

JUSTICE FOR WAR CRIMINALS

BY SHELDON GLUECK

THE recent cold-blooded murder of unarmed American soldiers by the Germans in Belgium is but a small sample of the cruelties, crimes and wholesale violation of the laws and customs of warfare chargeable to Axis leaders and soldiers. The world was shocked by the German massacre of the innocent civilians of Lidice; but the number of Lidices pillaged and burned by the Germans is so large that all count of them has been lost. The world was stunned by the disclosure of the Nazi murder factory at Maidanek near Lublin, Poland. But the whole diabolical plan of gas chambers, mass crematoriums, the careful saving and classification of the clothes and possessions of the innocent victims — down to babies' dolls — and the use of the victims' ashes as fertilizer on the German soldiers' vegetable plots — all this has been repeated not only at Tremblinka, but in many other stamping grounds of the Master Race.

What shall be the response of the victorious United Nations?

The war criminals problem is among

the most complex yet important puzzles facing the United Nations. At the end of the last war, the Germans were permitted, after two and a half years of procrastination, to try their war criminals in their own special court at Leipzig. They found only six guilty out of the 896 accused on the Allied list. The sentences imposed for numerous and cruel violations of the laws of warfare were absurdly small; and the two chief malefactors were permitted to escape shortly after their imprisonment. The ex-Kaiser chopped wood at Doorn in peace and plenty.

The lessons to be drawn from this débâcle are clear:

(1) The United Nations must not again trust Germany to do justice. To the Germans, the military and political chieftains responsible for the horrible cruelties inflicted are heroes, exactly as were the German war criminals of World War I.

(2) Surrender of the leading malefactors should be a firm condition to the granting of any armistice, instead of being postponed again until the signing of the peace treaty.

SHELDON GLUECK is professor of criminal law and criminology at Harvard and one of America's foremost authorities on the subject. His books include *Crime and Justice*, *Mental Disorder and the Criminal Law*, *500 Criminal Careers* (with Dr. Eleanor T. Glueck), and the recently published *War Criminals*.

(3) The accused must be tried as soon as possible; otherwise they and witnesses will disappear, die off, or suffer loss of memory.

(4) The good faith of the government that succeeds the Hitlerian régime should be tested, among other things, by its co-operation in assembling proof of violations of the laws and customs of legitimate warfare and of the criminal law common to the majority of civilized states; but most of the preparation of the trials should be by the United Nations.

(5) Fair and lawful, but *expeditious*, judicial procedure should be provided. The United Nations should stand for no German blustering or chicanery. Attempts to interfere with the orderly and swift administration of justice should be severely punished.

(6) German public opinion should be systematically prepared to recognize the justice of punishing leaders guilty of atrocities. Alleged heroes should be deflated by convincing proof of their barbarous actions against helpless old men, women and children. The fair and orderly United Nations' proceedings against individual Germans accused of specific crimes should be contrasted with the indiscriminate mass-butcheries carried out upon orders of German leaders against many thousands of innocent hostages. They should also be contrasted with the proceedings brought against anti-Nazi Germans in the infamous "People's Courts." It should be stressed that the United Nations' prosecutions are directed more against

high-placed leaders and planners of mass atrocities than against the ordinary "Hans Schmidts"; and that punishments will take account of the differences, in respect to freedom of action and to moral and legal responsibility, between the powerful and self-seeking leaders and the ordinary, especially the non-Nazi, Germans.

(7) The United Nations must remain united throughout the liquidation of the war criminals' problem and not be fooled, manipulated or intimidated by the blandishments of the Germans or of their propagandists and apologists at home and abroad.

These provisions apply with equal validity to the trial and punishment of Japanese war criminals and those of the Axis scavenger satellites.

II

How can all this be made effective?

Among the fundamental questions to be answered by the United Nations as soon as possible are the following:

(1) *What types of acts can legitimately be denominated "War Crimes"?* Careful study of the problems created by the Axis policy of ruthless "total warfare," shows it to be legitimate and sensible to define war criminals as *persons — regardless of military or political rank — who, in connection with the immediate military, political, economic or industrial preparation for or waging of war, have, in their official capacity, committed acts contrary to (a) the laws and customs of legitimate warfare or (b) the principles of criminal law*

generally observed in civilized states; or who have incited, ordered, procured, counseled or conspired in the commission of such acts; or, having knowledge that such acts were about to be committed and possessing the legal duty and power to prevent them, have failed to do so.

(2) *What can an injured belligerent state legitimately do about violations of the laws and usages of permissive warfare or of its criminal law?* Remedies provided by international law against a state — publication of the facts, protest and demand for punishment sent the offending belligerent through neutrals, reprisals, postwar compensation — all these have proved unsatisfactory.

In addition to action which may be taken against the implicated state, is the injured nation justified in prosecuting and punishing *individual subjects* of that state? And if so, is this to be done under its own municipal law, under the law of the accused, or under the law of nations?

Although it is generally believed that international law obligates only states and not their individual nationals, examination of this theory in the light of modern realities shows it to be faulty. A state, or the United Nations acting jointly, may legitimately prosecute war criminals; and prior "implementation" of international law by domestic statutes is not indispensable. The vast majority of offenders should and can be properly proceeded against in the military or civil courts of the states whose laws

have been violated and subjects injured by Axis atrocities. However, a large number of defendants — heads of state and other military and political leaders, planners and executors of widespread atrocities in two or more countries, those who committed crimes against entire classes of persons whom they first rendered "stateless" and then slaughtered *en masse* in pursuance of a calculated policy of destroying "inferior races" — such supermalefactors ought to be tried and punished properly under the solemn auspices of the entire civilized world. This can be done most appropriately in an International Criminal Court to be established as soon as possible by the United Nations and such neutrals as wish to participate.

Despite claims to the contrary, it can reasonably be demonstrated that the law for the use by such a world criminal tribunal already exists; and its enforcement by the proposed court would violate no fundamental tenets of civilized justice. The law for an international tribunal can be drawn from the rich reservoirs of (a) common ("unwritten"), (b) conventional ("written") law of nations and (c) the principles, doctrines and standards of criminal law that constitute the common denominator of practically all civilized penal codes. It may be desirable, later, for the nations of the world to enter into a convention, setting out specific definitions of "*international crimes*" to be cognizable in the future by the world criminal tribunal; but the pre-

existence of such an international penal code is not a *sine qua non* to the just and efficient functioning of an International Criminal Court in the case of the criminals of the present war. Punishments to be imposed by the international tribunal could legitimately be based either upon those permitted by the law of nations in the case of piracy and the violations of the laws and customs of warfare, or upon punishments provided for crimes of similar nature and gravity by the laws of the accusing state.

An International Criminal Court might well be a more vivid symbol of the reign of justice on an international plane than even the Permanent Court at The Hague has been. The common man is hardly interested in nor can he even understand the latter's technical decisions. He *could* understand that justice had been done if, with the "*People of the World Community*" as the plaintiff, Hitler, Tojo, Mussolini, Himmler, Goering, Goebbels and the rest of the master-criminals were subjected to trial in a world tribunal, were given a fair procedure and opportunity to defend themselves, and, upon legal proof of guilt, were punished in vindication of law and justice.

(3) *Can heads of state (e.g., Hitler) legitimately be subjected to trial and punishment by the United Nations; or are such high-placed scoundrels exempt from legal liability and trial in a foreign jurisdiction?* It was the insistence of the American and Japanese representatives on the Commission of Re-

sponsibilities at Versailles that the ex-Kaiser could not be so tried that helped to prevent his punishment. However, the legal authority in support of the proposition that a chief of state is necessarily and always exempt from foreign trial is open to serious question. By invading neighboring countries in flagrant violation of treaty obligations and for the purpose of aggression and the mass extermination of human beings, a sovereign strips himself of any mantle of immunity he may have claimed by virtue of international comity. He outlaws himself. The imprisonment of Napoleon at St. Helena was partly founded on the legal argument that a gross breach of faith by an absolute sovereign renders *him* (not merely his state) personally responsible for an offense against the law of nations. But even if there be no valid technical legal basis, the disposal of chiefs of state is, in the final analysis, a *political* question. By simple agreement between his captors, a sovereign or ex-sovereign can be executed, imprisoned or banished without any trial at all. That was the procedure followed in the case of Napoleon.

(4) *What, if any, is the responsibility of subordinates? And how should an Axis soldier's defense that he committed war crimes only in obedience to his government or military superior be treated?* The existing principle in English and American rules of warfare would seriously hamper the administration of justice in the case of war

criminals, since it provides (e.g., *American Rules of Land Warfare*, Sec. 347) that

Individuals of the armed forces will not be punished for these offenses in case they are committed *under the orders or sanction of their government or commanders*. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

Apart from the ambiguity as to where the line of "commander" should be drawn, this very liberal rule would exempt a great many Axis soldiers from liability. It is not completely in harmony with the principles embodied in English and American judicial decisions. As a reasonable and fair policy for the modification of Anglo-American rules and as a just principle to be applied by an International Criminal Court, it is suggested that the commission of war crimes (as defined above) in obedience to an order of a state, government or military superior should be no defense *if the accused actually knew, or, under the circumstances in question, had reasonable grounds for knowledge, that the act commanded was illegal*.

Where the offender's domestic law and the law of nations or commonly accepted tenets of civilized criminal law are in conflict, the accused's law should give way. Otherwise, the most lawless nations could easily whitewash their militarists and politicians for the most flagrant violations of the rules of warfare and of criminal law, simply by enacting that such deeds

are legitimate under their own municipal law. Much of the Nazi decree-law clearly illustrates this danger. While a sovereign state is free to adopt any legislation it sees fit — however much it may, in so doing, turn back the clock of civilization — the Family of Nations is not obligated, either in law or in morals, to be bound by such aberrations. Otherwise, any backward nation would always have the power to stultify the progress of justice.

The fact of the superior's order, the circumstances under which the accused committed the act, the amount of discretion lodged in the subordinate, his education and training and like matters should be weighed in the balance in assessing the punishment in the individual case.

(5) *How should the accused be apprehended?* This question may turn out to be the most troublesome one facing the United Nations. At the close of the first World War, the Allies failed to occupy all of Germany and to seize those persons wanted for trial as war criminals. The cessation of hostilities in the present war should find the United Nations the complete masters of Axis territory and in a position to incarcerate for trial as many persons charged with war crimes as still remain and can be ferreted out. A main provision of the list of terms of "unconditional surrender" ought to be the surrender of the chief war criminals for prosecution. No excuses for not doing so should be tolerated, except convincing proof of death.

Those with whom the United Nations' military and political leaders deal in negotiating for surrender must be held strictly and personally accountable for seeing that none of the principal war criminals escapes to neutral countries, and that all are immediately arrested and kept in custody until taken over by representatives of the United Nations.

But the most perplexing problem will be the capture of war offenders who have sought "asylum" in other countries. Between member states of the United Nations an agreement for free exchange of wanted war criminals — regardless of existing extradition treaties — can be negotiated at once. As for accused who may escape to neutral lands, the first step in the right direction has already been taken: solemn warning of neutrals, in accordance with the Moscow Statement's policy of pursuing "to the uttermost ends of the earth" those who have "imbrued their hands with innocent blood" and delivering them up to their accusers for justice. However, the replies received are none too revealing, and, in the case of two or three neutrals, not very promising.

The United Nations ought, therefore, to press frank discussions with neutral states with a view to just and sensible agreements in the matter. They must be prepared to bring the full pressure of world public opinion to bear. They must use economic and political arguments against defiant refusal to deliver up notorious war criminals upon some obviously spe-

cious or unreasonable ground, such as the claim that the mass-butchery of millions of civilians, war prisoners, and "stateless" peoples are mere "political offenses." Instead of the crime for which Holland refused delivery of the former Kaiser at the close of the last war — a "supreme offense against international morality and the sanctity of treaties" — master-criminals should be plainly and bluntly charged with being principals, accessories or conspirators in such ordinary crimes as murder, arson, kidnaping, rape, robbery, larceny, receiving stolen goods and others usually listed in extradition treaties.

(6) How shall the guilty be punished?

Because of the nature and multiplicity of the atrocities committed by the Axis war criminals, and the deeply indoctrinated bigotry of their troops, a philosophy of correction, reform and rehabilitation must yield first place to one of punitive retribution. The profoundly injured sensibilities of the survivors of Axis atrocity are more to be taken into account than are the feelings or reformatory possibilities of the war criminals; for unless the survivors of Nazi-Fascist tyranny witness the punishment of at least the chief contrivers of deliberate torture and mass-murder, the very foundations of their mental and moral well-being will be undermined. There has been altogether too much cynicism about law and justice. It is high time that the awesome power of disciplined punishment for violations of law be

made evident throughout the world.

But a program that stresses retribution for wrongdoing does not necessarily rule out the opportunity for individualized corrective and therapeutic measures in especially worthy and promising cases. What each of the Allied countries will do with its convicted war criminals is its own concern; a United Nations policy might well be more elastic and experimental.

In non-capital cases the jails, penal and correctional establishments and reformatory agencies, including probation and parole as well as hospitals for the criminal insane usually employed by the prosecuting state (if these are still available), should also be used by the international court. The court will, however, to some extent probably need detention and punitive facilities of its own. A Bureau of Imprisonment and Correction will also have to be set up in order to work with the international tribunal in supervising the execution of its sentences.

A basic consideration will be the need of hundreds of thousands of able-bodied workers to rebuild what they have destroyed. Work in labor battalions, for years to come, ought to be the fate of the vast majority of convicted Axis war criminals. However hard such labor may be, it will at least be imposed as a lawful penalty following conviction for crime, and will be more humane than the extermination of supposedly lesser men by a self-styled master race.

III

The task confronting the United Nations in all this is tremendous. To make long lists of accused and summaries of the proof available against them is but one step on a very tortuous road. It is necessary that the United Nations Commission in London be fully empowered to work out details of general policy and to implement the entire program with conventions and executive agreements, new tribunals, prosecuting and defending agencies, sheriffs and court officers, penal and correctional authorities and facilities. Above all, Hamlet's well-known "law's delays" must find no place in the program. To permit two and a half years to elapse between the accusation and the trial — as was done last time — means the strangulation of justice through the death, disappearance or intimidation of complainants and witnesses and the loss of public interest.

In quality if not in quantity, the task of doing justice in the matter of war criminals is the joint responsibility of the United Nations. The mere fact of the continued participation of the United Nations in doing at least one postwar job jointly, efficiently, firmly and fairly will awaken hope that the forward-looking members of the Family of Nations can continuously co-operate in the more pleasant and fruitful activities of peace. In the performance of justice the United Nations must present a continuing united front.

FLUFF AND FLINT

A Story

BY WILLIAM J. RYAN

THINGS were different back there when I was eighteen.

In those days eighteen was when you were young. It was when your pride in practically everything was fierce, your heart strong and eager, your eyes bright with the light of living.

Eighteen was when all things in the universe were crystal-clear in a spinning, shining, dizzy, baffling, out-of-focus sort of way.

You knew everything about everything.

It was wonderful.

Now, it's not that way at all. Everything is grim and purposeful and valiant. Things don't happen now that used to happen then. Like some things which happened to me the year I turned eighteen.

THAT was the year back there in the late twenties when I had a little trouble with Pop. Pop was all right, I guess, only he was sort of Irish, and impulsive. He worried about me too much. He'd look at me and get dis-

gusted and want to do something about it, and this always seemed to make him a little crazy. It seemed to me he was always messing up my destiny with his craziness.

I never worried, especially about my destiny. I knew what I was going to do to life. My plans changed from time to time, of course — sometimes every three or four days, in fact. This used to infuriate Pop and make him fill the whole house with his shillalah voice and make him act very disgusted.

Make up your mind, he used to say. Make up your mind and keep it that way! I don't care what it is but get it settled once and for all!

Damn it all to hell and back again! he'd bellow. Make up your mind, lad!

He'd get very disgusted.

Life would be serene and exciting, the long minutes standing still, full of throbbing ecstasy and joyous wonder, while the months and seasons, spring and winter and the rest, would go rushing by with breathless swiftness and I'd race like the nimble-witted genius I was to keep up with them, to

WILLIAM J. RYAN was graduated from the University of Newark and later practised law in Newark. He is now a lieutenant (j.g.) attached to the Naval Air Station in Jacksonville, Florida. This is his first published story.