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WORLD WAR I: “THE WAR TO END ALL WARS” AND THE BIRTH OF A HANDICAPPED INTERNATIONAL CRIMINAL JUSTICE SYSTEM

M. CHERIF BASSIOUNI*

“Strategy is a system of stop-gaps.”

—Moltke¹

INTRODUCTION

The words of Von Moltke, Germany’s well-known general, are an apt prelude to the strategy of justice pursued by the Allies after World War I. It was, indeed, a “system of stop-gaps.”

World War I, commonly referred to as the “Great War” and “the war to end all wars,” took place between 1914 and 1918 and “was the first general war, involving all the Great Powers of the day, to be fought out in the modern, industrialized world.”² The trigger for the war was an incident that occurred in the volatile Balkans³ on June 28, 1914, in which Archduke Franz Ferdinand and his wife were assassinated by Gavrilo Princip as they rode in a car in Sarajevo.⁴ The

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1. ERICH VON MANSTEIN, *LOST VICTORIES* 367 (1958). See Gunter E. Rothberg, *Moltke, Schlieffen & the Doctrine of Strategic Envelopment*, in *MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE* 299 (Peter Paret ed., 1986).

Moltke believed that war, given its uncertainties and changing circumstances, was more an art than a science. Consequently, there could be no “general rules” or “precepts.” Instead, strategy could be no more than a “system of expedience” based on the strength of character and experience of the commander and his ability to make rapid decisions under stress. [C]ommon sense and opportunity, based on the honing of personal judgment were in fact his recipe for a commander’s strategic decisions.

Id. See also EBERHARD KESSEL, *MOLTKE* (1957).

2. DAVID STEVENSON, *THE FIRST WORLD WAR AND INTERNATIONAL POLITICS* 1 (1988).

3. The First and Second Balkan Wars had just been fought in the region in 1912 and 1913. See M. CHERIF BASSIOUNI, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 10 (1996) [hereinafter BASSIOUNI, *LAW OF THE ICTY*] (“The two Balkan wars involved ethnic conflict on a massive scale. The worst atrocities appear to be related to efforts to unite the peninsula’s Serbian population.”). Cf. M. Cherif Bassiouni, *The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 *CRIM. L.F.* 279 (1994).

4. JOHN KEEGAN, *THE FIRST WORLD WAR* 49 (1999).

plot to assassinate the heir to the Hapsburg throne was planned by a secret Serbian nationalist organization known as the Black Hand.⁵ Bosnia, which had been annexed into the Austro-Hungarian Empire in 1908, was viewed by such nationalist groups as an extension of Serbia.⁶ On July 28, 1914, following a Hapsburg ultimatum and the Serbian government's refusal to allow Austro-Hungarian representatives to participate in its official investigation of the assassinations, Austria-Hungary declared war on Serbia.⁷

What began as nothing more than a local Balkan conflict, however, soon escalated into a continental one.⁸ Following Russia's general mobilization on July 30, 1914, and France's refusal to declare its neutrality in the event of a Russo-German confrontation, Germany declared war on Russia and France on August 1 and August 3, respectively.⁹ Then, on August 4, 1914, Great Britain declared war on Germany after the latter invaded Belgium.¹⁰

The Allied and Associated Powers included the major powers of the *Triple Entente*, namely: Russia; France; and Great Britain; as well as, Belgium; Serbia; Japan; Italy; and numerous other nations.¹¹ The United States did not officially enter the conflict until April 6, 1917, when it declared war on Germany and joined the Allied and Associated Powers.¹² The Central Powers' alliance comprised

5. See *id.* (“[T]hrough the terrorists were all Austrian subjects, they had been armed in Serbia and smuggled back across the Austrian border by a Serbian nationalist organization.”); STEVENSON, *supra* note 2, at 11-12.

6. See KEEGAN, *supra* note 4, at 48-49; see also STEVENSON, *supra* note 2, at 12 (“After the annexation a loosely organized group of secret societies, the Young Bosnians, turned to assassination as a means of touching off a revolutionary movement that would attain their goal of an independent federation uniting the South Slavs. From this milieu the Sarajevo conspirators came.”). This was the basis for Serb ultra-nationalists in 1992 to claim portions of Bosnia as being part of “Greater Serbia.” See BASSIOUNI, LAW OF THE ICTY, *supra* note 3, at 33, 37; see also MISHA GLENNY, THE BALKANS: NATIONALISM, WAR AND THE GREAT POWERS, 1804-1999, at 635-36 (2000).

7. See KEEGAN, *supra* note 4, at 55-56, 58; STEVENSON, *supra* note 2, at 11. It is interesting to note that if Serbia had pursued an effective and transparent investigation, World War I may not have commenced. Thus, legal accountability could have prevented war.

8. See STEVENSON, *supra* note 2, at 11. Influences that helped to catapult this localized conflict into a war of global proportions included antagonism between the great alliances of the *Triple Entente* and the *Triple Alliance* (weakened, in part, by Italy's secret defection), nationalism, an accelerated arms race, economic rivalry between Britain and Germany, bitterness over the German annexation of Alsace-Lorraine following the Franco-Prussian War of 1870, and Russian designs on the Straits. See *id.* at 18-22; HARRY ELMER BARNES, THE GENESIS OF THE WORLD WAR: AN INTRODUCTION TO THE PROBLEM OF WAR GUILT 43-90 (Howard Fertig, Inc. 1970) (1926). See generally BARBARA W. TUCHMAN, THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR, 1890-1914 (1966).

9. See STEVENSON, *supra* note 2, at 17-29. Germany's declaration of war on Russia was particularly revealing of inter-European shifting alliances in view of Kaiser Wilhelm II's personal friendship with Czar Nicholas II. See CORRESPONDANCE ENTRE GUILLAUME II ET NICOLAS II: 1894-1914 (1924) (revealing how close that the two leaders were, as they referred to each other as “Willy” and “Nikki”).

10. See STEVENSON, *supra* note 2, at 35.

11. See FRANCIS A. MARCH, HISTORY OF THE WORLD WAR: AN AUTHENTIC NARRATIVE OF THE WORLD'S GREATEST WAR 73-74 (1919). The other countries comprising the Allied and Associated Powers were Brazil, China, Costa Rica, Cuba, Greece, Guatemala, Haiti, Honduras, Liberia, Montenegro, Nicaragua, Panama, Portugal, Romania, San Marino, and Siam. See *id.*

12. See MARCH, *supra* note 11 at 74; Joint Resolution Declaring that a State of War Exists

Austria-Hungary, Germany, the Ottoman Empire, and Bulgaria.¹³ In total, twenty-eight countries entered the war.¹⁴

The number of casualties from the war was unprecedented - totaling 33,434,443.¹⁵ The final tally of the dead was 7,781,806, in addition to 18,681,257 persons who were wounded,¹⁶ and no one knows how many among the latter died of their injuries or related illnesses. Russian, German, and French deaths due to combat or disease were estimated at 4,696,404.¹⁷ World War I was the first time that asphyxiating gas and mustard gas were utilized as weapons in warfare.¹⁸ These chemical agents not only caused painful deaths and immediate illness, but permanent injuries as well.¹⁹ In time, many of the chemical agents' victims died of their injuries or of health complications.²⁰ In addition, there were many allegations of atrocities being committed by combatants against civilians, including claims that women and children had been used as human shields, mutilated, and systematically executed.²¹

After four years of brutal trench warfare characterized by the Napoleonic-era strategy of massive frontal attacks,²² which caused so many senseless casualties,

Between the Imperial German Government and the Government and the People of the United States and Making Provision to Prosecute the Same, Apr. 6, 1917, *reprinted in* JAMES BROWN SCOTT, A SURVEY OF INTERNATIONAL RELATIONS BETWEEN THE UNITED STATES AND GERMANY, AUGUST 1, 1914—APRIL 6, 1917, at xxi-xxii (1917).

13. *See* MARCH, *supra* note 11, at 73-74.

14. *Id.* at 21. *See supra* notes 11-13 and accompanying text.

15. *See* MARCH, *supra* note 11, at 32.

16. *Id.*

17. *Id.* at 31-32.

18. KEEGAN, *supra* note 4, at 197-99.

19. *See id.* at 197, 199.

20. This led to the adoption in 1925 of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65, 26 U.S.T. 571.

21. *See* MARCH, *supra* note 11, at 97-98; *cf.* JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 9-10 (1982). In Annex I to its 1919 *Report*, the Allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties cited to the following examples of offenses alleged to have been committed by the Central Powers: "A German infantry captain put three children round him to protect him from Belgian fire;" "[f]requent tortures—before murder; tearing out eyes, cutting off nose and ears, also breasts of women;" "[w]omen undressed and nailed to the ground;" and "[c]ivilians compelled to march in front of Austro-Hungarian troops as a shield." 6 DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 32, VIOLATION OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS 32-33 (photo. reprint 2000) (1919) [hereinafter VIOLATION OF THE LAWS AND CUSTOMS OF WAR].

22. *See* KEEGAN, *supra* note 4, at 175-80, 182. Trench warfare in "no man's land" was dominated by the British policy of "redigging trenches closer to the enemy's and staging frequent trench raids." *Id.* at 182. As described by Sir John Keegan:

The first trench raid appears to have been mounted on the night of 9/10 November 1914 near Ypres by the 39th Garwhal Rifles of the Indian Corps. Fierce irruptions into enemy positions under cover of darkness was a traditional feature of Indian frontier fighting and this first murderous little action may have represented an introduction of tribal military practice into the "civilised" warfare of western armies. The event set a precedent of

the war finally ended on November 11, 1918, when a German delegation, led by Secretary of State Matthias Erzberger, signed the armistice agreement on behalf of Germany in an isolated railway car located in the Compiègne Forest near Paris.²³ Unfortunately, rather than promoting lasting European stability, the harsh terms of the armistice²⁴ and the Carthaginian peace dictated by the Allies at Versailles sowed the seeds that brought about the Second World War two decades later.²⁵ Thus, the “war to end all wars” was a prelude to another war whose consequences were even more devastating than the first one.

The Treaty of Versailles forced upon Germany draconian reparation measures. For example, the treaty required Germany to cede to the Allies all of its merchant ships over 1,600 tons, plus one-quarter of its fishing fleet;²⁶ to deliver huge quantities of coal to numerous Allied nations, as well as Benzol, coal tar, and ammonium sulfate to France;²⁷ and, despite the existence of famine conditions in

which the British were to make a habit and which the Germans were to copy. The French, despite their long experience of tribal warfare in North Africa, never found a similar enthusiasm for these barbaric flurries of slash and stab. *Id.*

23. See 12 AMERICANIZATION DEP'T, VETERANS OF FOREIGN WARS OF U.S., AMERICA: GREAT CRISES IN OUR HISTORY TOLD BY ITS MAKERS 158-65 (1925) [hereinafter AMERICA: GREAT CRISES]. After Germany defeated France in 1940, Adolph Hitler, in an act of symbolic irony, dictated armistice terms to the French in the very same railroad car. DAVID IRVING, HITLER'S WAR 295 (1990). Hitler retrieved the dining car from its permanent display in Paris and placed it in the identical location in the Compiègne Forest in which it sat in 1918. *Id.*

24. See C. PAUL VINCENT, THE POLITICS OF HUNGER: THE ALLIED BLOCKADE OF GERMANY, 1915-1919, at 162-65 (1985) (noting potential connection between armistice's continuation of Allied hunger blockade of Germany and the rise of National Socialism).

25. See LEON DEGRELLE, HITLER: BORN AT VERSAILLES 532 (1987) (“The inequity of the Versailles Peace Treaty created the exceptional circumstances that paved Hitler’s road to power. All the obstacles that would have stood in his way were swept away by the treaty. Hitler as a political man was born at Versailles.”); KEEGAN, *supra* note 4, at 3 (“The Second World War, five times more destructive of human life and incalculably more costly in material terms, was the direct outcome of the First.”); cf. IRVING, *supra* note 23, at 234-35 (“[President Roosevelt] himself recognized that the real reason for the war lay in the one-sided *Diktat* of Versailles which made it impossible for the German people to acquire a living standard comparable with that of their neighbors in Europe.”).

In fact, Hitler wrote publicly about the significance of the Treaty of Versailles for revitalizing Germany:

In 1919, when the Peace Treaty was imposed on the German nation, there were grounds for hoping that this instrument of unrestricted oppression would help to reinforce the outcry for the freedom of Germany. Peace treaties which make demands that fall like a whip-lash on the people turn out not infrequently to be the signal of a future revival.

.....

Each point of that Treaty could have been engraved on the minds and hearts of the German people and burned into them until sixty million men and women would find their souls aflame with a feeling of rage and shame; and a torrent of fire would burst forth as from a furnace, and one common will would be forged from it, like a sword of steel. Then the people would join in the common cry: “To arms again!”

ADOLPH HITLER, MEIN KAMPF 347-48 (James Murphy trans., photo. reprint n.d.) (1939).

26. See Degrelle, *supra* note 25, at 509; U.S. DEP'T OF STATE, THE TREATY OF VERSAILLES AND AFTER: ANNOTATIONS OF THE TEXT OF THE TREATY 490-99 (photo. reprint, Greenwood Press 1968) (1944) [hereinafter VERSAILLES AND AFTER] (reprinting and providing commentary on Annex III to Part VIII of the Versailles Treaty).

27. See DEGRELLE, *supra* note 25, at 511; VERSAILLES AND AFTER, *supra* note 26, at 508-15 (reprinting and providing commentary on Annex V to Part VIII of the Versailles Treaty).

Germany, to provide the Allies with a substantial portion of its remaining livestock.²⁸ In addition, in April 1921, the Reparation Commission set the total amount of damage on which reparations were due at 132 billion gold marks.²⁹ In the assessment of Lenin, who was certainly no friend to Germany: "A peace of usurers and executioners has been imposed on Germany. This country has been plundered and dismembered . . . All its means of survival were taken away. This is an incredible bandits' peace."³⁰

Reparations and collective sanctions are fundamentally unfair. They punish not only the innocent of the time, but also generations of innocents to come. Such injustice breeds the call for revenge and can always be counted on to bring about renewed conflict. Indeed, injustice is never conducive to peace. The economic benefits that accrued to the Allies as a result of the Versailles Treaty produced dire economic conditions in Germany and fed the hungry the desire for redress. This led to the formation of the German National Socialist Labor Party, a labor-oriented movement dedicated to combating the indignities forced upon Germany by the treaty.³¹ It was that party under Hitler's leadership that brought about World War II and all its related tragedies, the worst of which was the Jewish Holocaust.³²

The Allies needed to personify the cause of this brutal and humanly costly war to satisfy the masses' desire for revenge or justice, as the case may be. The German Kaiser was easily identifiable as such a figure and was to be tried;³³ however, because of the blood relations between the German and English monarchies, England's desire to prosecute the Kaiser, even though professed, remains suspect. The government of the Kingdom of the Netherlands, whose royal

28. See DEGRELLE, *supra* note 25, at 511-12; VERSAILLES AND AFTER, *supra* note 26, at 499-508 (reprinting and providing commentary on Annex IV to Part VIII of the Versailles Treaty).

29. See VERSAILLES AND AFTER, *supra* note 26, at 433. The lessons are unfortunately seldom remembered, and in the aftermath of the Gulf War in 1991, the United Nations Security Council, led by the United States, imposed harsh economic sanctions on Iraq that in a decade destroyed its economy and caused the death of an estimated 1 million children and elder persons due to lack of medicine and food. There is no escaping the responsibility of these consequences, which can only be deemed criminal. See IRAQ UNDER SIEGE: THE DEADLY IMPACT OF SANCTIONS AND WAR (Anthony Armove ed., 2000).

30. DEGRELLE, *supra* note 25, at 528.

31. See Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 520 (1945) ("It is well known that the political responsibility for the Treaty of Versailles was a main cause for the breakdown of the Weimar Republic and the rise of national socialism."); *supra* note 25 and accompanying text; see also HITLER, *supra* note 25, at 193.

The reservoir from which the young movement has to draw its members will first of all be the working masses. Those masses must be delivered from the clutches of the international mania. Their social distress must be eliminated. They must be raised above their present cultural level, which is deplorable, and transformed into a resolute and valuable factor in the folk-community, inspired by national ideas and national sentiment.

HITLER, *supra* note 25, at 193.

32. See, e.g., M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 202 (1979).

33. See *infra* note 46 and accompanying text.

family was also related to the Kaiser, gave him refuge after he abdicated.³⁴ The Allies' public opinion also demanded war crimes trials of the defeated Germans. But the Allied governments' will to do so dissolved between 1919-1922 and the desire to "let bygones be bygones," accompanied by the fear of internal revolution due to fierce German opposition to war crimes trials, led the Allies to acquiesce in Germany's request to conduct in 1923 only a limited number of trials before the national Supreme Court at Leipzig.³⁵ The experience was disastrous.

Lastly, Allied attempts to prosecute Turkish officials for the Armenian massacres committed during World War I were aborted.³⁶ This was due to changing political circumstances in the region, particularly after the 1917 Russian Revolution under Lenin's ruthless leadership and the establishment of what the Allies called the Bolshevik Regime. This led the Allies to assuage the new Turkish government and to avoid causing it embarrassment through prosecutions for crimes against the Armenians, especially in light of Turkish claims that the Armenians had sided with the "Bolsheviks" during the War.

PRELUDE TO PARIS

The Paris Peace Conference held its first plenary session on January 18, 1919.³⁷ The purpose of the Conference was to effect peaceful settlements of the disputes arising out of World War I.³⁸ At the Conference the British Empire, France, Italy, Japan, and the United States had five delegates each.³⁹ Belgium, Brazil, and Serbia had three delegates apiece.⁴⁰ Australia, Canada, China, the Czecho-Slovak Republic, Greece, India, the Kingdom of the Hedjaz, Poland, Portugal, Romania, and South Africa were each allotted two delegates.⁴¹ The countries of Cuba, Guatemala, Haiti, Honduras, Liberia, Montenegro, New Zealand, Nicaragua, Panama, and Siam each had one delegate.⁴² The Conference officially ended on January 21, 1920.⁴³ Numerous treaties were negotiated as a result of the efforts of the Paris Peace Conference,⁴⁴ the most influential being the Treaty of Versailles with Germany. However, before examining the negotiations that took place at the Paris Peace Conference in connection with war crimes prosecutions, it is instructive to briefly describe the fervent political climate in which such deliberations took place.

34. See *infra* notes 246-256 and accompanying text.

35. See *infra* notes 257-305 and accompanying text.

36. See *infra* notes 306-334 and accompanying text.

37. See F.S. MARSTON, *THE PEACE CONFERENCE OF 1919: ORGANIZATION AND PROCEDURE* 235 (photo. reprint, Greenwood Press 1981) (1944).

38. See *id.* at 84.

39. See MARCH, *supra* note 11, at 739.

40. See *id.*

41. See *id.*

42. See *id.*

43. See MARSTON, *supra* note 37, at 246.

44. See *id.* at 234-46.

At the end of World War I, there was a great outcry from the *Entente*, and especially from Great Britain, for the trial of Wilhelm II of Hohenzollern, Emperor of Germany.⁴⁵ The factors that contributed to this demand to indict the Kaiser included the general public's aversion to the horrors of a protracted war, the success of newly developed wartime propaganda techniques,⁴⁶ and the desire of Allied politicians to advance their public standing by acting on their wartime pledges to bring to trial the Germans responsible for the war and those who committed war crimes.⁴⁷ This led American Secretary of State Robert Lansing, who served as chairman of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties established on January 25, 1919, during the Paris Peace Conference, to argue that the Europeans' plan to place the Kaiser on trial was nothing more than an exercise in political pandering.⁴⁸

Nevertheless, the passion of the times pervaded deep into legal circles. For example, one author, writing in 1919 on the subject of the Kaiser's status under international law, stated: "The Germans, by their ferocious and bestial methods, have acted in a manner without precedent in the conduct of this Society of Nations for over three centuries. We are consequently entitled, in maintaining our rule of law, to act without precedent under that law . . ."⁴⁹ The writer then proposed, "[u]nder the extraordinary conditions of the problem" with the Kaiser,⁵⁰ to ignore the *ex post facto* principle *nulla poena sine lege* and to instead prescribe a penalty that was not established prior to the war⁵¹ - in the words of this attorney, "the

45. It was none other than David Lloyd George, Britain's Prime Minister, who, towards the end of the Great War, exclaimed, "Hang the [K]aiser!" DEGRELLE, *supra* note 25, at 17. See also James Brown Scott, *The Trial of the Kaiser*, in WHAT REALLY HAPPENED AT PARIS: THE STORY OF THE PEACE CONFERENCE, 1918-1919, at 231, 240 (Edward Mandell House & Charles Seymour eds., 1921) ("Mr. Lloyd George appeared to be bent on trying the kaiser.").

46. See DEGRELLE, *supra* note 25, at 17 ("[W]ilhelm's reputation was effectively hanged by the war propaganda of the day . . .") ("[L]arge numbers of people still believe the German emperor to have been a particularly baneful species of ogre . . ."); WILLIS, *supra* note 21, at 41 (describing film entitled "The Kaiser, the Beast of Berlin," which portrayed alleged German atrocities in Belgium).

British propaganda mills had devised horror stories to suit each country's population. They were to be the cannon fodder, and they had to be convinced. For four years the concoctions of the London propagandists would ceaselessly fill the ears of millions of gullible people. In big headlines the press kept pouring out enormous lies about Belgian Red Cross nurses being shot by Hun firing squads; it depicted little girls praying to the Virgin Mary to replace hands that had been savagely chopped off by barbaric Teutons.

DEGRELLE, *supra* note 25, at 522. For an exposé of wartime propaganda tales, see ARTHUR PONSONBY, FALSEHOOD IN WAR-TIME: CONTAINING AN ASSORTMENT OF LIES CIRCULATED THROUGHOUT THE NATIONS DURING THE GREAT WAR (1928).

47. WILLIS, *supra* note 21, at 69.

48. See *id.* (noting that Lansing felt that "the scheme to try the kaiser was solely the result of Lloyd George's election campaign").

49. R. Floyd Clarke, *The Status of William Hohenzollern, Kaiser of Germany, Under International Law*, 53 AM. L. REV. 401, 414 (1919). It should be noted that many of the casualties occurring in the war resulted from the archaic strategy of frontal attacks; however, it was much easier to simply blame these casualties on German "militarism." See *supra* notes 22, 46 and accompanying text.

50. See Clarke, *supra* note 49, at 425.

51. See *id.* at 416-17.

Kaiser must die.”⁵² “Th[is] penalty,” the author added, “we are entitled to add by reason of our victory . . .”⁵³ Fortunately, other legal scholars of the period addressed the question of the legal propriety of trying the Kaiser with cooler heads and more rational legal arguments.⁵⁴

In early January 1919, leaders of the Allies met to determine an outline for the upcoming peace conference.⁵⁵ At that meeting, Lloyd George, Prime Minister of Great Britain, suggested that a special commission be established to consider questions pertaining to the responsibilities for the causes of the war.⁵⁶ President Wilson responded that a committee was unnecessary because the leaders themselves could resolve such a problem.⁵⁷ Wilson apparently had in mind the realistic prospect of exiling the Kaiser in the same manner that Napoleon had been banished to St. Helena almost a century before.⁵⁸ Lloyd George, however, failed to follow Wilson’s lead and insisted on the committee approach.⁵⁹ James Willis, in his leading study on the subject, described this decision as “Lloyd George’s single most important error.”⁶⁰

By insisting on a commission, Lloyd George unleashed a process that, due to bitter disputes between the Allies, not only disinclined the Dutch to cooperate with

52. Clarke, *supra* note 49, at 415.

53. *Id.* at 417.

54. See, e.g., James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT’L L. 70 (1920); Quincy Wright, *The Legal Liability of the Kaiser*, 13 AM. POL. SCI. REV. 120 (1919).

55. See WILLIS, *supra* note 21, at 68. It was very unusual to hold a pre-conference meeting; likewise, it was peculiar to have the conference’s investigative commission issue its decision prior to the signing of the peace treaty. In addition, such proceedings were conducted without all parties being present, were directed specifically against the Germans, and, like Nuremberg, represented the viewpoint of only one side of the conflict.

56. *Id.*

57. *Id.*

58. See *id.* Cf. L.C. Green, *Enforcement of the Law in International and Non-International Conflicts—The Way Ahead*, 24 DENV. J. INT’L L. & POL’Y 285, 302-03 (1996).

As early as 1815 it was suggested that Napoleon should be brought to trial for having violated the 1814 agreement exiling him to Elba. After his escape and return to France where he again raised an army, he was declared by the Congress of Vienna “to have destroyed the sole legal title upon which his existence depended . . . placed himself outside the protection of the law, and manifested to the world that it can neither have peace nor truce with him . . . [and placed himself] outside the civil and social relations, [so] that, as Enemy and Perturbator of the World, he has incurred liability to public vengeance.”

While Blücher would have had him shot as an “outlaw,” Napoleon was regarded “by the Powers as their Prisoner” and placed in the custody of the British who exiled him to St. Helena. Green, *supra* (quoting 2 JAMES GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 438-39 (1920)).

59. See ARTHUR WALWORTH, *WILSON AND HIS PEACEMAKERS: AMERICAN DIPLOMACY AT THE PARIS PEACE CONFERENCE, 1919*, at 214 (1986).

At Paris, Wilson suggested that the question of national and individual crimes against decency be settled in the comparative privacy of the Supreme Council; but when Lloyd George brought up the matter in that body for a second time, it was decided to place the subject on the agenda of a plenary session. As a result the Peace Conference decided . . . to create a commission to study the question. *Id.*

60. WILLIS, *supra* note 21, at 68.

the victorious powers,⁶¹ but ultimately sounded the death knell for the establishment of an international tribunal to try the Kaiser. Although Lloyd George may simply have been seeking to set new international precedent with respect to aggressive warfare,⁶² the referral of significant issues of political import to committees, which can be mired in endless discussions and fail to reach effective and timely decisions, often evidences *realpolitik* at its finest.⁶³ Such a subterfuge permits *realpoliticians* to publicly announce their purported goals of justice while in fact burying them in a bureaucratic maze from which they will never emerge or emerge as otherwise intended.⁶⁴

The continuous clamor in the French, Belgian, and British press for war crimes prosecutions⁶⁵ represented the rise in influence of modern world public opinion—similar to the present-day international civil society clamoring for accountability for international crimes.⁶⁶ The demand for war trials following the First World War, therefore, constituted a mixture, rather than a convergence, of domestic political pressures for accountability and the realization of the political goals of the Allied governments. Thus, while the war crimes issue was utilized to satisfy popular opinion in France, Belgium, and Britain, it was also used by the Allied governments to extract exorbitant reparations from Germany.⁶⁷

As with any conflict, its end brings about a feeling of relief which, after the original impulse for accountability, historically asserted by the victors against the defeated, is followed by a certain lassitude. This weariness, which may well be the product of a socio-psychological condition arising out of war's trauma, leads to the desire to forget the pain and to move beyond the events that brought about these feelings. Governments, however, tend to view such matters from the perspective of state interests and, more often than not, use the public's desire to psychologically "move on," or the sense of lassitude that sets in after the heat of passion following war has abated, to manipulate justice for political ends.⁶⁸

61. See WILLIS, *supra* note 21, at 68..

62. *Cf. id.*

63. The use of multiple committees, different mandates, different venues, and divergent schedules serve to dilute public opinion, erode focus, and cause people to forget the significance of the issue at hand. In addition, by making the process very costly, *realpoliticians* can justify the eventual cessation of the committee process and thereby derail any final resolution.

64. It was Field Marshal Von Blücher, the aged Prussian commander whose timely arrival at the Battle of Waterloo led to Napoleon's defeat, who stated, following the famous battle, "May the pens of the diplomats not ruin again what the people have attained with such exertions." JOHN BARTLETT, FAMILIAR QUOTATIONS 469 (14th ed. 1968) (quoting Gebhard Leberecht von Blücher).

65. See WILLIS, *supra* note 21, at 141-42.

66. See M. Cherif Bassiouni, *The Need for International Accountability*, in 3 INTERNATIONAL CRIMINAL LAW 3, 3-30 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereinafter Bassiouni, *The Need for International Accountability*]; M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000) [hereinafter Bassiouni, *Combating Impunity*].

67. See WILLIS, *supra* note 21, at 127, 141-43.

68. See, e.g., Bassiouni, *Combating Impunity*, *supra* note 66, at 409-11; M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 17-21 (1997) [hereinafter Bassiouni, *From Versailles to Rwanda*].

ALLIED COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND
ON ENFORCEMENT OF PENALTIES

On January 25, 1919, exactly one week after the formal opening of the Preliminary Peace Conference at Paris, the Allied and Associated Powers appointed a commission to inquire into the causes and responsibilities for the recently concluded war.⁶⁹ The rapid establishment of the commission was in harmony with the demands of Britain's Lloyd George and French Premier Georges Clemenceau that the subject of war crimes be given first priority at the Peace Conference,⁷⁰ thus evidencing the rise of the value of justice in the context of post-conflict settlements.

This commission, which was the first modern international investigative body of its kind,⁷¹ was named the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission).⁷² It was composed of fifteen members, including two members from each of the respective Great Powers, the United States, Britain, France, Italy, and Japan, and one member from each of the following countries: Belgium, Greece, Poland, Romania, and Serbia.⁷³ The Commission met in secret for two months before issuing its final report.⁷⁴

The mandate presented to the Commission sought inquiry into the following areas: (1) the responsibility for the causes of the war; (2) the facts relating to violations of the laws and customs of war committed by the Central Powers; (3) the degree of responsibility that should attach to individual members of the enemy forces, "however highly placed;" and (4) the constitution and procedure for a

69. VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at v. The Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, March 29, 1919 [hereinafter 1919 Commission Report], is reprinted at pages 4-27 of VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21. The Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, April 4, 1919 [hereinafter U.S. Dissenting Report, 1919] is included as Annex II to the 1919 Commission Report and is reprinted at pages 58-79 of VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21. The Reservations by the Japanese Delegation, April 4, 1919 [hereinafter Japanese Dissenting Report, 1919], are included as Annex III to the 1919 Commission Report and are reprinted at pages 79-80 of VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21.

70. See WILLIS, *supra* note 21, at 68.

71. See Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 14. The commission was established five months prior to the signing of the Treaty of Versailles. However, in 1474, Peter von Hagenbach was put on trial and convicted by an *ad hoc* tribunal for crimes against the citizens of Breisach. See 2 GEORGE SCHWARZENBERGER, INTERNATIONAL LAW 462-66 (1968). The Breisach trial has been described as "the forerunner of contemporary international war crimes trials." 2 *id.* at 462.

72. See VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 1.

73. See *id.* The Commission was composed of the following representatives: United States of America—Robert Lansing, James Brown Scott; British Empire—Gordon Hewart or Ernest Pollock, W.F. Massey; France—André Tardieu, F. Larnaude; Italy—Mr. Scialoja, Mr. Raimondo (later Mr. Brambilla and Mr. M. d'Amelio); Japan—Mr. Adatci, Mr. Nagaoka (later Mr. Tachi); Belgium—Mr. Rolin-Jaequemyns; Greece—Mr. N. Politis; Poland—Mr. C. Skirmunt (later Mr. N. Lubienski); Roumania—Mr. S. Rosental; and Serbia—Slobodan Yovanovitch. *Id.* at 1-2.

74. See WILLIS, *supra* note 21, at 68.

tribunal to try such offenses.⁷⁵ Following some highly incendiary ideological clashes during the preliminary deliberations, the Commission divided up into three sub-commissions, which dealt respectively with the questions of war crimes, the legal ramifications of war guilt, and the prospects for prosecution before a tribunal.⁷⁶

On March 29, 1919, the Commission formally submitted its *Report Presented to the Preliminary Peace Conference (Report)*.⁷⁷ The *Report* presented conclusions regarding the authorship of the war, the personal responsibility of the Kaiser, war crimes, violations of the "laws of humanity," and the establishment of a High Tribunal to try offenses committed by the Central Powers.⁷⁸

On April 4, 1919, the American delegation to the Commission, which consisted of Robert Lansing and Dr. James Brown Scott, an eminent scholar in international law, submitted its *Memorandum of Reservations (Memorandum)* in response to the Commission's *Report*.⁷⁹ By means of this *Memorandum*, the United States, whether on account of political or legal reasons,⁸⁰ effectively

75. VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 1.

76. *See id.* at 2-3; WILLIS, *supra* note 21, at 69-74.

77. 1919 Commission Report, *supra* note 69, reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 4-27. The Commission's *Report* was 27 pages in length and contained four annexes. In preparing its extensive Summary of Examples of Offences committed by the Central Powers, the Commission relied upon official Allied government publications and memoranda, as well as upon reports issued by commissions of enquiry from various Allied nations. *See* Summary of Examples of Offences Committed by the Authorities or Forces of the Central Empires and their Allies Against the Laws and Customs of War and the Laws of Humanity, in 1919 Commission Report, *supra* note 69, Annex I [hereinafter Summary of Examples], reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 28-57.

78. *Infra* notes 86-150 and accompanying text.

79. *See* U.S. Dissenting Report, 1919, *supra* note 69, reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 58-79.

80. *See* KLAUS SCHWABE, WOODROW WILSON, REVOLUTIONARY GERMANY, AND PEACEMAKING, 1918-1919: MISSIONARY DIPLOMACY AND THE REALITIES OF POWER 248-49 (Rita Kimber and Robert Kimber trans., 1985) ("Wilson's reasons for differing so markedly from his Associates in th[e] question [of the Kaiser's trial] were not only legal but political as well.") ("The moderate line which the Americans took in the Commission on Responsibility clearly reflected Wilson's desire for a peace which would be both liberal and at the same time unassailable in terms of international law."); WILLIS, *supra* note 21, at 77 ("The conclusion is inescapable that disagreement about a trial of Wilhelm II resulted as much from political as from legal differences.").

The United States was subject to the presence of isolationists, whose ideology ultimately succeeded. *See* Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 20 ("[T]he United States was in the throes of isolationism, with its rejection of President Woodrow Wilson's internationalist views, evidenced by Congress' refusal to have the United States become part of the League of Nations.").

Although the Americans would have, as a matter of justice, agreed with the result sought by the Commission, their state policy was directly contrary to such an outcome. In fact, the position taken by the American delegation following World War I, which is analogous to that presently being asserted by the United States with respect to the Rome Statute of the International Criminal Court (ICC). *See* James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT'L L. REV. 105, 124-54 (2000); Cheryl K. Moralez, *Establishing an International Criminal Court: Will it Work?*, 4 DEPAUL INT'L L.J. 135, 147-64 (2000) (describing the United States' position regarding the Rome Treaty); *see also* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], reprinted in 37 I.L.M. 999 (1998).

undermined the Europeans' plan to try the Kaiser, to recognize crimes against "the laws of humanity" as a basis for the prosecution of Turkish officials, and to establish an international criminal court.⁸¹ Robert Lansing deliberately employed every available tactic to frustrate the aims of the Europeans during both Commission and subcommittee meetings;⁸² moreover, according to Lansing, President Woodrow Wilson "approved entirely of my attitude, only he is even more radically opposed than I am to th[e] folly [of trying the Kaiser]."⁸³

In addition to the *Memorandum* submitted by the Americans, the Japanese delegation to the Commission likewise tendered its own *Reservations* on April 4, 1919.⁸⁴ Specifically, the Japanese challenged the propriety of the overall concept of victor's justice, stating: "A question may be raised whether it can be admitted as a principle of the law of nations that a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side . . ."⁸⁵

As discussed below, the American-Japanese position foreclosed the opportunity of prosecuting Turkish officials and would have done the same for the Kaiser's prosecution, except that the Netherlands' act of granting him refuge solved that problem. In the end, the only two questions left were those of war crimes prosecutions and setting up an international tribunal to do so. The result was the failure of both efforts, as set forth below.

A. Responsibility of the Authors of the War

With respect to the authorship of the war, the Commission hastily concluded, in what would become "the most controversial legacy of the peace conference,"⁸⁶ that the responsibility for the Great War rested "first on Germany and Austria, secondly on Turkey and Bulgaria."⁸⁷ The Commission further determined that Germany, in concert with Austria-Hungary, "deliberately worked to defeat all the many conciliatory proposals made by the *Entente* Powers and their repeated efforts to avoid war."⁸⁸ Not only were the Commission's conclusions unjustified by the available evidence,⁸⁹ but they serve as an excellent example of the undesirability of having such momentous questions, best left to historians, decided by an investigative panel composed entirely of the victors.

81. *Infra* note 342 and accompanying text.

82. See WILLIS, *supra* note 21, at 69-70, 73-75, 76-77.

83. *Id.* at 70.

84. See Japanese Dissenting Report, 1919, *supra* note 69, reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 79-80.

85. *Id.*, reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 80.

86. WILLIS, *supra* note 21, at 72.

87. 1919 Commission Report, *supra* note 69, reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 4.

88. *Id.*, reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 11.

89. See WILLIS, *supra* note 21, at 72 ("[T]he evidence available to the subcommittee did not justify its strong conclusions."); see DEGRELLE, *supra* note 25, at 521 ("There is not a serious historian today who would dare attribute the sole guilt for World War I to Germany.").

The question of responsibility, of course, was not predicated on the pursuit of international criminal accountability or the pursuit of international justice. Rather, such a determination represented an attempt to justify harsh provisions on reparations. In this way, the Allies established a necessary legal bridge between the responsibility for the war and reparations, which, due to their severity, were quasi-penal in nature.⁹⁰ The eventual trial of the Kaiser was the frosting on the cake. But because there existed no legal basis for state criminal responsibility,⁹¹ the Allies were hard pressed to justify the reparations under existing international law. Articles 227 to 230 of the Versailles Treaty addressed only individual criminal responsibility,⁹² though Article 227, which addressed the criminal responsibility of the Kaiser for waging a war of aggression, as it would now be called, did not exist at the time in international criminal law.⁹³ Compensation, however, as recognized under international law principles of state responsibility, extended to actual damages, but it was questionable whether it included, under the circumstances, such punitive damages.⁹⁴ There was no principle in international law that satisfied the goals of the Allies.

Interestingly, the Commission's declaration of Germany's responsibility for the war did not constitute the basis for the controversial war-guilt clause, Article 231,⁹⁵ contained in the Treaty of Versailles.⁹⁶ Because this clause followed immediately after Articles 228 to 230, the war crimes clauses, the Germans assumed that Article 231 was based upon the Commission's *Report*.⁹⁷ Article 231, however, actually stemmed from a compromise in the Commission on Reparation of Damage.⁹⁸

90. Cf. Fritz Munch, *State Responsibility in International Criminal Law*, in A TREATISE ON INTERNATIONAL CRIMINAL LAW 143, 152 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) ("The Peace Treaties of 1919/1920 stipulated a responsibility for damages caused by the war, but war was not considered a delinquency at that time, and the articles in question read rather like political motivations for the constitution of a debt.").

91. See M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 INTERNATIONAL CRIMINAL LAW 3, 28-29 (M. Cherif Bassiouni ed., 2d ed. 1999); Munch, *supra* note 90, at 148; John Dugard, *Criminal Responsibility of States*, in 1 INTERNATIONAL CRIMINAL LAW 239, 239 (M. Cherif Bassiouni ed., 2d ed. 1999).

92. See Munch, *supra* note 90, at 148.

93. See Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 26.

94. See Munch, *supra* note 90, at 151-53.

95. See Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, art. 231, 2 BEVANS 43, 137-38 [hereinafter Treaty of Versailles]. Article 231 states:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies. *Id.*

96. See Willis, *supra* note 21, at 72 ("The Allies did not include [the Commission's] accusation in the peace treaty.").

97. See *id.*

98. See *id.*; SCHWABE, *supra* note 80, at 289; MARC TRACHTENBERG, REPARATION IN WORLD POLITICS: FRANCE AND EUROPEAN ECONOMIC DIPLOMACY, 1916-1923, at 56-57 (1980). Article 231 is contained in Part VIII of the Treaty of Versailles, which is entitled "REPARATION"; in contrast, the "Kaiser clause," Article 227, and the war crimes clauses, Articles 228 to 230, are contained in Part VII

B. The Personal Criminal Responsibility of the Kaiser

After finding that the Central Powers and their allies had conducted the war “by barbarous or illegitimate methods,”⁹⁹ the Commission declared that all guilty persons from the enemy nations, including heads of state, were individually liable for such war crimes and, therefore, were subject to criminal prosecution:¹⁰⁰

[T]here 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. *This extends even to the case of Heads of States.* An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a Sovereign of a State. . . . However, even if, in some countries, a Sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.¹⁰¹

The Commission further remarked that a bar against prosecuting heads of state who were guilty of war crimes and violations of the laws of humanity “would shock the conscience of the civilized world.”¹⁰²

Concerning those individuals responsible for causing the outbreak of the war, the Commission concluded that such persons, most notably the former Kaiser, should not be subjected to criminal charges in front of a tribunal for breaching the peace.¹⁰³ The Commission proclaimed that any member of the Central Powers

of the Treaty, which is entitled “PENALTIES.” See Treaty of Versailles, *supra* note 95, arts. 227-230, 231, at 136-38. For a discussion of the origins of Article 231, see *infra* notes 205-215 and accompanying text.

99. 1919 Commission Report, *supra* note 69, at 19.

100. *See id.* at 20.

101. *Id.* at 19 (emphasis added).

102. *Id.* at 20. The announcement of such a principle of individual criminal responsibility for heads of state was unprecedented. Admittedly, a head of state could be found politically responsible and, as in the case of Napoleon, punished by removal from power and by exile. But this new concept was a throwback to earlier times when the defeated head of state was subjected to death or torture, though irrespective of any wrongful conduct. Most contemporary writers erroneously focus on Article 7 of the Nuremberg Charter, by which the Allies refused to recognize the defendants’ official positions as “freeing them from responsibility or mitigating punishment,” as the first time in history that the immunity of heads of state was removed. Charter of the International Military Tribunal, Aug. 8, 1945, art. 7, 82 U.N.T.S. 284, 288, 59 Stat. 1546, 1548 [hereinafter Nuremberg Charter], *annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544. The ICC Statute provides for it in Article 27(1):

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

ICC Statute, *supra* note 80, art. 27(1), *reprinted in* 37 I.L.M. 999, 1017 (1998).

103. 1919 Commission Report, *supra* note 69, at 23. The debate concerning *ius ad bellum* had gone through a long historical evolution, mostly influenced by the arguments of canonist writers on the differences between just and unjust wars; however, no resolution was reached. See Remigiusz Bierzanek, *War Crimes: History and Definition*, in 3 INTERNATIONAL CRIMINAL LAW 87, 87-88 (M.

who violated the laws and customs of war or the "laws or humanity," whatever his rank or position, should be subject to trial.¹⁰⁴

In its *Memorandum*, the United States took issue with the Commission's conclusions on a number of critical points. First of all, the Americans objected to the concept of placing a chief of state on trial:

But the law to which the head of State is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries, and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act.¹⁰⁵

The British, however, opined that the Americans were afraid "to create the possibility of their President ever being incriminated."¹⁰⁶

Similarly, the American delegation, as well as the Japanese delegation,¹⁰⁷ refused to assent to the Commission's adoption of the doctrine of "negative criminality."¹⁰⁸ "It was frankly stated that the [Commission's] purpose was to bring before this [international] tribunal the ex-Kaiser of Germany, and that the jurisdiction of the tribunals must be broad enough to include him even if he had not directly ordered the violations."¹⁰⁹

Cherif Bassiouni ed., 2d ed. 1999); Geoffrey Parker, *Early Modern Europe*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 40, 42-44 (Michael Howard et al. eds., 1994).

Following World War II, the Allies tried the leading members of the Axis at Nuremberg for crimes against peace, which the Charter of the International Military Tribunal defined as "planning, preparation, initiation or waging of a war of aggression." Nuremberg Charter, *supra* note 102, art. 6(a), 82 U.N.T.S. at 288, 59 Stat. at 1547. Yet, there was nothing in positive law at the time upon which to predicate such a charge. See Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 26 ("Prosecution for 'crimes against peace' was without legal precedent . . ."). Presently, there is no convention defining aggression. M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace*, in 1 *INTERNATIONAL CRIMINAL LAW* 313, 334 (M. Cherif Bassiouni ed., 2d ed. 1999). On the other hand, the ICC, although it did not define aggression, does include the crime within its jurisdiction. *Id.* at 346; see ICC Statute, *supra* note 80, art. 5, reprinted in 37 I.L.M. 999, 1003-04 (1998).

104. 1919 Commission Report, *supra* note 69, at 23-24.

105. U.S. Dissenting Report, 1919, *supra* note 69, at 66.

106. WILLIS, *supra* note 21, at 77. A position that seems to prevail in connection with the ICC. See Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, *FOREIGN AFF.*, Nov.-Dec. 1998, at 20, 22, 23.

107. See Japanese Dissenting Report, 1919, *supra* note 69, at 80.

108. *Id.* (footnotes omitted). See also Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 *AM. J. INT'L L.* 573, 573 (1999).

Despite United States and Japanese dissent, the latter arguing that high-ranking officials could not be held personally accountable under international law in accordance with the abstention theory of responsibility, trials instituted at the German Supreme Court in Leipzig recognized the existence of concrete duties pertaining to military commanders. Undoubtedly, two precursors to the *Leipzig* proceedings, the Hague Conventions IV (1907) and X (1907) created affirmative command duties in relation to the conduct of subordinate persons, establishing the doctrine of "command responsibility."

109. U.S. Dissenting Report, 1919, *supra* note 69, at 60. Since then, the doctrine of command responsibility has been well established in international criminal law. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 439 (2d rev. ed. 1999) [hereinafter

In this regard, until its final revision, the majority *Report* proposed that a High Tribunal was the appropriate forum in which to try charges against all enemy authorities, military or civil, including chiefs of state, who “abstained from preventing, putting an end to, or repressing, violations of the laws or customs of war.”¹¹⁰ The United States expressed its opposition to this formulation of criminal responsibility as follows:

It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offence. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission.¹¹¹

Ironically, it was this very concept of command responsibility¹¹² that the United States selectively employed after World War II in convicting and executing General Tomoyuki Yamashita, the former commander of the Japanese armed forces in the Philippines.¹¹³

The American representatives, however, were in agreement with the Commission’s recommendation that no criminal charges could be brought based upon acts that provoked the war, including breaches of neutrality alleged against the Kaiser,¹¹⁴ yet, this position changed drastically with the advent of World War II.¹¹⁵ As a matter of fact, it was then the United States that took the lead in

BASSIOUNI, *CRIMES AGAINST HUMANITY*]; see L.C. Green, *Superior Orders and Command Responsibility*, 27 *CAN. Y.B. INT’L L.* 167 (1989).

110. U.S. Dissenting Report, 1919, *supra* note 69, at 72.

111. *Id.* at 72.

112. A failure to act to prevent unlawful conduct may provide the basis for imposition of criminal responsibility under the doctrine of command responsibility. BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 109, at 19. To effectively further the goal of deterrence, however, a showing of actual intent is required. *Id.* at 423.

No one can be deterred from conduct beyond the control of the person whose responsibility may be called into question. To hold a superior accountable on the basis of omission for the conduct of a subordinate, therefore, requires intent or knowledge that the omission can actually or reasonably and foreseeably lead to a violative act and that the superior is in a position or has the ability to act in the prevention of the violative act.
Id.

113. In spite of General Yamashita’s assertion that he neither ordered nor committed any of the atrocities perpetrated by his troops, the United States Supreme Court held that he had “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.” *In re Yamashita*, 327 U.S. 1, 16 (1946). See also RICHARD LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949).

114. See U.S. Dissenting Report, 1919, *supra* note 69, reprinted in *VIOLATION OF THE LAWS AND CUSTOMS OF WAR*, *supra* note 21, at 67.

115. The United States could have justified a change in position by claiming that the inclusion of Article 227 in the Versailles Treaty reflected an emerging custom that had ripened by the time World War II ended. But then, the United States has never been known for legal and diplomatic subtleties.

establishing "crimes against peace" as an international crime¹¹⁶ under the Nuremberg and Tokyo Charters.¹¹⁷ The United States did not employ the concept of a head of state's personal criminal responsibility against Japan's Emperor Hirohito.¹¹⁸

Significantly, while arguing for the inclusion of crimes against peace at the International Conference on Military Trials in London, Robert H. Jackson, the American representative, pointed out that "sentiment in the United States and the better world opinion have greatly changed since Mr. James Brown Scott and Secretary Lansing announced their views as to criminal responsibility for the first World War I don't think we can take the 1918 view on matters of war and peace."¹¹⁹ Justice Jackson, however, conveniently omitted reference to the more explicit views of Lansing and Scott, acting on behalf of the United States, regarding crimes against the laws of humanity.¹²⁰ Thus, although the Commission was against prosecuting the Kaiser for initiating the war, the drafters of the Versailles Treaty took the opposite position.¹²¹

C. War Crimes

As a means of classifying violations of "the laws and customs of war," the Commission prepared the following categorical listing:¹²²

- (1) Murders and massacres; systematic terrorism.
- (2) Putting hostages to death.
- (3) Torture of civilians.
- (4) Deliberate starvation of civilians.
- (5) Rape.
- (6) Abduction of girls and women for the purpose of enforced prostitution.
- (7) Deportation of civilians.
- (8) Internment of civilians under inhuman conditions.
- (9) Forced labour of civilians in connection with the military operations of the enemy.

116. See WILLIS, *supra* note 21, at 174; Bassiouni & Ferencz, *supra* note 103, at 319.

117. See Nuremberg Charter, *supra* note 102, art. 6(a), 82 U.N.T.S. at 288, 59 Stat. at 1547; Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, art. 5(a), T.I.A.S. No. 1589, 4 BEVANS 27, 28 [hereinafter IMTFE Amended Charter].

118. RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 110-17 (1971); see also JAMES WEBB, THE EMPEROR'S GENERAL (1999).

119. Minutes of Conference Session of July 19, 1945, in U.S. DEP'T OF STATE, PUB. NO. 3080, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, at 299 (1949).

120. See *infra* notes 141-143 and accompanying text.

121. See *infra* notes 159-193 and accompanying text.

122. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 34-35 (1948) [hereinafter UNWCC].

- (10) Usurpation of sovereignty during military occupation.
- (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory.
- (12) Attempts to denationalise the inhabitants of occupied territory.
- (13) Pillage.
- (14) Confiscation of property.
- (15) Exaction of illegitimate or of exorbitant contributions and requisitions.
- (16) Debasement of the currency, and issue of spurious currency.
- (17) Imposition of collective penalties.
- (18) Wanton devastation and destruction of property.
- (19) Deliberate bombardment of undefended places.
- (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments.
- (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew.
- (22) Destruction of fishing boats and of relief ships.
- (23) Deliberate bombardment of hospitals.
- (24) Attack on and destruction of hospital ships.
- (25) Breach of other rules relating to the Red Cross.
- (26) Use of deleterious and asphyxiating gases.
- (27) Use of explosive or expanding bullets, and other inhuman appliances.
- (28) Directions to give no quarter.
- (29) Ill-treatment of wounded and prisoners of war.
- (30) Employment of prisoners of war on unauthorised works.
- (31) Misuse of flags of truce.
- (32) Poisoning of wells.¹²³

The violations catalogued by the Commission fell within the meaning of war crimes under law and custom and the 1907 Hague Convention;¹²⁴ yet, the Commission also cited to examples of violations of the “laws of humanity,”¹²⁵ which did not fall under the same legal norms.

In addition, the Commission stated that “civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have

129. 1919 Commission Report, *supra* note 69, at 17-18.

130. See UNWCC, *supra* note 122, at 35; see also Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631 [hereinafter 1907 Hague Convention].

131. See UNWCC, *supra* note 122, at 35; see also *infra* notes 128-129 and accompanying text.

been convicted of the same offense.”¹²⁶ In so doing, the Commission was attempting to limit the defense of obedience to superior orders; otherwise, in the telling words of the *Report*, “the trial of the offenders might be seriously prejudiced.”¹²⁷

D. Crimes Against the “Laws of Humanity”; Prosecuting Turkish Officials

In an Annex to its 1919 *Report*, the Commission, under the category of “Murders and Massacres: Systematic Terrorism,” made specific reference to the “Massacres of Armenians by the Turks.”¹²⁸ More specifically, the Commission made the following notation: “More than 200,000 victims assassinated, burned alive, or drowned in the lake of Van, the Euphrates or the Black Sea.”¹²⁹ This finding was in harmony with the Triple *Entente’s* earlier May 24, 1915, Declaration condemning the Armenian massacres as “crimes against humanity and civilisation” and promising retribution.¹³⁰

The Commission also recommended the establishment of a High Tribunal to try the enemy offenders.¹³¹ The Tribunal was to be composed of persons appointed by the Allied and Associated Powers and was to set its own procedures.¹³² Significantly, the law to be applied by the High Tribunal was to consist of “the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity and from the

132. 1919 Commission Report, *supra* note 69, at 20.

133. *Id.* at 20. As stated in note 102, most contemporary authors erroneously attribute to the Nuremberg and IMTFE Charters, articles 8 and 6, respectively, the originality of limiting the defense of obedience to superior orders. See Nuremberg Charter, *supra* note 102, art. 8, 82 U.N.T.S. at 288, 59 Stat. at 1548; IMTFE Amended Charter, *supra* note 117, art. 6, 4 BEVANS at 28; see also NICO KEIJZER, *MILITARY OBEDIENCE* (1978); LESLIE C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 15-242 (1976); YORAM DINSTEIN, *THE DEFENSE OF “OBEDIENCE TO SUPERIOR ORDERS” IN INTERNATIONAL LAW* 5-20 (1965); EKKEHART MÜLLER-RAPPARD, *L’ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ DU SUBORDONNÉ* 185-251 (1965).

134. Summary of Examples, *supra* note 77, at 28, 30.

135. *Id.* at 30. It has now been estimated that more than one million Armenians were exterminated: During World War I, as the rest of the world looked on, the Ottoman Empire carried out one of the largest genocides in the world’s history, slaughtering huge portions of its minority Armenian population. The Armenian genocide followed decades of persecution by the Ottomans and came only after two similar but smaller round of massacres in the 1894-96 and 1909 periods had resulted in two hundred thousand Armenians deaths. In all, over one million Armenians were put to death.

Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT’L L. 221, 223 (1989) [hereinafter Dadrian, *Genocide*].

136. Dadrian, *Genocide*, *supra* note 129, at 262 & n.129; UNWCC, *supra* note 122, at 35-36 (“The warning thus given to the Turkish Government on that occasion by the Triple *Entente* dealt precisely with one of the types of acts which the modern term ‘crimes against humanity’ is intended to cover, namely, inhumane acts committed by a government against its own subjects.”). See Bassiouni, *The Need for International Accountability*, *supra* note 66, at 3-4 (noting that the number of victims always increases in time).

137. See 1919 Commission Report, *supra* note 69, at 24-25.

138. See *id.*

dictates of public conscience.”¹³³ This language was taken directly from the concluding paragraph of the Preamble to the 1907 Hague Convention.¹³⁴

The 1907 Hague Convention endeavored to set forth the general laws and customs of war, but due to a lack of specificity, failed to encompass all conduct that qualified as war crimes. In an effort to address this shortcoming, the drafters inserted the following language in the Preamble:

It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹³⁵

This language became known as the Martens Clause, so named for Fyodor Martens, the Russian diplomat who penned it.¹³⁶ Thus, customary international law did establish a basis for individual war crimes prosecutions as envisioned by the Commission.¹³⁷

The inclusion of this particular wording in the Commission’s *Report* was designed to enable the Allies to prosecute leading members of the Ittihad party, commonly known as the Young Turks, who were believed to be responsible for the massacre of hundreds of thousands of Armenians perpetrated under the guise of wartime deportations.¹³⁸ Because the Commission’s mandate was technically restricted to violations of the laws and customs of war, the Commission invoked the Martens Clause in the hopes of expanding the Tribunal’s ability to prosecute

139. 1919 Commission Report, *supra* note 69, at 24.

140. *See infra* notes 135-136 and accompanying text.

141. 1907 Hague Convention, *supra* note 124, preamble, 36 Stat. at 2279-80, 1 BEVANS at 632-33.

142. *See* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 60 & n.81.

143. *See id.* at 71. On the other hand, violations attributable to the state resulted only in a “civil” responsibility. *See* Munch, *supra* note 90, at 153; Dugard, *supra* note 91, at 239 (“[T]he only remedy for a wrong committed by a state was reparation of the kind associated with compensation in civil, delictual claims.”).

144. *See* Dadrian, *Genocide*, *supra* note 129, at 252, 272-77, 279-81. *See also* Vahakn N. Dadrian, *Documentation of the Armenian Genocide in Turkish Sources*, in 2 GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 86 (Israel W. Charny ed., 1991). *See generally* VAHAKN N. DADRAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS (1995) [hereinafter DADRAN, HISTORY OF ARMENIAN GENOCIDE] (tracing religious and cultural roots of Turkish-Armenian conflict).

Turkish officials for acts committed against their own nationals¹³⁹ that are now recognized as "crimes against humanity."¹⁴⁰

The Americans, however, vigorously protested the Commission's attempt to assign criminal responsibility on the basis of violations of the "laws of humanity." As a technical matter, the United States asserted that the Commission had gone beyond the express terms of its mandate, which was restricted to violations of the laws and customs of war.¹⁴¹ As a theoretical matter, the American delegation argued that "the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity."¹⁴² Because such considerations "vary with the individual," the *Memorandum* concluded that they should not be within the province of criminal law.¹⁴³

In addition, the Americans objected at length to the creation of an international criminal court "for which there is no precedent, precept, practice, or procedure," and, instead, proposed the use of military commissions or tribunals.¹⁴⁴ Relying upon the seminal decision of *United States v. Hudson*,¹⁴⁵ in which the United States Supreme Court reaffirmed its commitment to upholding the principles of legality, namely, that there can be no crime without a law (*nullum crimen sine lege*) and no punishment without a law (*nulla poena sine lege*),¹⁴⁶ the delegates declared:

145. See Bierzanek, *supra* note 103, at 91 ("[T]he Commission also took note of the atrocities committed on the territory of the Central Powers against their own nationals such as the massacres of the Armenian population perpetrated by the Turkish authorities . . ."); Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 16-17; Dadrian, *Genocide*, *supra* note 129, at 279-81. As explained by Willis:

To assure prosecution of such atrocities as the Armenian massacres and other outrages not clearly prohibited by the laws of war, the Europeans, anticipating the idea of crimes against humanity and genocide, wanted reference to the laws of humanity that were mentioned in the preamble to the Hague convention of 1907 as supplementing the laws of war.

WILLIS, *supra* note 21, at 75.

146. "Crimes against humanity" represent a jurisdictional extension from war crimes:

The essential difference between acts deemed war crimes and those deemed "crimes against humanity" is that the former acts are committed in time of war against nationals of another state, while the latter acts are committed against nationals of the same state as that of the perpetrators. Thus, the [Nuremberg] Charter took a step forward in the form of a jurisdictional extension when it provided that the victims of the same types of conduct which constitutes war crimes, were protected without the requirement that they be of a different nationality than that of the perpetrators.

BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 109, at 72.

147. See U.S. Dissenting Report, 1919, *supra* note 69, at 73.

148. *Id.* at 73.

149. *Id.* at 64.

150. *Id.* at 70-71.

151. 11 U.S. (7 Cranch) 32 (1812).

152. See *id.* at 34 ("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.").

What is true of the American States must be true of this looser union which we call the Society of Nations. The American representatives know of no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence.¹⁴⁷

In sum, the Americans asserted that the establishment of an international criminal tribunal that applied new laws and new penalties would be directly contrary to the United States Constitution's prohibition against *ex post facto* laws.¹⁴⁸

In keeping with the recommendations of the Commission, provisions to bring the perpetrators of the Armenian massacres to justice were later included in the Treaty of Sèvres, but this treaty was never ratified.¹⁴⁹ Shortly thereafter, however, such retributive efforts were nullified by the amnesty declaration that accompanied the Treaty of Lausanne.¹⁵⁰

E. Final Recommendations

In an effort to facilitate implementation of the recommendations included in its *Report*, the Commission proposed a set of draft articles for inclusion in peace treaties with the Central Powers.¹⁵¹ These articles provided, *inter alia*, that the enemy government: (1) admit the right of every Allied State, even after peace was concluded, to try and punish any enemy or former enemy who came into the Allies' custody; (2) recognize the right of the Allies to establish a High Tribunal, with judges appointed by the Allies, to try and punish enemies for war crimes and violations of the laws of humanity; (3) agree that trials conducted and sentences imposed by enemy tribunals would not bar subsequent trial by the High Tribunal or by Allied national courts; (4) deliver to the Allies any accused sought for trial; and (5) furnish to the Allies any documents that might be necessary for identification purposes or that might be utilized as evidence.¹⁵² However, as discussed below, these recommendations were only partially integrated into the Treaty of Versailles.

THE TREATY OF VERSAILLES

Following the work of the 1919 Commission, the Allies proceeded to deliberate on the Treaty of Versailles, which took into account the Commission's work, but only in part. It did not include crimes against the laws of humanity,

153. U.S. Dissenting Report, 1919, *supra* note 69, reprinted in VIOLATION OF THE LAWS AND CUSTOMS OF WAR, *supra* note 21, at 74-75.

154. *See id.* at 76; U.S. CONST. art. I, § 9, cl. 3.

155. *See infra* notes 306-312 and accompanying text.

156. *See infra* notes 313-322 and accompanying text.

157. *See* 1919 Commission Report, *supra* note 69, at 27.

158. *See* Provisions for Insertion in Treaties with Enemy Governments, in 1919 Commission Report, *supra* note 69, Annex IV [hereinafter Provisions], at 81-82.

which the Commission eventually recommended and the United States opposed, and it included the prosecution of the Kaiser, which the Commission rejected. The Treaty did, however, include war crimes, which the Commission recommended.

A. Applicable Treaty Provisions

The Treaty of Versailles was signed on June 28, 1919, and contained the following provisions relating to criminal responsibility for wartime conduct:

Article 227

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

Article 228

The German Government recognises 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. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

Article 229

Persons guilty of criminal acts against the nationals of one of the Allied and

Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the powers concerned.

In every case the accused will be entitled to name his own counsel.

Article 230

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.¹⁵³

In addition, following directly after the war crimes clauses was the contentious war-responsibility clause, Article 231, which played a central role in German negotiations with the Allies over the acceptance of Articles 227 to 230. This clause, known throughout Germany as the “*Schuldartikel*,” or article on guilt,¹⁵⁴ provided as follows:

Article 231

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.¹⁵⁵

These provisions of the Versailles Treaty introduced several major innovations into international criminal law. First of all, Article 227 set a historical basis in precedent for prosecution of a head of state for what Article 6(a) of the Nuremberg Charter called “crimes against peace.”¹⁵⁶ For the first time in history, a treaty established the individual criminal responsibility of heads of states for initiating and conducting what was later called a war of aggression. Secondly, the war crimes clauses provided for the trial of Germans, including military and civilian personnel, in the courts of their wartime opponents for violations of the laws and customs of war or before jointly established Allied tribunals.¹⁵⁷ “For the first time, a major international peace treaty had established the principle in

159. Treaty of Versailles, *supra* note 95, arts. 227-230, at 153.

160. VERSAILLES AND AFTER, *supra* note 26, at 414.

161. Treaty of Versailles, *supra* note 95, art. 231, at 153.

162. See Bassiouni, *Combating Impunity*, *supra* note 66, at 411.

163. *Id.*; UNWCC, *supra* note 122, at 44 (“[T]he Peace Treaties of that period sanctioned the principle that any persons, civilians or members of the Armed Forces, accused of violations of the laws of war, could be tried and punished for such violations by the courts of the adversary.”).

international law that war crimes [criminal responsibility] was a proper conclusion of peace, that the termination of war did not bring a general amnesty as a matter of course."¹⁵⁸

B. The "Kaiser Clause"—Article 227

After abdicating the throne on November 9, 1918, the Kaiser went to the Netherlands where he received asylum after giving assurances that he would not engage in any political activity. Thus, any prosecution would require his extradition from Holland.

The idea of holding the Kaiser accountable originated with the British and was introduced for a variety of political purposes, though not necessarily with the expectation that it would be carried out.¹⁵⁹ In 1918, the British Imperial War Cabinet received a recommendation from legal officers of the British crown suggesting that Wilhelm II be arraigned in front of an Allied tribunal after being extradited from Holland.¹⁶⁰ Specifically, an international war crimes trial was proposed by Lord Curzon at the War Cabinet meeting of November 20, 1918.¹⁶¹ On November 28, 1918, the War Cabinet unanimously adopted this recommendation, stating that "so far as the British Government have the power, the ex-kaiser should be held personally responsible for his crimes against international law."¹⁶² The proposition was novel and could have far-reaching implications in the future.

164. WILLIS, *supra* note 21, at 85. Cf. Bierzanek, *supra* note 103, at 89 ("[I]t was the general practice to insert in peace treaties an amnesty clause for persons guilty of wrongful acts during the war.").

165. See WALWORTH, *supra* note 59, at 213. Interestingly, during the course of their deliberations on the fate of the Kaiser, the British commissioned a detailed study on their earlier decision to exile Napoleon to St. Helena. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 37 (2000).

166. WALWORTH, *supra* note 59, at 213.

167. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES* 17 (2000). On this occasion, Lord Curzon referred to the Kaiser as "the arch-criminal of the world." BASS, *supra* note 159, at 65. Lloyd George forcefully contended that Wilhelm II should stand trial. *Id.* at 66. At this initial meeting, however, Curzon and Lloyd George were unable to persuade the cabinet. *Id.* In fact, their proposals were met with numerous objections. For example, the Australian prime minister noted that it was not illegal to make war, as such was the prerogative of sovereigns. *Id.* at 66-67. Churchill was concerned that an inquiry into the Kaiser's responsibility might lead to embarrassing revelations about Russia's role in the crisis that led to war in 1914. *Id.* at 68. Austen Chamberlain feared that singling out the Kaiser might create a "Napoleonic legend" and—rather prophetically—might lead to a nationalistic uprising in Germany. *Id.* at 67. By way of historical footnote, Hermann Göring first heard Adolph Hitler speak at a rally held in opposition to French demands to try Germans as war criminals. See BASS, *supra* note 159, at 60, 92.

168. WALWORTH, *supra* note 59, at 213. See BASS, *supra* note 159, at 69-73. During this meeting, Attorney General Smith asserted that Wilhelm II was responsible on the basis of the doctrine of command responsibility. *Id.* at 69-70. Smith then suggested that the Kaiser could be punished, like Napoleon, without a formal trial or, in the alternative, could be prosecuted before an international tribunal. *Id.* at 70-71. Gary Bass described the ironic circumstances surrounding the historic outcome of this meeting as follows:

At the end of the greatest war in history to date, the decision about the fate of Britain's

On December 2, 1918, this resolution was approved by French Premier Georges Clemenceau and Italian Premier Vittorio Orlando during their meeting in London with British Prime Minister Lloyd George.¹⁶³ Shortly thereafter, Great Britain informed the United States about the *Entente's* adoption of the resolution proposing a trial for the Kaiser and his "accomplices."¹⁶⁴ Prior to this time, however, no serious thought had been given by the government of the United States to the concept of conducting war trials before an international court.¹⁶⁵

In late January 1919, United States State Department legal experts James Brown Scott and David Hunter Miller submitted a memorandum representing the American position on the British proposal.¹⁶⁶ Their study found that there was no legal justification for trying the German government for authoring the war because such an act did not constitute a violation of existing international law.¹⁶⁷ Next, Scott and Miller concluded that the Kaiser was not legally responsible because of his status as a sovereign.¹⁶⁸ Finally, the experts noted that, even if the Germans had transgressed certain of the Hague rules, it would be impossible to extradite them.¹⁶⁹

Following Lloyd George's refusal to restrict discussion of the Kaiser's fate to the Supreme Council¹⁷⁰ and in light of the subsequent impasse on this question reached by the Commission and the American delegation,¹⁷¹ the Council of Four finally tackled the issue at Paris. On April 8, 1919, the Big Four extensively discussed the propriety of trying the Kaiser.¹⁷² During these deliberations, President Wilson repeatedly opposed the *Entente* plan. Not only did he believe that "the evidence would be lacking," but he also feared that any physical punishment of Wilhelm II would turn him into a martyr and could revitalize the Hohenzollern dynasty. Furthermore, Wilson objected to the thought of transgressing existing legal norms just to satiate public sentiment.¹⁷³ In this latter demur, he received the support of Italian Premier Orlando.¹⁷⁴

In response, French Premier Clemenceau argued that the law of responsibility superseded all others and that the Council had a unique opportunity to enlarge this rudimentary principle of national law into one of an international character.¹⁷⁵ British Prime Minister Lloyd George declared that the English people would not

chief adversary had not been made on the basis of the arguments of the general staff, or foreign secretary, or war secretary. It had been made on the authority of the attorney general and a committee of lawyers. *Id.* at 73.

169. WALWORTH, *supra* note 59, at 213.

170. SCHWABE, *supra* note 80, at 164.

171. *Id.* at 163-64.

172. *Id.* at 164.

173. *Id.*

174. *Id.*

175. *Id.*

176. *See supra* notes 55-60 and accompanying text.

177. *See supra* notes 100-106 and accompanying text.

178. WALWORTH, *supra* note 59, at 215-16.

179. *Id.* at 215.

180. *Id.*

181. *Id.*

accept a treaty that did not resolve this critical question.¹⁷⁶ The British prime minister then proposed that the Kaiser be tried only for violating the 1839 Treaty of London that guaranteed Belgian neutrality.¹⁷⁷

Under the pressure of this unified opposition and cognizant of his upcoming meeting before the Commission on the League of Nations to get approval for an amendment regarding the United States' Monroe Doctrine,¹⁷⁸ President Wilson consulted that evening with Secretary Lansing in order to prepare compromise proposals.¹⁷⁹ In fact, President Wilson's draft articles were, in essence, dictated by Lansing—"recommendations that Lansing must have known would undermine the proposed prosecution of the kaiser."¹⁸⁰ In the words of Dr. Scott, the State Department legal advisor:

The original draft prepared as a compromise by President Wilson himself—for he was adverse to any proceeding against the kaiser—contained an express denial that the offense was criminal, but at the suggestion, it is believed, of Mr. Lloyd George, this was omitted. Arraigning the kaiser solely for an offense against international morality and the sanctity of treaties, and declaring that the judgment of the tribunal would be guided by the highest motives of international policy, were in effect an admission that law, in the legal sense of the word, did not exist for either offense, or that its violation was not a crime in the sense of criminal law.¹⁸¹

The following morning, April 9, 1919, Wilson presented his draft articles to the Allied Supreme Council, and they were approved.¹⁸² These proposals provided the specific basis for Articles 227 and 229¹⁸³ and for the Treaty of Versailles'

182. WALWORTH, *supra* note 59, at 215.

183. See WILLIS, *supra* note 21, at 79. The Commission's *Report* contained a discussion of Belgian neutrality, including reference to Article 1 of the Treaty of London of April 19, 1839 and subsequent Prussian declarations in relation thereto. See 1919 Commission Report, *supra* note 69, at 12-15. The need to anchor such a concept of responsibility to an existing international treaty was evident in the Nuremberg and Tokyo charges of "crimes against peace." The treaty in these cases was the 1928 Kellogg-Briand Pact, which benignly stated: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." General Treaty for Renunciation of War as an Instrument of National Policy, *signed at Paris* Aug. 27, 1928, art. 1, 46 Stat. 2343, 2345-46, 94 L.N.T.S. 57, 63.

184. WALWORTH, *supra* note 59, at 216. The Monroe Doctrine was officially enunciated by President James Monroe in a message to Congress on December 2, 1823. The doctrine forbade European interference in the affairs of the Americas and asserted, "[a]s a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers." 5 AMERICA: GREAT CRISES, *supra* note 23, at 288, 293.

185. WALWORTH, *supra* note 59, at 216; WILLIS, *supra* note 21, at 80.

186. WILLIS, *supra* note 21, at 80.

187. Scott, *supra* note 45, at 237.

188. SCHWABE, *supra* note 80, at 294; WALWORTH, *supra* note 59, at 216; WILLIS, *supra* note 21, at 80.

189. WALWORTH, *supra* note 59, at 216.

penalty provisions, Articles 227 to 230, in general.¹⁸⁴ Pursuant to Wilson's draft articles, under which the Kaiser would be tried by a special tribunal for violating the neutrality of Belgium, "[i]t was assumed that the tribunal would pronounce a verdict of guilty in a political and moral sense, but it would not be conducting actual criminal proceedings against the Kaiser, that is, the possibility of a death sentence was precluded."¹⁸⁵ On May 1, 1919, however, Lloyd George influenced the Council to strike the language from Wilson's proposal that explicitly prevented the Kaiser from being tried on criminal charges.¹⁸⁶

In its final form, Article 227 charged the Kaiser with having committed "a supreme offence against international morality and the sanctity of treaties." This accusation, however, did not constitute a violation of existing international law and, instead, simply expressed a "political" transgression and not an international crime.¹⁸⁷ Said another way, Article 227 articulated a "moral", rather than a "legal", offense.¹⁸⁸ Not coincidentally, the political nature of this provision corresponded directly with the position championed by the American delegation during the Commission's deliberations, namely:

that there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offences were justiciable and liable to trial and punishment by appropriate tribunals, but that moral offences, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.¹⁸⁹

Additional considerations indicating that Article 227 was not actually intended to produce a trial include the fact that the charge, as phrased, likely failed to satisfy existing extradition standards,¹⁹⁰ namely, the principle of "double criminality," which requires that the offense for which extradition is sought constitutes a crime in both countries,¹⁹¹ since such a crime did not exist in Dutch criminal law. The realization that the provision's principal proponents, the British, "were not eager to prosecute a crowned head, particularly when the family lineage of that crowned head was related to their own monarchy."¹⁹² In this latter regard, Secretary of State Lansing was of the opinion that the British were forced by

190. See SCHWABE, *supra* note 80, at 294; WILLIS, *supra* note 21, at 80.

191. SCHWABE, *supra* note 80, at 294.

192. *Id.*

193. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19; UNWCC, *supra* note 122, at 44; see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 502-83 (4th rev. ed. 2002). See generally CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* (1980).

194. UNWCC, *supra* note 122, at 44.

195. U.S. Dissenting Report, 1919, *supra* note 69, at 58-59.

196. See Scott, *supra* note 45, at 240-41; WILLIS, *supra* note 21, at 66.

197. For a discussion of extraditable offenses and double criminality, see BASSIOUNI, *supra* note 187, at 388-96.

198. Bassiouni, *supra* note 66, at 411.

public pressure to champion the trial of the Kaiser and were actually relying on the Americans to prevent the occurrence of such a proceeding.¹⁹³

The British also knew that the Netherlands, which had granted asylum to the Kaiser, would not subsequently surrender him for trial. Thus, the British government could represent itself to world public opinion, particularly its own, as supporting the French and Belgian position, with the reasonable expectation that the Kaiser's trial would never take place. The blame for that outcome could therefore be placed on others. Indeed, in the course of time, the literature on that subject blamed the Netherlands for refusing to extradite the Kaiser. For some unknown reason, the role of the United States was not included in subsequent legal commentaries on the failure to prosecute the Kaiser.

C. War Crimes Clauses—Articles 228 to 230

The origins of Articles 228 and 229 of the Treaty of Versailles can be found in a memorandum submitted to the Commission by the American delegation.¹⁹⁴ In this memorandum, the United States advocated the use of military commissions or tribunals, in contrast to the creation of a new international criminal court, that had jurisdiction to try violations of the laws and customs of war.¹⁹⁵ The American memorandum provided as follows:

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;
2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;
3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;
4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and
5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus

199. WALWORTH, *supra* note 59, at 215.

200. See Scott, *supra* note 45, at 250.

201. See U.S. Dissenting Report, 1919, *supra* note 69, at 70-71.

forming an international tribunal for the trial and punishment of persons charged with the commission of such offences.¹⁹⁶

These principles, which were incorporated into Articles 228 and 229, brought nothing new to international law. Prior to the First World War, it was well established that a belligerent nation had the right to try persons charged with violating the laws and customs of war if they fell into its custody and had committed such offenses on its soil or against its nationals or their property.¹⁹⁷ Military tribunals traditionally had the jurisdictional competence to entertain such war crimes prosecutions.¹⁹⁸ In addition, although Article 229 provided for a mixed tribunal composed of individuals from more than one of the member nations, the Allies did not contemplate a supranational, or even an international, court. Accordingly, the transition to the Leipzig trials was relatively easy.¹⁹⁹

202. U.S. Dissenting Report, 1919, *supra* note 69, at 70-71.

203. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 706 (1994) (“This doctrine could hardly be regarded as novel or revolutionary even before the First World War.”); Bierzanek, *supra* note 103, at 89.

It was generally accepted that international law permitted the trial of persons charged with breaches of the customs of war if they fell into the hands of the country whose citizens had been the victims of their offenses. For this purpose special courts might be set up. The right of a victorious power to bring to trial individual members of enemy armies accused of violating the laws of war was recognized by international custom.

Bierzanek, *supra* note 103, at 89.

204. Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction Over War Crimes*, in 2 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 65, 72 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

205. This is probably why Grand-Admiral Karl Dönitz, who was appointed by Hitler as Reich President during the final days of World War II, issued an ordinance directing the Supreme Court at Leipzig to adjudicate war crimes cases—just as the tribunal had done following the First World War. See DAVID IRVING, *NUREMBERG: THE LAST BATTLE* 49-50 (1996). Pursuant to this precedent, there would be criminal responsibility for Germans who had committed violations of national law.

Significantly, the Allies initially recognized the legitimacy of Dönitz’s government, which had withdrawn to Flensburg, when negotiating the instruments of surrender. *Id.* On May 7, 1945, Colonel-General Alfred Jodl signed the initial surrender instrument at General Eisenhower’s headquarters in Rheims. *Id.* at 50. This surrender, however, was not to go into effect until May 9; the delay was designed to allow hundreds of thousands of German civilians and military personnel to escape the rapidly advancing Soviet army. *Id.* On May 9, 1945, the overall instrument of surrender of the General High Command was signed by Field-Marshal Wilhelm Keitel at Soviet headquarters in Berlin-Karlshorst. *Id.* As one commentator noted, “[I]t is important to keep in mind that there has never been an unconditional surrender of Germany, but only of the German armed forces.” Max Rheinstein, *The Legal Status of Occupied Germany*, 47 *MICH. L. REV.* 23, 23 (1948).

Then, on May 15, 1945, Dönitz issued the aforementioned ordinance calling for war crimes trials to be conducted before the Supreme Court at Leipzig. *Id.* at 50. A copy of this pronouncement was sent to Eisenhower, but he did not reply. When Eisenhower next sent his advisors to meet with Dönitz, the latter suggested a joint Allied-German effort against the Soviets. *See id.* Within less than a week after this proposal, Dönitz and his entire government at Flensburg were arrested by the Allies. *See id.* at 51. In so doing, the Allies effectively “dissolve[d] the German government.” Rheinstein, *supra*, at 24. *See* Kelsen, *supra* note 31, at 519 (“By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state.”). In sum,

[N]o matter what the Allies did, Germany at that time had a legitimate government which was briefly recognized by the Allies when it suited them and that very German

When Article 228 was finalized,²⁰⁰ prosecutions were restricted to “violation[s] of the laws and customs of war.” This eliminated trials predicated upon the “laws of humanity,” as well as reliance upon the doctrine of “negative criminality” - both substantial concerns that the United States had addressed in its *Memorandum of Reservations*.²⁰¹ In addition, by providing for trials “before military tribunals” in Articles 228 and 229, the Americans, by means of one of President Wilson’s April 9, 1919, compromise proposals,²⁰² were able to prevent the creation of an international criminal court, as envisioned by the Commission.²⁰³

On the other hand, Article 230, which required the German government to furnish the Allies with information and documentary evidence to facilitate war trials, appears simply to have been a condensation of Articles V and VI from the Commission’s recommended draft articles.²⁰⁴

D. War-Guilt Clause—Article 231

Article 231, although not textually linked to Articles 227 through 230, became inextricably intertwined with these penalty provisions during German negotiations with the Allies over the Versailles Treaty.²⁰⁵

The provision that became famous as the “war-guilt” clause actually stemmed from a compromise proposal originally made by John Foster Dulles in February 1919,²⁰⁶ which was then submitted to the Commission on Reparation of Damage.²⁰⁷ Dulles’ draft proposals were designed to conceptually acknowledge Germany’s responsibility for reparations (Article 231), while restricting its actual

government wanted to prosecute war criminals. The Allies could not accept such a proposition because it would have legitimized the Dönitz government and precluded the Four Major Allies to claim that there was no legitimate government of Germany and hence assume the role of Germany’s government. Thus, they ignored the Dönitz proposal and proceeded with their own plans.

BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 84.

Interestingly, the subsequent trials that occurred in the Allied zones of occupation could properly be classified as domestic, rather than international, prosecutions because of the Allies’ exercise of sovereign authority in Germany. See Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 30; cf. Rheinstein, *supra*, at 25.

206. The phrase “punishments laid down by military law” in the May 7, 1919 text of the first paragraph was changed in the final version to read “punishments laid down by law.” See VERSAILLES AND AFTER, *supra* note 26, at 376.

207. See WILLIS, *supra* note 21, at 80; see also *supra* notes 107-111, 141-143 and accompanying text.

208. See *supra* notes 182-184 and accompanying text. The first clause of Wilson’s proposal “provided for trial before Allied national or mixed military tribunals of persons accused of violating the laws and customs of war.” WILLIS, *supra* note 21, at 80.

209. See WILLIS, *supra* note 21, at 80.

210. See Provisions, *supra* note 152, arts. V, VI, at 82.

211. See *infra* notes 216-245 and accompanying text.

212. At the time, John Foster Dulles was considered a “leading American representative” on the Commission on Reparation of Damage. TRACHTENBERG, *supra* note 98, at 56-57. He was later appointed Secretary of State under President Eisenhower.

213. See SCHWABE, *supra* note 80, at 289; VERSAILLES AND AFTER, *supra* note 26, at 413; WALWORTH, *supra* note 59, at 288; see also *supra* note 98 and accompanying text.

liability to Germany's limited ability to pay (Article 232).²⁰⁸ Similarly, Norman Davis, President Wilson's chief financial advisor in Paris, recommended: "It can be said that Germany was *morally* responsible for the war and all the consequences thereof, and legally that she is responsible in accordance with the formula adopted for damage to property and to persons."²⁰⁹

In short, the United States wanted Article 231, the foundation for reparations, to remain "purely theoretical and have no binding character in either a legal or practical way if it was to be included in the treaty at all."²¹⁰ In fact, during the initial discussion on the subject of reparations, Wilson had the reference to Germany's guilt stricken altogether.²¹¹ The other *Entente* powers, however, ultimately prevailed and thus, in its final form, Article 231 represented a decidedly British and French formulation.²¹²

In the view of the Allies:

Article 231 was regarded . . . as establishing th[e] basis for the assessment of reparation. The question of responsibility for the war, as distinguished from the damage resulting from it, was considered elsewhere in the peace conference and the conclusions were exhibited in Part VII, Penalties, of the treaty. Those provisions were narrowed down to the responsibility of individuals and afforded slight ground for argument on the broad question. Article 231 was a general statement, modified by article 232.²¹³

On the other hand, the Germans construed Article 231 as forming the basis upon which the threatened war crimes prosecutions were based,²¹⁴ universally denounced the clause as the "war-guilt lie," and saw the provision as a blank check by which the Allies could make unlimited reparation demands.²¹⁵

E. German Negotiations on the Provisions of the Treaty of Versailles

When the Germans first learned of the harsh terms of the Versailles Treaty, mass demonstrations erupted.²¹⁶ Articles 227 to 231 met with nearly unanimous

214. See TRACHTENBERG, *supra* note 98, at 56; WALWORTH, *supra* note 59, at 288; cf. VERSAILLES AND AFTER, *supra* note 26, at 414 ("It was perfectly clear from the discussion that this form was chosen simply to establish the potential extent of responsibility in clause 1 (art. 231) and to define its limitations in clause 2 (art. 232) . . .").

215. TRACHTENBERG, *supra* note 98, at 56-57 (quoting 1 REPARATION AT THE PARIS PEACE CONFERENCE FROM THE STANDPOINT OF THE AMERICAN DELEGATION 826 (Philip Mason Burnett ed., Columbia Univ. Press 1940) (emphasis added)). See WALWORTH, *supra* note 59, at 288.

216. SCHWABE, *supra* note 80, at 289-90 (citing PAUL MANTOUX, 1 DES DELIBERATIONS DU CONSEIL QUATRE 83 1955).

217. *Id.* at 290.

218. *Id.*

219. VERSAILLES AND AFTER, *supra* note 26, at 414.

220. *Id.* at 372 ("The German delegation linked th[e] issue of penalties to the question of responsibility for the war.").

221. See *id.* at 414-19; WILLIS, *supra* note 21, at 72; WALWORTH, *supra* note 59, at 288.

222. WILLIS, *supra* note 21, at 83.

opposition.²¹⁷ The war-guilt clause, Article 231, caused particular outrage.²¹⁸ In fact, when the Treaty was given to the German delegation at Versailles on May 7, 1919,²¹⁹ Count Brockdorff-Rantzau, President of the German peace committee, retorted, "It is demanded of us that we shall confess ourselves to be alone guilty of the war. Such a confession from my lips would be a lie."²²⁰ In addition, he made the following reply:

Crimes in war may not be excusable, but they are committed in struggle for victory, and in defense of national existence, and under the influence of passions which deaden the conscience of peoples. The hundreds of thousands of non-combatants who have perished since the 11th of November by reason of the blockade, were killed with cold deliberation after our adversaries had conquered and victory had been assured them. Think of that when you speak of guilt and of punishment.²²¹

Brockdorff-Rantzau was, of course, referring to the Allied hunger blockade, "a measure contrary to the law of nations,"²²² which, pursuant to Article 26 of the

223. WILLIS, *supra* note 21, at 82.

224. *Id.* at 84.

225. *Id.* at 83.

226. Address of Count Brockdorff-Rantzau, May 7, 1919, *reprinted in* GERMAN WHITE BOOK CONCERNING THE RESPONSIBILITY OF THE AUTHORS OF THE WAR 3 (Div. of Int'l Law, Carnegie Endowment for Int'l Peace trans., 1924) [hereinafter GERMAN WHITE BOOK].

227. *Id.* at 4.

228. Note of Count Brockdorff-Rantzau, President of the German Delegation, to Georges Clemenceau, President of the Peace Conference (May 24, 1919), *reprinted in* GERMAN WHITE BOOK, *supra* note 220, at 10. Britain's "distant" blockade of Germany was in violation of the Declaration of Paris of 1856, which directed that "[b]lockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Declaration Respecting Maritime Law (Declaration of Paris), Apr. 16, 1856, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 699, 700 (Dietrich Schindler & Jiri Toman eds., 1981). See VINCENT, *supra* note 24, at 34.

Armistice agreement of November 11, 1918,²²³ was maintained with tragic consequences long after the Germans had laid down their arms.²²⁴

Because the Allies refused to negotiate in person with the Germans at Versailles, the German peace delegation was left with no other option but to submit its counterproposals in writing.²²⁵ In response to Article 227, the German delegation stated that there was no legal basis upon which to prosecute the Kaiser, especially in light of the fact that there was no penalty prescribed for the political conduct alleged against him at the time the act was committed.²²⁶ Similarly, the delegation pointed out that the German code prevented the surrender of individuals subject to prosecution under Article 228.²²⁷

The Germans, however, expressed their desire to see violations of international law punished severely and, to that end, proposed that questions pertaining to offenses against the laws and customs of war be submitted to “an international tribunal of neutrals competent to judge all violations by nationals of all the signatories.”²²⁸ Punishment, according to this plan, would remain the province of the national courts.²²⁹

On May 13, 1919, Brockdorff-Rantzau, quoting Article 231, requested that the Allies provide the German Peace Delegation with a copy of the Allied *Report of the Commission on Responsibility*.²³⁰ One week later, Georges Clemenceau, President of the Peace Conference, wrote a response in which he refused to provide

229. Armistice with Germany, Nov. 11, 1918, art. 26, *reprinted in* 2 BEVANS 9, 14. Article 26 provided as follows:

The existing blockade conditions set up by the allied and associated powers are to remain unchanged, and all German merchant ships found at sea are to remain liable to capture. The Allies and United States contemplate the provisioning of Germany during the armistice as shall be found necessary.

Id. at 14.

In their Declaration that accompanied the Armistice, the German Plenipotentiaries pointed out that “the carrying out of this agreement must throw the German people into anarchy and famine.” Declaration of German Plenipotentiaries, Nov. 11, 1918, *reprinted in* 2 BEVANS 18, 18. The delegation further noted that, “[a]ccording to the declarations which preceded the armistice, conditions were to be expected which, while completely insuring the military situation of our opponents, would have ended the sufferings of women and children who took no part in the war.” *Id.*, *reprinted in* 2 BEVANS 18, 19.

The November 11th armistice terms, which included the continuation of the hunger blockade, were renewed on a number of successive occasions. *See* Prolonging of Armistice with Germany, Dec. 13, 1918, *reprinted in* 2 BEVANS 23; Prolonging of Armistice with Germany, Jan. 16, 1919, *reprinted in* 2 BEVANS 24; Prolonging of Armistice with Germany, Feb. 16, 1919, *reprinted in* 2 BEVANS 28.

230. For a discussion of the Allied hunger blockade and its aftermath, *see generally* VINCENT, *supra* note 24.

231. *See* WILLIS, *supra* note 21, at 83.

232. VERSAILLES AND AFTER, *supra* note 26, at 371-72.

233. *Id.* at 372.

234. *Id.*

235. *Id.*

236. Note of Count Brockdorff-Rantzau, President of the German Delegation, to Georges Clemenceau, President of the Peace Conference (May 13, 1919), at 6.

the Germans with a copy of the Commission *Report*, referring to it as a document of "an internal character."²³¹

Despite being denied the Allied *Report*, the Germans assembled a panel, which included the renowned sociologist Max Weber, to challenge the Commission's findings.²³² Forced to rely solely on news reports,²³³ the expert panel prepared a response by May 27, 1919.²³⁴ The panel began its *Observations* by emphasizing the need for a neutral commission to decide such grave questions as war guilt:

[T]he question of the responsibility for the outbreak of war can not be decided by one side which was itself a party to the war, but that only a commission of inquiry, recognized by both sides as impartial, to which all records are accessible and before which both parties alike can state their case, can venture to pronounce judgment . . .²³⁵

The panel took special note of the Commission's failure to mention the significance of the general Russian mobilization or the Pan-Slavist plans to annex the Bosphorus and Dardanelles Straits.²³⁶ According to the panel, Germany, faced with the reality of a war to be fought on both fronts, was forced by necessity to engage in a defensive war.²³⁷

In reply to German assertions that justice in the victors' tribunals would be one-sided, the Allies stated that it would be "impossible to entrust in any way the trial of those directly responsible for offences against humanity and international right to their accomplices in their crimes."²³⁸ In addition to rejecting the remainder of the German arguments *in toto*,²³⁹ the Allied reply contained an ultimatum demanding an agreement to sign the treaty as it stood; otherwise, the Allies promised to "take such steps as they think needful to enforce their Terms."²⁴⁰

On June 22, 1919, with just one day remaining under the Allied ultimatum, the German delegation sent a note to Clemenceau stating its intention to fulfill all of the conditions imposed by the Versailles Treaty, except those contained in

237. Note of Georges Clemenceau, President of the Peace Conference, to Count Brockdorff-Rantzau, President of the German Delegation (May 20, 1919), reprinted in GERMAN WHITE BOOK, *supra* note 226, at 7.

238. WILLIS, *supra* note 21, at 84.

239. See *id.*; VERSAILLES AND AFTER, *supra* note 26, at 372 (noting that "somehow the report got into the press").

240. See *Observations on the Report of the Commission of the Allied and Associated Governments on the Responsibility of the Authors of War, May 27, 1919* [hereinafter *Observations*], reprinted in GERMAN WHITE BOOK, *supra* note 226, at 31-43.

241. *Id.* at 31.

242. See *id.* at 35, 37, 40; cf. DEGRELLE, *supra* note 25, at 6.

243. *Observations*, *supra* note 234, at 36-37.

244. UNWCC, *supra* note 122, at 44-45.

245. See VERSAILLES AND AFTER, *supra* note 26, at 372.

246. Reply of the Allied and Associated Powers to the *Observations of the German Delegation on the Conditions of Peace, and Ultimatum, Letter of Georges Clemenceau, President of the Peace Conference, to President of the German Delegation, Covering the Reply of the Allied and Associated Powers* (June 16, 1919), reprinted in VERSAILLES AND AFTER, *supra* note 26, at 44, 54.

Articles 227 and 231;²⁴¹ moreover, the note concluded with the following declaration:

The Government of the German Republic is ready to sign the treaty of peace without . . . undertaking any responsibility for delivering persons in accordance with Articles 227 to 230 of the treaty of peace.²⁴²

In response, the Allies issued a new ultimatum threatening to invade Germany the next day.²⁴³ Lacking sufficient military resources, the German government unconditionally accepted the Allied terms just several minutes before the expiration of the ultimatum on June 23.²⁴⁴ Five days later the treaty was opened for signature in the Versailles Hall of Mirrors.²⁴⁵

OUTCOMES

A. *Attempted Arrest and Extradition of Kaiser Wilhelm II*

At the end of the war, Kaiser Wilhelm II and the crown prince sought asylum in the Netherlands. Queen Wilhelmina sympathized with the Emperor, who was then housed in the country estate of Count Bentinck at Amerongen.²⁴⁶ It was from this chateau that the Kaiser formally abdicated on November 28, 1918, and asked that German officials and members of the military “protect the German people against the menacing dangers of anarchy, famine, and foreign domination.”²⁴⁷

At the beginning of the following year, a bold attempt was made to arrest the Kaiser in Holland - a fascinating, but forgotten, footnote of history, the accuracy of which has been obscured by the passage of time and colored by the brush of legend. Willis relates an incident involving a United States Lieutenant Colonel Luke Lea, a former United States senator:

Lea led six soldiers to Amerongen just after New Year’s Day. They planned to seize the kaiser by surprise and roar off to Paris, daring the Dutch to shoot while the kaiser was held prisoner in their car. Near Amerongen, however, they came upon a washed-out bridge and saw that capture was inevitable at that point in a return trip. What had begun as a serious undertaking consequently turned into a semicomical confrontation. The Americans determined to persuade the kaiser to go with them voluntarily to face his accusers manfully. They continued on to the Bentinck estate on the night of January 5, bluffed their way inside the house, and demanded to see Wilhelm II. After a two-hour standoff, during which the kaiser

247. See VERSAILLES AND AFTER, *supra* note 26, at 373.

248. *Id.*

249. WILLIS, *supra* note 21, at 85.

250. *See id.*

251. STEVENSON, *supra* note 2, at 281.

252. *See WILLIS, supra* note 21, at 66.

253. 12 AMERICA: GREAT CRISES, *supra* note 23, at 187-88.

refused to meet with the Americans, Dutch troops surrounded the estate with spotlights and machine guns, forcing Colonel Lea and his men to depart.²⁴⁸

No further attempts were made to apprehend the Kaiser.

Several weeks after the attempted arrest of Wilhelm II, the Allies submitted a request to the Netherlands to turn over the Kaiser for trial.²⁴⁹ The Allied demand stated, in part:

In addressing this demand to the Dutch Government the powers believe it their duty to emphasize its special character. It is their duty to insure the execution of Article 227 without allowing themselves to be stopped by arguments, because it is not a question of a public accusation with juridical character as regards its basis, but an act of high international policy imposed by the universal conscience, in which legal forms have been provided solely to assure to the accused such guarantees as were never before recognized in public law.²⁵⁰

This request, however, was in the nature of a diplomatic note, and the Dutch were informed that the Allies would not press for the Kaiser's extradition.²⁵¹ Dr. Scott commented on the Supreme Council's demand as follows: "In endeavoring to impose a duty upon Holland [to surrender Wilhelm II] and to bring that country to a realization of this duty, as the supreme council saw it, the note dwelt upon the peculiar nature of the offense, and in so doing supplied Holland with an answer which would defeat the purpose, if indeed the Allied Governments wished at this time the surrender of the former German kaiser."²⁵²

On January 23, 1920, the Dutch denied the Allies' request, citing Holland's long tradition of providing political refuge, Dutch national law, and the fact that Holland had not signed, and was thus not subject to, the Treaty of Versailles.²⁵³ But it was the very wording of Article 227 that gave substance to the Dutch argument. The idea that there existed a "supreme offence against international morality and the sanctity of treaties" was simply not a valid legal basis for extradition; furthermore, the choice of these words evidenced the political nature

254. WILLIS, *supra* note 21, at 100-01. See also Bassiouni, *Combating Impunity*, *supra* note 66, at 411-12.

255. See WILLIS, *supra* note 21, at 107. Lord Birkenhead, the lord chancellor, was sent to Paris by Lloyd George to assist in the preparation of the demand. Birkenhead, who was formerly known as Sir F.E. Smith, had advised the British prime minister from the start regarding the Kaiser's trial. *Id.* The formal request was filed 15 Jan. 1920, and was submitted to the government of the Queen of The Netherlands on behalf of the 26 Allied Powers who signed the treaty of peace. The response of The Netherlands denying the request was signed on behalf of Her Majesty the Queen of The Netherlands by Mr. Herman Von Karnebeek on 23 Jan. 1920. It was followed by a protest by David Lloyd George on behalf of the Allied Powers. See *Weekblad van Hetrecht*, nos. 10511 and 10529. Also reported in 47 *REVUE DE DROIT INTERNATIONALE ET DE LEGISLATION COMPARÉ* 37-45 (1920); and in A. MÉRIGNAC & E. LEMONON, *LE DROIT DES GENS ET LA GUERRE DE 1914-1918* 580 (Paris, 1921).

256. Scott, *supra* note 45, at 243.

257. WILLIS, *supra* note 21, at 107.

258. Scott, *supra* note 45, at 242-43.

259. See *id.* at 243-44; WILLIS, *supra* note 21, at 107-08; see also Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 18 & n.21.

of the conduct charged as a “crime,” which neither existed in Dutch law, nor in international law.

On February 14, 1920, the Allied council of ambassadors sent a second demand to Holland.²⁵⁴ In early March, the Dutch government, as before, refused to honor the Allies’ petition - this time replying that compliance would be “incompatible with the national honor if [Holland] consented, at the request of the powers, to violate the[] laws by abolishing the rights which they accord to a fugitive finding himself within the country’s territory.”²⁵⁵

It was well understood in political circles that these impotent requests, predicated upon Article 227, were made as a concession to the *Entente* masses, who still anticipated a trial, and, on behalf of the French and Belgian governments, as a means of humiliating the Hohenzollern dynasty.²⁵⁶

B. War Crimes—The Leipzig Trials

After signing the Versailles Treaty, Germany prepared to deal with the anticipated Allied request for the surrender of war criminals.²⁵⁷ On November 5, 1919, in an effort to prevent such a calamitous event, and sensing an ambivalence of the part of the Allies, Baron von Lersner proposed that Germans be permitted to conduct the trials of accused war criminals in their own courts.²⁵⁸ Toward this end, on December 13, 1919, the German legislature passed a special law (*Reichsgesetzblatt*) that granted jurisdiction to the *Reichsgericht*, the German Supreme Court, at Leipzig to try the defendants selected by the Allies.²⁵⁹

On February 3, 1920, pursuant to Article 228, the Allies presented the German ambassador, von Lersner, with a list of 895 persons²⁶⁰ to be surrendered as war criminals - a sharp contrast from the 20,000 originally named by the Commission.²⁶¹ The publication of this list, which included such German military leaders as Hindenburg and Ludendorff, caused immediate outrage in Germany.²⁶² The German ambassador threatened to resign, and the German government responded by warning the Allies that the surrender of such national heroes could

260. Scott, *supra* note 45, at 244.

261. *Id.* at 245.

262. See WILLIS, *supra* note 21, at 107; Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19.

263. WILLIS, *supra* note 21, at 113; See also, Bierzanek, *supra* note 103, at 92 (“As soon as the Treaty of Versailles was ratified, the Germans embarked on diplomatic action to prevent the surrender of their war criminals . . .”).

264. See WILLIS, *supra* note 21, at 118.

265. See CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS’ TRIALS AND A STUDY OF GERMAN MENTALITY* 35 (1921); WILLIS, *supra* note 21, at 118.

266. The sources conflict as to the specific number of persons listed. See BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 109, at 520 (895 persons); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 17 (1992) (854 persons); cf. UNWCC, *supra* note 122, at 46 (896 persons); WILLIS, *supra* note 21, at 113 (854 persons); Bierzanek, *supra* note 103, at 92 (901 persons).

267. Bassiouni, *Combating Impunity*, *supra* note 66, at 412.

268. See UNWCC, *supra* note 122, at 46.

imperil the stability of the weak Weimar Republic.²⁶³ This struck a particular note with the Allies, who, with good reason, were already fearful of a Bolshevik takeover in Germany.²⁶⁴

After appointing a commission, the Allies accepted Germany's offer to conduct the trials before the *Reichsgericht*, with the caveat that if the Allies found the prosecutions to be unsatisfactory, they reserved the right to try the defendants before their own tribunals.²⁶⁵ Under this arrangement, the Allies had to submit their cases, including their evidence, to the Procurator General of the Supreme Court, who retained prosecutorial discretion as to which cases would be brought.²⁶⁶

In addition, after further negotiations, the Allies agreed to drastically reduce the number of persons subject to prosecution.²⁶⁷ Based on this reaction, on March 31, 1920, an Inter-Allied Commission submitted a much shorter list of only forty-five individuals,²⁶⁸ but even that number was resisted by the Germans. In the end, only twelve military officers were tried by the *Reichsgericht*.²⁶⁹ Six of the cases were submitted by the British, five by the French, and one by the Belgians.²⁷⁰ The Allies lost control of the situation when, in agreeing to have the German Supreme Court try these offenders under German law, they were subject to the Procurator General's discretion in initiating these prosecutions. The French and Belgians were outraged and withdrew from the process; the British, however, remained engaged in it with the intention to see it through no matter how symbolic the outcome.

The trials finally commenced on May 23, 1921, some two and one-half years after the signing of the Armistice.²⁷¹ Of the twelve prosecutions undertaken, six resulted in convictions.²⁷² The British cases resulted in a greater than 80% conviction rate; the cases submitted by the French enjoyed only a 20% success rate; and the lone Belgian case ended in an acquittal.²⁷³ The cases of greatest interest today were those brought by the British,²⁷⁴ and all three involved the defense of obedience to superior orders.

269. See UNWCC, *supra* note 122, at 46; William A. Schabas, *International Sentencing: From Leipzig (1923) to Arusha (1996)*, in 3 INTERNATIONAL CRIMINAL LAW 171, 172 (M. Cherif Bassiouni ed., 2d ed. 1999); Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19.

270. See WILLIS, *supra* note 21, at 113; See also DEGRELLE, *supra* note 25, at 339-55, 375-91 (discussing the violent Communist activities taking place in Germany during this period). Cf. ADOLF EHRT, COMMUNISM IN GERMANY: THE COMMUNIST CONSPIRACY OF THE EVE OF THE 1933 NATIONAL REVOLUTION 9-26 (photo. reprint 1990) (1933).

271. Bierzanek, *supra* note 103, at 93; UNWCC, *supra* note 122, at 46.

272. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 19-20.

273. See Bassiouni, *Combating Impunity*, *supra* note 66, at 413.

274. See WILLIS, *supra* note 21, at 128.

275. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 20. In addition, a case was prosecuted against Dr. Oskar Michelsohn, who was accused of deliberately contributing to the deaths of hospitalized French prisoners. WILLIS, *supra* note 21, at 141. Dr. Michelsohn was acquitted. *Id.*

276. MULLINS, *supra* note 259, at 191.

277. See UNWCC, *supra* note 122, at 47.

278. MULLINS, *supra* note 259, at 191.

279. See *id.*

280. See GERMAN WAR TRIALS: REPORT OF PROCEEDINGS BEFORE THE SUPREME COURT IN

In *Robert Neumann's Case*, a prison guard at a chemical factory at Pommerensdorf was charged with brutalizing prisoners of war.²⁷⁵ On one occasion, a group of British prisoners refused to work.²⁷⁶ After Trienke, the defendant's superior, unsuccessfully tried to peaceably persuade the prisoners to do their work, he called the Commandant for instructions.²⁷⁷ Thereafter, Trienke ordered his sentries, including Neumann, to "set about the prisoners."²⁷⁸ The defendant admitted to using his fist against one prisoner during the incident.²⁷⁹ The court held that Neumann was not responsible:

He was covered by the order of his superior which he was bound to obey. According to §47 of the Military Penal Code a subordinate can only be criminally responsible under such circumstances, when he knows that his orders involve an act which is a civil or military crime. That was not the case here. . . . As matters stood there could be no doubt of the legality of the order.²⁸⁰

In other instances, however, the defendant was convicted of assault.²⁸¹

In the *Dover Castle Case*, a submarine commander, Lieutenant-Captain Karl Neumann, was charged with torpedoing a British hospital ship in violation of the 10th Hague Convention.²⁸² The commander admitted to torpedoing the ship, but stated that he was only acting in obedience to orders.²⁸³ Specifically, because the German government was convinced that the Allies were using hospital ships for military purposes, the Admiralty had issued two memoranda to the Allies notifying them that, unless enemy hospital ships kept to a certain course in the Mediterranean and fulfilled other conditions, the vessels would be treated as ships of war.²⁸⁴ The defendant believed that these orders constituted legitimate reprisals.²⁸⁵ The court acquitted Neumann:

It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of the criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible . . .

LEIPZIG (London 1921) (providing an official overview of the British cases, including the complete judgments rendered by the *Reichsgericht*).

281. MULLINS, *supra* note 259, at 88-89.

282. *Judgment in Case of Robert Neumann* (1921), 16 AM. J. INT'L L. 696, 697 (1922).

283. *Id.* at 697-98, 699.

284. *Id.* at 699.

285. *Id.* at 698.

286. *Id.* at 699.

287. MULLINS, *supra* note 259, at 97.

288. *Id.* at 99, 103-04.

289. *Id.* at 99-100.

290. See *Judgment in Case of Commander Karl Neumann Hospital Ship "Dover Castle" (1921)*, 16 AM. J. INT'L L. 704, 706 (1922).

291. *Id.* at 707.

The Admiralty Staff was the highest authority over the accused. He was in duty bound to obey their orders in service matters. So far as he did that, he was free from criminal responsibility.²⁸⁶

In contrast, in the *Llandovery Castle Case*, the defendants' superior order defense was unsuccessful.²⁸⁷ In *Llandovery Castle*, a hospital ship was torpedoed by a German U-boat in the Atlantic Ocean, in an area in which such ships were not barred from traveling.²⁸⁸ The commander of the U-boat, Helmut Patzig, incorrectly believed that the ship was being used to transport troops and munitions.²⁸⁹ After three lifeboats were successfully deployed from the sinking hospital ship, the U-boat fired shells at the lifeboats and caused the destruction of two of them and the death of their occupants, according to the finding of the court.²⁹⁰ Because Patzig was not in custody, the court tried two first lieutenants, Ludwig Dithmar and John Boldt, who were with Patzig when the shells were fired.²⁹¹ The defendants refused to give evidence at trial because of a promise of silence they made to Patzig.²⁹²

In finding the accused guilty as accessories, the court stated:

Patzig's order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law They [the defendants] should, therefore, have refused to obey. As they did not do so, they must be punished.²⁹³

In sentencing the defendants, however, the court did consider the existence of the superior order in mitigation.²⁹⁴

In contrast to the British, the French and Belgians unwisely named high-ranking individuals, especially in the case of German war hero General Karl

292. "*Dover Castle*", *supra* note 290, 16 AM. J. INT'L L. 704, 707.

293. *See Judgment in Case of Lieutenant Dithmar and Boldt Hospital Ship "Llandovery Castle" (1921)*, 16 AM. J. INT'L L. 708, 721-22 (1922).

294. *See id.* at 710.

295. *See id.* at 710, 712-14.

296. *Id.* at 711, 718-19. Although there were no witnesses to either the intended target or the effect of the firings, the court concluded "beyond all doubt that . . . Patzig attained his object so far as two of the boats were concerned." *Id.* at 718-19.

297. *See MULLINS*, *supra* note 259, at 107-08.

298. *Llandovery Castle*, *supra* note 293, at 716.

299. *Id.* at 721-722.

300. *See id.* at 728.

Stenger, and failed to authenticate their evidence.²⁹⁵ As a consequence, only one defendant was convicted in these cases.²⁹⁶

In particular, after N.C.O. Max Randohr was acquitted of having maltreated and imprisoned Belgian children, the Belgian delegation left Leipzig in protest and withdrew evidence it had previously submitted.²⁹⁷ Similarly, after failing to secure the desired convictions of General Stenger and Lieutenant Laule, the French Mission abruptly departed for Paris during the middle of the trial of Generals von Schack and Krushka, following which the French issued a forceful protest to the Germans.²⁹⁸ By way of comparison, following the acquittal of General Stenger, the one-legged war veteran was showered with flowers by a crowd of admiring German spectators.²⁹⁹

On January 15, 1922, the Commission of Allied Jurists (Allied Jurists) declared that the *Reichsgericht* had failed in carrying out its mandate and that “some of the accused who were acquitted should have been condemned and . . . in the case of those condemned the sentences were not adequate.”³⁰⁰ The Allied Jurists also recommended that Germany be required to extradite its war criminals as provided for in Article 228.³⁰¹ Although no further action was taken by the Allies toward this goal,³⁰² it should be noted that the French and Belgians did prosecute accused German war criminals *par contumace* (in absentia).³⁰³

In assessing the failure of the Allies to enforce Articles 228 to 230 of the Versailles Treaty, the United Nations War Crimes Commission cited to the following factors: (1) the failure to promptly commence the war crimes trials, when public support was still high; (2) lack of unity among the Allies; (3) the world “was not internationally mature;” and (4) improper drafting of the war crimes clauses.³⁰⁴ To these may be added the most significant influences of all, namely, the priority of the Allies in maintaining peace and in fulfilling their domestic political agendas over the quest for retributive justice.³⁰⁵

301. See WILLIS, *supra* note 21, at 134; see also MULLINS, *supra* note 259, at 191 (noting that “the Belgian and French evidence did not impress the Court as being impartial and credible”).

302. See WILLIS, *supra* note 21, at 134.

303. UNWCC, *supra* note 122, at 47; WILLIS, *supra* note 21, at 134-35.

304. See UNWCC, *supra* note 122, at 47; WILLIS, *supra* note 21, at 135-36.

305. UNWCC, *supra* note 122, at 50; WILLIS, *supra* note 21, at 135, 136.

306. UNWCC, *supra* note 122, at 48.

307. Bierzanek, *supra* note 103, at 94.

308. See *id.*

309. See BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 109, at 522; WILLIS, *supra* note 21, at 142-45; see also Garner, *supra* note 54, at 81-82 (discussing the propriety of *condemnation par contumace*).

310. UNWCC, *supra* note 122, at 52. President Wilson remarked that the war crimes clauses were “the weak spot in the Treaty of Peace.” BASS, *supra* note 159, at 100.

311. See Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 20. Popular German reaction to the trials was overtly hostile. For example, after General Stenger’s acquittal, he was met by cheering crowds and was showered with flowers; in contrast, the crowd “taunted and spat upon members of the French mission.” WILLIS, *supra* note 21, at 136. Similarly, the German press, almost without exception, highlighted the arguments of defense counsel. *Id.* at 131. In addition, the viability of the principle of the defense of obedience to superior orders was strongly reaffirmed. See *supra* notes 275-

C. Crimes Against the Laws of Humanity—Efforts to Prosecute Turkish Officials for the Armenian Massacres

The 1919 Commission recommended that guilty persons from the Central Powers be tried for crimes against the “laws of humanity.”³⁰⁶ On August 10, 1920, the Allies and Turkey signed the Treaty of Sèvres.³⁰⁷ In an attempt to ensure prosecution of the perpetrators of the Armenian massacres, the Allies inserted, in addition to war crimes clauses virtually identical to Articles 228 to 230 of the Versailles Treaty,³⁰⁸ a special provision that addressed the mass killings. Article 230 of the Treaty of Sèvres provided, in pertinent part:

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.

The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish government undertakes to recognise such tribunal.

In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.³⁰⁹

Although the Advisory Committee of Jurists shortly thereafter recommended the establishment of a High Court of International Justice to “try crimes against international public order and the universal law of nations,”³¹⁰ the League of Nations ignored the proposal.³¹¹ In any event, the Treaty of Sèvres was not ratified, and Article 230 was therefore never implemented.³¹²

British and Turkish domestic attempts to bring the suspects to trial were similarly unsuccessful.³¹³ For example, in May 1919, the British seized a large

294 and accompanying text.

312. See *supra* notes 128-140 and accompanying text.

313. Tripartite Agreement Between the British Empire, France and Italy Respecting Anatolia (Treaty of Sèvres), Aug. 10, 1920, reprinted in 15 AM. J. INT'L L. 153 (Supp. 1921).

314. Cf. *id.*, arts. 226-228.

315. *Id.*, art. 230.

316. James Brown Scott, Report on the Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Sept. 17, 1920 [hereinafter 1920 Advisory Committee Report], reprinted in 7 DIVISION OF INTERNATIONAL LAW, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 35, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS 139 (photo. reprint 2000) (1920) [hereinafter PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE].

317. WILLIS, *supra* note 21, at 158.

318. UNWCC, *supra* note 122, at 45; Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 17.

319. See Dadrian, *Genocide*, *supra* note 129, at 281-317; see also BASS, *supra* note 159, at 106-46.

number of detainees from a Turkish military prison and took them to Malta to await trial by the Allies.³¹⁴ Political conditions, however, soon changed drastically. Domestically, the nationalist movement headed by Mustafa Kemal was rapidly gaining strength.³¹⁵ Internationally, the French and the Italians began to secretly negotiate with Kemalists and thereby undermined British efforts to bring the suspects to trial.³¹⁶ Eventually, in October 1921, the British agreed to an “all for all” exchange of its remaining Turkish prisoners for British hostages held by the nationalists.³¹⁷

In addition, following the nationalists’ recovery of Izmir and Kemal’s bold confrontation with the British,³¹⁸ the victorious Turks were able to set the terms of a peace.³¹⁹ Accordingly, on July 24, 1923, the Allies and Turkey signed the Treaty of Lausanne.³²⁰ Unlike the earlier Treaty of Sèvres, this treaty contained no war crimes clauses;³²¹ furthermore, it was accompanied by a “Declaration of Amnesty” covering offenses committed during the wartime period.³²² Such concessions were also predicated upon the Allies’ desire to ensure that Turkey, the master of the Bosphorus and Dardanelles Straits, remained friendly to the western powers, as well as upon their concomitant fear of the potential naval mobility of the nearby Communist regime in Russia.³²³

Instead, the Allies negotiated with Turkey to prosecute offenders, much as they had done with Germany with the resulting Leipzig Trials. Ottoman authorities eventually agreed to conduct domestic trials of those deemed responsible for the Armenian massacres because they thought that by doing so Turkey would be treated less severely at the Paris Peace Conference.³²⁴ On November 23, 1918, the Administration’s Inquiry Commission (Inquiry Commission) was established to investigate the misdeeds of Turkish officials.³²⁵ By January 1919, the Inquiry Commission had compiled 130 dossiers on suspects.³²⁶ On March 8, 1919, the Sultan authorized statutes for a new Court Martial, which was charged with inquiring into the massacres.³²⁷ The Key Indictment that was issued was directed against the leaders of the Ittihad party.³²⁸ On July 5, 1919, a verdict was entered in which a number of ruling Ittihad

320. Dadrian, *Genocide*, *supra* note 129, at 285.

321. *Id.* at 286.

322. *Id.* at 286, 291.

323. *Id.* at 288-89.

324. See HANNS FROEMGEN, *KEMAL ATATURK: A BIOGRAPHY* 186-97 (1937).

325. See WILLIS, *supra* note 21, at 162.

326. Treaty with Turkey and Other Instruments Signed at Lausanne, July 24, 1923 (Treaty of Lausanne), *reprinted in* 18 AM. J. INT’L L. 1 (Supp. 1924).

327. See *id.*; UNWCC, *supra* note 122, at 45.

328. See Declaration of Amnesty and Protocol, July 24, 1923, *reprinted in* 18 AM. J. INT’L L. 92, 94 (Supp. 1924).

329. See Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 17.

330. Dadrian, *Genocide*, *supra* note 129, at 292.

331. *Id.* at 295.

332. *Id.* at 295.

333. *Id.* at 296.

334. *Id.* at 298.

members were condemned to death in absentia.³²⁹ The Courts Martial were, however, abolished by January 1921, and numerous prosecutions were never undertaken.³³⁰

In sum, the Istanbul Trials, which were conducted between 1919 and early 1921, failed to secure justice for the slain Armenians. Like the later Leipzig Trials, these proceedings before the Turkish Courts Martial were plagued by absent defendants, light sentences, and a lack of popular support.³³¹

The Turks, however, deny that events involving the Armenians during 1915-1917 constituted crimes against humanity. They suggest that such claims were wartime propaganda and point out that the Turks and the Armenians both died in approximately the same proportion *vis-à-vis* the population size.³³² Turkey denies that there was a preconceived plan to exterminate the Armenians and attributes their deaths, as well as the deaths of millions of Turks, to the famine, disease, and breakdown in civil society that accompanied World War I:

There was no plan to destroy Armenians, but only the wartime necessity of relocating them for the sake of military security. Those deported . . . were generally treated humanely and all necessary provisions were made for their safety and well-being (though, admittedly this broke down at times). Some Armenians were killed by criminals and roving tribes; others were killed as the result of the civil war they were waging against Turkey within a global war.³³³

Professor Dadrian, one of the foremost scholars on the Armenian genocide, has, in the context of the post-war experience in Turkey, aptly summarized the *realpolitik* of the Allies following the First World War:

As World War I ended, the Allies focused attention on punishment for the war crimes committed against the Armenians. At first, the Allies attempted to apply principles of international law to the perpetrators of the massacres. The initial impulse to seek justice, however, faded in the months after the war and eventually gave way to political expediency. The Turkish government's attempts to bring its own nationals to justice also faltered. The rise of nationalism, and the Turkish populace's increasingly defiant attitude toward the Allies, weakened the government's resolve in its quest for justice. This weakened resolve and the Allies' own waning interest sabotaged the efforts to punish those responsible for the genocide.³³⁴

335. Dadrian, *Genocide*, *supra* note 129, at 309.

336. *Id.*

337. *See id.* at 309-10, 312-14.

338. Roger W. Smith, *Denial of the Armenian Genocide*, in 2 GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 63, 67 (Israel W. Charny ed., 1991).

339. *Id.* at 68.

340. Dadrian, *Genocide*, *supra* note 129, at 278.

CONCLUSION

Although the Allies secured the inclusion of specific war crimes clauses in the Treaty of Versailles, the treaty's two major penalty provisions, Articles 227 and 228, were never implemented.³³⁵ This was due in no small part to the efforts of the United States to limit the work of the Commission, whose substantive recommendations were, for the most part, disregarded.³³⁶ As one of the American delegates on the Commission later wrote, "I am bold enough to say that the American commission rendered a service to the world at large in standing as a rock against the trial of the kaiser for a legal offense . . ."³³⁷

It is important to note that the Treaty of Versailles began with the Covenant of the League of Nations (Covenant).³³⁸ Article 14 of the Covenant provided, in pertinent part:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it.³³⁹

In light of this mandate, approximately one year after the signing of the Versailles Treaty, an Advisory Committee of Jurists (Advisory Committee) was assembled to formulate plans for the establishment of such a court.³⁴⁰ On September 17, 1920, Dr. James Brown Scott formally tendered the Committee's *Report on the Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists (Committee Report)*.³⁴¹ In a veiled indictment of Allied *realpolitik* at the Paris Peace Conference, the *Committee Report* referred to the following statement uttered by Baron Descamps, the President of the Advisory Committee:

[T]he failure of the Conference at Paris to create such a tribunal, due to the opposition of the American and Japanese representatives in the Commission on Responsibilities, prevented the punishment of Emperor William II for the invasion of Belgium and of the German officers for the crimes and violations of

341. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 18.

342. See Bierzanek, *supra* note 103, at 92 ("The Allied Powers ultimately followed the recommendations of the Commission only to a limited extent in drafting the Treaty of Versailles."); cf. Bassiouni, *From Versailles to Rwanda*, *supra* note 68, at 18 ("The Treaty of Versailles did not link the 1919 Commission to eventual prosecutions recognized under its Articles 228 and 229, resulting in an institutional vacuum between the investigation and prosecution stage.")

343. Scott, *supra* note 45, at 245.

344. See Treaty of Versailles, *supra* note 95, at 48.

345. *Id.*, Covenant, art. 14, at 52.

346. See 1920 Advisory Committee Report, *supra* note 310, reprinted in PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 2, 5.

347. Letter from James Brown Scott, Secretary and Director of the Division of International Law, to Board of Trustees of the Carnegie Endowment for International Peace (Sept. 17, 1920), reprinted in PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 1.

international law which they were alleged to have committed in the course of the World War.³⁴²

This weighty assessment accompanied the Advisory Committee's draft proposal for a High Court of International Justice.³⁴³

On two separate occasions following "the war to end all wars" the Allies failed to establish an international tribunal to try crimes committed by belligerents. The Paris Peace Conference rejected the 1919 Commission's recommendation to set up a High Tribunal to prosecute violations of both "the laws and customs of war" and "the laws of humanity."³⁴⁴ Likewise, the League of Nations ignored the proposal of the Advisory Committee of Jurists to create a Permanent Court of International Justice to try "crimes against international public order and the universal law of nations."³⁴⁵

Thus, apart from helping to lay the legal foundations for international criminal justice in the future, the Allies' experiment in retributive justice following the First World War was a dismal failure. Despite ample Allied resources, the availability of the exhaustive investigative findings of the Commission, and an enemy prostrate from war, hunger, and internal revolution, very few prosecutions were ever undertaken, and of those that were, the sentences handed down were either comparatively light or never fully executed. The value of justice had not penetrated the practices of *realpolitik*.

It was only after being exposed to the total warfare of World War II that the Allies finally began to travel down the road to justice that led to Nuremberg,³⁴⁶ Tokyo, and other Allied and national prosecutions, some of which persist to date.

As the time approached for the World War II Allies to pursue post-war justice, the First World War precedent acquired more significance and even the failures of the time served as a basis for what was to come. In time, the failures of post-World War I justice were transformed into a partially valid precedent because that was what was needed to justify the rising expectations of the international society. And so it was also for the post-World War II precedent, whose weaknesses were omitted in favor of the positive aspects that international society wanted to buttress. History's revisionism, or selective memory, has its way of

348. 1920 Advisory Committee Report, *supra* note 310, reprinted in PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 139.

349. *See id.*, reprinted in PROJECT OF PERMANENT COURT OF INTERNATIONAL JUSTICE, *supra* note 310, at 139.

350. *See supra* notes 131-140 and accompanying text.

351. *See supra* notes 310-312 and accompanying text.

352. As a transition between the wartime massacres in Turkey and World War II, reference is often made to Adolph Hitler's purported rhetorical query, "Who after all is today speaking of the destruction of the Armenians?" This statement, which is cited as evidence of genocidal intent on the part of the Nazis, was allegedly uttered by Hitler at Obersalzberg on August 22, 1939 to his leading generals in anticipation of the invasion of Poland. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 138, at 403. The document from which this remark is taken, however, was rejected by the Nuremberg Tribunal as not being authentic. *Id.* at 47. Yet, the debate surrounding the statement continues to the present day. *See id.* at 403-12.

shaping the future even when it deforms the past. Niccolò Machiavelli's adage is confirmed - the ends justify the means.³⁴⁷

353. See NICCOLÒ MACHIAVELLI, *THE PRINCE* (Peter Bondanella ed., Oxford Univ. Press 1984) (1532).