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Documents on Prisoners of War

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## DOCUMENT NO. 31

**THE "USAGES OF WAR ON LAND" (KRIEGSBRAUCH IM  
LANDKRIEGE) (c. 1902)**

SOURCES

Morgan, *The German War Book* 51 (1915)  
Bernhardi, *Britain as Germany's Vassal* 240  
(Becker trans., 1914)

NOTE

Shortly after the 1899 Hague Conference which had drafted the 1899 Hague Convention II (DOCUMENT NO. 28), and probably in 1902, a "War Book," really a military manual on the law of war on land and bearing the official name *Kriegsbrauch im Landkriege*, was issued by the German General Staff. It was generally similar in form to the manuals on the law of war on land issued by many armies. (See, for example, DOCUMENT NO. 138 and DOCUMENT NO. 141.) It received little publicity at the time despite the fact that it had been issued under the imprimatur of the German General Staff. A French scholar promptly pointed out that if this volume represented German military legal doctrine, as it apparently did, then in many respects that doctrine was in conflict with the 1899 Hague Convention II and its Annexed Regulations. (Carpentier, *Les lois de la guerre continentale* [1904 and 1916].) J. H. Morgan, an English lawyer, was one of the leaders in publicizing the contents of the War Book. His book, which is one of the rare sources for the complete German War Book in English, contains a discussion of that book, followed by the translation thereof. (It is interesting to note the War Book's laudatory comment concerning the prisoner-of-war provision of the 1785 Prussian-United States treaty [DOCUMENT NO. 7].)

EXTRACTS

2. *Capture of Enemy Combatants*

If individual members or parties of the army fall into the power of the enemy's forces, either through their being disarmed and defenceless, or through their being obliged to cease from hostilities in consequence of a formal capitulation, they are then in the position of "prisoners of war," and thereby in some measure exchange an active for a passive position.

According to the older doctrine of international law all persons belonging to the hostile State, whether combatants or non-combatants, who happen to fall into the hands of their opponent, are in the position of prisoners of war. He could deal with them according to his pleasure, ill-treat them, kill them, lead them away into bondage, or sell them into slavery. History knows but few exceptions to this rule, these being the result of particular treaties. In the Middle Ages the Church tried to intervene as mediator in order to ameliorate the lot of the prisoners, but without success. Only the prospect of ransom, and chivalrous ideas in the case of individuals, availed to give any greater

protection. It is to be borne in mind that the prisoners belonged to him who had captured them, a conception which began to disappear after the Thirty Years War. The treatment of prisoners of war was mostly harsh and inhuman; still, in the seventeenth century, it was usual to secure their lot by a treaty on the outbreak of a war.

The credit of having opened the way to another conception of war captivity belongs to Frederick the Great and Franklin, inasmuch as they inserted in the famous Treaty of Friendship, concluded in 1785 between Prussia and North America, entirely new regulations as to the treatment of prisoners of war.

The complete change in the conception of war introduced in recent times has in consequence changed all earlier ideas as to the position and treatment of prisoners of war. Starting from the principle that only States and not private persons are in the position of enemies in time of war, and that an enemy who is disarmed and taken prisoner is no longer an object of attack, the doctrine of war captivity is entirely altered and the position of prisoners has become assimilated to that of the wounded and the sick.

The present position of international law and the law of war on the subject of prisoners of war is based on the fundamental conception that they are the captives not of private individuals, that is to say of Commanders, Soldiers, or Detachments of Troops, but that they are the captives of the State. But the State regards them as persons who have simply done their duty and obeyed the commands of their superiors, and in consequence views their captivity not as penal but merely as precautionary.

It therefore follows that the object of war captivity is simply to prevent the captives from taking any further part in the war, and that the State can, in fact, do everything which appears necessary for securing the captives, but nothing beyond that. The captives have therefore to submit to all those restrictions and inconveniences which the purpose of securing them necessitates; they can collectively be involved in a common suffering if some individuals among them have provoked sterner treatment; but, on the other hand, they are protected against unjustifiable severities, ill-treatment, and unworthy handling; they do, indeed, lose their freedom, but not their rights; war captivity is, in other words, no longer an act of grace on the part of the victor but a right of the defenceless.

According to the notions of the laws of war to-day the following persons are to be treated as prisoners of war:

1. The Sovereign, together with those members of his family who were capable of bearing arms, the chief of the enemy's State, generally speaking, and the Ministers who conduct its policy even though they are not among the individuals belonging to the active army.
2. All persons belonging to the armed forces.
3. All Diplomats and Civil Servants attached to the army.
4. All civilians staying with the army, with the approval of its Commanders, such as transport, sutlers, contractors, newspaper correspondents, and the like.

5. All persons actively concerned with the war such as Higher Officials, Diplomats, Couriers, and the like, as also all those persons whose freedom can be a danger to the army of the other State, for example, Journalists of hostile opinions, prominent and influential leaders of Parties, Clergy who excite the people, and such like.
6. The mass of the population of a province or a district if they rise in defence of their country.

The points of view regarding the treatment of prisoners of war may be summarized in the following rules:

Prisoners of war are subject to the laws of the State which has captured them.

The relation of the prisoners of war to their own former superiors ceases during their captivity; a captured officer's servant steps into the position of a private servant. Captured officers are never the superiors of soldiers of the State which has captured them; on the contrary, they are under the orders of such of the latter as are entrusted with their custody.

The prisoners of war have, in the places in which they are quartered, to submit to such restrictions of their liberty as are necessary for their safe keeping. They have strictly to comply with the obligation imposed upon them, not to move beyond a certain indicated boundary.

These measures for their safe keeping are not to be exceeded; in particular, penal confinement, fetters, and unnecessary restrictions of freedom are only to be resorted to if particular reasons exist to justify or necessitate them.

The concentration camps in which prisoners of war are quartered must be as healthy, clean, and decent as possible; they should not be prisons or convict establishments.

It is true that the French captives were transported by the Russians to Siberia as malefactors in the years 1812 and 1813. This was a measure which was not illegal according to the older practice of war, but it is no longer in accordance with the legal conscience of today. Similarly the methods which were adopted during the Civil War in North America in a prison in the Southern States, against prisoners of war of the Union Forces, whereby the men were kept without air and nourishment and thus badly treated, were also against the practice of the law of war.

Freedom of movement within these concentration camps or within the whole locality may be permitted if there are no special reasons against it. But obviously prisoners of war are subject to the existing, or to the appointed rules of the establishment or garrison.

Prisoners of war can be put to moderate work proportionate to their position in life; work is a safeguard against excesses. Also on grounds of health this is desirable. But these tasks should not be prejudicial to health nor in any way dishonourable or such as contribute directly or indirectly to the military operations against the Fatherland of the captives. Work for the State is, according to The Hague Regulations, to be paid at the rates payable to members of the army of the State itself.

Should the work be done on account of other public authorities or of private

persons, then the conditions will be fixed by agreement with the military authorities. The wages of the prisoners of war must be expended in the improvement of their condition, and anything that remains should be paid over to them after deducting the cost of their maintenance when they are set free. Voluntary work in order to earn extra wages is to be allowed, if there are no particular reasons against it. Insurrection, insubordination, misuse of the freedom granted, will of course justify severer confinement in each case, also punishment, and so will crimes and misdemeanours.

Attempts at escape on the part of individuals who have not pledged their word of honour might be regarded as the expression of a natural impulse for liberty, and not as a crime. They are therefore to be punished by restrictions of the privileges granted and a sharper supervision but not with death. But the latter punishment will follow of course in the case of plots to escape, if only because of the danger of them. In case of a breach of a man's parole the punishment of death may reasonably be incurred. In some circumstances, if necessity and the behavior of the prisoners compel it, one is justified in taking measures the effect of which is to involve the innocent with the guilty.

The food of the prisoners must be sufficient and suitable to their rank, yet they will have to be content with the customary food of the country; luxuries which the prisoners wish to get at their own expense are to be permitted if reasons of discipline do not forbid.

Correspondence with one's own home is to be permitted, likewise visits and intercourse, but these of course must be watched.

The prisoners of war remain in possession of their private property with the exception of arms, horses, and documents of a military purport. If for definite reasons any objects are taken away from them, then these must be kept in suitable places and restored to them at the end of their captivity.

Article 14 of The Hague Regulations prescribes that on the outbreak of hostilities there shall be established in each of the belligerent States and in a given case in neutral States, which have received into their territory any of the combatants, an information bureau for prisoners of war. Its duty will be to answer all inquiries concerning such prisoners and to receive the necessary particulars from the services concerned in order to be able to keep a personal entry for every prisoner. The information bureau must always be kept well posted about everything which concerns a prisoner of war. Also this information bureau must collect and assign to the legitimate persons all personal objects, valuables, letters, and the like, which are found on the field of battle or have been left behind by dead prisoners of war in hospitals or field-hospitals. The information bureau enjoys freedom from postage, as do generally all postal dispatches sent to or by prisoners of war. Charitable gifts for prisoners of war must be free of customs duty and also of freight charges on the public railways.

The prisoners of war have, in the event of their being wounded or sick, a claim to medical assistance and care as understood by the Geneva Convention, so far as is possible, to spiritual ministrations also.

These rules may be shortly summarized as follows:

Prisoners of war are subject to the laws of the country in which they find themselves, particularly the rules in force in the army of the local State; they are to be treated like one's own soldiers, neither worse nor better.

The following considerations hold good as regard the imposition of a death penalty in the case of prisoners; they can be put to death:

1. In case they commit offences or are guilty of practices which are punishable by death by civil or military laws.
2. In case of insubordination, attempts at escape, etc., deadly weapons can be employed.
3. In case of overwhelming necessity, as reprisals, either against similar measures, or against other irregularities on the part of the management of the enemy's army.
4. In case of overwhelming necessity, when other means of precaution do not exist and the existence of the prisoners becomes a danger to one's own existence.

As regards the admissibility of reprisals, it is to be remarked that these are objected to by numerous teachers of international law on grounds of humanity. To make this a matter of principle, and apply it to every case exhibits, however, "a misconception due to intelligible but exaggerated and unjustifiable feelings of humanity, of the significance, the seriousness and the right of war. It must not be overlooked that here also the necessity of war, and the safety of the State are the first consideration, and not regard for the unconditional freedom of prisoners from molestation."

That prisoners should only be killed in the event of extreme necessity, and that only the duty of self-preservation and the security of one's own State can justify a proceeding of this kind is to-day universally admitted. But that these considerations have not always been decisive is proved by the shooting of 2,000 Arabs at Jaffa in 1799 by Napoleon; of the prisoners in the rising of La Vendée; in the Carlist War; in Mexico, and in the American War of Secession, where it was generally a case of deliverance from burdensome supervision and the difficulties of maintenance; whereas peoples of a higher morality such as the Boers in our own days, finding themselves in a similar position, have preferred to let their prisoners go. For the rest, calamities such as might lead to the shooting of prisoners are scarcely likely to happen under the excellent conditions of transport in our own time and the correspondingly small difficulty of feeding them — in a European campaign.

The captivity of war comes to an end:

1. By force of circumstances which *de facto* determine it, for example, successful escape, cessation of the war, or death.
2. By becoming the subject of the enemy's state.
3. By release, whether conditional or unconditional, unilateral or reciprocal.
4. By Exchange.

As to 1. With the cessation of the war every reason for the captivity ceases, provided there exist no special grounds for another view. It is on that account

that care should be taken to discharge prisoners immediately. There remain only prisoners sentenced to punishment or awaiting trial, *i.e.*, until the expiation of their sentence or the end of their trials as the case may be.

As to 2. This pre-supposes the readiness of the State to accept the prisoner as a subject.

As to 3. A man released under certain conditions has to fulfil them without question. If he does not do this, and again falls into the hands of his enemy, then he must expect to be dealt with by military law, and indeed according to circumstances with the punishment of death. A conditional release cannot be imposed on the captive; still less is there any obligation upon the state to discharge a prisoner on conditions — for example, on his parole. The release depends entirely on the discretion of the State, as does also the determination of its limits and the persons to whom it shall apply.

The release of whole detachments on their parole is not usual. It is rather to be regarded as an arrangement with each particular individual.

Arrangements of this kind, every one of which is as a rule made a conditional discharge, must be very precisely formulated and the wording of them most carefully scrutinized. In particular it must be precisely expressed whether the person released is only bound no longer to fight directly with arms against the State which releases him, in the present war, whether he is justified in rendering services to his own country in other positions or in the colonies, etc., or whether all and every kind of service is forbidden him.

The question whether the parole given by an officer or a soldier is recognized as binding or not by his own State depends on whether the legislation or even the military instructions permit or forbid the giving of one's parole. In the first case his own State must not command him to do services the performance of which he has pledged himself not to undertake. But personally the man released on parole is under all circumstances bound to observe it. He destroys his honour if he breaks his word, and is liable to punishment if recaptured, even though he has been hindered by his own State from keeping it. According to The Hague Regulations a Government can demand no services which are in conflict with a man's parole.

As to 4. The exchange of prisoners in a single case can take place between two belligerents without its being necessary in every case to make circumstantial agreements. As regards the scope of the exchange and the forms in which it is to be completed the Commanding Officers on both sides alone decide. Usually the exchange is man for man, in which case the different categories of military persons are taken into account and certain ratios established as to what constitutes equivalents.

Transport of Prisoners. — Since no Army makes prisoners in order to let them escape again afterwards, measures must be taken for their transport in order to prevent attempts at escape. If one recalls that in the year 1870-71, no fewer than 11,160 officers and 333,885 men were brought from France to Germany, and as a result many thousands often had to be guarded by a proportionately small company, one must admit that in such a position only the most zealous energy and ruthless employment of all the means at one's

disposal can avail, and although it is opposed to military sentiment to use weapons against the defenceless, none the less in such a case one has no other choice. The captive who seeks to free himself by flight does so at his peril and can complain of no violence which the custody of prisoners directs in order to prevent behaviour of that kind. Apart from these apparently harsh measures against attempt at escape, the transport authorities must do everything they can to alleviate the lot of the sick and wounded prisoners, in particular they are to protect them against insults and ill-treatment from an excited mob.