[**Source**: The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. XII, 1949, pp. 86-89]

The following analysis is based upon the judgment of US v. Wilhelm von Leeb, et al. (The High Command Case, US Military Tribunal, Nuremberg, October 27-28, 1948) Source 11 TWC 462.

[...]

(xii) The Interpretation and Applicability of the Hague and Geneva Conventions

The Tribunal pointed out that: “Another question of general interest in this case concerns the applicability of the Hague Convention and the Geneva Convention as between Germany and Russia.” [...]

Of the applicability of the Geneva Convention, the Tribunal said that: “It is to be borne in mind that Russia was not a signatory Power to this Convention. There is evidence in this case derived from a divisional order of a German division that Russia had signified her intention to be so bound. However, there is no authoritative document in this record upon which to base such a conclusion. In the case of Goering, et al., [...] the IMT [...] stated as follows:

> “The argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention, is quite without foundation. On 15th September, 1941, Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, signed by General Reinecke on 8th September, 1941. He then stated:
>
> “The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R. Therefore only the principles of general International Law on the treatment of prisoners of war apply. Since the eighteenth century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people... The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint.”
>
> “Article 6 (b) of the Charter provides that “ill-treatment... of civilian population of or in occupied territory ... killing of hostages ... wanton destruction of cities, towns, or villages” shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: “Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected.””

“It would appear from the above quotation that Tribunal accepted as International Law the statement of Admiral Canaris to the effect that the Geneva Convention was not binding as between Germany and Russia as a contractual agreement, but that the general principles of International Law as outlined in those Conventions were applicable. In other words, it would appear that the IMT in the case above cited, followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that

they were binding insofar as they were in substance an expression of International Law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint."

The Tribunal next dealt with two points of interpretation as follows:

"One serious question that confronts us arises as to the use of prisoners of war for the construction of fortifications. It is pointed out that the Hague Convention specifically prohibited the use of prisoners of war for any work in connection with the operations of war, whereas the later Geneva Conventions provided that there shall be no direct connection with the operations of war. This situation is further complicated by the fact that when the proposal was made to definitely specify the exclusion of the building of fortifications, objection was made before the conference to that limitation, and such definite exclusion of the use of prisoners, was not adopted. It is no defence in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under International Law, such evidence is pertinent. At any rate, it appears that the illegality of such use was by no means clear. The use of prisoners of war in the construction of fortifications is a charge directed against the field commanders on trial here. This Tribunal is of the opinion that in view of the uncertainty of International Law as to this matter, orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal upon their face, but a matter which a field commander had the right to assume was properly determined by the legal authorities upon higher levels.

"Another charge against the field commanders in this case is that of sending prisoners of war to the Reich for use in the armament industry. The term for the armament industry appears in numerous documents. While there is some question as to the interpretation of this term, it would appear that it was used to cover the manufacture of arms and munitions. It was nevertheless legal for field commanders to transfer prisoners of war to the Reich and

thereafter their control of such prisoners terminated. Communications and orders specifying that their use was desired by the armament industry, or that prisoners were transmitted for the armament industry are not in fact binding as to their ultimate use. Their use subsequent to transfer was a matter over which the field commander had no control. Russian prisoners of war were in fact used for many purposes outside the armament industry. Mere statements of this kind cannot be said to furnish irrefutable proof against the defendants for the illegal use of prisoners of war whom they transferred. In any event, if a defendant is to be held accountable for transmitting prisoners of war to the armament industry, the evidence would have to establish that prisoners of war shipped from his area were in fact so used.

“Therefore, as to the field commanders in this case, it is our opinion that upon the evidence, responsibility cannot be fixed upon the field commanders on trial before us for the use of prisoners of war in the armament industry.”

The Tribunal then returned to the question of the declaratory character of the Hague and Geneva Conventions:

“In stating that the Hague and Geneva Conventions express accepted usages and customs of war, it must be noted that certain detailed provisions pertaining to the care and treatment of prisoners of war can hardly be so designated. Such details it is believed could be binding only by international agreement. But since the violation of these provisions is not in issue in this case, we make no comment thereon, other than to state that this judgment is in no way based on the violation of such provisions as to Russian prisoners of war.

“Most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia. These concern (1) the treatment of prisoners of war; [...].

[Here the Court provides twenty-four quotations of parts of some of the provisions of the 1907 Hague Regulations and the 1929 Geneva Convention on Prisoners of War, which it considers to be binding as customary law.]
