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War Crimes and Their Punishment

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WAR CRIMES AND THEIR PUNISHMENT

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In public pronouncement of the spoken word, in declaration printed in The Outlook, and through the pages of Current History, Admiral Sims has reopened the problem of atrocities and war crimes and has caused the editorial writers of our public press to make many fantastic and unsound statements on these matters. Now that the heat of belligerent animosity has passed and the vigorous propaganda lost much of its pertinency and point, it may be possible to take a saner view and to see where we stand today.

Many and many a man has remarked that war is becoming more and more humane with the passing of centuries. Property was taken and apportioned among the victors. Prisoners were sold into slavery. But gradually the professional standing armies of the seventeenth and eighteenth centuries and the policies and proclamations of the revolutionary armies of France, succeeded in segregating to some extent the combatant and the non-combatant, even the combatant in arms and the combatant temporarily hors de combat. In 1863 the famous Lieber Instructions issued for the government of the United States armies in the field set forth a fairly full and very decent code of conduct, which has been praised by international lawyers and followed to a great extent by the civilized nations of the earth so far as to result in the issuing of similar instructions to other armies. Then came Geneva, and Brussels, and Oxford, and The Hague. At the beginning of the twentieth century, it was perfectly proper to say that wars were subjected to more regulations and restrictions than ever before.

And yet at the same time that this amiable development was taking place, the character of war itself was undergoing a great change. War was taking unto itself new implements and means out of the scientific life of the world. Gone were the days when an advantage in equipment would be condemned as unchivalrous, like the magic coat of mail that could not be pierced, the enchanted sword that would not break, the charmed battle-axe that always brought victory, the token that preserved its wearer from wounds. Secret types of armor-belts were developed and used.

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on ships; secret ranging devices were devised and employed; secret processes in the manufacture of artillery and small arms were used; better telegraphic communication, better aircraft, better railway facilities, were eagerly sought. The object was to gain in advance of the conflict a material advantage that would make the success more sure. The advantage was coveted, not spurned. Fair play came to mean merely the absence of treachery.

War was also taking to itself new personnel. The citizen as well as the soldier was in arms. The nation was "all in it." For a century and a half statesmen had been announcing their hostility toward the enemy government, not the enemy people. It was so announced in the continental wars that opened in the nineteenth century, in the War of 1812, in South America in the dreadful annihilating Paraguayan war, in the Franco-Prussian War, and so on and on, until President Wilson announced that we had no quarrel with the German people, but only with a dangerous military organization. And yet that German people were "all in it too," as Spenser Wilkinson was quick to admit. On the one hand were the public declarations of statesmen; and on the other the facts of the present—the people in arms—and the doctrine of law that war is not simply a relation between governments and sovereigns but between each individual citizen or subject of one state and each individual of the other state. And this had a tremendous effect upon the character of war and the methods of its conduct.

Since modern war is a scientific war, we must expect the intricate mind of man to be continually devising new forms of destruction. Since modern war is a popular war, we must expect the patriotic partisanship inherent in all democratic nationalities and the fervent propaganda that rouses the citizens to declare and wage war, to destroy sober judgment and cause acts which might at other times appear abhorrent. This character of modern war must be in our minds when we think and speak of war crimes, scrutinize those that have happened in the past or plan to prevent those that may happen in the future. We should not forget the words uttered by Admiral Dent in London in 1922:

"Where war was carried on by a warrior caste, rules were generally observed. For the observance of rules, military forces must be highly disciplined. But the modern tendency is against the warrior-caste and in favor of the nation-in-arms. To lay down rules under present conditions makes it very difficult for the military to conduct war humanely. If the national discipline is lowered, atrocities will follow."
Attempts to prevent violations of the laws of war will be made by the nations of the world, each in its own way, military efficiency demands control and order, compliance with regulations. Vattel so announced in 1758. General Halleck has so judged, declaring it is a military necessity that no crimes be committed by members of an army, even war crimes. Washington at White Plains, McClellan at Yorktown, Oyama at Port Arthur, all generals in the field, have tried to repress transgressions. And yet transgressions have taken place. Laws are made to be broken, remarks the wag. And laws against murder and burglary and embezzlement are broken from day to day. So it is extremely probable that in the armies of the future the laws of war will likewise be broken. Especially is this true, since the armies of the future will be more and more based upon universal conscriptions and therefore less and less disciplined.

Amid all the pother and balderdash about the so-called “unsatisfactory” outcome of the Leipzig trials of German war criminals in 1921, editorials all over the world, excessive epithets in the British Parliament, for which Mr. Bottomley was chiefly responsible, and before the Grotius Society, for which Lord Cave was responsible,—amid all of this it appeared that two essential facts were overlooked. One was that one prisoner then brought to justice had already been removed from his command in 1915, and tried and sentenced by a German court-martial in 1916, for the very same offenses. The other was that when the commander of the submarine which sank the Llandovery Castle could not be found, the German authorities on their own initiative discovered and brought to the bar two subordinate officers who were duly convicted. The law might have been broken. Guilty men may have escaped. But the law was justified.

The laws of war will be broken. Of course they will be broken, or there would not be any necessity for setting them up as laws. But let us not demand too much. Let us not imagine that words on paper followed by flourishing diplomatic signatures will of themselves prevent mischief. They merely serve as a definite standard as to what is and what is not mischief. After some experience they may be justified, or they may be altered. Their defect is that they are framed in times of peace, and often by men of a pacific turn of mind—or at least publicly interpreted by such—and that they become effective only in time of war when national prejudices and passions are inflamed and public newspapers print or delete as their partisanship or the dictates of
the state censor may demand. When, in the last decade of the eighteenth century, we protested against British interference with our overseas commerce, England maintained her position in fact; but later acceded to it in law and paid damages. When in the early months of the late war, the British seized privately owned ships and the American Embassy in London was flooded with delicate demands, the British continued their practice, but actually paid damages in one case and it was understood that adjustments would later be made in the other cases. In other words, the sea-going, trading Empire found it worth while, for military purposes, to break the law and to forfeit the penalties. Yet the law may still be supreme. In general the law acts as a repressive agency. It establishes conventions. It restrains license.

The law may be violated deliberately by one government. A member of the army or navy may receive orders to do things which are in direct contravention of law. As a learned member of the legal profession said almost a hundred and forty years ago:

“He must not judge of the danger, propriety, expediency, or consequence of the order which he receives; he must obey; nothing can excuse him but physical impossibility.”

This principle has been upheld in innumerable courts from that day to this. It appeared in the German War Code, and was the point on which the acquittal of a submarine commander turned. It likewise appeared in the American and British rules of land warfare. The conflict of theories appears in Galsworthy’s Loyalties, where the barrister announces that he serves the law, and the soldier that he serves his country. It is a conflict that should not be settled too rapidly. In time of war we are likely to think only of our own country, and to judge our enemies only by the law, forgetting their own patriotism which is perhaps as intense as ours. And I have a sneaking suspicion that the man at the front is as apt as any to do the right thing, in most cases at least. As Mr. C. E. Montague said in that excellent volume entitled Disenchantment which every literate person in the world should read:

“While a learned man at Berlin keeps on saying Delenda est Britannia! at the top of his voice and a learned man in London keeps on saying that every German must have a black heart, an enemy dog might be trotting across to the British front line to sample its rats, and its owner be losing in some British company’s eyes his proper quality as an incarnation of all the Satanism of Potsdam and becoming simply ‘him that lost the dog.’ . . . How shall a man not offer a drink to the first disbanded German
soldier who sits next to him in a public house at Cologne, and try to find out if he was ever in the line at the Brickstacks or near the Big Crater? Why, that might have been his dog!"

There was a paper signed at Versailles which a British soldier has called "the meanest of treaties." It provided among other things for the trial of German war criminals by allied courts. This was a reprisal pure and simple. It was an act of political hate. It was as much a reprisal as some of the war-time punishments which the mediaeval chroniclers Matthew Paris and Froissart record. It was as much contrary to accepted standards of international law as the retaliatory British Orders in Council against Napoleon which British courts denounced but found themselves bound to enforce by municipal law. It was in many of its provisions as subversive of acknowledged principles as the British bombing of Leipzig which the publicist Holland said could only be justified as a reprisal.

It had long been believed that members of an army should be dealt with according to the laws of their own country. So Saladin treated the Prince of Antioch. Europe held up its hands in horror when Pizzaro punished the monarch of Peru by Spanish law for carrying out the customs of the Peruvian people. The courts of the United States have persisted in holding immune a soldier under orders on foreign, hostile soil from any but his own national and military laws. When England suggested that her naval men responsible for the Baralong incident be tried by a court of American naval officers, our government declined. So, it is fortunate indeed that better sense prevailed. It was a German court that denounced the acts of Lieutenants Dithmar and Boldt as throwing "a dark shadow on the German fleet." The German acts were condemned out of German mouths, according to German law; and no man could say that the principle of the law had not been upheld. The decision was not a political decision, but a judicial one. As far back as 1795, Ward, the historian of the laws of nations "did not perceive the fairness of considering them as amenable to the laws we choose to pursue or as punishable for breaches of those laws." If the victor becomes plaintiff, judge, and sheriff, the standards of international law will be determined by force of arms alone. War will then indeed become the sole litigation of nations. A new weapon may appear, like the submarine. One belligerent may denounce it because it cannot conform to the previously acceptable and reasonable modes of use. The opposing belligerent may claim that the laws are
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out of date, cannot apply to this new weapon, and that "military necessity" permits the new use of the unforeseen instrument. The idea of the nation that wins the war will prevail. What is that but the rule of force? It is not a legal precept legally arrived at; but a doctrine established by victory and by that alone. Had Germany won the war, the uses of the submarine might have been as Germany wished. Since England and her allies won, the uses are limited. And—it may be added—the theory of continuous voyage and the abrogation of certain neutral rights are now where England put them when she was "fighting for her life," and will so remain unless England concedes the point and pays damages.

This is the crux of the matter. Let these things be settled by law, neither by pacifist theorists nor by bayonet or shell. Rules of war must be maintained by each nation as regards its own nationals. The Versailles treaty contemplated trying Germans after the war by Allied courts. A five-power treaty in Washington gave "any power" jurisdiction over one type of offender. At the August, 1922, meeting of the International Law Association in Buenos Ayres, Mr. H. H. L. Bellot proposed, and secured the passage of, a resolution for the creation of an international criminal court for the trial of offenders. To this Sir Graham Bower has protested. He deems it an invasion of national sovereignty and jurisdiction. He considers it a dangerous feeder of belligerent animosity and a probable tool for vicious war-time persecution. His opinion is concurred in by many sensible people, notably by an American naval officer whose opinions on the laws of war are often asked and commonly respected and also by the greatest living authority on international law.

Far better to let a guilty man escape through national sentiment than that an enemy should be unfairly tried by a court with mind perverted by patriotic war-time propaganda. The military superior is the proper judge, and the proper man to see that justice is rendered. It may be true, as a British court has remarked, that the proceedings of courts-martial are in no wise analogous to the proceedings of regular courts of justice. It may be true that it is merely from motives of convenience and decorum that these courts-martial act to restrain acts of violence in time of war, instead of leaving punishment "to the casual action of persons acting without sufficient consultation or without sufficient order or regularity in the procedure in which things alleged to have been done are proved." And yet it is even more true that the honor of his profession and the reputation of his service,
will make a military or naval man a saner and more desirable judge in the premises than will the vengeful spirit and nationalistic vigor of the average enemy. War crimes will persist. But the laws of war must also persist. International prosecutions will shatter the stability of those laws and offend state dignity more than will dependence on national responsibility.