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UNITED NATIONS WAR CRIMES COMMISSION

TRIAL OF WAR CRIMINALS BY MIXED INTER-ALLIED MILITARY TRIBUNALS

Memorandum by the Office of the United States  
Representative  
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Two related questions are treated in this paper. They may be stated as follows:

- a. May an allied commander upon his own authority empower mixed allied military courts to try and adjudge punishment of war criminals who fall into the hands of the allied forces?
- b. Does this power extend to the trial and punishment of war criminals irrespective of where the crime was committed?

These questions are discussed and answered in the order stated.

- a. May an allied commander upon his own authority empower mixed allied military courts to try and adjudge punishment of war criminals who fall into the hands of the allied forces?

It is a fundamental principle of international law that states may do those things which are not prohibited by the established principles and rules of that law, and that restrictions upon their independence of action may not be presumed. It follows that a state may punish any war criminal which falls into the hands of its armed forces unless there is a rule of international law which prohibits it. No such international prohibition exists, and long-established practice of states makes it clear that there are no restrictions in the matter upon the jurisdictional competence of states.

So far as the freedom of action of states is concerned, under international law the various states may exercise this jurisdiction to try and punish in any manner they choose, consistent with established principles of justice. Thus they may set up special civilian courts to administer the law applicable to such cases; they may specially empower their regular courts to take cognizance of them; or they may authorize their military courts to apply the law in this type of case. As Eriquiry says in his article on "The Nature of War Crimes Jurisdiction" in the May-June 1944 issue of the *Norseman*:

"The laws of war ... do not establish any international machinery for the exercise of this jurisdiction; they leave a wide discretion to belligerent states, without giving any precise indication as to the kind of court (e.g., whether military or civil), the forms of procedure, or the definition of particular offences, which they should adopt. Hence in exercising its right a state is free within wide limits, which may be defined as the limits set by natural justice, to adopt its own policy in these matters. There is, for example, no reason why a state, if it thinks fit, should not use its courts of ordinary criminal jurisdiction, though in that event these courts would be exercising not their ordinary, but a special war jurisdiction."

/ Inasguch



Inasmuch as offences against the laws and customs of war are usually committed in close connection with military operations or occupation, it has been the general practice of states to permit national military tribunals to try such offences. Familiar examples of such courts are councils of war, military courts, military commissions, and courts-martial. Thus we find, from ancient Greece down to the present time, military courts trying spies. From a somewhat later period down to date they have punished pillage, marauding, and crimes of all sorts which have had some substantial connection with the conditions created by war.

The foregoing statements refer exclusively to the competence of a state to establish and maintain courts to try war criminals under the laws and customs of war. Any jurisdictional limitation on the power of a particular state in this regard, which may be found in its law, is a limitation which has been self-imposed by that state and which that state, under international law, is free to remove if it chooses to do so.

In a war between only two nations, one belligerent may thus try and punish offences against the laws and customs of war by military courts. But the further question remains: When belligerents are allied, and a supreme allied commander is appointed, may he, upon his own authority, appoint mixed allied military courts to try war criminals?

Each of the Allies could do this if they acted separately, and there is no rule of international law which prohibits them from doing jointly what they could do separately. The familiar rule of international law, that for many purposes allies in a war constitute a single side, is applicable here. However, the fundamental consideration, which goes to the very basis of international law, is that there is no accepted international rule which precludes allied governments or their military commanders from jointly establishing and maintaining military courts. Whether or not an allied commander appoints such a mixed court for such cases is purely a matter of allied policy. No treaty or legislative act of any kind is needed in order to exercise the power or to define the procedure or rules of evidence to be applied, because the power to establish such courts is an incident of command. The Supreme Court of the United States has stated this fact as follows:

"An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." - (Ex parte Quirin, 317 U.S.1, 28-29 (1942).)

Again in 1865, the Attorney General of the United States held that "the commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war." - (11 Ops. A.G., 297, 305 (1865).) As Cowles says in his article in the June 1944 issue of the American Bar Association Journal entitled the "Trial of War Criminals by Military Tribunals", "a decision as to what type of court or personnel is to be used is simply a matter of policy. A military tribunal with mixed inter-allied personnel may properly be established by the commanding general of co-operating co-belligerent forces." (p.351).

Such courts, in the trial of such cases, are, of course, subject to the established substantive and procedural principles of justice which are common to civilized countries, and the military convening commander may not properly preclude their application. Thus Winthrop, the outstanding American authority on military law during the last century, says:



"As the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will - like a court-martial - permit and pass upon objections interposed to members, as indicated in the 88th Article of war, will formally arraign the prisoner, allow the attendance of counsel, entertain special pleas if any are offered, receive all the material evidence desired to be introduced, hear argument, find and sentence after adequate deliberation, render to the convening authority a full authenticated record of its proceedings, and, while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied." - (William Winthrop, Military Law and Precedents (1896), 1920 reprint pp. 841-842.)

The following propositions summarize the basic rights of the war criminals before military tribunals in the United States. These propositions are taken mostly from holdings by the Judge Advocate General of the United States Army. They represent the general practice in the United States:

The accused has the right to have charges signed by a commissioned officer; he is entitled to a copy of the charges against him, and of any amendments thereto; and he has a right to have the members of the commission and the Judge Advocate sworn in his presence. The general charges of violating the laws and customs of war, the specifications thereof and the order convening the commission are to be in writing and be read aloud to, or within hearing of, the accused; he is given an opportunity to challenge the members of the commission; he must be allowed to plead to the charges and specifications as recited in the order convening the commission; he need not respond to questions; he has a right to be confronted with the witnesses against him; the witnesses must be sworn before they testify; all testimony should be fully set forth in the record; it is fatal error for the military commission to refuse to admit evidence of the defence material to the issues; and the guilt of the accused must be proved beyond a reasonable doubt. It is error to reject testimony that the accused was insane at the time of the offence. The accused is allowed defence counsel with the usual rights of such counsel as found in civilian courts. - (From 30 Am. Bar Assn. Journal at 335)

Any policy jointly to try by military tribunals may be decided by the allied policy-making officers, and it may be carried into effect forthwith without other governmental formality. As a practical matter, however, such policy-making military officers would presumably not decide to try cases which arose before their military operations or occupation began without receiving advice from the highest authorities of their respective governments.

Precedent strongly supports the establishment of mixed inter-allied military courts. In Article 228 of the Treaty of Versailles the Allies asserted, and Germany recognized, the right to bring to trial, by "the Allied and Associated Powers", persons accused of having committed acts in violation of the laws and customs of war. Again, the next Article (229) stipulates that certain German war criminals might be brought before courts "composed of members of the military tribunals of the (Allied and Associated) Powers concerned." Further, in Article 227, the Allies asserted, and Germany agreed to, the right to establish a special tribunal to try the Kaiser. This tribunal was to be composed, not of judges of any one of the Allies, but of judges from all the principal Allied and Associated Powers.

/ Similar



Similar provisions are contained in the other 1919 peace treaties. The parties to all these treaties either asserted or recognized the right of joint allied military tribunals to try war criminals. They include all the present enemy countries. The fact that these provisions are inserted into peace treaties is of no significance for war-time or an armistice period. They were inserted in the treaties for post-war purposes - to make it clear that military courts might operate not only during time of war and through the armistice period but after the conclusion of peace as well. These treaties afford unimpeachable evidence of the right of military tribunals to try war criminals when the personnel of such courts consist of members of various allied forces.

In the light of the foregoing facts and considerations it is clear that an allied commander may, upon his own authority and without more, appoint mixed allied military courts and empower them to try and adjudge punishment of war criminals who fall into the hands of the allied forces.

b. Does this power extend to the trial and punishment of war criminals irrespective of where the crime was committed?

It is fundamental in considering this question to bear in mind that for the past century at least war crimes have been considered as "crimes against society" and war criminals as "enemies of mankind". Thus an Attorney General of the United States has spoken of them as "*hostes humani generis*" - (11 Opinions of the Attorney General 297, 307 (1865)); war criminals have been spoken of as "outlaws" by United States military commissions (United States v. Gumban, General Order No 197, Division of the Philippines, 27 July 1901; United States v. Ferrer et al., General Order No. 120, Division of the Philippines, 13 June 1901); and certain it is that war crimes have such a moral taint as to outrage common justice, and that they should not go unpunished even though, through some circumstances, the country having primary interest is unable to lay hands on such individuals.

While the state whose nationals are directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes. Thus, although the nationals of only comparatively few of the thirty-three United Nations had been subjected to German atrocities, in the Moscow Declaration the three allied powers stated that they spoke in the interest of every member of the United Nations; and the Lord Chancellor (Viscount Simon), on October 7, 1942, stated in the House of Lords: "I take it to be perfectly well established international law that the laws of war permit a belligerent commander to punish by means of his military courts any hostile offender against the laws and customs of war who may fall into his hands wherever be the place where the crime was committed." (Parliamentary Debates, House of Lords, vol. 124, no. 86 (Oct. 7, 1942), p. 578, Emphasis supplied).

There is much support for this position both in the literature of authoritative writers and in practice. Nearly a century ago we find Francis Lieber taking the position that where a prisoner of war had committed a crime before his capture he might be punished by the detaining power if he has not already been punished by his own authorities. - (Par. 59, General Order No. 100, 24 April 1863). Flory, in his work on Prisoners of War, states generally that prisoners of war "having committed violations of the laws of war prior to their capture and not tried by their state of origin were, and are, subject to trial and punishment by the detaining state." - (p. 89-90). Brierly has recently stated that jurisdiction over war crimes "has no territorial basis, and it may therefore be exercised without any reference to the locus delicti" ("The Nature of War Crimes Juris-



diction", 2 The Norseman, No. 3, May-June 1944). Glueck too states that "the jurisdictional question presents little difficulty, because the territorial principle does not govern military tribunals in time of war." - ("By What Tribunal Shall War Offenders be Tried?" 56 Harvard Law Review 1059, 1065 (1943)). McNair in his note for the United Nations War Crimes Commission of 3 August 1944 likewise speaks of punishment of war crimes "by the opposing State into whose hands the perpetrators may fall". - (p.7). Again, A.N. Sack, in his article on the "Punishment of War Criminals and the Defence of Superior Order" (60 L.Q.R. 63, 67 (1944)) says that "the question whether a given killing is a legitimate act of warfare or a war crime is determinable by International Law, which required punishment for war crimes in the interest of the entire community of civilized States, and, of course, not by the 'law' of the lawless belligerent government which authorized or ordered it." (Emphasis supplied). A committee of the American Bar Association, consisting of Edwin D. Dickinson, Chairman, and George A. Finch and Charles Cheney Hyde, reporting to the Section of International and Comparative Law of that Association in 1943, held that most war crimes in the present war had been committed "against the security of the United Nations."

In the military commission case of United States v. Hogg et al., decided in 1865, the reviewing authority made the following statement pertinent to that case:

"Military courts are not restricted in their jurisdiction by any territorial limits. They may try in one State offences committed in another, and may try in the United States offences committed in foreign parts, and may try out of the United States offences committed at home. They have to do only with the person and the offence committed; all else is simply a matter of convenience, of witnesses, of the means of assembling a court, etc." - (8 Rob. Rec. II 674, 678. Emphasis supplied).

The 1912 Digest of Opinions of the Judge Advocates General of the United States Army contains the following holding: "A military commission, whether exercising a jurisdiction strictly under the laws of war or as a substitute in time of war for the local criminal courts, may take cognizance of offences committed during the war, before the initiation of the military government or martial law, but not then brought to trial." - (p.1067). Again, the Italian Wartime Penal Military Code, of 6 May 1941, provides that the laws and customs of war are applicable to military and civilian members of the enemy's armed forces whenever an offence against the law of war is committed against the Italian state or an Italian citizen, "or against an allied state or a subject thereof." - (Sec. 13, Book I, Title I, Supp., Gazzetta Ufficiale, No. 107).

Two United States cases will be noted, abstracts of which are now set forth:

In 1864 an enemy soldier murdered several persons in enemy territory beyond the military lines. He was thereafter captured by the United States forces. The Judge Advocate General of the United States Army was asked whether the prisoner-of-war might be tried by a military commission. The Judge Advocate General held that a military commission would have jurisdiction over such an enemy soldier irrespective of "whether such crime were perpetrated within or beyond the ordinary field of occupation of our armies." - (8 J.A.G. Record Book: 529-530)



A celebrated case of this sort arose in 1900 during the war in the Philippine Islands between the United States forces and the Filipino Insurrectionists. From 1896 to 1898, prior to the Spanish-American War of 1898, a Filipino revolution took place against the authority of Spain. During the course of that revolution the Filipino forces captured a large number of Spanish soldiers, which they held as prisoners-of-war. In 1900, although United States forces occupied Manila and Northern Luzon, a large area of Southern Luzon was under the de facto sovereignty of the Filipino Insurgents. It had never been occupied by the United States forces. In that year the United States forces on Luzon proceeded south from Manila to take over the area.

The particular facts of a war crime's case which arose at that time are well summarized as follows in the opinion of Major-General Chaffee, Military Governor of the Philippines, who was the confirming authority of the military commission which later tried the case:

The accused was Major Francisco Braganza of the Filipino army. He "had been a lieutenant of police of San Fernando and recently appointed a major in the insurgent forces. That at Minalabag, a party, by roll-call, of one hundred and seventy-three Spanish prisoners, were delivered to him for the ostensible purpose of being conducted to a place of greater security from the approaching American troops. It appears that from high sources orders had been given to prevent their rescue by the Americans.

"At the time the accused took charge of these prisoners, they were footsore, weary and half-starved, their hurried marching and large number apparently overtaking the available means of support which the presidentes of the pueblos through which they passed, had at their ready disposal.

"Apprehension of the sudden appearance of the American troops caused confusion and disorder among the guard and police, which composed the escort under the orders of the accused, who, on the 23rd day of February 1900, the morning following the day he assumed charge of the escort, proceeded to have the arms of his prisoners bound at the elbows with cords drawn across their backs so as to render them comparatively helpless. This was the first act of unmistakable indignity imposed upon the prisoners, who, up to this time, had been treated with some kindness. Knowing the habits of the people in whose hands they were, to bind and make helpless one doomed to death, the prisoners must have readily interpreted its sinister meaning. The next act of the accused was to cause the prisoners to be searched for money and valuables and to appropriate the lion's share for himself. The prisoners were then told off in detachments of ten men, more or less, with a suitable guard placed over each. They were then conducted to the rice fields, a short interval being preserved between the detachments. At a pre-concerted signal the blowing of a whistle by accused, the guards fell upon their victims and slaughtered them with daggers, bolos, clubs and spears; the accused standing by, encouraging, directing and urging on the barbarous assault.

"Those of the victims, who were strong enough, bound as they were, made a break for liberty and accused ordered them to be pursued and killed. On the following morning it was reported to accused that thirty of the escaped prisoners had been recaptured at Lupi, whereupon he proceeded there, ordered them bound, conveyed to the woods, and again the scenes of the



preceding day were enacted. Returning to Lupa, accused found another party of his recaptured victims and these, in turn, were bound and led to death ....

"From official records it appears that about one-half of the prisoners escaped and, after devious wanderings under cover of the tropical vegetable growth and wooded lands, in small parties and after much suffering, finally reached safety within the American lines."

Braganza was later captured by the United States forces. Upon the request of the Spanish Government he was put on trial before a United States military commission and sentenced to be hung. Three general charges were made against him, together with detailed specifications apprising him of the exact nature of the charges. The style of the general charges are worth noticing as they indicate clearly the law which was being applied. It was not Filipino law, not Spanish law, not United States law, but the international law of war. The general charges read verbatim as follows: Charge I - "Murder in violation of the laws of war." Charge II - "Violation of the laws of war." Charge III - "Robbery, in violation of the laws of war."

It will be noted that the war crimes in this case were not against nationals of the United States but against Spaniards. Nevertheless the Spanish Government requested the United States to punish Braganza who was in United States custody, and this was done by a United States military tribunal.

A photostatic copy of the record in this case is now available in London at the Offices of the United States Representative of the United Nations War Crimes Commission. It consists of 285 folio pages. The testimony of all witnesses is set forth verbatim. The four-square analogy of the facts of this case to the present invasion of the Continent and to military jurisdiction over captured war criminals whose acts were committed before D-day is quite apparent. Presumably similar support would be found in the records of other countries if the source material were gathered and studied.

Francis Lieber took the position that war-time marauders might be treated as "pirates" (Par. 82, General Orders No. 100, 24 April 1865). Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate judicial system operating on the spot where the crime takes place - in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fundamental fact, hoping thereby to commit their crimes with impunity. It is not generally appreciated that the military jurisdiction which has been exercised over war crimes has been of the same non-territorial nature as that exercised in the case of the pirate, and that this broad jurisdiction has been assumed for the same fundamental reason that both are against the interests of the whole civilized world.

Summary: Jurisdiction to punish offences against the laws



of war may be concurrent. An offence against the laws of war is a violation of the law of nations, and a matter of general interest and concern. War crimes are now being especially recognized as of general concern to the United Nations, which states in a real sense represent the civilized world. Whether committed by their own forces or those of the enemy, all civilized belligerents have an interest in the punishment of offences against the laws of war.

Conclusion: Both on principle and in practice allied military courts are empowered to try and adjudge punishment of war criminals in allied custody no matter where or against whom the offence was committed.