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## Trying the Kaiser: The Origins of International Criminal Law

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International criminal law can be said to have come of age in 1945, when jurists and policymakers decided to prosecute the defeated German leaders for crimes connected with the Second World War. Robert Jackson captured the general mood when he argued that to let them go free would “mock the dead and make cynics of the living”.<sup>1</sup> A variety of justifications for a trial were forthcoming. The war had been uniquely barbaric, necessitating new legal methods to deal with perpetrators (Bohuslav Ečer).<sup>2</sup> Germany’s actions had placed her outside international society, so her leaders should be treated as outlaws (William Chanler).<sup>3</sup> States had every right to instigate new customs and agreements as the source of future law (Robert Jackson).<sup>4</sup> Preceding decades had seen the crystallisation of customary law validating the aggression charges (Sheldon Glueck).<sup>5</sup> Prosecutors could transpose modes of liability from domestic security law into international law (Aron Trainin and Murray

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<sup>1</sup> Robert Jackson, “Report to the President”, in *Report of Robert H. Jackson, United States Representative, to the International Conference on Military Trials*, Department of State, Washington, DC, 1949, p. 46.

<sup>2</sup> Bohuslav Ečer, “Minority Report”, 27 September 1944, p. 2: The National Archives, UK (‘TNA’), FO 371/39003.

<sup>3</sup> William Chanler, “Memo”, 30 November 1944, reprinted in Bradley Smith, *The American Road to Nuremberg: The Documentary Record 1944–1945*, Hoover Institution Press, Stanford, 1982, pp. 69–70.

<sup>4</sup> Jackson, 1949, p. 52, see *supra* note 1.

<sup>5</sup> Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, Knopf, New York, 1946, pp. 37–38.

Bernays).<sup>6</sup> Prosecutors would not be transgressing the legality principle by adding new punishments to pre-existing offences (Hersch Lauterpacht and Hartley Shawcross).<sup>7</sup> Prosecutors could not breach the principle of legality because it had not been incorporated into international law (Hans Kelsen).<sup>8</sup> And so on.

Although they appeared new, the Nuremberg arguments were not wholly original. The revolution that gave birth to international criminal law had already taken place a quarter century earlier in the aftermath of the previous world war. In late 1918 the Entente powers proposed trying the just-abdicated Kaiser and his subordinates for starting the war and committing crimes during its course. Policymakers and jurists not only set out an *international* jurisdiction over war crimes for the first time; they also proposed new categories of crimes (the precursors to ‘crimes against peace’ and ‘crimes against humanity’). In the process, they engaged in sophisticated debates about the implications of these steps – arguments that would later be rehashed at Nuremberg. Here, we will examine these original perspectives, focusing on the work of the official advisors to the British and French governments – including John Macdonell, John Morgan, Ferdinand Larnaude and Albert Geouffre de Lapradelle – as well as three influential commentators: the French jurist, Louis Le Fur, the American lawyer, Richard Floyd Clarke, and the British official, James Headlam-Morley. Over the course of just eight weeks, from late October to early December 1918, they turned their attention to the proposed trial of Wilhelm II, and offered strikingly prescient insights into the issues that shaped – and would continue to shape – international criminal law.

### 7.1. The Official Approach

Trying the ex-Kaiser was an Anglo-French idea. After the two powers sounded each other out in November 1918, David Lloyd George formally placed the proposal on the Entente’s agenda when he met with Georges Clemenceau, Vittorio Orlando, and their respective ministers in London

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<sup>6</sup> Aron Naumovich Trainin, *Hitlerite Responsibility Under Criminal Law*, A.Y. Vishinsky (ed.), Hutchinson, London, 1945, p. 84; and Murray Bernays, “Memo”, 15 September 1944, reprinted in Smith, 1982, p. 36, see *supra* note 3.

<sup>7</sup> International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, The Blue Series (42 vols.), vol. 3, IMT, Nuremberg, 1947–1949, p. 106.

<sup>8</sup> Hans Kelsen, *Peace Through Law*, University of North Carolina Press, Chapel Hill, 1944, p. 87.

on 2 December. The British and the French (joined rather more reluctantly by the Italians)<sup>9</sup> decided that Wilhelm II, who had abdicated on 9 November, should be surrendered to an international court for “being the criminal mainly responsible for the War” and for presiding over the German forces’ violations of international law.<sup>10</sup> The reasons for doing so were set out in a British Foreign Office telegram:

- (a) That justice requires that the Kaiser and his principal accomplices who designed and caused the War with its malignant purpose or who were responsible for the incalculable sufferings inflicted upon the human race during the war should be brought to trial and punished for their crimes.
- (b) That the certainty of inevitable personal punishment for crimes against humanity and international right shall be a very important security against future attempts to make war wrongfully or to violate international law, and is a necessary stage in the development of the authority of a League of Nations.
- (c) That it will be impossible to bring to justice lesser criminals... if the arch-criminal, who for thirty years has proclaimed himself the sole arbiter of German policy, and has been so in fact, escapes condign punishment.<sup>11</sup>

When coming to their decision in London, the delegates had to hand two officially sanctioned legal reports making the case for the indictment of the ex-Kaiser and his subordinates. The first was a British report, produced by a Special Sub-committee on Law answerable to the Attorney General F.E. Smith and presided over by the jurists Sir John Macdonell and Adjutant General John Morgan. (This report, presented to Smith on 28 November, was distributed to the London conference attendees on their arrival.) The sub-committee members were aware that the Imperial War Cabinet had pre-empted their own discussion by debating the desirability of prosecuting Wilhelm II, and that Lloyd George

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<sup>9</sup> Vittorio Emanuele Orlando, “On the Aborted Decision to Bring the German Emperor to Trial”, in *Journal of International Criminal Justice*, 2007, vol. 5, no. 4, p. 1023.

<sup>10</sup> Foreign Office to Washington and New York, 2 December 1918, TNA, FO 608/247.

<sup>11</sup> *Ibid.*

strongly favoured a trial.<sup>12</sup> Hemmed in by these political constraints, their report occupied the middle ground by accepting the idea of trying the ex-Kaiser in principle while expressing doubts about Lloyd George's most subversive proposal: prosecuting him for the hitherto unknown crime of embarking on war.

Their arguments in favour of trying him rested on negative bases. First, if he were not tried for the violation of the principles of international law, then these principles would never be completely vindicated.<sup>13</sup> And second, if he were not tried for breaches of the laws of war, then the case against his subordinates would be weakened.<sup>14</sup> Perhaps aiming to spread the responsibility for creating a new jurisdiction, they rejected the idea of trying him under domestic jurisdiction, and advised instead the establishment of an international tribunal, which, they argued, would be free from national bias, would produce authoritative decisions and fortify international law.<sup>15</sup>

Some members of the sub-committee nevertheless expressed strong reservations about trying Wilhelm II for starting an aggressive war.<sup>16</sup> The first difficulty, they argued, was that it might raise unwanted issues about the behaviour of the Entente powers, and thus distract attention away from the other charges against him. Mindful of the arms races, provocations and bad faith on both sides during the pre-war period, they warned that courtroom proceedings

might involve a prolonged examination of the whole political situation, the political difficulties and controversies preceding August 4th, 1914 and, indeed, the entire political history of Europe for some years before that date. It might be difficult to set limits to such enquiries [...]<sup>17</sup>

The second difficulty was the possibility that Wilhelm II, however reprehensibly he had behaved when in power, had nonetheless been acting constitutionally. Some members argued that his conduct "might be

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<sup>12</sup> See for example, Imperial War Cabinet 37, 20 November 1918, TNA, CAB 23/43.

<sup>13</sup> "Report of Special Sub-committee on Law" (as part of *First Interim Report from the Committee of Enquiry into Breaches of the Laws of War*), presented 28 November 1918, dated 20 December 1918, p. 95, TNA, CAB 24/85.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, p. 96.

<sup>16</sup> *Ibid.*, p. 97.

<sup>17</sup> *Ibid.*

said to be a political act, the guilt of which is shared by the German nation, the representatives of which were the Bundesrath and Reichstag”.<sup>18</sup> Others countered that his conduct “might be constitutionally correct and, nevertheless, might be a grave breach of International Law”.<sup>19</sup> Beset with doubts of his personal culpability, the sub-committee members divided over whether to advise the Attorney General to charge him for aggressive war. After taking a vote on the question, they decided by the narrowest margin – four to three – in favour of bringing this charge against him.<sup>20</sup> It was one of the earliest debates on an issue that continues to exercise legal minds to this day.

## 7.2. New Law to Meet Changed Circumstances

The second official report, *Examen de la responsabilité pénale de l'empereur Guillaume II*, was written by the French jurists Larnaude and de Lapradelle, and published by the French Ministry of War in November 1918.<sup>21</sup> This so impressed Clemenceau that he insisted on it being distributed to all the delegates at the preliminary Peace Conference convened in Paris in January 1919.

Larnaude and de Lapradelle had no doubt that Wilhelm II was criminally responsible for crimes committed during the course of the war, but they were compelled to confront the significant implications of placing a one-time head of state on trial. On the one hand, they reasoned, the Kaiser when in power enjoyed the international rights of legal immunity, honours and precedence; on the other, he bore international responsibilities – “*Ubi emolumentum, ibi onus esse debet*.”<sup>22</sup> They left it to the reader to make the logical connection: that by renouncing his responsibilities when he abdicated, he thereby lost his rights, and could thus be compelled to account for himself in a court of law.

Should it be a military court, a criminal court or a specially constituted international tribunal? They argued that while military courts

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Ferdinand Larnaude and Albert Geouffre de Lapradelle, *Examen de la responsabilité pénale de l'empereur Guillaume II*, Ministère de la Guerre, Paris, 1918. My thanks to Julien Anglade for translating the French materials in this chapter.

<sup>22</sup> *Ibid.*, p. 17.

were the most appropriate arrangement for dealing with alleged war criminals captured by belligerent parties during hostilities, they were *not* suitable for trying the ex-Kaiser. Even if he had been captured in such circumstances he could not have been considered a prisoner of war, because he had abdicated and had therefore “ceased to be a soldier”.<sup>23</sup> A further problem, they observed, was that while military courts could pass judgment during a war, they could not do so after the suspension or termination of hostilities – in this case, the armistice with Germany.

Given that the ex-Kaiser was now hypothetically no more than a “vulgar malfasant”,<sup>24</sup> could he perhaps be tried by an ordinary criminal court? Here the authors were confronted with a double bind relating to the distinction between the Kaiser and the man. On the one hand, had Wilhelm II *not* abdicated, then, as Kaiser, he would have been protected by sovereign immunity, and would therefore have escaped all responsibility. This was because immunity “still covers the acts of duty [...] over which the courts, traditionally, refuse to exercise jurisdiction”.<sup>25</sup> On the other hand, given that he had indeed abdicated, then as a mere man he could not be pursued in the criminal courts for crimes committed in relation to his official functions. He could therefore be tried only for personal crimes unconnected to those roles.

Despite its limitations, domestic criminal law did offer some guidelines for potential charges. For example, the authors considered charging the ex-Kaiser for complicity in plans to commit crimes of war:

Criminologists might ask themselves if complicity – which [...] must entail *an abuse of power* constituting an incitement to commit a *special act* – can still be applied in regard to the German emperor who, manifestly, was only giving a general order. To which they will no doubt reply that, for complicity, the necessary and sufficient condition is the *relation between cause and effect* between the accomplice and the principal perpetrator, a relation that clearly exists between the order or directives emanating from the German emperor and the charges made against such-and-such officer or soldier within his troops: the leader of a band of brigands is their accomplice as soon as he gives the

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<sup>23</sup> *Ibid.*, p. 5.

<sup>24</sup> *Ibid.*, p. 6.

<sup>25</sup> *Ibid.*, p. 8.

general order to commit theft, murders, set light or pillage, even if he hasn't specifically ordered this or that murder or arson.<sup>26</sup>

They admitted, however, that there were difficulties in bringing complicity charges against groups of people for acts committed in the course of the war. Even if the Entente powers managed to capture both the ex-Kaiser (who had given the general orders) and the military personnel who had carried them out, this might prove to be counterproductive, because “we would only manage, and not without difficulty, to restrict the scope of [Wilhelm II's] personal responsibility by limiting it to a few specific cases, where in fact these cases are countless, and make him appear to be an accessory when in fact he holds a principal role”.<sup>27</sup> Criminal law was thus no more suitable than military law for dealing specifically with the ex-Kaiser's responsibility for orchestrating crimes that were in “singular defiance of the essential laws of humanity, of civilisation, of honour”.<sup>28</sup>

Larnaude and de Lapradelle considered it unthinkable that such crimes should go unpunished,<sup>29</sup> so they turned to the international sphere for a possible solution. It was immediately apparent that the old approaches to crimes of war – which had emerged in response to the old conception of war “as simply a means of political coercion”<sup>30</sup> – were no longer adequate. A new approach was required, involving legal responsibilities, and in the process, the authors declared, “A new international law is born.”<sup>31</sup>

The most urgent task for this new regime was the establishment of an international tribunal to hold the ex-Kaiser to account for his embarking upon a premeditated and unjust war, violating the neutrality of Belgium and Luxembourg, and breaching customary and Hague law.<sup>32</sup> Beginning with his responsibility for launching the war, they wrote:

Given that the violation of the public peace of a state gives

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<sup>26</sup> *Ibid.*, p. 9 (original emphases).

<sup>27</sup> *Ibid.*, p. 10.

<sup>28</sup> *Ibid.*, p. 9.

<sup>29</sup> *Ibid.*, p. 8.

<sup>30</sup> *Ibid.*, p. 12.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, pp. 18-19.

rise to the gravest of penalties, it would not be understandable that an attack on the peace of the world might go unpunished. The corporeal responsibility of the emperor, if one might call it that, presents itself first and foremost, and we must seize upon it – as we emerge from war – lest we should fail to bring about from this new international law its most necessary consequences.<sup>33</sup>

Although Larnaude and de Lapradelle referred on several occasions to the ex-Kaiser's responsibility for embarking on an aggressive and premeditated war, and although they paid lip service to the views of Vattel, Vitoria and Bellini on unjust wars, they did not go into the details of this proposed charge. They clearly felt themselves to be on firmer legal ground when dealing with the ex-Kaiser's liability for the conduct of the war, rather than for starting it – although they were careful to leave the door ajar for a charge of aggression, just in case the issue was raised at a later date.

### 7.3. The Kaiser as an 'Outlaw'

While the British and French governments took their lead from the commissioned reports, those with more independent or critical views also sought to influence official opinion. Among them was the New York-based lawyer, Richard Floyd Clarke (1859–1921), the author of *The Science of Law and Law-making* and an American authority on international law. As well as representing private companies against Venezuelan and Cuban interests, and the US government against Mexico over land claims in Texas, he was one of the earliest contributors to the *American Journal of International Law*.<sup>34</sup> Like many jurists after the First World War, he embraced naturalism (and derided the Analytical School's "exploded theories").<sup>35</sup> In his view, sovereign states summoned nationalism and positivism to march the world into war; now, a community of states guided by higher ideals would advance towards peace.

Clarke took a lively interest in the settlement of the war, and not only advocated trying the ex-Kaiser, but also hanging him. This stance

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<sup>33</sup> *Ibid.*, pp. 16–17.

<sup>34</sup> Richard Floyd Clarke, "A Permanent Tribunal of International Arbitration: Its Necessity and Value", in *American Journal of International Law*, 1921, vol. 1, no. 2, pp. 342–408.

<sup>35</sup> Richard Floyd Clarke, *In the Matter of the Position of William Hohenzollern, Kaiser of Germany: Under International Law*, 1918, p. 13, TNA, FO 371/3227.



was sharply at odds with the official American position – set out by Robert Lansing and Woodrow Wilson at the Paris Peace Conference – that trying a head of state would establish an unwelcome sovereignty-breaching precedent. Undeterred, in November 1918 he wrote a paper entitled “In the Matter of the Position of William Hohenzollern, Kaiser of Germany: Under International Law,” which he sent to each of the major Entente leaders. In this, he made arguments that strikingly prefigured those advanced after the Second World War.

He began by decrying the paucity of international law when it came to dealing with the ex-Kaiser: “That in spite of his many atrocious crimes [...] he must now go free because there is no law according to the principles of our municipal or international law under which jurisdiction can be obtained of his person, or under which he may be convicted, is a conclusion absolutely shocking to the moral sense.”<sup>36</sup> He proposed several solutions to this problem. The first was to invoke customary international law as the basis for a prosecution. While conceding that treaties dealing with conduct of war might have expired, he nonetheless argued that:

If Moses, in accepting the decalogue, had declared that the Jewish nation should not be bound thereby beyond ten years, the expressions of truth contained in that Code would have remained the same without regard to this express limitation. It follows, therefore, that the civilized nations of the world, prior to 1914, had, by common consent at The Hague Tribunal, declared certain moral rules to exist in respect to the conduct of nations in war.<sup>37</sup>

In other words, Clarke was contending that the Hague Conventions generated customary international law. Although subsequently vindicated, his claim was premature: states’ actions deriving from the Conventions signed in 1899 and 1907 did not – because too recent – meet one of the tests of customary law, namely, long-standing practice. (The Nuremberg Tribunal was more cautious about timescale, stating, for example, that “by 1939” the rules laid down by the 1907 Convention “were regarded as being declaratory of the laws and customs of war”.<sup>38</sup>) But Clarke’s assertion of a customary basis for the conventions served a further

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<sup>36</sup> *Ibid.*, pp. 1–2.

<sup>37</sup> *Ibid.*, p. 14.

<sup>38</sup> IMT, vol. 1, 1947–1949, p. 254, see *supra* note 7.

purpose: to get around the fact that the relevant treaties had either expired or lacked sanctions. If customary norms were present, however, then all that was required was “the consent of the majority of nations recognizing them to prescribe a sanction for their violation”.<sup>39</sup> So, after summoning custom from thin air, he proceeded in the same fashion to summon a punishment for its transgression.

Who or what would be punished? Clarke argued that by violating customary international law, Germany had placed itself outside the society of nations, and hence beyond the law itself: “She has placed herself beyond the pale,”<sup>40</sup> he wrote; “She has become an outlaw in the truest sense.”<sup>41</sup> But if Germany was outside the law, then so too, by the same logic, were Germany’s leaders. *Ergo*,

The Kaiser, as the representative of Germany and the author of the acts which have been done by her as a sovereign state, stands in the same relation to the nations of the world as a pirate, and as an outlaw stood under the old law. He is *hostis humani generis*, and has no standing as the representative of a nation or state so far as concerns the rest of the Society of Nations.<sup>42</sup>

If the German leaders were mere pirates, then the question about jurisdiction appeared to be solved: whoever captured them had the right to deal with them as they saw fit. But bringing a head of state or his senior ministers before an international court on unprecedented charges smacked of retroactivity, and Clarke knew it. He addressed this by first claiming that the prohibition on retroactivity was merely “an American stipulation obtaining in American Constitutions” and that “no constitution limits the activities of the Allied Nations in this case”.<sup>43</sup> (In 1944, Hans Kelsen made a similar point about the absence of the legality principle from

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<sup>39</sup> Clarke, 1918, p. 15, see *supra* note 35.

<sup>40</sup> *Ibid.*, p. 24.

<sup>41</sup> *Ibid.*, pp. 15.

<sup>42</sup> These arguments were echoed by 1944 by the American official, William Chanler, who proposed trying the German leaders for starting the Second World War. He argued that they had effectively placed themselves outside international law and thus forfeited the rights and protections afforded those engaged in legitimate wars – they were, he wrote, “on no better footing than a band of guerillas who under established International Law are not entitled to be treated as lawful belligerents”. (Smith, 1982, p. 71, see *supra* note 3).

<sup>43</sup> Clarke, 1918, p. 26, see *supra* note 35.

international law.<sup>44</sup>) Second, he argued that the law forbidding murder in war was already in existence, and that the German perpetrators must have *foreseen* that a penalty might be added to the prohibition. A wrongdoer “took his chances with his eyes wide open” and could hardly complain if a penalty were imposed upon him.<sup>45</sup> (Again, Kelsen made a similar point about foreseeability, this time in 1945.<sup>46</sup>) Be that as it may, the fact remained that the prosecuting powers would still have been transgressing the legality principle by adding not-yet-determined punishment to a pre-existing offence, whether doing so was foreseeable or not.<sup>47</sup>

#### 7.4. The Irresponsibility of Sovereignty

Although originally interested in federalism and constitutional law, Louis Le Fur (1870–1943), a Catholic natural law advocate based at the University of Strasbourg at the end of the war, was also part of the naturalist movement that gained momentum in public international law during the 1920s. He believed that states’ pursuit of sovereign aims was at odds with the world order ordained by God, criticised the formalism of positive law, and contributed to discussions about both dispute settlement and theological issues during the interwar years.<sup>48</sup> In late 1918 he wrote the piece ‘Guerre juste et juste paix’, published in *Revue générale de droit international public* in 1919,<sup>49</sup> which raised the perennial question: Was there no basis in international law for bringing Wilhelm II to justice? To admit the possibility that there was not, he wrote, “would give reason to those that see in international law only a colossal denial of justice, a series

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<sup>44</sup> Kelsen, 1944, p. 87, see *supra* note 8.

<sup>45</sup> Clarke, 1918, p. 26, see *supra* note 35.

<sup>46</sup> Hans Kelsen, “The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals”, in *The Judge Advocate Journal*, 1945, vol. 2, no. 3, p. 10.

<sup>47</sup> When the British prosecutor Hartley Shawcross made similar claims at Nuremberg, the German jurist Hans Ehard complained: “A law which fills a gap is new law; a law which creates a jurisdiction not hitherto existing is also new law”. (“The Nuremberg Trial Against the Major War Criminals and International Law”, in *American Journal of International Law*, 1949, vol. 43, no. 2, p. 241.)

<sup>48</sup> Le Fur’s post-war books include *Des représailles en temps de guerre* (1919), *La théorie du droit naturel depuis le XVIIe siècle et la doctrine modern* (1928) and *Les grands problèmes du droit* (1937).

<sup>49</sup> Louis Le Fur, “Guerre juste et juste paix”, in *Revue générale de droit international public*, 1919, vol. 26, pp. 268–405.

of rules dreamt up by jurists that are incapable of protecting those who trust in it against the injustice and barbarity of sovereigns”.<sup>50</sup>

The problem was that there was no precedent for putting a head of state on trial. There were no rules and no tribunal: “There’s nothing, in other words.”<sup>51</sup> Surely, then, the announcement of a new jurisdiction would violate the principle of non-retroactivity? No, he argued, “the fact that no precedent exists proves nothing; it can simply signify, as is the case here, that during these last centuries no war has witnessed such a multiplicity of crimes, nor provoked such universal indignation”.<sup>52</sup> It was clear where Le Fur was going with this argument: the unprecedented horror of the latest war demanded unprecedented action to prevent the next. (Bohuslav Ečer would make similar claims based on the uniqueness of the Second World War.)<sup>53</sup> Indeed, he stated, it was nothing less than “the vital duty of international society” to protect itself from those who would “tear down the social fundaments”.<sup>54</sup>

But in case this argument was not sufficiently persuasive, he adopted a belt and braces approach by additionally asserting the existence of customary international law as the grounds for punishment:

[F]or centuries, war, even when justly declared, has no longer been an enterprise for brigands in which everything is permitted. There exists – without even mentioning the regulations of the Hague – customary rules of war that impose themselves on all civilised states. Those who violate them [...] place themselves outside of the laws of war and the law of nations in general; their acts become criminal once again and can be pursued as such.<sup>55</sup>

If, as Le Fur claimed, the creation of a new jurisdiction was supported by either an international duty to take action, or by customary international law, then surely there were no further impediments to prosecution? He admitted that in fact there were. The first, he noted, was the view that sovereigns enjoyed immunity – what he describes as “the principle of

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<sup>50</sup> *Ibid.*, p. 367.

<sup>51</sup> *Ibid.*, p. 377.

<sup>52</sup> *Ibid.*

<sup>53</sup> Ečer, 1944, see *supra* note 2.

<sup>54</sup> Le Fur, 1919, p. 377, see *supra* note 49.

<sup>55</sup> *Ibid.*, p. 368.

irresponsibility of public power”.<sup>56</sup> In the domestic context, he argued, sovereign power may have diversified from King to Parliament, but there was still an entity not answerable to anyone, and therefore not subject to *internal* control. At the same time, in the international arena, sovereignty was expressed as independence from – and thus equality with – other states, so the sovereign entity was not subject to *external* control either. This absolute sovereignty was, he claimed, essentially an anarchic state of affairs, because sovereigns, like anarchists, wrote their own rules and refused to accept restraints on their actions. (Small wonder, he added, that some French publicists had compared Wilhelm II to the anarchist Jules Bonnot,<sup>57</sup> who had led *La bande à Bonnot* before dying in a police shoot-out in Paris in 1912.) Nation states, like anarchists, considered freedom to be an absolute; they saw waging war as an expression of their sovereignty – “as anarchists of public law, there is no law, there is only force, be that individual or collective, and triumph over the adversary is proof of that law”.<sup>58</sup>

The outcome was a fundamental absence of responsibility. When it came to adhering the rules of war, a sovereign power, whether King or Parliament, could exercise discretionary power because they were not answerable to a higher authority – “he or they are thereby irresponsible”.<sup>59</sup> At the same time, the subordinates to this sovereign were duty-bound to carry out orders, so they could not be held personally responsible for their actions either.

So it is that [...] even in the case of a blatant crime, nobody is responsible: neither the author of the decision, because he is sovereign, nor the lesser agents, because responsibility and the power of decision are not in their hands and it would be unjust to take against the simple executors of orders that emanate from a superior authority.<sup>60</sup>

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<sup>56</sup> *Ibid.*, p. 369.

<sup>57</sup> *Ibid.*, p. 373.

<sup>58</sup> *Ibid.*, p. 374.

<sup>59</sup> *Ibid.*, p. 370.

<sup>60</sup> *Ibid.* In 1945 Robert Jackson argued the same: “With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility.” Jackson, 1949, p. 47, see *supra* note 1. This repetition of *Le Fur*’s

So how might this cycle of irresponsibility be broken? After all, he wrote: “Positive law is not designed to go against justice, to assure the triumph of evil, but, quite the opposite, to satisfy social needs, first and foremost of which is the maintenance of public order.”<sup>61</sup> These needs could be met by focusing on the perpetrators’ knowledge about the criminality of their actions, even if the crimes had not yet been codified in international law. He argued that it must have been plain to everyone that acts committed in the inception and during the course of the war were crimes. Even the perpetrators, despite their lack of moral scruples, were perfectly well aware of their illegality. So, if there was no doubt in anyone’s minds about the criminality of the action, there was also no doubt about the right to punish the perpetrators.<sup>62</sup> (The Nuremberg Tribunal drew a similar conclusion, stating that the defendants *must have known* that they were doing wrong.<sup>63</sup>) Drawing together the threads of the argument, Le Fur concluded:

[T]he Emperor, the chancellor, the army chiefs and the commanders on the ground, are all authors of criminal orders – orders, certainly, that they issue knowing full well that they are covered by their sovereign, but that they have nevertheless taken on their own authority, while exercising the power invested in them, such that their personal responsibility is not in doubt. For all of them, there exists no legal impediment to their being punished for their crimes; for all of them, any criminal pursuit now depends solely on the capacity to bring them to justice. Now the Allies are victorious and such issues are accounted for in the treaty; there is nothing, in this regard, to oppose the pursuit of justice.<sup>64</sup>

### 7.5. Crimes, Moral and Legal

The final commentator considered here is James Headlam-Morley (1863–1929), the English classicist and historian on Germany who joined the

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point and the reference to “official irresponsibility” suggests that Jackson may have borrowed from Le Fur without attribution.

<sup>61</sup> *Ibid.*, p. 375.

<sup>62</sup> *Ibid.*, p. 374.

<sup>63</sup> IMT, vol. 1, 1947–1949, p. 219, see *supra* note 7.

<sup>64</sup> Le Fur, 1919, p. 376, see *supra* note 49.

Foreign Office's Political Intelligence Department during the First World War, and advocated internationalised approaches to the Saar, Danzig and minorities questions at the Paris Peace Conference.<sup>65</sup> While a strong believer in the League of Nations, he was more sceptical about the prospects of successfully trying the ex-Kaiser. Unlike the aforementioned lawyers, who sometimes attempted to downplay the perils of a prosecution, Headlam-Morley, while not a lawyer, was sensitive to the pitfalls, and warned against mounting a potentially unsuccessful case. In particular, he recognised the difficulties of ascribing sole blame to Germany for starting the war – one of his books, *The History of Twelve Days*, published in 1915, had probed the origins of the conflict – and while accepting charges on the basis of war crimes, he opposed charges on grounds of aggression.

He raised these issues in an official memorandum dated 12 December 1918, written at the height of a general election campaign during which Lloyd George promised to prosecute Wilhelm II for starting the war.<sup>66</sup> (Two days later, the electorate returned Lloyd George's government by a landslide.) Headlam-Morley was under no illusion that this charge was anything other than a leap into the unknown. He noted that prior to the war, international relations were conducted on the premise that in certain circumstances wars were “the legal and natural method” for settling disputes.<sup>67</sup> At the same time, he added, there was a growing sentiment that war should be avoided – especially wars in which states attempted to coerce other states. When this happened, the statesmen responsible for initiating these assaults were regarded “morally as criminal” – but no more than that, because a “moral crime is [...] quite different from a legal crime”.<sup>68</sup>

What prospect, then, was there of bringing criminal charges against the ex-Kaiser on grounds of aggression? The proposal was “something absolutely new” because there was no precedent for such charges, and no

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<sup>65</sup> His books, written under the name James Wycliffe Headlam, included *The German Chancellor and the Outbreak of War* (1917), *Bismarck and the Foundation of the German Empire* (1926) and *Studies in Diplomatic History* (1930).

<sup>66</sup> See for example, “Coalition Policy Defined, Mr. Lloyd George's Pledges”, in *The Times*, 6 December 1918, p. 9.

<sup>67</sup> “Memorandum by Mr. Headlam-Morley”, 12 December 1918, p. 1, TNA, FO 371/3227.

<sup>68</sup> *Ibid.*, p. 2.

court with jurisdiction over them.<sup>69</sup> This, he thought, was an important – though not an insurmountable – impediment, because the creation of a jurisdiction might be justified as precedent on which future law could be founded<sup>70</sup> (an argument revived by Robert Jackson in 1945).<sup>71</sup>

A far greater stumbling block, in his view, was the weakness of the case against the ex-Kaiser. He argued that if the prosecuting powers charged the ex-Kaiser for mere recklessness, incompetence or folly in foreign affairs, then an injustice might be perpetrated against him. “[I]t has often been said that the punishment for the Emperor is only just, for kings should no more be regarded as immune than lesser men,” he explained.<sup>72</sup> But “if he were to be punished merely for folly and recklessness, then far from enjoying immunity denied to other men, he would himself be subjected to a responsibility from which statesmen and politicians are free”.<sup>73</sup> For this reason, he stated that it was not enough for the prosecution to prove only that Wilhelm II was reckless or foolish; it also had to prove that he had *intended* to start the general war in Europe<sup>74</sup> (as distinct from merely supporting a localised war between Austria and Serbia). The question was: Could it be established that he deliberately brought about the general war, and in doing so, betrayed both his own country and the other European states? Based on the evidence, Headlam-Morley thought this was “extremely doubtful”.<sup>75</sup> The Germans, he wrote a few months later, “knew that they were taking the risk of a European war, but this is a very different thing from deliberately intending it”.<sup>76</sup>

## 7.6. Conclusion

Moving forward to 1945, the factual case against the Nazi leaders appeared more clear-cut. Yet the legal questions stubbornly refused to go away. In the event, the architects of the Nuremberg Tribunal sought

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<sup>69</sup> *Ibid.*, p. 1.

<sup>70</sup> *Ibid.*, p. 3.

<sup>71</sup> Jackson, 1949, pp. 51–52, see *supra* note 1.

<sup>72</sup> “Memorandum”, p. 1, see *supra* note 67.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, pp. 3–4.

<sup>75</sup> *Ibid.*

<sup>76</sup> James Headlam-Morley, “Note on the Report of the Sub-commission”, 19 March 1919, p. 2, TNA, FO 608/246/1.



solutions in the discussions of their predecessors in 1918, and ended up relying heavily on their ideas. Yet they consistently failed to acknowledge this debt, which is one reason why their ideas were erroneously assumed to be new.

This was not a matter of forgetfulness. Rather, they had a strong incentive *not* to publicise the earlier debates. The Americans (the greatest advocates of trying the Nazi leaders) had previously been the greatest critics of proposals to try the ex-Kaiser for newly minted crimes. At the same time, the British and French (the greatest advocates of trying the ex-Kaiser) were now the most opposed to charging the Nazi leaders for these same crimes. Small wonder then that no official was particularly interested in referring back to earlier positions, thus drawing attention to their own nation's policy reversals.<sup>77</sup> This expediency, coupled with the monumental historical impact of the tribunal at Nuremberg, in which national leaders actually *were* put on trial, has helped consign to relative obscurity the groundbreaking ideas of an earlier era in which influential voices called for the very same thing.

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<sup>77</sup> At the 1945 London Conference, for example, there was just one exchange about the change of American policy, prompted by the French delegate, André Gros (who, incidentally, made no reference to his own nation's about-turn). *Report of Robert Jackson*, 1949, p. 297, see *supra* note 1.