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Was the Assassination of Abraham Lincoln a War Crime?

Dr. Mudd and the Lincoln Assassination: The Case Reopened 213
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There does not appear to be any dispute about the following facts concerning the assassination of President Abraham Lincoln: that on 14 April 1865, while sitting in a box at Ford's Theater in Washington, D.C., watching a performance of "Our American Cousin," Lincoln was shot and killed by John Wilkes Booth; that in jumping from the box to the stage (where he delivered the *sic semper tyrannis* pronouncement) one of Booth's spurs caught on a flag decorating Lincoln's box with the result that he fell and broke his leg; that despite this he was able to escape from the theater and from Washington; that he was later joined in his flight by David E. Herold; that Dr. Samuel Mudd, a Booth acquaintance living in Maryland, treated Booth's leg and provided him with a makeshift crutch; and that all this occurred five days after Lee's surrender to Grant at Appomattox.

From that point on there is little agreement on the facts¹—and even less on the applicable law. However, as to some of the facts which are disputed, there is really no basis for argument. For example, it is sometime argued that with Lee's surrender the Civil War (or the War Between the States) came to an end. That is not so. Lee had merely surrendered the Army of Northern Virginia. The Confederate States of America had other armies in the field, armies which continued to fight, armies which did not surrender until well after the date of the assassination.² Moreover, because of the presence of thousands of Confederate sympathizers in Washington, martial law had been declared for that city, which was fortified and heavily guarded by Union troops, and that status still existed on 14 April 1865, when the assassination took place.

The current manual on the law of war of the United States Army defines a war crime as "a violation of the law of war by any person or persons, military or civilian."³ Adopting this definition, the sole question that this article will attempt to answer is: Was the assassination of Abraham Lincoln by John Wilkes Booth (and any co-conspirators) a violation of the law of war and, hence, a war crime? To refine our discussion even further: Is the murder of an individual

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.

committed in wartime by one or more individuals of the same nationality as the victim a war crime?

If the answer to these questions is in the affirmative, under the law of war a military commission would unquestionably have jurisdiction to try the accused persons, including Dr. Samuel Mudd, brought before it charged with such an offense. If the answer to these questions is in the negative, the question of the jurisdiction of a military commission becomes one of constitutional and national law which is beyond the purview of this discussion.⁴

For our purposes we will assume the worst case for the accused: 1) that the evidence established that there was a conspiracy to assassinate President Lincoln; 2) that the eight individuals convicted by the military commission on 30 June 1865, including Dr. Samuel Mudd, as well as others who were not charged, were parties to that conspiracy;⁵ 3) that all of the conspirators charged, being residents of the District of Columbia or of the State of Maryland, were nationals of the Union; 4) that, nevertheless, all of the conspirators were strong supporters of the Confederate cause; and 5) that the conspiracy to assassinate Lincoln was motivated by a desire on their part to help that cause.⁶

The charge with respect to which the military commission opened its hearings on 9 May 1865, and to which the eight accused pleaded “Not Guilty” on the following day, alleged that they “maliciously, unlawfully and traitorously” combined, confederated, and conspired to kill and murder Abraham Lincoln and others.⁷ There is no allegation that their acts were in violation of the law of war. The wording of the charge itself demonstrates that the prosecution considered the offense charged to be a conspiracy to commit treason by murdering the President and his successors-to-be and that it did not consider this to be a war crime.⁸ As the present author has said elsewhere:⁹

There are a number of actions which, while they are wartime criminal offenses and are punishable by the injured belligerent, do not come within any definition of war crimes. Thus, while there is a wide-spread belief that espionage and treason are violations of the laws and customs of war and are, therefore, war crimes,¹⁰ this is not so.¹¹ International law does not forbid espionage and treason; national laws do.¹²

Presumably, the accused, Union citizens, assumed their acts of assassination would in some manner benefit the Confederate cause, even at that late date in the war. Their acts were, therefore, traitorous—but, as it has just been shown, treason is not a violation of the law of war, and it is not a war crime.

The post-World War II trials in which Germans tried Germans, Austrians tried Austrians, Hungarians tried Hungarians, etc., were not true war crimes trials. For the most part they were collaborationist (treason) cases and, in many cases, prosecuted misuse or abuse of power. Nor were the euthanasia cases or

the concentration camp cases (involving actions which took place prior to, and after, 1 September 1939, the official date of the beginning of World War II in Europe), which were tried by the Germans, true war crimes cases. They were violations of German criminal law, which had existed at the time of the offenses, but which, for obvious reasons, had not been enforced by Nazi officials.¹³

In the Nordhausen Concentration Camp case, the review of the case contains the following statement:

For an illegal act to be a war crime certain elements must be present, viz., (1) the act must be a crime in violation of international law; (2) there must be a disparity of nationality between the perpetrator and the victim; and (3) the criminal act must have been committed as an incident of war.¹⁴

These elements were not present in the trial of those alleged to have been parties to the conspiracy to assassinate Abraham Lincoln. The act charged was not a violation of international law; there was no disparity of nationality between the persons charged as perpetrators and the victim; and it is extremely doubtful that the assassination of Lincoln may be considered to have been an incident of the war. Therefore, it was not a war crime.

Proponents of the argument that the law of war governed the assassination of Abraham Lincoln, a Union citizen, by those who were likewise Union citizens, will find support in the trial of Mariano Uyeki,¹⁵ a case for which the present author can find no justification:

Mariano Uyeki was born in 1924 in Iloilo, Panay, the Philippines, of Japanese parents. When the war broke out in 1941 he apparently suffered at the hands of his Filipino schoolmates because he was pro-Japanese and it was alleged that on 10 May 1942, after the Japanese occupation of Panay, and without any justification, he shot and killed a fellow Filipino teenager. There was some evidence at that period he was acting as an interpreter for the Japanese and that he was wearing at least parts of a Japanese Army uniform. However, he was not conscripted into the Japanese Army until October 1944. He became a prisoner of war on 1 September 1945. Early in 1946 he was tried for the murder by a United States Military Commission. He was convicted and sentenced to death. That conviction was vacated because "the validity of the proceedings is faulty." Unfortunately, there is no explanation of the basis for that statement. He then made an application to the Supreme Court of the Philippines for a writ of habeas corpus, claiming that he was a Filipino citizen and that the United States Military Commission had no jurisdiction to try him. His application was denied on the ground that even if he had originally been a national of the Philippines, he had forfeited that nationality by rendering military service to the Japanese Government. This was not a decision that the military commission had jurisdiction to try him, it was a decision that the Supreme Court of the Philippines had no jurisdiction to rule on the jurisdiction

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of the United States court because he was not a citizen of the Philippines. He was retried by another United States Military Commission in April 1946 and was again convicted and sentenced to death.¹⁶

Concerning this case the present author went on to say:

When the offense was committed in 1942, it was a matter of the murder of one (pro-American) Filipino civilian by another (pro-Japanese) Filipino civilian. It was a violation of the criminal law of the Commonwealth of the Philippines. Surely, this was a case for the courts of the Philippines and not a war crime for trial by a United States Military Commission. Even though the accused may have lost his Filipino nationality in 1944, upon entering the Japanese Army, and even though the Philippines were not yet fully independent, it did have its own fully-developed criminal justice system. It is difficult to find a basis for the jurisdiction of the United States military commission for this offense committed in 1942. Regrettably, no application for a writ of habeas corpus was made to the United States Courts.¹⁷

In other words, it is not believed that motive alone can convert an offense which is a violation of national law into one which is a violation of international law. Had Booth and his fellow conspirators been disappointed office seekers, the assassination of President Lincoln would certainly not have been a war crime, and the fact that they acted as they did because of their political motivation, because of their desire to support the Confederacy, does not convert a common law national crime into an international crime.

The conclusion is reached that the assassination of President Abraham Lincoln by John Wilkes Booth and his fellow conspirators was not a violation of the law of war and, therefore, was not a war crime, but was a politically motivated, treasonous act committed by Union citizens in the hope that it would help the Confederate cause. Accordingly, even if we assume that the evidence supported Dr. Mudd's conviction of conspiracy to commit treason and murder under national law, he was properly convicted only if a trial by military commission at that time and place complied with the constitutional and statutory law of the United States.

Notes

1. See OTTO EISENSCHIML, *WHY WAS LINCOLN MURDERED?* (1937) (discussing one extreme, and perhaps discredited, version of the facts); WILLIAM HANCHETT, *THE LINCOLN MURDER CONSPIRACIES* (1983) (containing a 15-page bibliography and more scholarly discussion on the subject); see also LOUIS J. WEICHMAN, *A TRUE HISTORY OF THE ASSASSINATION OF ABRAHAM LINCOLN AND THE CONSPIRACY OF 1865* (Floyd H. Risvold ed., 1975) (setting forth the contents of a number of interesting documents).

2. For example, Confederate General Joseph E. Johnston did not surrender to Union General William T. Sherman until 18 April 1865. *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, ser. I, vol. XLVII, pt. III, 243-45 (Washington, GPO 1895).

General Sherman was reprimanded for giving General Johnston what were considered to be excessively favorable conditions for his surrender and the Federal Government repudiated the surrender agreement! *Id.* at 301-02, 334-36, 345.

3. DEPARTMENT OF THE ARMY, FIELD MANUAL FM27-10, *The Law of Land Warfare* ¶ 499 (1956). Much of this manual was the work of the late Richard R. Baxter, subsequently the United States Judge on the International Court of Justice.

In amplification of the foregoing the present author has stated:

Anyone—military or civilian, man or woman, enemy nationals, allied nationals, and neutral nationals—may commit a war crime and may be tried and punished for the criminal act.

HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 431 (1993). No national of the United States was tried by a United States military commission for a war crime during or after World War II although a considerable number were tried by courts-martial for violations of the Articles of War, then the Army's penal code; and many of those trials would have been considered to be war crimes trials if they had been tried by the enemy. For such activities during Vietnam, see W. Hayes Parks, *Crimes in Hostilities* (pt. 1 & conclusion), 60 *MARINE CORPS GAZETTE* 16 (Aug. 1976), 60 *MARINE CORPS GAZETTE* 33 (Sept. 1976).

4. There were a number of trials by military commissions after the Civil War which, unquestionably, involved war crimes, primarily the maltreatment of Union prisoners of war held in the South. The most famous of these was the trial of Captain Henry Wirz, who had commanded the notorious prisoner-of-war camp at Andersonville, Georgia. See H.R. EXEC. DOC. No. 23, 40th Cong., 2d Sess. (1867); 8 *AMERICAN STATE TRIALS* 657 (John Davison Lawson ed., 1918). For a different type of war crime, see T.E. Hogg *et al.*, Gen. Orders No. 52, Dep't of the Pac. (June 27, 1865) in *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, ser. II, vol. VIII, 674-81 (Washington, GPO 1899).

5. Of course, Booth must be added to this group. He was not a defendant at the trial because, while being pursued by the Union authorities, he had been shot and killed in Garrett's barn, near Bowling Green, Virginia. John Surrat, another alleged conspirator, had left the country and, not having been apprehended and returned to the United States until a considerable period thereafter, could not be tried with those whom we are assuming to be his fellow conspirators. He was tried in a civil court in 1867, the trial resulting in a hung jury. He was not retried.

6. It has often been charged that the conspiracy to assassinate President Lincoln was approved by Jefferson Davis and members of the Confederate Cabinet. In fact, the charge (or indictment) includes their names and the specification includes a statement to the effect that the conspirators were "incited and encouraged" by Davis and other well known Confederates. However, no substantial evidence of their involvement was adduced at the conspiracy trial. Davis was taken into Union custody on 10 May 1865, after the trial was under way, and he was not brought before the Commission. He was released from custody in May 1867 without having been tried for any offense.

7. BENN PITMAN, *THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS* 18-21 (New York, Moore, Wiltach & Baldwin 1865) (*facsimile ed.* 1954). This is the courtroom testimony as recorded by Pitman, the official court reporter.

8. In *Ex parte Quirin*, 317 U.S. 1 (1942), where unlawful belligerents, including one individual who claimed to be a citizen of the United States, had entered this country for purposes of espionage and sabotage, the Court stated that "even when committed by a citizen, the offense [entering the country for the purpose of committing sabotage while wearing civilian clothes] is distinct from the crime of treason . . . since the absence of uniform essential to one is irrelevant to the other." *Id.* at 38.

In other words, unlawful combatants wearing civilian clothes and bent on sabotage are in violation of the law of war; inasmuch as only citizens can commit treason, their attire at the time of the commission of the act is immaterial, and there is no unlawful combatancy involved.

9. LEVIE, *supra* note 3, at 3.

10. See, e.g., Iu. A. Reshetov, *International Criminal Responsibility of Individuals for International Crimes*, in *THE NUREMBERG TRIALS AND INTERNATIONAL LAW* 167 (George Ginsburgs & V.N. Kudriavtsev eds., 1990); Jacob Berger, *The Legal Nature of War Crimes and the Problem of Superior Command*, 38 *AM. POL. SCI. REV.* 1203, 1204 (1944); W.L. Ford, *Resistance Movements in Occupied Territory*, 3 *NETH. INT'L L. REV.* 355, 372 (1956). Ford appears to take the position that neither spying nor sabotage is a violation of the law of war. Sabotage by legal combatants is not a violation of the law of war. Sabotage by illegal combatants is such a violation. Roling says: "Both in the case of espionage and in that of 'risky war acts' the term 'war crimes' is used metaphorically. This concept should be kept for breaches of the laws and customs of war, for violations of the international law concept of *jus in bello*." B.V.A. Roling, *Supranational Criminal Law in Netherlands Theory and Practice*, 2 *INT'L L. IN THE NETH.* 161, 194 (1979).

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11. With respect to espionage and war treason. War Office, *THE LAW OF WAR ON LAND* ¶ 624 (Sir Hersch Lauterpacht, rev., 1958), states rather conservatively that "the accuracy of the description of such acts as war crimes is doubtful." See also UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* 487 (1948).

12. Nathan Hale, Major John André, Mata Hari, Richard Sorge were not war criminals. They did not violate the laws and customs of war; each of them violated the laws relating to espionage of the enemy of the belligerent for which he or she acted—and they were punished under those laws. The United States Supreme Court erred in *Ex parte Quirin* when it stated that spies are "offenders against the law of war." 317 U.S. at 31. Similarly, Quisling, Pétain, Laval, Lord Haw Haw, Kawakita, Tokyo Rose, etc., were not war criminals. They did not violate the laws and customs of war, they were collaborationists who violated the treason laws of their own countries—and they were punished under those laws.

13. The trials of Germans by German courts for membership in Nazi organizations determined to have been criminal in nature were mandated by the Charter of the International Military Tribunal which sat in Nuremberg and by the judgment of that Tribunal.

14. See LEVIE, *supra* note 3, at 283. This case was officially known as *The Trial of Kurt Andree*. National Archives, Records Group 338, File M 1079, Rolls 1-16. It was tried by a United States military commission at Dachau, Germany, in December 1947.

15. Archives of the Hoover Institution for War, Peace, and Revolution, U.S. Armed Forces W. Pac, File CSUZZX 191-A, Box 2, LEVIE, *supra* note 3, at 236.

16. LEVIE, *supra* note 3, at 236.

17. *Id.*