TRIAL AND PUNISHMENT

OF THE

AXIS WAR CRIMINALS

by Sheldon Glueck

THE increasing terrorism in occupied countries by which the Nazis are desperately seeking to stifle every sign of revolt has raised the question of the trial and punishment of the Axis war criminals. President Roosevelt's forthright warnings of August 21 and October 7, 1942, to the Axis Powers that their war criminals will be held to strict accountability for their barbaric offenses in Europe and Asia reflect the attitude of the United Nations, and the statement of Soviet Foreign Commissar Molotov indicates that action may not be long delayed.

This is in marked contrast to the tragi-comic betrayal of justice after the first World War. The history of the action taken against the Axis criminals under the Treaty of Versailles should serve as a warning of what must *not* happen again and as a basis for a realistic and just program which must be ready and agreed upon by the Allies as soon as possible.

On January 25, 1919, the Preliminary Peace Conference of World War I set up a Commission of Fifteen to inquire into and report upon violations of international law chargeable to Germany and her allies. It appointed subcommissions to establish the facts regarding culpable conduct in the course of hostilities, to consider whether prosecution for such offenses could be instituted, and to indicate the persons deemed guilty as well as the court in which they should be tried. The Commission summarized, as follows, memoranda submitted by the various Allied Governments, giving long lists of "breaches of the laws and customs of war committed by the forces of the German Empire and their allies on land, on sea, and in the air":

> Murders and massacres, tortures, shields formed of living human beings, collective penalties, the arrest and execution of hostages, the requisitioning of services for military purposes, the arbitrary destruction of public and private property, the aerial bombardment of open towns without there being any regular siege, the destruction of merchant ships without previous visit and without any precautions for the safety of passengers and crew, the massacre of prisoners, attacks on hospital ships, the poisoning of springs and of wells, outrages and profanations without regard for religion or the honor of the individuals, the issue of counterfeit money, . . . the methodical and deliberate destruction of industries with no other object than to promote German economic supremacy after the war, constitute the most striking list of crimes that has ever been drawn up to the eternal shame of those who committed them.

Not the most striking list, since the Nazis and Japanese and Italian Fascists have improved on the foregoing, as may be seen in the recently published "Black Book of Poland."

The Commission recommended the setting up of a special commission to collect and classify systematically the information at hand or to be obtained, "in order to prepare as complete a list of facts as possible concerning the violations of the laws and customs of war committed by the forces of the German Empire and its Allies." Speaking of liability, the Commission was of opinion that "in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal." It expressly insisted that "all persons belonging to enemy countries, however high their position may have been, without distinction of rank, *including chiefs of states*, who have been guilty of offences against the law and customs of war or the laws of humanity are liable to criminal prosecution."

How, under Article 227 of the Treaty of Versailles, "William II of Hohenzollern,

formerly German Emperor," was "publicly arraigned" for a "supreme offence against international morality and the sanctity of treaties," to be tried before a specially constituted tribunal; how the Government of The Netherlands, acting within its legal rights, refused to surrender the Squire of Doorn; and how a distinguished bearded exile spent the rest of a long and prosperous life as the world's most illustrious wood-chopper—all this is well known. Not so well remembered is the tipsy dance of the blindfolded goddess with those malefactors less exalted than "William II of Hohenzollern."

The Commission recognized that under international law a belligerent may try persons charged with crimes constituting violations of the laws and customs of war, once the accused are within its power, and may for this purpose set up its appropriate military or civil tribunals and employ its own trial procedure. But four classes of charges seemed to the Commission to call for trial before an *international* tribunal: (a) offenses against civilians and soldiers of several Allied nations, such as outrages committed in prison camps housing prisoners of war of several countries; (b) offenses by "persons of authority" whose orders were "executed not only in one area or on one battle front, but affected the conduct of operations against several of the Allied armies"; (c) offenses by civil or military authorities, "without distinction of rank, who ordered, or abstained from preventing, violations of the laws or customs of war"; (d) charges against "such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the High Tribunal."

To conduct the trials in these four classes of cases, the Commission recommended the setting up of this High Tribunal, to be composed of three members appointed by each of the five chief Allied Governments, and one by each of the Governments of the lesser powers. This court was to apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." It was empowered to determine its own procedure. Upon a finding of guilty, it could sentence to such punishment as could be imposed for the offence in question "by any court in any country represented on the tribunal or in the country of the convicted person." Selection of cases for trial and direction of prosecutions were to be left to a five-member Prosecuting Commission to be appointed by the great powers; their assistants, by the others. Conviction before an enemy court was to be no bar to trial and sentence by either the High Tribunal or a national court of one of the Allied Powers.

These, in brief, were the relevant recommendations of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" to the Preliminary Peace Conference. They were, however, not adopted. In a memorandum of reservations the representatives of the United States differed from their colleagues in the means of accomplishing the common desire. In respect to the law to be applied, they pointed out that "the laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law."

In the Americans' opinion, the international tribunal, if established, "should be formed by the union of existing national military tribunals or commissions of admitted competence in the premises." Furthermore, the American members refused their assent "to the unprecedented proposal of creating an international criminal tribunal" as well as to the "doctrine of negative criminality" (i. e., criminal responsibility for failure to prevent violations of laws and customs of war and of humanity). The Japanese on the Commission also had reservations. They raised the question, among others, "whether international law recognizes a penal law as applicable to those who are guilty." And it seemed to them "important to consider the consequences which would be created in the history of international law by the prosecution for breaches of the laws and customs of war of enemy heads of States before a tribunal constituted by the opposite party." Farsighted, the Japanese!

And so, instead of the majority views of the Commission prevailing, there were inserted in the Treaty of Versailles the now almost completely forgotten Articles 228, 229, and 230. By Article 228 the defeated German government recognized "the right of the Allied and

Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." The German Government was to "hand over" to one or all of the Allied and Associated Powers all such accused who were to be specified by name or by the rank, office, or employment which they held under the German authorities; and the guilty were to be "sentenced to punishments laid down by law." Article 229 provided for the trial of the accused before military tribunals of the power against whose nationals the crimes were allegedly committed; and specified that "in every case the accused will be entitled to name his own counsel." By Article 230 the German Government undertook "to furnish all documents and information of every kind," the production of which might "be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders, and the just appreciation of responsibility."

So far so good. The malefactors were to be tried.

Thus ends the first chapter.

II

IN pursuance of Article 228, long lists of accused persons were prepared by the principal Allied Governments, from which a joint list was compiled and presented to the Germans on February 3, 1920, with the reservation that it did not comprise "all the authors of the innumerable crimes committed during the course of the war by the Germans." The list contained almost 900 names.

France demanded the surrender of 334 persons, among them General Stenger, commander of the 58th Brigade and alleged author of the following orders dated August 26, 1914: "(a) Beginning with today, no more prisoners will be taken. All prisoners, whether wounded or not, must be destroyed; (b) All prisoners will be massacred; the wounded, whether armed or not, massacred; even men captured in large organized units will be massacred. Behind us, no enemy must remain alive." Numerous other high-ranking officers were requested for extradition on a wide variety of charges, among them the Imperial Crown Prince, Count Bismarck, grandson of the Chancellor, and Marshal von Hindenburg.

The British claimed 100 Germans for trial, among them Grand Admiral von Tirpitz and Admiral Scheer, for having ordered limitless submarine warfare, and some twenty former commandants of German prison camps, for excessive cruelty. Belgium called for delivery of 265 Germans, including Ex-Chancellor von Bethmann-Hollweg, for the attack on Belgian sovereignty. Poland, Rumania, Italy, and Yugoslavia also demanded the surrender of various offenders.

Though in signing the Peace Treaty the Germans had solemnly obligated themselves to deliver up the accused for trial, they soon reneged. Baron von Lersner, President of the German Peace Delegation, informed the Allied diplomats that a political and economic revolution would rend Germany and topple the entire peace structure if the extradition request were pressed. He returned Millerand's note containing the list of the accused. He then resigned. In an article he wrote later for the archives of German history, von Lersner closes the account of his protest on a triumphant Wagnerian trumpet note: "This first great demand which the Entente Government imposed on us by virtue of the *Diktat von Versailles* was shattered, like glass upon a stone, against the unity of the German people."

But four days after von Lersner's defiant reply, Millerand bounced back the list of accused to the new Chancellor of the German Republic, with the politely ironical comment: "The Powers have no doubt that M. Lersner's act was only a personal manifestation, not engaging the responsibility of the German Government. They have been unable to believe that in effect the latter is avoiding an obligation which it contracted in signing the Treaty of Versailles; . . . less than a month after the Treaty has gone into effect, it refuses, of set purpose, to execute an essential stipulation."

On January 25, 1920, Germany had proposed, by way of "compromise," that all persons accused by the Allies of war crimes and misdemeanors should be tried before the Supreme Court of the Reich at Leipzig. "To this end Germany would make all conceivable guarantees for the impartial and firm execution of the proceedings, especially through the assistance of official representatives of the interested opposition States." As "new evidence of its earnest will to punish Germans guilty of a war crime or misdemeanor," it made known that on December 13, 1919, it had brought about the passage of a law for the prosecution of war offenders.

The Allies accepted the suggestion but without consenting to participate in the trials, "so as to leave full and complete responsibility with the German Government." They reminded Germany that the proposed trials at Leipzig could "in no case annul the dispositions of articles 228 to 230 of the Treaty"; and they expressly reserved the right to consider, as a result of these prosecutions, whether the German Government were sincerely resolved to administer justice in good faith. If not satisfield, they would exercise the right to try the accused before their own tribunals, a right which the Germans acknowledged in their letter of reply.

On May 7, 1920, a sample "abridged list" of war criminals was delivered to the German Government for trial before the Supreme Court at Leipzig. How abridged this list was can be seen from the fact that while the Allies had cautioned that the 900 accused persons in the original list were themselves only a sample of all the actual offenders, this new "test list" contained only 45 names. To this list the British, for example, contributed only seven names.

But the Germans were not ready for trial even after receiving this abridged list. They informed the Allies that difficulties were being experienced in obtaining evidence against the accused, because much of the necessary information was in possession of the Allied Governments. The Allies then arranged to assemble statements of the evidence against the persons on the abridged list and transmit them to the *Oberreichsanwalt* (public prosecutor) in Leipzig. They prepared the evidence with commendable care. Preliminary examinations were made in France and Belgium; depositions were taken in London; witnesses were collected from across the seas and brought to Leipzig.

Thus ends the second chapter.

III

THE trial of the war criminals accused by the Allies at long last began in Leipzig on May 23, 1921, *two-and-a-half years* after the fateful November 11, 1918, which had closed the war to make the world safe for democracy. Instead of the seven defendants selected with such great care by the British, only *four* were tried. The Germans were not in a position to bring U-boat Commander Patzig to trial, because, although he had an address in Danzig, his then whereabouts were unknown. Lieut.-Commander Werner could regrettably not be traced at all; and Trinke was unfortunately now resident in Poland. However, Lieuts. Ludwig Dithmar and John Boldt were put on trial, on the initiative of the German Government (which evidently desired to clarify the law regarding "superior orders"), in connection with the *Llandovery Castle* atrocity for which Commander Patzig was not available—the sinking without warning of a British hospital ship and the firing on and sinking of the lifeboats containing the survivors, thereby converting them into death boats to the score of 234 persons. The Criminal Senate of the Imperial Court of Justice, before which the accused were tried, consisted of seven German judges. They had a most unenviable duty to perform, not made easier by the truculent chauvinism of the military caste. A typical sample of the nature of the judicial reasoning at the Leipzig trials appeared in the case of Capt. Emil Müller who was charged with maintaining atrociously bad conditions in a prison camp from which hundreds of prisoners died, and with inflicting terrible cruelties on numerous prisoners. Despite numerous British witnesses to the contrary, the court found that the prison atrocities occurred after Müller was no longer in charge of the camp; hence he was not responsible. On some of the charges of personal brutality, however, the court found Müller guilty. While finding that the English prisoners unfairly had a "preconceived idea that the accused was animated by feelings of spiteful malignity toward them," the court went on to find that "instead of earning the prisoners' confidence," the Captain somehow "got a reputation among them for being a tyrant and a nigger-driver."

Among the numerous instances of Müller's brutality found by the court to have been proved were, in its own words, the following:

> The accused admits that he liked, as soon as he appeared at roll-call, to ride quickly up to the ranks. He thought this was a suitable way of ensuring proper respect for himself and of making the prisoners attentive. According to the evidence of almost all the English, and also of some of the German witnesses, he frequently rode so far into the ranks that they were broken. The prisoners scattered on all sides and many who could not get out of the way quickly enough were thrown down by the

horse. Such excesses when riding up to a body of men are altogether contrary to regulations and are to be condemned.

The accused while on horseback struck a prisoner who was suffering from a bad foot. At roll-call this prisoner had raised his leg to show it to the accused, but the accused hit him across his leg with his riding cane. The man cried out, fell down and had to be carried into the barracks. . . .

The accused once struck Drewcock at roll-call . . . across his wounded knee with his riding cane so hard that an abscess developed and later had to be cut. The accused could not have foreseen this, for the wounds on Drewcock's knee were not visible to him. But the blow must have been a heavy one. . . .

According to the statement of the witness Lovegrove, the accused once saw two sick men lying down; they were so weak that they could not stand up before him and were groaning pitifully. But the accused is said to have got angry and impatient and to have kicked them. There is a possibility that the accused did not wish to hurt the men, whose sickness he apparently did not yet believe to be real, but that he only wished to secure that his order to get up was immediately obeyed. It is not clear that the kicking was particularly violent or painful. Clearly, however, in each instance this constituted a treatment of the sick contrary to regulations.

There has been an accumulation of offences which show an almost habitually harsh and contemptuous, and even a frankly brutal, treatment of prisoners entrusted to his care. His conduct has sometimes been unworthy of a human being.

The court expressed its conviction that such conduct "dishonors the German Army." However, the very same paragraph of its opinion which ends with that statement, *begins* with this: "It must be emphasized that the accused has not acted dishonorably; that is to say, his honor both as a citizen and as an officer remains untarnished."

The defendant was held liable to punishment for crimes under the German Military Penal Code and the Imperial Penal Code; and for the sixteen offenses in which it found him guilty, the court imposed a total sentence of six months' imprisonment.

Summarizing the outcome of the Leipzig trials, we get the following results:

Number accused in original Allied list	850-900
Number included on abridged "test" list	45
Number actually tried (British charges—including 2 by Germans, 6; French, 5; Belgian, 1)	12
Number actually convicted (British-German charges, 5; French, 1; Belgian, 0)	6

Thus, the sentences imposed included: on British charges, two of six months and one of ten; on German charges, two of four years; and on French charges, one of two years. The French case involved a German major, convicted on charges of killing wounded French war prisoners and found guilty of homicide by negligence in misinterpreting General Stenger's actual orders. Stenger himself was acquitted despite much evidence by German witnesses that he did order the massacre of wounded war prisoners.

I understand that in December, 1922, the Leipzig Court decided to continue with more trials despite the absence of Allied observers disappointed at the outcome of the above cases; and that of over 90 accused in a new batch, there was not even a public trial in the vast majority and only six were convicted, the others getting off on the ground that their offenses were not covered by German law. I have been unable to locate a record of these later trials.

Thus ends the third chapter.

IV

"SAD stupefaction seized French public opinion." The French Mission was recalled, vigorous protests were addressed to the German Government by the French and Belgians, who determined to withdraw the documents of accusation and proof. The accusations by the Italians seem to have been as much disregarded as Il Duce's phantom claim to equal partnership in the Axis.

In January, 1922, a Commission of Allied jurists set up to inquire into this comedy of errors unanimously recommended to the Supreme Council that it was useless to let the Leipzig court continue. It recommended that no new cases be sent to Leipzig and that the German Government be compelled to hand over accused persons for trial by the Allies in pursuance of Article 228. This only resulted in great indignation in Germany and in "looking toward England" in order to divide the

Allies. Chauvinistic groups organized truculent protest meetings throughout Germany, at which high-ranking officers reminded the Allies that "250,000 national soldiers and the police of the *Reichswehr* are in alliance" to prevent the handing over of Germans to the "justice of the Entente."

In August, 1922, Poincaré, on behalf of the Conference of Ambassadors, vigorously protested to the German Ambassador that the German Government "has not kept its promise to administer justice objectively and loyally," and that the Allies would "completely disregard the German proceedings taken by the Leipzig Court against future defendants," and would "resume and reserve to themselves all rights belonging to them by virtue of the Treaty of Versailles at present and in the future, in particular the right to prosecute the war criminals themselves, if necessary *in absentia.*" The Germans were indignant that "leading German personalities [among others, von Hindenburg] continued to run the risk, if they stepped foot on French or Belgian soil, of being arrested and sentenced."

An item in the *Journal de Droit International,* shortly after his imprisonment, carried the following tidings concerning one of the two officers who received the heaviest sentences for U-boat atrocities:

> The correspondent of the *Daily Mail* in Berlin telegraphed, on Nov. 20, 1921:
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> "Mystery still surrounds the circumstances of the escape of Lieut. Boldt, submarine commander, sentenced to four years' imprisonment by the tribunal at Leipzig for having torpedoed a hospital-ship. Lieut. Boldt escaped from the Holstenplatz house of detention at Hamburg. This prison serves only for those accused, and never for the convicted.
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> "The director of the prison declared that Boldt had been authorized to wear civilian clothes. He had a private room and could communicate with the outside. At 3:30 a check-up established his presence; at 4:45 he had disappeared. The director of the prison believes that Boldt succeeded in reaching, by means of the ventilator shaft, a wing of the prison under repair. It is supposed that he passed, unnoticed, among the workmen.
>
> "The police bloodhounds put on the trail lost the scent almost immediately. It is believed that Lieut. Boldt had prepared his escape for a long time and that his accessories, who had waited for him in an automobile, helped him to cross the Dutch frontier."

The other prisoner convicted of U-boat atrocities also somehow mysteriously escaped.

And thus ends the last chapter.

V

WHAT can be done to ensure justice when the present war is over? The problem is highly complex. Our aims are to see that the Nazis and Fascists do not again lead us around by the nose; to see that vigorous but fair justice is administered; to draw as much insurance as we possibly can against future aggressions and violations of the laws and customs of war through the deterrent effect of punishment; to recognize at the same time that many of the doers of the dark deeds involved are themselves unwilling victims of systems of enslavement and that reform through correction and education must not be excluded as one of the instruments of justice; to establish a vital symbol of the existence of international law; to separate the masses of the Axis lands from their rulers and military castes as soon as possible; and, withal, to take account of the understandable cry for vengeance on the part of the millions of victims of the nazi-fascist brutalities.

Let it be admitted at once that a large measure of success in all these enterprises cannot be hoped for. The following ten-point program is suggested as a means of insuring reasonable success:

1. *Tactics.* The provisions for the trial and punishment of the Axis war criminals must be made part and parcel of the Armistice terms as well as the Treaty of Peace. This will compel the defeated Axis nations to surrender for trial their chief war criminals as well as civilian violators of civilized criminal law, as a prerequisite to cessation of hostilities. Any amnesty granted by the Axis Governments or their immediate successors should not be recognized by the United Nations.

2. *Proof of guilt.* A list of accused persons and relevant data as to the crimes they are charged with (e. g., murder of hostages or war prisoners, torpedoing of hospital ships, forcing civilians into slavery, rapes, thefts, pillagings, etc.) should be kept now and be added to as detailed information is received. In fact, indictments can be drawn up now against the major offenders. Evidence of crimes ought to be assembled and conserved for purposes of later trials. This ought to include military and

civilian orders found in captured headquarters and civilian archives, or on prisoners of war, or on the bodies of Axis soldiers. One of the Armistice conditions ought to require the turning over of archives, military and civilian records, and other sources of proof to the United Nations; and destruction of such records to hamper prosecution ought to be severely punished.

3. *Jurisdiction.* National civilian and military courts of the countries overrun by the Axis Powers can and should try and punish most of the offenders for crimes committed on their own territory, by means of their own law and procedure. This applies especially to the Quislings, Lavals, and Doriots, and members of the Gestapo. However, because of the "territorial theory" of jurisdiction prevailing in some of the countries involved*, such disposition will leave untouched the numerous crimes committed by Axis nationals on their own territory, such as the torturing and slaying of American prisoners of war by the Japanese in Japan, or the cruelties committed by the Nazis in concentration camps inside Germany.

4. *An International Criminal Court.* A court formed by the union of existing national military tribunals or commissions can be rapidly established; but it is desirable, in the interest of an early return to peace, that a non-military International Criminal Court be established. Not only jurisdictional limitations of certain national courts, but a better reason calls for the early establishment of such a court. It is urgently required, also, as a vital and vivid symbol of the more orderly, civilized, and just intercourse among nations that we all hope to see developed after this war. The court should not be confined in jurisdiction to crimes committed on Axis territory. It should be given cognizance also of (a) crimes committed by heads of enemy states, prominent military and naval officials, and civilian authorities who had been empowered to frame major policies and to exercise the widest discretion; (b) offenses committed against nationals of several countries in combination; (c) those committed against the "stateless" and persons who cannot prove their exact nationality; (d) cases which an injured nation prefers not to try in its own courts.

Establishment of the International Criminal Court ought not to wait upon the cessation of hostilities. The court should be set up and staffed and begin its preliminary labors of organization, appointment of personnel, drafting of rules, as soon as possible; so that by the time of the Armistice it can function smoothly and expeditiously as a going concern which has already achieved some prestige among the free peoples of the world.

The court ought to be created by agreement among the member-states of the United Nations and such neutral countries as wish to adhere. Provision should be made for the future adherence of the countries now in the Axis if and when they have firmly established civilized standards of government and can give responsible guarantees of civilized justice. Judges could be obtained by the method employed in electing members of the Permanent Court of International Justice or by some other reasonable and equitable plan. There seems to be no good reason why some of the distinguished jurists who have been hounded out of nazi Germany or fascist Italy, France, or Spain should not be eligible for judgeships on the International Criminal Court even before their countries are admitted to the family-circle of nations establishing the court.

While there are numerous complex legal and political problems involved in the creation of an International Criminal Court, we must by all means avoid the hasty conclusion that these cannot be solved. Certainly, the argument that such a court should not be established because it would be "unprecedented" ought nowadays be given short shrift. *All* courts were at one time unprecedented, including the Permanent Court of International Justice. Considering the shrinkage of the globe in our day to such narrow dimensions that it is common to fly the Atlantic in a few hours, considering the colossal wastage and carnage of the last and present wars, one must inevitably conclude that more intimate co-operation among nations and the effective enforcement of international justice are the only protections against the suicide of the human race. And no symbol and instrument of closer co-operation of nations would be more powerful than an International Criminal Court, performing its duties fearlessly and with a scrupulous regard for justice and fair play.

5. *Law to be applied.* The International Criminal Court ought as soon as possible to be supplied with a code of international criminal law, defining the crimes and limiting the punishments (based largely on the prohibitions contained in international conventions and customary law), so as to preclude arguments regarding "retrospective legislation." But even in the absence of a formal code, the court could legitimately apply the relevant national law—both of the victim

*In some European states, jurisdiction may be based on the principle of "passive nationality," under which it is enough if the victim of the crime was a national of the prosecuting state, no matter where the crime was committed.

and the defendant (particularly in respect to punishments)—and customary and conventional international law (particularly the Geneva Convention of 1929, governing the treatment of prisoners of war, and the Fourth Hague Convention, 1907, with its annexed regulations governing abuses of warfare on land). There is hardly a single line in the solemn conventions by which Germany, Italy, and Japan are bound, that has not been violated by them on numerous occasions in the present war.

6. *Re-examination of legal doctrines.* The prevailing majority view is that there is no such thing as the responsibility of individual persons for violations of treaty provisions, inasmuch as it is the "high contracting parties" and not their individual nationals whom a treaty obligates. According to this theory, the only way a state can prosecute for acts by individuals violative of treaty obligations is by enacting legislation making such acts crimes under its domestic law. This theory which limits responsibility for violations of treaty obligations to sovereign states can well stand modification in this day when the consequences of violations of such rules as those annexed to the Hague Convention can be so disastrous to the civilized world. It can be confidently insisted that the arguments in favor of personal liability are just as convincing as, and much more realistic than, those maintaining the traditional position. Citizens of the Axis powers enjoy the protections of such regulations since the United Nations regard themselves as obligated. Why, then, should they not be tried and punished for their violations because of the theory that it is their governments, and not they themselves, who have committed them? It has been well put in a nutshell: "The duties and rights of States are all merely the duties and rights of the men who compose them." However, legislation converting violations of such regulations by individuals into crimes is an easy way of getting the desired result.

This could be done either by designating as crimes in themselves the various types of violations by individuals of such provisions as the regulations accompanying the Fourth Hague Convention and affixing appropriate punishments thereto, or by a simple declaration stripping those who violate such rules of the defense of "justification" which they would otherwise have on the ground that the acts they are charged with were lawful because done in the course of lawful war upon an enemy in battle. These acts would then be laid bare as ordinary murder, robbery, burglary, theft, and other traditional crimes. The ironical claim of the Germans both during the last war (particularly after the sinking of the *Lusitania*) and the present one, that *"Krieg ist Krieg"* would thereby be realistically refuted by reminding them that by their own adherence to international agreements they recognized that there are illicit as well as permissible acts of warfare.

Express power is given Congress by the Constitution (Article I, Section 8, Clause 10) "to define and punish . . . offenses against the Law of Nations." The American Basic Field Manual, "Rules of Land Warfare," provides specifically that among the remedies open to an injured belligerent "in the event of clearly established violation of the laws of war," is the "punishment of captured *individual offenders.*"

Outrages by non-military officials, such as Himmler, Goebbels, members of the Gestapo, *Gauleiters,* and so on, could be treated as ordinary crimes for which there is no justification whatsoever, these being clearly violations of the penal codes of the various countries who wish to prosecute.

The legal defense of obedience to "superior orders," conveniently applied by the Leipzig Court to acquit unprincipled military and naval officers, can also be legitimately modified. The doctrine is not without its common sense limits. Certainly, a soldier's committing a homicide in obedience to the military order of his superior ought not to be justifiable if he either knows or has reasonable grounds for knowing that the act ordered is illegal. Admittedly, this may work harshly in the case of the common soldier who is between the Charybdis of defying the order and being instantly disciplined (perhaps shot) and the Scylla of obeying it and being later charged with murder. Sound common sense must however come to the aid of technical principle: the sentence can be individualized to take account of the amount of discretion exercisable by the defendant and the other surrounding circumstances of the crime. Failing some reasonable limitations on the doctrine of superior orders, the absurd Alice-in-Wonderland results of the Leipzig trials are arrived at: All the military and naval personnel—from ordinary soldier or seaman up the hierarchy to von Hindenburg, von Tirpitz, and the German General Staff—could conveniently "pass the buck" to the man higher up; and, by way of ridiculous climax, the men highest up were never tried.

The doctrine that a "chief of state" is immune from trial and punishment no matter how heinous and numerous his crimes requires serious re-examination. A sound argument can be made to the effect that it is a doctrine of municipal law and does not necessarily apply to international law nor to the jurisdiction of the proposed International Criminal Court.

7. *Caption of accused.* The Provost-Marshals divisions of the military forces of the United

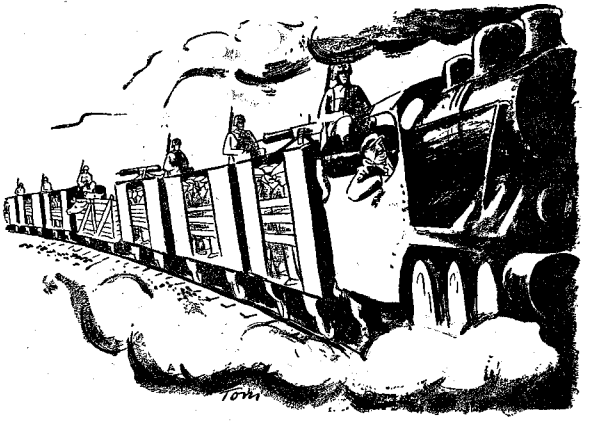
Nations should be called upon to furnish police officials and sheriffs for the arrest and detention for trial of accused persons. Extradition treaties should be re-examined now to see that the leaders of the axis-fascist rogues' gallery do not prepare for themselves—against the day of reckoning—comfortable nests of "asylum" as "political prisoners" in certain neutral countries —there to live out their days in comfort.

8. *Prosecution.* A Prosecuting Staff of trained representatives of the various countries establishing the International Criminal Court, as well as a public defender's staff, should be appointed by the court from panels submitted by the chief executives of the countries involved. As is true of all prosecutors, the former will have to exercise some discretion in regard to the nature and number of cases brought to trial. It is a practical impossibility to subject to trial the millions of persons who in one way or another have committed acts contrary to the laws and customs of war. A wise policy will take into account the fact that the common soldier in the Axis countries is virtually a slave. The prosecution and conviction of the leaders and subleaders will probably be enough for the purpose of symbolizing the vindication of law and order in international relations. Moreover, knowledge among the common peoples of the Axis countries that some such line of division will be followed should serve to separate them from their masters and to counteract the recently propagated whine of the Axis leaders that the common people are in the same boat with them. Further, such a policy should help to restrain the not unnatural desire for immediate and wholesale vengeance on the part of the victims of nazi-fascist cruelty.

The procedure in the International Criminal Court ought to consist of a simplified combination of the best features of the Anglo-American and Continental criminal procedure, guaranteeing certain fundamental rights, such as the right of counsel (with a public defender for indigent defendants), the right to call one's own witnesses (including experts) and to cross-examine those of the prosecution, the right to set up any legitimate defenses found in civilized penal codes. Rules of evidence should be simple and should not too greatly stress exclusionary provisions, since the trials are to be before panels of judges trained in evaluation of evidence, rather than before lay juries. Appeals on points of law and on sentences should be permitted to an appellate branch of the court. The chief executives of the nations represented on the court should designate persons to serve as a Committee of Pardons and Commutations.

9. *Punishment and correction.* The punishments to be applied by the International Criminal Court should be those provided for similar crimes by the criminal laws of the accusing countries, taking into account legal provisions of the defendants' own countries. Jails, penal and correctional institutions, and reformative and correctional devices and agencies, including probation and parole, as well as hospitals for the criminal insane, should be those normally employed by the country bringing the charges.

10. *Preparation.* A fully implemented program of political policies, international conventions, and appropriate modifications of the criminal law of the various countries co-operating as the United Nations needs to be worked out *now,* in order to give the executives and legislatures of the interested nations ample time to study and debate the necessary conventions setting up the court and providing an international penal code; in order, further, to avoid possible arguments regarding "retroactivity"; and in order, finally, to have the whole scheme and apparatus of criminal justice, including the procedural rules, ready when the war is over. The knowledge that official representatives of the United Nations are working on some such plan should itself have a sobering effect on the Axis criminals and an encouraging one on the rest of the world.



Laval's "Volunteer Labor Corps"

THE NEGRO *Knows* FASCISM

by
Mercer Cook

Not since the Civil War has an armed conflict been fraught with such possibilities of salvation or disaster for the Negro. In his greeting to the Thirty-third Annual Conference of the National Association for the Advancement of Colored people, President Roosevelt wrote on July 7: "I note with satisfaction that the theme of your significant gathering reads 'Victory is Vital to Minorities.' This theme might well be reversed and given to the nation as a slogan. For, today, as never before, 'Minorities are Vital to Victory.' "

That the potential importance of a minority of thirteen million traditionally loyal, liberty-loving citizens has been recognized in administration circles is readily apparent to anyone who compares, however cursorily, the official status of the Negro in 1917 and in 1942. In World War I, it was only after considerable effort that a single training camp for colored officers was established at Des Moines, Iowa. To prevent the promotion that was rightfully due him, the ranking Negro officer, Colonel Charles Young, was retired on the pretext that he suffered from high blood pressure. The navy admitted colored men only in the most menial capacities, and the Negro marine was as nonexistent as the Negro aviator. One enterprising youth, rejected by our air corps, became a "French" ace and a member of the Legion of Honor. Moreover, the Negro had no official spokesmen. In the War Department, he was represented by a well-meaning, old-school politician, whose status, I understand, was that of Special Clerk.

Today, a courageous and competent Amherst– and Harvard-trained Negro is Civilian Aide to the Secretary of War. He is ably assisted by another brilliant young lawyer, a graduate of Northwestern. A Negro Lieutenant-Colonel works with the Selective Service Board. Ranked by a colored Brigadier-General, Negro officers are being trained in various camps. Negro aviation cadets are regularly being commissioned from Tuskegee. The navy has recently let down some of its bars; and, *mirabile dictu,* colored marines are now being recruited.

Some defense industries have been persuaded to employ skilled Negro labor, thanks to the relentless efforts of Dr. Robert Weaver, young Negro economist who has lately been transferred to the War Man Power Board. Facing the almost insurmountable obstacle of prejudiced employers and reactionary labor unions, Dr. Weaver has been powerfully aided by President Roosevelt's Fair Employment Practices Committee, created by Executive Order 8802. Recently this committee held an epoch-making hearing in Birmingham, Alabama, at which at least one employer engaged in defense production promised to do this patriotic duty and to hire workers without respect to color.

All of this represents appreciable progress and indicates that the Government and a large number of white liberals, Northern and Southern, are determined to give the Negro his chance to fight and work for a free world. Unfortunately, there is another side of the picture, which makes the Negro doubt the sincerity of any movement for a free world, confuses his thinking, and lowers his morale. He reads, for example, that a Negro is lynched in Missouri; that a colored soldier in uniform is killed in Arkansas; that a black man as inoffensive and as cultured as Roland Hayes is beaten by the police in Rome, Georgia. He hears stories like the one about the promoter who allegedly said: "There are no seats for colored patrons, but