

## XI

# Criminality in the Law of War

*1 International Criminal Law 233 (M. Cherif Bassiouni ed., 1986)*

**T**here are two completely different aspects of the subject of criminality in the law of war insofar as prisoners of war are concerned—offenses committed before capture (pre-capture offenses or war crimes); and offenses committed after capture (post-capture offenses). Many of the rules applicable are similar or identical, but some are different. The two aspects of the problem are certainly worthy of separate treatment. They will be so treated and in the order mentioned.

### Pre-capture Offenses (War Crimes)

#### *Historical*

By offenses committed before capture we normally refer to violations of the law of war committed against the nationals, civilian or military, or the property, of the Capturing Power or of one of its allies. Despite a rather widespread misunderstanding on the subject, there was nothing new about the war crimes trials conducted after World War II except their numbers and the broad range of the offenses charged. One author has given considerable publicity to a case which occurred in 1474 in which an *ad hoc* international tribunal tried one Peter von Hagenbach for various crimes committed while he was in command of what might be termed a military occupation, although the war was yet to come. Hagenbach pleaded that he had only obeyed the orders of his master, the Duke of Burgundy. His defense was rejected, he was found guilty, and he was executed.<sup>1</sup>

After the termination of hostilities in the American Civil War (1861–1865), a conflict which had most of the characteristics of an international war, the Federal authorities conducted a number of trials of individuals for offenses committed against Union prisoners of war during the course of the conflict.<sup>2</sup> During the pacification of the Philippines which followed the acquisition of those islands by the United States as a result of the Spanish–American War (1898), a number of American officers were tried by American Army courts-martial for violations of the law of war.<sup>3</sup> (This is another area where there is a good deal

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

of misunderstanding. While these men were tried for violations of specific provisions of the American Army's "Articles of War," the offenses for which they were tried were also violations of the law of war and their trials would have been denominated "war crimes trials" if they had been tried by an enemy, or an international court.) And at about this same period the British Army not only tried some of its own personnel for violations of the law of war committed during the hostilities in the Boer War (1899-1902),<sup>4</sup> but the Treaty of Vereeniging (1902) which ended that conflict specifically provided for British courts-martial for certain Boers who had allegedly committed acts "contrary to the usages of war."<sup>5</sup>

After the end of World War I a "Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties" created by the Versailles Peace Conference recommended criminal prosecution for all persons, without distinction of rank, "who have been guilty of offenses against the laws and customs of war or the laws of humanity."<sup>6</sup> The Peace Conference implemented that recommendation with Articles 228-230 of the Treaty of Versailles<sup>7</sup> by which Germany recognized the right of the Allies to conduct trials for violations of the laws and customs of war and promised to hand over the individuals requested for trial by a requesting Ally. Public opinion prevented a weak German government from complying with those provisions and agreement was reached for trials to be conducted by the Supreme Court of Leipzig. The results of the twelve trials which were conducted were so unsatisfactory to the former Allies that they dropped the matter.<sup>8</sup> This episode convinced most students of the problem that the Versailles solution to the problem was not a viable one. (The so-called "war crimes trials" conducted by the Federal Republic of Germany itself since the end of World War II do not disprove that conclusion. For the most part they have involved the trials of Germans for offenses against Germans, where no nationalism is involved; and when they were begun sufficient time had elapsed for a change of public attitude and a cooling of wartime patriotism.)

### *Codification*

All that has been mentioned up to this point was in the realm of the customary law of war. In a 1906 Convention for the protection of the wounded and sick there was a provision by which the Parties agreed, if their laws were then insufficient, to seek from their legislatures

"the necessary measures to repress, in time of war, individual acts of robbery or ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the

Red Cross by military persons or private individuals not protected by the present convention.”<sup>9</sup>

This was, of course, a call for national legislation to provide for the punishment of certain specific war crimes. Little was done to implement this provision; but the 1929 version of this Convention went even further when the Parties agreed therein to seek from their legislatures

“the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention.”<sup>10</sup>

(For some reason there was no comparable provision in the prisoner-of-war convention drafted at the same time by the same Diplomatic Conference.)

The first real international codification in this area, if such it can be called, was the 1945 London Charter drafted and signed by France, Great Britain, the Soviet Union, and the United States, to which 19 other states subsequently adhered.<sup>11</sup> It was, of course the basis for the Nuremberg Trial. A number of the other war crimes trials in Germany which followed World War II were based on an adaptation of the London Charter by the four Powers governing occupied Germany, issued either jointly or severally.<sup>12</sup> However, most of the several thousand war crimes trials which followed World War II, both in Europe and in the Pacific, were based on the customary law of war and were conducted by courts established by individual states.<sup>13</sup> It was not until the drafting of the four 1949 Geneva Conventions for the Protection of War Victims that we find true codification in this area of international law. Those Conventions contained two articles which, with appropriate and understandable differences, were common to all of them.<sup>14</sup> The articles contained in the 1949 Third (Prisoners-of-War) Convention read as follows:

#### Article 129

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

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Each High Contracting Parties shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following article.

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

### Article 130

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

If you analyze the provisions of these two articles you will find that the Parties to these Conventions have:

- a. specifically established a number of substantive penal offenses which they have characterized as “grave breaches” of the Conventions;
- b. agreed to universal jurisdiction (of Parties to the Conventions) over those offenses;
- c. indicated that trials for “grave breaches” of the Conventions will be conducted by national courts;
- d. agreed that they will either themselves try any accused found in their territory or will extradite that accused to any other Party concerned who makes out a *prima facie* case (*aut dedere aut punire*);<sup>15</sup> and
- e. guaranteed a fair trial for any person accused of having committed such a grave breach.

The procedural rules relating to the trials and punishment of prisoners of war contained in the 1949 Third (Prisoner-of-War) Convention, set forth in some detail below in the discussion of post-capture offenses, would be equally applicable with respect to pre-capture offenses. However, it is probably appropriate to mention here that although Article 85 of the 1949 Third Geneva Convention provides that prisoners of war prosecuted for pre-capture offenses “retain, even if convicted, the benefits of the present Convention,” a number

of states have made reservations to that article, insisting upon the right to treat such individuals as common criminals after they have been finally convicted and while they serve their sentences.<sup>16</sup>

In 1977 a Protocol I to the 1949 Geneva Conventions was signed which elaborated considerably on the provisions quoted above.<sup>17</sup> Articles 11, 75(2), and 85 of this Protocol repeat many of the offenses listed in the 1949 Geneva Conventions. They also add to the list contained in the Conventions a number of offenses which cannot be considered as being established penal offenses; rather, they are offenses more closely related to the conduct of war. These offenses include such matters as making the civilian population the object of attack; or the launching of an attack against an installation known to contain dangerous forces, such as a nuclear generating plant; or attacking an undefended locality; or attacking an individual who is *hors de combat*; etc.

Although the Diplomatic Conference which drafted this Protocol was unable to reach agreement on the question of the defense of "superior orders," it did agree on provisions making superiors responsible for the acts of a subordinate

"if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

(Article 86(2))

It also agreed on provisions making it the duty of a commander who is aware that persons under his control

"are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof." (Article 87(3)).

Presumably, should the commander fail to comply with the foregoing provisions of Article 87(3), he would be punishable under Article 86(2), above.<sup>18</sup>

Article 88 of the 1977 Protocol I is entitled "Mutual assistance in criminal matters;" and Article 89 is entitled "Co-operation." As is not unusual in this area, where politics determine policy, these articles express pious statements rather than positive rules:

"The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings in respect of grave breaches;" (Article 88(1)).

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“ . . . when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition;” (Article 88(2)).

“ . . . The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters;” (Article 88(3)).

“ . . . the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations.” (Article 89).

On the other hand, Article 75 of the 1977 Protocol I, entitled “Fundamental guarantees,” does affirmatively set forth the whole gamut of protections to which a person charged with an offense “related to the armed conflict” or “arising out of the hostilities” is to be afforded. Thus, he is entitled to be informed of the reason for his arrest. He is to be tried by “an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure;” and those “generally recognized principles of regular judicial procedure” are enumerated at length. Suffice to say that if they are applied by a truly impartial court (if any court trying enemy military or civilian personnel in time of war can be such!), no accused could complain that he had not had a fair trial.

### *Mercenaries*

There is one aspect of the 1977 Protocol I which requires special mention. Article 47 of that document defines the term “mercenary” and provides that

A mercenary shall not have the right to be a combatant or a prisoner of war.

The drafting of such a provision and its inclusion in the 1977 Protocol I was, of course, a matter within the discretion of the Diplomatic Conference. However, what is bothersome is that all attempts to provide in that article that if the individual alleged to be a mercenary was tried as an illegal combatant, he would be entitled to proper trial safeguards, to the “Fundamental guarantees” of Article 75 of the Protocol,<sup>19</sup> a privilege accorded to the members of liberation movements who fail to comply with certain provisions of the Protocol and thus become, in effect, illegal combatants. Numerous aspects of the trial of the mercenaries in Angola<sup>20</sup> appear to warrant considerable pessimism with respect to the fairness of the trials that these individuals will receive.

*Conclusion*

Apart from the weakness of the provisions calling for international cooperation in the prosecution of pre-capture offenses, including the extradition of persons charged with such offenses, the 1949 Geneva Conventions and the 1977 Protocol I establish a number of substantive offenses and provide for the trials of persons accused of having committed those offenses, at the same time granting them all of the safeguards necessary to assure a fair trial. Any problems which may arise in the future with respect to the trial and punishment of persons alleged to have committed war crimes will not be because of a lack of applicable law, substantive or procedural, but because such law is disregarded or because of the improper manner in which it is applied.

**Post-Capture Offenses***Introduction*

There has never been any question but that a Detaining Power has the right to try enemy personnel in its hands for offenses committed during the period of internment.<sup>21</sup> The problems which have arisen in this regard are usually concerned with the actions of the Detaining Power in making penal offenses out of acts committed by prisoners of war, when the same acts would not be penal offenses if committed by its own personnel; in trying enemy personnel before specially constituted "hanging" courts; in denying to enemy personnel the safeguards of trial accorded to its own personnel; and in adjudging sentences against enemy personnel in excess of the sentences which could be adjudged against its own personnel found guilty of committing the same acts.

When the matter of a convention on prisoners of war was under review after World War I, the Xth International Conference of the Red Cross recommended that "An international code of disciplinary and penal sanctions applicable to prisoners of war should be included in this Convention."<sup>22</sup> That recommendation suffered the not-unusual fate of attempts to expand the international criminal law field—it was not accepted by the subsequent conferences on the subject. However, over the course of the years the offenses committed during the period of detention for which prisoners of war may be punished, and the procedures by which they may be punished for those offenses, have become highly institutionalized and, if there is compliance with the provisions of the latest and currently applicable set of rules in this regard, those contained in the 1949 Third (Prisoner-of-War) Convention, there should be no valid cause for complaint either by the person convicted and punished, or by his Protecting Power, or by his Power of Origin.

*Substantive Offenses*

The Convention has reached a very simple solution to the problem of the specific substantive offenses for which prisoners of war may be punished:

1. Article 82(1) of the 1949 Third Convention makes them subject to the “laws, regulations and orders in force in the armed forces of the Detaining Power” and authorizes the Detaining Power to take appropriate action for violations of those laws, regulations and orders.
2. Article 82(2) of that Convention provides that if any law, regulation or order of the Detaining Power makes an act committed by a prisoner of war punishable when that same act committed by a member of its own forces would not be punishable, the maximum allowable punishment is to be disciplinary, not penal, in nature.

By this means the Convention has, with respect to penal matters, equated the prisoner of war to the member of the armed forces of the Detaining Power. It has, moreover, accepted the fact that there will necessarily be some special rules of conduct promulgated by the Detaining Power which will be uniquely applicable to prisoners of war—but it has placed severe limitations on the punishment which may be imposed for violations of those special rules of conduct.

*Procedural Rules*

**General:** a. A prisoner of war must be tried by the same court, either military or civilian, that would try a member of the armed forces of the Detaining Power for the particular offense charged (Article 84(1));

b. The trial court must be one which affords the prisoner-of-war accused “the essential guarantees of independence and impartiality as generally recognized” (Article 84(2));

c. Double jeopardy (*non bis in idem*) is specifically prohibited (Article 86);

d. The penalty assessed against a prisoner of war may not exceed that provided for in respect of members of the armed forces of the Detaining Power (Article 87(1)).

**Disciplinary sanctions:** a. This is a type of punishment for minor offenses which may be imposed administratively by the camp commander or his delegate (Article 96(2)). There is probably an equivalent type of administrative punishment in the armed forces of most nations;

- b. The accused must be advised of the charge and must be given an opportunity to defend himself (Article 96(4));
- c. The allowable punishments are limited to a monetary fine, discontinuance of any privileges normally allowed by the Detaining Power above those granted by the Convention, fatigue duties not exceeding two hours daily, and a maximum of 30 days confinement (Articles 89 and 90(2));
- d. The punishment must not be inhuman, brutal or dangerous to the health (Article 89(3));
- e. There are a number of provisions establishing norms for any confinement awarded as a disciplinary punishment (Articles 88, 97 and 98);
- f. It is here that violations of the offenses unique to prisoners of war mentioned above will be punished; for example, there are several provisions with respect to attempted escapes which, when unsuccessful, are punishable by disciplinary sanctions only (Articles 91-94, inclusive).

**Judicial proceedings:** a. The offense for which a prisoner of war is to be tried must have been such in the law of the Detaining Power or in international law at the time of its commission (no *ex post facto* laws) (Article 99(1)). Logically, this provision should have been in the general provisions, with the prohibition against double jeopardy;

- b. Lists of the offenses punishable by the death sentence must be exchanged as soon as possible after the outbreak of hostilities and additions to those lists may not be thereafter made without the agreement of the two belligerents involved (Article 100); and when a death sentence is adjudged, it may not be executed until six months after notice of its imposition has been given to the Protecting Power (Article 101);
- c. Mental or physical coercion in order to extort a confession is specifically prohibited (Article 99(2));
- d. The Protecting Power must be notified of an impending trial three weeks in advance (Article 104(1)) and must, except in rare cases involving state security, be permitted to attend the trial (Article 105(5)); proof of the notification is jurisdictional (Article 104(4));
- e. The accused is entitled to particulars of the charge and other documents in a language which he understands; to be represented by counsel of his own choice, or one provided by the Protecting Power, or one provided by the Detaining Power; to confer with counsel freely and privately; to confer with and to call witnesses; to have the services of an interpreter (Article 105); and to have a full opportunity to present his defense (Article 99(3));
- f. The punishment which may be imposed upon conviction is limited to that which could be imposed upon a member of the armed forces of the Detaining Power convicted of the same offense (Article 87(1));

- g. The accused is entitled to the same rights of appeal as a member of the armed forces of the Detaining Power (Article 106);
- h. There are a number of provisions establishing norms for any confinement adjudged by the court (Articles 88 and 108).<sup>23</sup>

### Conclusion

Under the able guidance of the International Committee of the Red Cross, in the course of drafting the 1949 Third Convention the 1949 Diplomatic Conference modernized the provisions of the 1929 Geneva Prisoner-of-War Convention with respect to the trial and punishment of prisoners of war for offenses committed while in that status. Although there has, fortunately, been no occasion to test the application of these provisions on a wide scale they do appear to ensure fair and just treatment for prisoners of war accused of post-capture offenses. Once again, it may be stated that any problems which may arise will not be because of a lack of applicable law, substantive or procedural, but because such law is disregarded or because of the improper manner in which it is applied.

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### Notes

1. G. Schwarzenberger, *International Law as Applied by Courts and Tribunals*, 462-466 (1968).
2. H. Levie, *Prisoners of War in International Armed Conflict* 343-344 (1979). See, e.g., "United States v. Henry Wirz," *Documents on Prisoners of War* 46 (H. Levie, ed., 1979) (hereinafter Levie, Documents).
3. See, e.g., *The Law of War: a Documentary History*, I, 799-829 (L. Friedman, ed., 1972).
4. One such incident has recently been given wide publicity in the Australian motion picture "Breaker Morant."
5. Article 4, Treaty of Vereeniging, Pretoria, 31 May 1902, 191 Parry, *Consolidated Treaty Series* 232; Levie, *Documents*, 66.
6. 14 *Am. J. Int'l L.* 95 (1920); Levie, *Documents*, 158. The recommendation was limited to "persons belonging to enemy countries."
7. Treaty of Peace between the Allied and Associated Powers, of the One Part, and Germany, of the Other Part, Versailles, 28 June 1919, 255 Parry, *Consolidated Treaty Series* 188; Levie, *Documents*, 165.
8. See, generally, C. Mullins, *The Leipzig Trials* (1921). It is worthy of note that in one trial the German Court said:  
 "Patzig's order does not free the accused from guilt. It is true that according to the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. Military subordinates are under no obligation to question the order of their superior, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law. . . ."
9. *The Llandoverly Castle Case*, *ibid.*, 130-131.
9. Article 28(1), Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, 222 Parry 144, *The Laws of Armed Conflicts* 233 (D. Schindler & J. Toman, eds., 1981) (hereinafter Schindler/Toman).
10. Article 29(1), Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, 118 *U.N.T.S.* 303; Schindler/Toman, 257.

11. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 United Nations Treaty Series 280; Levie, *Documents*, 276. Although the Court which heard the Tokyo Trial was international in membership, it was created by a Special Proclamation of General MacArthur, acting as the Supreme Commander for the Allied Powers. Schindler/Toman 823; Levie, *Documents*, 312.

12. Control Council Law No. 10, 20 December 1945, Trial of War Criminals before the Nuremberg Military Tribunals, I, xvi (hereinafter T.W.C.); Levie, *Documents*, 304. For a typical implementing order, see Ordinance No. 7 of the Military Government of Germany, U.S. Zone of Occupation, 18 October 1946, T.W.C., I, xxiii, Levie, *Documents*, 364.

13. See generally the fifteen volumes issued by the United Nations War Crimes Commission entitled *Law Reports of Trials of War Criminals (1947-1949)*.

14. Common Articles 49/50/129/146 and 50/51/130/147, 1949 Conventions for the Protection of War Victims, 75 U.N.T.S. 31/85/135/287; Schindler/Toman, 305-333-355-427.

15. There is, however, disagreement as to whether Article 146(2) is itself an extradition treaty or is effective only when the two States involved have a general extradition treaty.

16. The North Vietnamese reservation stated:

"The Democratic Republic of Vietnam declares that prisoners of war *prosecuted for and convicted of war crimes* or crimes against humanity, in accordance with the principles laid down by the Nuremberg Court of Justice shall not benefit from the present Convention as specified in Article 85." (Emphasis added.) (The original French translation furnished to the depositary by the North Vietnamese used the words "poursuivis et condamnés"—prosecuted *and* convicted. 274 United Nations Treaty Series 340.)

Despite the foregoing, the North Vietnamese took the position that *upon capture* all American prisoners of war were immediately war criminals and, therefore, not entitled to any of the benefits of the 1949 Third (Prisoner-of-War) Convention, a denial which would, presumably, include the provisions thereof with respect to trial safeguards.

17. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Schindler/Toman, 551; Levie, *Documents*, 824.

18. This represents a return to the doctrine of the responsibility of the commander expounded in *In re Yamashita*, 327 U.S. 1, Levie, *Documents*, 294 and 319, which had appeared to be on its way to oblivion.

19. The Nigerian delegate, the main proponent of the provisions which became Article 47 of the 1977 Protocol I, stated that mercenaries would not be denied the protection of the fundamental guarantees of Article 75 and of the 1949 Geneva Conventions generally. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, XV, 192 (par. 16). However, statements by the delegates of other supporters of the article, and their adamant refusal to include any specific mention of Article 75 does not augur well in this regard. This was the obvious feeling of many of the delegates. See, e.g., *id.*, 191 (par. 14), 193 (par. 23), 194 (par. 25); 195 (par. 28); etc.

20. See Note, "The Laws of War and The Angolan Trial of Mercenaries: Death to the Dogs of War," 9 *Case W. Res. J. Int'l L.* 323 (1977).

21. Many of the provisions with respect to this time period will likewise be found, *mutatis mutandis*, in Articles 64-77 (civilian population in occupied territory) and 117-126 (civilian internees) of the 1949 Fourth (Civilians) Convention.

22. International Committee of the Red Cross, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War 407 (Pictet, ed., 1960).

23. Persons who do not benefit from more favorable treatment under the 1949 Third or Fourth Conventions would fall within the purview of the protective provisions of Article 75 of the 1977 Protocol I.

## Criminality in The Law of War

### Addendum

After the end of World War II in 1945 the victorious Allied Powers established International Military Tribunals for the trials of the major German and Japanese war criminals, as well as many other tribunals and military commissions for the trials of other persons who were deemed guilty of having violated the law of war. Hundreds of such trials were conducted. (Probably the

last of those trials were those of Klaus Barbie, decided on 4 July 1987, and of Paul Touvier, decided on 20 April 1994, both by French Cours d'Assises. In October 1997 proceedings were instituted in a Bordeaux court charging Maurice Papon, once a member of post-war French cabinets, with responsibility for the deaths of 1,090 French Jews during World War II.)

Despite the many international wars which have taken place since 1945 and the many violations of the law of war which have been committed during the course of those conflicts, there has not been a single war crimes trial arising out of violations of the law of war which had occurred during those conflicts. (The United States tried William Calley and others for violations of the law of war at My Lai, in Vietnam, but at the time these were not considered to be true war crimes trials because the United States was trying its own personnel. Why this should make a difference is difficult to understand.)

For subsequent developments in this area, see *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future* (page xx hereof) and *War Crimes in the Persian Gulf* in the present collection. In August 1996 the Congress enacted, and on 21 August 1996 the President approved, the *War Crimes Act of 1996*, an amendment to Title 18 of the United States Code, which reads as follows:

### Chapter 118—WAR CRIMES

#### §2401. War crimes

(a) OFFENSE. Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES. The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) DEFINITIONS. As used in this section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.

Under this statute the *Calley Case* would now be considered to be a war crimes case.