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Wars are made by politicians and diplomats and fought by soldiers. There is a spirit abroad suggesting that civilians may influence the prosecution of so-called war criminals with the result that soldiers who have served their country will be made the object of vengeance when subjected to the control and power of a triumphant state.

First of all, it should be noted that the law and customs of war developed over a long period of years and, up to the present time at least, with increasing concern for humane objectives, provide ample and unquestioned precedents for punishing commonly recognized war crimes, e.g., mistreatment of prisoners of war, assassination of soldiers by civilians of an enemy country, espionage, sabotage, and irregular or guerrilla warfare. *Ex Parte Quirin,* 317 U. S. 1.

For the orderly trial and punishment of war crimes as defined by established and commonly accepted law the army needs neither advice nor instruction from civilians. A case in point is the recent trial of four German civilians accused and found guilty of beating to death a United States aviator forced down on German soil. All were hanged with the exception of one and in his case the Commanding General, in the exercise of his authority and discretion, reduced the sentence to life imprisonment. Similar convictions frequently are reported in the press.

There was a time in the history of mankind when soldiers of a beaten army were put to the sword or held in bondage and their leaders chained to the chariots of the conquering commanders to make a Roman holiday. These practices passed with the advance of civilization — at least until recently, perhaps — and now are found only among savage tribes.

Early last June a report to the President on Trials of War Criminals was made public. The report cites no precedents and fails to reveal how it reconciles its proposals and conclusions with the law and customs of war and principles of international law as heretofore established and applied. Its concepts are directly violative of the fundamental principles which the American Bar Association's Committee on Prosecution of War

Criminals, composed of distinguished international lawyers, has found should govern these prosecutions, i.e., (1) the objective is not revenge but vindication of the processes of organized justice; (2) anything which may fairly be denounced as legislation after the event must be excluded; and (3) there is no rule of international law making an enemy person criminally responsible to the military or civil courts of other countries for acts committed within his own territory and against his own fellow nationals.

Concerning the fixation of *ex post facto* criminal standards, the rule is well stated in *U. S. v. Hudson and Goodwin,* 7 Cranch. 32, decided in 1812:

"* * * the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence * * *"

This principle was accorded recognition in the majority opinion of Justice Jackson in *Cramer v. United States* in——U. S.——, 89 L. Ed. 937, 962, wherein a judgment of conviction for treason against the United States was reversed, citing *Ex Parte Bollman* and *Swartout,* 4 Cranch 75. In the *Bollman* and *Swartout* case Chief Justice Marshall, speaking of treason, which, like so-called war crimes, generates passion and desire for vengeance, said (p. 127):

"* * * punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate * * *."

This is the doctrine advocated by the United States as a rule of international as well as of municipal law, at least until the above mentioned report was presented to the President. It was insistently urged by the American Members of the Commission of Responsibilities of the Paris Peace Conference after World War I, *and no contrary precedent was established after that war.*

A victorious state has the power to punish a defeated nation by exacting indemnities or otherwise and international law does not prevent such exactions solely as the penalty of defeat without regard to moral questions possibly present. But to deprive individuals of liberty or life is another matter and ought to and does rest upon different concepts of law.

The report to the President apparently would create a standard of individual conduct premised upon whether the state to which he owed allegiance was believed engaged in acts of aggression and in violation of treaties.

International law in its present state affords no support for the report's thesis of individual criminal responsibility for acts other than those recognized by the law and customs of war. History — even recent history — is full of acts of aggression

and violation of solemn treatiest by states and yet, until the above mentioned report was published, there has been no serious suggestion of individual criminal responsibility. It happens that only recently one of the allied nations has been involved in several such enterprises, e.g., eastern Poland (contemporaneous with Hitler's invasion of Poland), Finland, and the Baltic Republics, and, so far as made public, the United States has not as yet recognized the change in status of the last named or of what once was eastern Poland.

It is fair to say that the report creates the impression that its doctrine in this regard is based solely on the circumstance whether aggression succeeds or fails, a rather unsatisfactory standard when life and liberty of individuals are in issue.

It is plain that international law affords no sanction for prosecuting Germans for alleged crimes against other Germans before the war. Moreover, if an individual's life or liberty is to be taken, it would seem that his conduct should be measured by a standard having universal application. It does not take a long memory to recall that, after control of one of the allied states was seized by those now in power, its former ruler and his helpless family were cruelly destroyed, and it is notorious that atrocities, concentration camps, purges, forced labor, banishment to Siberia, mass transfers of peoples, and kindred practices are associated with the group presently ruling that great country. It is common knowledge that such practices are characteristic of any totalitarian regime and essential instruments in keeping it in power.

A recent press inquiry directed to the American chief prosecutor of war crimes reportedly was answered by the quip that appeals of those convicted would be "to history," thus suggesting that review of the record or approval of sentence would not be required. Such a concept of procedure is in conflict with fundamental principles governing military courts, cf. A.W. 46, *Ex Parte Quirin,* 317 U. S. 1.

For prosecution of war crimes under the law and customs of war there is no occasion to invent *ex post facto* legal standards or to create an international kangaroo court.

A current newspaper account states that war criminals are likely to be given a mass trial. Such procedure is suggestive of Soviet jurisprudence and trial technique. It is violative of all the fundamental legal concepts of this country. If it were not such a serious matter the proposal might well be dismissed lightly as suggestive of some super-colossal Hollywood stunt.

The plan of procedure outlined in the report will create dangerous precedents tending to place on the shoulders of the military men responsibility for the mistakes or misdeeds of the government to which they must render allegiance. After sur-

viving the perils of battle in fighting for their country they would still be confronted with the necessity of fighting for life and liberty before a hostile court.

It is always within the power of the conqueror to deal with the defeated as the aggressor. News reports assert that it is contemplated to execute or imprison the members of the German General staff and to obliterate the Junker class said to produce largely the officers of the German permanent military establishment. On that theory of law, should the United States ever lose a major war — and God forbid — graduates of West Point and of the military colleges and schools, officers of the Regular Army, National Guard and the Reserve Corps — and manifestly the General Staff and especially the War Plans Division, would be particularly vulnerable — and corresponding Naval personnel would be in danger of being imprisoned or executed as war criminals.

Measured by established legal standards, the program outlined by the report is arbitrary, amounts to legislation after the event, exhibits a spirit of revenge rather than the vindication of established law and justice, and in addition would tend to create precedents adding to the hazards of those who must fight our country's battles.