The Punishment of War Criminals

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A Statement of the
NATIONAL LAWYERS GUILD

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The Punishment of War Criminals

The National Lawyers Guild has been heartened by the determination of the United Nations to bring to justice all who had a part in perpetrating the monstrous crimes of the Axis. As lawyers we have a particular interest in the vindication of law and justice—and as lawyers we know that such vindication can be achieved only if swift and sure punishment is meted out to those responsible for the cold-blooded massacres and the incredible horrors of Maidanak, Lidice, Kharkov and Nanking.

But the punishment of war criminals is not only a matter of law and justice—it goes to the root of our war policy, to the basic objective of destroying the system of organized aggression and all its works. It is a war measure in virtually the same sense as direct military action. Our action on this issue will therefore be a touchstone of our intentions with respect to the extermination of Fascism. Compromise and vacillation as to war crimes will be construed everywhere as a sign of weakness and indecision in our fundamental war policy. The result is bound to be suspicion and mistrust among the United Nations and a serious barrier to the wholehearted collaboration which is essential to a real peace.

The legal profession has a special responsibility in the matter of war criminals. We have seen how finely-spun technicalities and inapplicable precedents can be used to confuse issues and frustrate justice. This may happen in the case of the war criminals. It is our duty as lawyers to see that it does not.

The Guild is convinced that the punishment of war criminals has a firm basis in well-established principles of law. The United Nations have not proposed indiscriminate vengeance. They have declared that trial and punishment are to be “through the channel of organized justice” and “according to the laws.” The Guild believes that accepted legal processes are adequate and that resolute action need not now be delayed. We wish particularly to call attention to the following basic legal and practical considerations.

1. Nature of War Crimes

There has been serious confusion as to the definition of a war crime. It has been charged that war crimes constitute ex post facto legislation and that punishment of war criminals would violate the fundamental principle nulla poena, sine lege. This is completely unfounded. A war crime is not an offense newly invented and retroactively fastened upon a captured enemy. Nor is it something plucked out of a vague and little-known body of international law. Defined simply, it is a violation of the positive laws of warfare—that is, of the specific rules which civilized nations have generally recognized as governing the conduct of war.

The laws of warfare are known to all Armies. They are in part codified as in the Hague and Geneva Conventions, and in part common law applied by military tribunals and incorporated in treaties and Army manuals. The rules are clear cut and specific; they forbid the killing of surrendered soldiers, the torture of prisoners of war, pillage, the deliberate killing of innocent civilians, the seizure of women for soldiers’ brothels, and similar atrocities.

It is important to recognize that these are the war crimes. They should not be confused with the war guilt question or with violations of the Treaty of Versailles and the Pact of Paris. To do so would be to introduce complicated legal issues and in effect to draw a red herring.

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1. Allied Declaration on German War Crimes, Jan. 13, 1943 (Inter-Ally Rev. Jan. 15, 1943, p. 2) 4
across the whole problem. The Axis has been guilty of enough definite and well-recognized crimes to make it unnecessary to invent new offenses.

2. Assembling the Evidence

As lawyers we have a keen appreciation of the importance of investigation. It is not enough to have vague or fragmentary reports of atrocities. The evidence must be assembled and organized in a comprehensive and systematic manner. Specific times, places, actions, and witnesses must be uncovered. This cannot be done by commissions deliberating in London. It must be done close to the scene of the atrocity and without unnecessary delay—otherwise witnesses may be lost and the accused disappear. Soviet investigation commissions have already shown us how important these practical questions are.11 It is strongly urged that the United States and allied authorities take similar action. Military or civilian commissions should be organized now to conduct the basic investigations—to hear witnesses, organize the facts, prepare reports, and preserve the records. Unless this is done it will be difficult to carry through with the trial and punishment of the guilty.

3. Jurisdiction of the United Nations

Abstruse technicalities have unfortunately complicated the question of jurisdiction in the matter of war criminals. Thus it has been contended that members of the armed forces are subject only to the criminal jurisdiction of their own tribunals12 and that war criminals can be tried only in German and Japanese courts. We submit that this contention has no merit. The immunity from jurisdiction normally accorded members of the armed forces does not extend to violations of the rules of war—either in the inter-bellum or post-bellum period. The prevalent view is that there is concurrent jurisdiction: the injured State as well as the State to which the accused belongs has the right to try and punish.13 As a practical matter it is easier that the United Nations exercise this right. The fiasco of the Leipzig war crime trials of the last war must not be repeated.14

It has also been suggested that the doctrine of territoriality of jurisdiction bars allied trials for atrocities committed within Germany or Japan.15 This is certainly doubtful. Territoriality is not the only basis of jurisdiction under international law. A State may assume jurisdiction for an extraterritorial crime if the crime is against its nationals or its national interest.16 The United States, Germany, and other countries have frequently asserted such jurisdiction.17 There can be little question that many of the atrocities committed within Germany and Japan affect allied interests sufficiently to justify allied jurisdiction.18

One further point on jurisdiction. The vast majority of the war criminals will be tried by the national tribunals of the United Nations, either civilian or military. In a few cases joint or mixed tribunals may be established by two or more of the United Nations, and in some cases a genuinely international tribunal may be deemed appropriate. Such mixed and international tribunals should be welcomed as a symbol of justice on the international plane.19 However, it must be borne in mind that the creation of international courts are complicated and protracted affairs. We believe therefore that an international tribunal should not be regarded as an indispensable element to the trial of war criminals, nor should it afford a reason for delaying prosecution. The domestic tribunals of the United Nations have jurisdiction and experience. It is urged that they proceed with the job as soon as possible.


The importance of apprehending the accused must not be overlooked. After the last war a cardinal error was the failure to require surrenders of the war criminals as a condition of the Armistices. This time Roosevelt and Churchill have already declared that the Armistice terms will contain provisions for the rendition of the criminals,20 and the Romanian and Finnish Armistices already contain such provisions.21

We urge that future armistice terms go one step further: that they contain, together with the general provisions for the delivery of criminals a list of the chief criminals, by name, who are to be given over to the Allies for trial.

5. Extraterritorial Crimes from Neutral States

The neutral States present a major obstacle to the capture and trial of the war criminals. This is understood by the United Nations. Solemn warning was given to the neutrals in the Moscow declaration which declared that Allied Powers will pursue the criminals "to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."22 In pursuance of this declaration the President and the State Department have taken steps to prevent the Axis criminals from finding refuge in the neutral territories.23

We fear that more vigorous action is necessary, particularly with respect to those neutral States which have shown themselves not unfriendly to the Axis. It must be made clear that the traditional right of asylum is not involved here,24 that these are not political offenses, but crimes and atrocities such as murder, rape, arson, and robbery. They are crimes covered in virtually all cases by existing extradition treaties and conventions.25 Only a country unfriendly to the United Nations could interpret these outrages as the type of "political crime" exempted in the extradition pact.

It should also be made clear that the interpretation of the extradition treaties will not be left exclusively to the neutral country. The Allies must be prepared to implement the Moscow declaration either by arrangements with the neutrals or, if agreements fail, by appropriate sanctions.26

6. Defense of "Act of State"

The "act of State" doctrine holds that a foreign individual cannot be made personally liable for an act ordered or affirmed by his State.27 The individual in such a case is said to be an instrument of the State and therefore the State alone can be held responsible.28

We submit that this doctrine has no place in the prosecution of war criminals. It is a doctrine based on sovereign immunity and applicable only to disputes between nations.29 We have found no valid precedent for applying it to the trial of war criminals. To do so would largely nullify the laws of warfare since violations can be defended as having in effect been ordered or ratified by the State. It would run counter to the solemn declarations of the United Nations to punish the criminals who at the time of such declarations were acting under the orders of their Governments.30 It would be contrary to the precedents of military tribunals which have punished individual war offenders time and time again31 although they have acted under the direction of those Governments. To apply this doctrine would mean that all violations of the rules of warfare could be legalized by a State under the control of the law breakers.32 There is no precedent or legal principle which compels us to reach so absurd a result.

7. Plea of Superior Orders

A crucial issue in many of the war crime

12. Manner, supra note 4, at 419 et seq.
14. 1 Gooch, op. cit. supra n. 4, ch. 2.
17. 63 F. (2d) 706, 708.
18. 54 F. 2d 117, 119.
21. Article 100, International Criminal Court (see particularly chs. 6 and 12).
22. Statement of President Roosevelt, Sept. 7, 1942.
24. Moscow Declaration, supra note 2.
26. Manner, supra note 4 at 416.
28. Manner, supra note 4 at 416.
29. Moscow Declaration, supra n. 2.
trials will be presented by the plea of "superior orders"—a defense which asserts that members of the armed forces are not liable for offenses committed by them under the orders or sanction of their military or governmental superiors. 32 A soldier, it is said, cannot be held responsible for obeying his superior's order. 33

It is essential to examine this doctrine with care. Its practical effect, if not qualified, would be the acquittal of many of the subordinate malefactors. For practically all of the Axis atrocities will be defended as done pursuant to orders or general directions of higher authorities.

As a matter of law, it is extremely doubtful whether a "superior order" necessarily constitutes a valid defense. Indeed the basic doctrine in American law is to exclude it as a defense: a person does not normally escape liability for an illegal act on the plea that he was acting on orders of a higher authority. 34 The exception to this principle—exculpating the soldier who follows orders in war—is found in the Army Rules of Land Warfare 35 and in the treaties on military law. Despite its unequivocal inclusion in the Army Rules, the doctrine has not been recognized in the cases without serious qualifications.

First, judicial authority has generally rejected superior orders as a defense where the orders were manifestly illegal or where the defendant knew they were illegal. 36 This is true not only of Anglo-American law, but of continental law as well. 37 Even the Leipzig Court in the farce of war crime trials of the last war excluded the defense of superior orders raised by a submarine commander on trial for torpedoing a hospital ship. 38 Under this rule, superior orders would not be a valid defense in a vast number of war crime trials, since the torture and pillage committed by the Axis were flagrant violations of the laws of war and undoubtedly known to be such. The German soldier who buried civilians alive 39 and the Japanese torturer of war prisoners 40 must be deemed to have known that their acts were unlawful.

Secondly, it should be plain that superior orders afford no protection where the defendant has discretionary power to consider the directors and executives of the Axis States. Nor must we overlook those officials who appear to be somewhat further removed from the actual atrocities; the Von Papiens and Ribbentrops who schemed and plotted in the diplomatic realm, and the directors of I. G. Farben and the Mitsui who looted on a grand scale are all as guilty as the S. S. men or Black Dragon assassins. There is no reason why the names of these principal criminals should not be revealed to the world as first on the list of accused. We regret that the United Nations War Crimes Commission at London has failed to do so. Our concern is increased by the reported reluctance of the chairman of the Commission to name even Hitler 41 as a war criminal. The excessive legalization which this reveals must be a source of grave anxiety to those interested in the effective carrying out of the Moscow declaration.

We trust that the caution of the London Commission with respect to Hitler is not based on the principle that chiefs of State cannot legally be tried by a foreign government. This doctrine was advanced at the end of the last war by the American members of the Commission on Responsibilities which was concerned with the war crime charges against the Kaiser. 42 A head of a State exercising sovereign rights, it was said, cannot be tried by any other sovereign. There is no basis, in our opinion, for applying this theory to the war crime trials. Sovereign immunity is a doctrine of international law based upon the necessity of yielding local jurisdiction as a condition of friendly intercourse among nations. 43 It is an immunity accorded the friendly sovereign, not the hostile one. Thus it is well accepted that the property of an enemy sovereign may be confiscated 44 and the ruler himself subject to capture as a prisoner of war. 45 An obvious historical precedent is the punishment of Napoleon Bonaparte while he was still the owner of his properties. But precedents and legal principles need hardly be cited. To treat Hitler as a friendly sovereign is so absurd and monstrous—it so clearly flouts the declarations of the United Nations—that we may be assured that it will not be permitted to happen.

Special attention should also be given the "economic" criminals. There can be no doubt that the Axis economic penetration constitutes pillage under the rules of war. 46 Country after country has been stripped of resources and manpower in the most thorough looting operation the world has ever seen. 47 We must not be confused by the cloak of legality used by the Axis plunders to cover their larcenies. All the complex and devastating methods which have been utilized to give a lawful appearance to transactions based on duress and fraud. The devices are well known: blocked Reichsmark accounts, occupation currencies, new security issues, mergers, sequestration, foreclosed property, and a variety of other methods of dispossession. 48 The forms have been sophisticated but the substance is simply theft on a grand scale. Neither their "respectable" position nor the cloak of legality can prevent the prosecution of these financial and industrial criminals. Two other classes of economic criminals should not be overlooked: those who have been the receivers and beneficiaries of the loot known to have been taken from oppressed peoples, and those who have exploited the slave labor. They too must share the guilt as they have shared the profits of robbery and slavery.

33. Munzer, supra n. 4 at 417.
34. See, e.g., Barrett, C. S. (1894), 2 Cranch, 179.
37. See, e.g., Schuch, op. cit. at p. 391.
38. Professor Glueck's work contains an excellent study of the defense of superior orders as applied to war criminals.
40. 43 Statement of President Roosevelt October 7, 1942.
41. 42 Hackworth, op. cit. at 391.
42. See Schooner Exchange v. McFadden (U.S. 1812), 7 Cranch, 116.
43. See, e.g., E. M. Kennedy v. Bulgaria (1921) 1 ch. 107.
44. See, e.g., E. M. Kennedy v. Bulgaria (1921) 1 ch. 107.
45. 52 See Basch, op. cit. at p. 10 et seq.
CONCLUSION

The foregoing discussion indicates the complicated technical and political issues presented by the war criminals problem. It reveals particularly the danger of an uncritical application of abstract dogma and empty concepts to the particular issues involved. As we have demonstrated, these dogmas and concepts must be carefully examined in the light of their purpose and their relevance to the cases on hand. We are not compelled to accept the vague doctrines of act of State, superior orders, territoriality of jurisdiction, political crimes and sovereign immunity and apply them mechanically to the prosecution of war criminals. Legal principle and procedure should be used to further our national policy and not merely to interpose technical obstacles. It would be a blow to law and justice everywhere if legal technicalities were permitted to block full retribution for the countless atrocities of the Axis. Nor must we forget that the punishment of war criminals is bound up with the problem of achieving a secure and lasting peace. The war criminals are the most aggressive and dangerous groups of Nazi and Japanese militarism; as long as they are permitted freedom they will constitute a threat to the security of the world and a source of disunity among the United Nations.