 Stat. 108; 50 U.S. C. 551-736).

