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The First World War, Wilhelm II and Article 227: The Origin of the Idea of ‘Aggression’ in International Criminal Law

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1.1 Introduction

At the end of the First World War, just after the Armistice with Germany on 11 November 1918, and shortly before the British general election the following month, David Lloyd George, campaigning on behalf of his coalition government, declared:

The Kaiser must be prosecuted. The war was a crime. Who doubts that? It was a frightful, a terrible crime. It was a crime in the way in which it was planned, in the deliberate wantonness with which it was provoked. It was also a crime in its action . . . Surely the war was a crime!¹

Electioneering rhetoric aside, this was a radical departure from the traditional approach to war, containing within it two innovative ideas: that embarking upon an aggressive war was a crime, and that a head of state could be held personally responsible for it. This would soon become an important theme in discussions between the entente nations about the viability of trying Wilhelm II for war-related crimes.

At the preliminary Paris Peace Conference convened in January 1919, the victorious powers set up a Commission to investigate the central powers’ responsibility for and conduct during the First World War. This body dismissed the idea of charging the ex-kaiser with initiating the war. But a few months later, the Council of Four bypassed the Commission’s recommendations and readmitted the idea of arraigining him for aggression under article 227 of the Versailles Treaty. It was only after the coming into force of this treaty in January 1920, and the Netherlands’ subsequent refusal to hand him over, that the powers finally abandoned this nascent experiment in international criminal law.

So Lloyd George’s plans for the ex-kaiser came to nothing. But the jurists involved in the Paris Peace Conference asked many questions that would

¹ ‘Coalition Policy Defined, Mr Lloyd George’s Pledges’, *The Times* (6 December 1918), 9.

foreshadow future discussions: should punishment of leaders for international crimes take a legal or a political form; could a head of state claim sovereign immunity from prosecution; might aggression charges be framed to exclude the causes of a conflict; should a leader be charged with conspiring with others to embark on aggressive war; and would a trial for embarking on war raise the problem of retroactivity? When, after the Second World War, the Allied negotiators were contemplating trying the Axis leaders for ‘crimes against peace’, they asked these very same questions. Now, nearly a century later, with the idea of charging leaders for the ‘crime of aggression’ on the International Criminal Court’s agenda, the issues raised at the Paris Peace Conference continue to resonate.

1.2 The Purposes of a Trial

Trying the ex-kaiser was an Anglo-French idea. After the two powers sounded each other out on the issue in November 1918, Lloyd George formally placed it on the entente’s agenda when he met with Georges Clemenceau, Vittorio Orlando and their respective ministers in London on 2 December. The British and the French (joined rather more reluctantly by the Italians)² there decided that Wilhelm II 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.³ 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.⁴

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. The first was a British report, produced by a ‘Special Sub-committee on

² V. E. Orlando, ‘On the Aborted Decision to Bring the German Emperor to Trial’, *Journal of International Criminal Justice*, 5 (2007), 1015–28, at 1023.

³ Foreign Office to Washington and New York, 2 December 1918: FO 608/247, National Archives, Kew, UK (TNA).

⁴ Ibid.

Law' answerable to Attorney General F. E. Smith, and led by the jurists Sir John Macdonell and Adjutant General John Morgan.⁵ The sub-committee members, who concluded their work on 28 November, were aware that the British Imperial War Cabinet had pre-empted their own discussion by debating the desirability of a prosecution, and that Lloyd George strongly favoured a trial.⁶ Hemmed in by these political constraints, their report occupied the middle ground, and, on the one hand, endorsing the idea of trying Wilhelm II for war crimes, and, on the other, raising doubts about Lloyd George's most subversive proposal – prosecuting him for embarking on war.

Their arguments in favour of trying him rested on two negative bases. First, if he were not tried for the violation of the principles of international law, these principles would never be wholly vindicated.⁷ And, second, if he were not tried, the case against subordinates who had obeyed his orders would be weakened.⁸ Perhaps aiming to spread the responsibility for creating a new jurisdiction, the sub-committee members rejected domestic jurisdiction in favour of an international tribunal, which, they argued, would be free from national bias, produce authoritative decisions and fortify international law.⁹

Some members nevertheless expressed strong reservations about trying Wilhelm II for starting an aggressive war – reservations that were carefully spelt out in the report.¹⁰ One difficulty, they argued, was that compelling him to account for Germany's actions might raise unwanted issues about the conduct of the entente powers as well, and thus distract attention away from the other charges against him. Mindful of the arms race, 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 . . .¹¹

Another difficulty was the possibility that when in power, Wilhelm II, while acting reprehensibly, might also have been acting constitutionally. His conduct, some members argued, 'might be 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'.¹² Others pointed out that his conduct might be simultaneously constitutional *and* a violation of international law.¹³ The sub-committee members divided over whether to advise the Attorney General to charge him for aggressive

⁵ '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: CAB 24/85, TNA.

⁶ See, for example, Imperial War Cabinet 37, 20 November 1918: CAB 23/43, TNA.

⁷ 'Report of Special Sub-committee on Law', *supra* note 5, at 95. ⁸ *Ibid.* ⁹ *Ibid.*, at 96.

¹⁰ *Ibid.*, at 97. ¹¹ *Ibid.* ¹² *Ibid.* ¹³ *Ibid.*

war, and, after taking a vote, they decided by the narrowest margin – four to three – in favour of doing so.¹⁴

1.3 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 Ferdinand Larnaude and Albert de Lapradelle, and published by the French Ministry of War in November 1918.¹⁵ This paper so impressed Georges Clemenceau that he insisted on it being distributed to all the delegates that congregated a month later at the preliminary Peace Conference.

Larnaude and de Lapradelle harboured no doubts that Wilhelm II was criminally responsible for crimes committed during the war, and considered it unthinkable that these should go unpunished.¹⁶ Turning to international law, they argued that the old methods for dealing with such crimes – which had emerged in response to the old conception of war ‘as simply a means of political coercion’¹⁷ – were no longer adequate. A new approach was required, which would include older political sanctions as well as newer legal strictures.¹⁸ In the process, the authors declared, ‘A new international law is born.’¹⁹

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.²⁰ Beginning with his responsibility for launching the war, the authors wrote that:

Given that the violation of the public peace of a state gives 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.²¹

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

¹⁴ Ibid.

¹⁵ F. Larnaude and A. de Lapradelle, *Examen de la responsabilité pénale de l'Empereur Guillaume II* (Paris: Ministère de la Guerre, November 1918), at 6 (available at: data.decalog.net/enap1/liens/fonds/F8G90.pdf). My thanks to Julien Anglade for translating the report.

¹⁶ Ibid., at 8. ¹⁷ Ibid., at 12. ¹⁸ Ibid. ¹⁹ Ibid. ²⁰ Ibid., at 18–19. ²¹ Ibid., at 16–17.

were careful to leave the door ajar for a charge of aggression, in case the issue was raised at a later date.

1.4 British Retreat on Aggression

The entente powers gathered at the preliminary Paris Peace Conference in January 1919, and one of their first acts was to establish the ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties’, chaired by the American Secretary of State, Robert Lansing. The Commission’s deliberations soon revealed sharp differences of opinion over whether to try the ex-kaiser in an international court. The European delegates, most of whom represented nations that had suffered heavy casualties and widespread damage, insisted upon his prosecution. His trial, they believed, would satisfy outraged public opinion, send a message to future aggressors, and provide the framework for a new international legal regime. The American delegates, by contrast, spoke for a nation that had emerged from the war relatively unscathed, and was politically divided over the question of its future role in global affairs. A trial, they thought, might stoke the fires of revolution in Germany – necessitating further engagement in European conflicts – and would, by holding a former head of state to account, establish legal precedents detrimental to their own sovereignty.

Once again, the British played a pivotal role in the discussion, this time led by the Solicitor General Sir Ernest Pollock. With the election wrapped up, senior government ministers calculated that they could retreat from Lloyd George’s popular but legally questionable promises to try the ex-kaiser for starting the war. This is exactly what Pollock did, piloting the other delegates away from the idea. At the same time, though, he refused to abandon the equally innovative idea of holding the ex-kaiser personally responsible for crimes committed in the course of the war. It was this dual strategy that Pollock pursued in two of the three sub-committees set up to report to the Commission.

In the second sub-committee, which was entrusted with making recommendations on ‘the responsibility of the authors of the war’, Pollock strongly advised against charging the ex-kaiser for initiating the hostilities. It was one thing to condemn him morally, but quite another ‘to bring any such criminal responsibility against the authors of the war before an actual court’.²² In his view, the Allies could build a far stronger case, and achieve the same salutary effect, by trying Wilhelm II solely for breaches of the laws and customs of war. He told his fellow delegates: ‘If we can prove the Kaiser guilty, as we can, for the crimes he has committed in Belgium, and on the sea, and elsewhere, then I am not prepared to spend much time

²² ‘Proceedings of a Meeting of “Sub-committee No. 2”’, 17 February 1919, 2: FO 608/246/1, TNA.

over . . . what I might call “political responsibilities”, because we can catch him absolutely on his brutality.²³ Pollock returned to this theme repeatedly, stressing that public opinion attached most importance to the ex-kaiser’s trial for atrocities,²⁴ that the entente powers had an overwhelming case against him on breaches of the laws of war,²⁵ and that they should not let him evade his crimes by mounting a trial on political issues.²⁶ The last thing the prosecuting powers needed, he believed, was a drawn-out political trial ‘lasting some eighteen months’.²⁷

Still on the theme of aggression, Pollock – doubtless mindful of the doubts raised by the earlier British ‘Special Sub-committee on Law’ – warned that any case conducted on this basis would entail investigation into the causes of the war. The difficulty, he explained, was that:

Any enquiry into the Authorship of the War must, to be exhaustive, extend over events that have happened during many years in different European countries, and must raise many difficult and complex problems which might be more fitly investigated by historians and statesmen than by a Tribunal appropriate to the trial of offenders against the laws and customs of war.²⁸

Pollock did not feel the need to spell out the dangers of recapitulating in a courtroom the events leading up to 1914. He knew perfectly well that his European colleagues had no wish to revisit the pre-war intrigues that would invariably tarnish their own nations’ foreign policies as well as those of Germany. At the same time, the Americans had no intention of defending their allies’ actions in plain sight of isolationist opponents back home who wished to renounce further involvement in European affairs.

While these debates were taking place, the British took what actions they could to suppress any ill-advised official statements about Germany’s responsibility for the war, lest these come back to haunt them during legal proceedings. Alarm bells rang, for example, over a French delegation paper, submitted to another sub-committee, which purported to show that Germany had provoked the war. James Headlam-Morley, the Assistant Director of the Foreign Office’s Political Intelligence Department (then attached to the British delegation in Paris), accused the French of presenting a tendentious reading of history. Where the report presented quotations from the kaiser in 1913 showing that he considered the war against France to be a certainty,²⁹ Headlam-Morley responded: ‘These quotations . . . show nothing more than that the German Emperor believed that war was inevitable; they do not show that he believed it to be desirable. It would, I think, be easy enough to find numerous statements to the same effect from men

²³ *Ibid.*, at 11. ²⁴ *Ibid.*, at 4. ²⁵ *Ibid.*, at 2.

²⁶ ‘Proceedings of a Meeting of “Sub-committee No. 2”’, 20 February 1919, 14: FO 608/246/1, TNA.

²⁷ *Ibid.* ²⁸ ‘Proceedings of a Meeting of “Sub-committee No. 2”’, *supra* note 22, at 12.

²⁹ ‘Annex A’, attached to ‘Report of Sub-commission 1’, c. 3 March 1919, 1: FO 608/246/1, TNA.

in a leading position among the Allies.³⁰ He also objected to the French manipulation of a report by Count Hugo von Lerchenfeld, which was designed to show that the Germans were contemplating a general conflict, whereas von Lerchenfeld had obviously envisaged a limited war between Austria and Serbia.³¹ Finally, Headlam-Morley thought there was nothing in the French paper that challenged the German argument that they hoped to localise the conflict between Austria and Serbia, while at the same time removing Serbian threats to the Hapsburgs. The Germans, he wrote, ‘knew that they were taking the risk of a European war, but this is a very different thing from deliberately intending it’.³²

1.5 Responsibility for Treaty Breaches

Once Pollock felt that he had successfully quashed the idea of charging the ex-kaiser for starting the war, he then also challenged the idea of trying him for violating treaties – conduct that was unlawful but did not incur criminal sanctions. Here he drew a distinction between the liability of states and that of individuals, arguing in accordance with international practice that punishment should be visited on states alone.³³ He further noted that because so many senior figures in Germany had been involved in the decision to violate the neutrality of Belgium and Luxembourg, there was ‘not a little difficulty in establishing penal responsibility upon the Sovereign head of the State for conduct which was in its essence national, and a matter of State policy, rather than one of individual will’.³⁴ He therefore proposed that no criminal charges should be laid against the ex-kaiser or his associates for breach of treaties, but, rather, that the Commission should request that the Peace Conference – a political rather than legal body – condemn ‘this gross outrage upon international good faith’.³⁵

The French delegate, Ferdinand Larnaude, concurred with Pollock’s approach to the initiation of the war (in the report earlier co-authored with Albert de Lapradelle, he had not delved into the practicalities, and in the sub-committee he thought it would be ‘a lengthy and difficult task’ to ascribe responsibility to the ex-kaiser).³⁶ But he parted company with Pollock over individual – as distinct from state – responsibility for the breach of treaties, which fell within the remit of the laws of war. Foreshadowing the debates that took place before the Nuremberg trial, he cast around for a suitable legal mechanism for catching national leaders – for it was they, after all, who were ultimately responsible for foreign policy. ‘We have the greatest interest in getting at the Kaiser,’ he said, ‘and those that helped and abetted him . . . all members

³⁰ J. Headlam-Morley, ‘Note on the Report of the Sub-commission’, 19 March 1919, 1: FO 608/246/1, TNA.

³¹ *Ibid.*, at 1–2. ³² *Ibid.*, at 2.

³³ ‘Proceedings of a Meeting of “Sub-committee No. 2”’, *supra* note 26, at 3. ³⁴ *Ibid.*, at 4. ³⁵ *Ibid.*

³⁶ ‘Proceedings of a Meeting of “Sub-committee No. 2”’, *supra* note 22, at 3.

of the General Staff, and the Crown Prince – they take responsibility with him. We must come back to the idea of personal responsibility.³⁷

To Larnaude's likely chagrin, it was the Belgian jurist, Edouard Rolin-Jacquemyns, who disagreed most vehemently with this approach. Although the Belgians were perfectly prepared to play their part as the symbolic victims of German aggression, they were not at all willing to admit the principle that sovereigns should be held personally responsible for international crimes. The late Leopold II, Belgium's previous monarch, had himself been the subject of international condemnation for his exploitation of the Congo Free State, involving the deaths of up to half of the Congolese population. And his successor, Albert I, who was present at the Paris Peace Conference, distinguished himself there by, among other things, exhorting fellow delegates to shore up the Hapsburg Empire and prevent the toppling of royals in south and central Europe.

In the sub-committee, Rolin-Jacquemyns advanced a distinctly conservative line. He rejected the idea of holding the ex-kaiser to account for initiating the war, arguing that legally, Wilhelm II as emperor may have been endowed with the right to declare war – 'even an unjust war'.³⁸ He also questioned the idea of holding him responsible for breaching neutrality treaties, saying that senior Belgian jurists were of the view that it was 'impossible to establish a penal sanction for violations of the laws of war'.³⁹ Further, he thought that attempting to hold him to account would have the effect of diminishing the guilt of his associates and the German people, and was anyway beyond the writ of positive law because the ultimate determination 'lies with higher authorities than those we can find here below'.⁴⁰

Whatever the differences between Larnaude and Rolin-Jacquemyns over the ex-kaiser's personal liability, the delegates agreed that he should not be held criminally responsible for initiating the war. So, in flat contradiction to David Lloyd George's proposals, Pollock stated on behalf of the sub-committee that: 'We therefore do not advise that the acts which provoked the war and its initiation should be charged against their authors and made the subject of proceedings before a tribunal.'⁴¹ On the more contested idea of holding the ex-kaiser accountable for the violation of the neutrality of Belgium and Luxembourg, they finally concurred that:

We are . . . of the opinion that no criminal charge should be made against the responsible persons, or individuals (and notably the ex-Kaiser) on this head of the breaches of the . . . Treaties; but we are of opinion that the breaches of the above Treaties should be reported to the Peace Conference as involving grave responsibility against the ex-Kaiser and his advisers, and that the Conference should be asked to express its condemnation of this gross outrage upon international law and international good faith.⁴²

³⁷ 'Proceedings of a Meeting of "Sub-committee No. 2"', *supra* note 26, at 13.

³⁸ 'Proceedings of a Meeting of "Sub-committee No. 2"', *supra* note 22, at 20–21. ³⁹ *Ibid.*, at 21.

⁴⁰ *Ibid.* ⁴¹ Report to the Commission by Sub-commission 2, 6 March 1919: CAB 29/9, TNA. ⁴² *Ibid.*

1.6 Discord over an International Trial

The most serious differences of opinion between the Commission's delegates were aired in the third sub-committee, which had been given the task of making recommendations about 'responsibility for the violations of the laws and customs of wars'. It was here that Pollock and other European delegates proposed establishing an international tribunal to try a one-time head of state. And it was here that they encountered an implacable opponent, American Secretary of State Robert Lansing, who had no wish to prosecute the ex-kaiser on any basis. Neither side was prepared to give way, and as the other American delegate, James Brown Scott, recalled: 'Feeling ran about as high as feeling can run . . . [They] ran so high that relations were somewhat suspended.'⁴³

As soon as the Commission was constituted, the British began probing their fellow delegates for their views about the prosecution of the ex-kaiser for breaches of the laws of war. They sensed early on that the Americans were not enthusiastic. In mid-February 1919, for example, Pollock informed Ian Malcolm, Balfour's private secretary, that while the French, Belgians and British all wanted to establish a court, 'the Americans seemed less anxious to do so, fearing that the trial might be succeeded by Capital Punishment which they thought would make a national martyr of William II and prepare for the Restoration of his dynasty in the same way that Macaul[a]y suggested the execution of Charles I led to the Restoration in England'.⁴⁴ But the British would soon discover that the Americans' opposition was somewhat stiffer than this initial report suggested.

The opening skirmishes took place on 21 February, when Lansing, chairing the third sub-committee, made his first attempt to derail dialogue about trying the ex-kaiser. He did this by claiming that the sub-committee lacked the mandate to discuss the constitution of a tribunal, and implying that there was anyway no case to answer on breaches of treaties because there was 'no absolute law as to the laws and customs of war'.⁴⁵ Expanding on this latter theme, Lansing explained:

When war was declared the Hague Conventions were swept aside, there having been non-signatory belligerents . . . The view of his [Lansing's] government was that there was no general treaty binding on all belligerents as to the conduct of the war. That view might be opened at debate, but in any case the Hague Convention remained as a guide something in the same way as the Declaration of London was a guide.⁴⁶

⁴³ J. B. Scott, 'The Trial of the Kaiser' (appendix), in E. M. House and C. Seymour (eds.), *What Really Happened at Paris: The Story of the Peace Conference, 1918–1919* (London: Hodder & Stoughton, 1921), 475–81, at 480.

⁴⁴ I. Malcolm, 'Note on Punishment for War Offences', 18 February 1919: MS. Eng. Hist. c. 943, Hanworth Papers, Bodleian Library.

⁴⁵ 'Notes of a Meeting of Sub-commission No. 3', 21 February 1919, 4: FO 608/246/1, TNA.

⁴⁶ *Ibid.*, at 4–5.

Even Rolin-Jacquemyns protested that this was going too far – it was one thing to say that the laws of war lacked criminal sanctions, but quite another to claim that they had been ‘swept aside’. These laws, he said, ‘had a unique value as containing a statement of the rules theretofore existing and bound everybody as being rules recognised by most civilised countries’.⁴⁷ But whatever the status of the Hague Conventions, Lansing had made his obstructive intent clear to the other delegates from the beginning.

Four days later, the British and French delegates, aiming to claim back the initiative, made their stand over the trial of the ex-kaiser for breaching the laws of war. Pollock stated that the establishment of a tribunal was extremely important from the British point of view because the whole country was demanding that Wilhelm II be tried: ‘When I was in London last week, this point of view was impressed upon me by those in authority, and the demand that we shall set up a tribunal to try the Kaiser is insistent, and urgent, and I can’t possibly neglect it.’⁴⁸ Larnaude backed him up, stating that ‘what Sir Ernest Pollock says for British opinion is also true of French public opinion’.⁴⁹ He continued: ‘We have reached a point at which the principles of international law should be vindicated, and receive a solemn consecration, through the intervention of criminal jurisdiction.’⁵⁰ It was, he said, absolutely essential that a tribunal be established which – unlike ordinary military courts – would be capable of summoning the leading figures,⁵¹ and which would ‘leave . . . its indelible mark in the history of this war’.⁵² (Larnaude, it appears, had been making these points with particular emphasis, because he apologised for raising his voice.⁵³)

Would the Americans be swayed by these arguments? The day after this meeting, Pollock wrote to Arthur Balfour to raise his concerns. He reported that there was strong feeling among the European delegates that the ex-kaiser ‘must himself be charged with the outrages which, if he did not instigate, he certainly condoned and failed to control’⁵⁴ – a comment indicating that they were already contemplating both positive liability (instigation) and negative liability (failure to control) for war crimes. ‘This view’, Pollock continued, ‘is shared very strongly by France, Serbia, Belgium, Romania, and indeed I think I may say by all countries, *except the United States of America*.’⁵⁵ Therein lay the problem, for Lansing, although outnumbered, was not prepared to compromise. ‘The view of the United States of America’, Pollock wrote, ‘seems to be . . . that while they are ready to assist to bring to trial, before national tribunals, persons of authority, however highly placed,

⁴⁷ Ibid., at 5.

⁴⁸ ‘Proceedings of a Meeting of Sub-commission No. 3’, 25 February 1919, 3: FO 608/246/1, TNA.

⁴⁹ Ibid., at 4. ⁵⁰ Ibid., at 5. ⁵¹ Ibid., at 4. ⁵² Ibid., at 5. ⁵³ Ibid.

⁵⁴ F. Pollock to A. Balfour, 26 February 1919: MS. Eng. Hist. c. 943, Hanworth Papers, Bodleian Library.

⁵⁵ Ibid. (emphasis added).

against whom definite charges can be made for breaches of the laws of war, they foresee too great difficulty in bringing to trial the sovereign of a state for outrages which were carried into execution by those beneath him; and they are therefore not anxious to take the trouble to set up an international court at all, as they are not interested in the most important case which would be brought before it, namely: the prosecution of the ex-Kaiser.’⁵⁶

1.7 The Problem of Sovereign Immunity

This issue came to a head on 4 March, when Lansing made it absolutely clear that he wanted no part in trying the ex-kaiser before an international tribunal. The United States, which until recently had been a neutral nation, would, he said, ‘be under great embarrassment to sit upon a tribunal which considers offences committed before it entered the war’.⁵⁷ He continued:

The people of the world demand that in some form the judgment of the world shall be registered, but at the same time we are all nations which have a very high reverence and veneration for the law, and for submission to the rules of law. If there is no instrument of justice by which we can operate, we may be helpless.⁵⁸

Uproar ensued, and Pollock took the floor. ‘I am very much obliged to Mr President for having so clearly and having so fairly stated the position of the United States, and I appreciate the difficulty in which he finds himself,’ he said, ‘but speaking here for the British Empire, I am afraid the difference between us is so great that we should be unable to find a basis of agreement.’⁵⁹ In his view, ‘nothing but an international tribunal of commanding power, force, and weight would have the moral position before the world to execute the justice which the entire world demands’.⁶⁰ Recalling the Americans’ statements after the sinking of the *Lusitania*, he added: ‘I say it regretfully, and I say it forcibly, that we shall regret the departure of the United States . . . from helping us carry out those principles which she, the United States, enunciated before she came into the war.’⁶¹

Larnaude immediately joined Pollock in proclaiming his disapproval of Lansing’s position. ‘I cannot really believe that the United States . . . will abandon us when the question will come whether it is time that the idea shall prevail – the idea which the United States has proclaimed as loud, if not louder than other nations – that idea that it is law and right that governs the world.’⁶² He said that as a professor of law, he simply could not accept the idea that violations of the laws of war should go unpunished. ‘What is the good . . . saying that right is the master of the world if you come out scot-free, as it were, after such crimes, because no

⁵⁶ Ibid. ⁵⁷ ‘Proceedings of a Meeting of Sub-commission No. 3’, 4 March 1919, 3: FO 608/246/1, TNA.

⁵⁸ Ibid., at 4. ⁵⁹ Ibid. ⁶⁰ Ibid., at 5. ⁶¹ Ibid. ⁶² Ibid.

technical law exists?’⁶³ He acknowledged that they would certainly encounter technical problems when founding an international court, but even so, such a court would be far superior to a national court because there would be ‘a hundredfold more guaranties for the persons deferred to it, because this tribunal in the first instance would assume the greatest responsibility as to its decisions that was ever known, and thus it would include the most qualified representatives, the highest magistrates countries would have to send’.⁶⁴

While the British and French were rallying support for a tribunal, the Greek delegate, Nicolas Politis, took issue with Lansing’s reasoning that the United States, as a neutral when certain acts were carried out, could not partake in the trial of a belligerent. Politis drew out the implications of this position. ‘The idea is wrong from a juridical point of view,’ he said, because it represented a reversion to ‘the old idea of the right of revenge given to the victims, and competence to the law to which the victim belonged’.⁶⁵ He continued:

If we accept that only those are qualified to judge who have been victims to the war, then we are going back . . . to the right of vengeance. Can we, when we have given such a solemn sanction to the matter of an international justice, can we come before the world with such an antiquated system? No. Our idea is not to defer the criminal to a tribunal composed of the victims, but to institute it on a broad basis.⁶⁶

Politis’ criticism hit the mark. The Americans did not attempt to advance this argument again.

Further rows flared up at one of the final meetings of the sub-committee. Pollock had submitted his draft recommendations to the Commission and, while listing the counts against the Germans, had included a proposed charge against ‘all authorities, civil or military, however high their position may have been, without distinction of rank, including the heads of States, who ordered, or abstained from preventing, putting an end to, or repressing, barbarities or acts of violence’.⁶⁷ Lansing objected to this direct reference to Heads of State, which he described as ‘superfluous’.⁶⁸ He was worried that the court might be endowed with the jurisdictional reach to catch other heads of state, and he complained that: ‘Under this article, the President of the United States, or the King of England might be tried for having failed to prevent certain of their soldiers from performing barbarous or atrocious acts. Now, I am not prepared to place the President of the United States in a position like that; but that is the way it reads, and I think it is a pretty serious position.’⁶⁹

These comments irked Pollock, who dismissed the idea that the reference to heads of state was superfluous; he said it had had been inserted deliberately to make

⁶³ *Ibid.*, at 7. ⁶⁴ *Ibid.*, at 9. ⁶⁵ *Ibid.*, at 14. ⁶⁶ *Ibid.*

⁶⁷ ‘Proceedings of a Meeting of Sub-commission No. 3’, 8 March 1919, 3: FO 608/246/1, TNA. ⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

his meaning clear.⁷⁰ The real problem was not a surfeit of words, but a fundamental disagreement over the personal liability of heads of state for the conduct of the war just concluded. Pollock was not afraid to spell this out: 'I mean on behalf of the British Empire to include the possibility of a charge against the sovereigns of States, and I think the view of the United States . . . is not to include a charge against the sovereigns of States, and therefore, there is a marked divergence between us.'⁷¹ At the same time, he deflected Lansing's argument that the principle might extend to an American head of state, saying that if the President of the United States had been 'responsible for the acts which we attribute to Wilhelm II', or for that matter, if the King of England had been 'responsible for what has happened in the course of the war', then they too would deserve condemnation.⁷² But he made it clear that the tribunal he envisaged was a purely *ad hoc* court, dealing solely with German conduct during the First World War, and would not have the broad jurisdictional reach and precedent-setting agenda so feared by Lansing.

1.8 The Majority and the Dissenters

The opposing points of view were expressed in the Commission's recommendations to the Council of Four, produced on 29 March 1919. This comprised a majority report, setting out the views of the European entente nations, and two annexed reservations, giving the dissenting views of the United States and Japan.

The majority report did not propose charging the ex-kaiser personally for initiating the war. Instead, it retained the idea of state responsibility for the conflict by laying blame 'wholly upon the [Central] Powers which declared war in pursuance of a policy of aggression, the concealment of which gives to the origin of this war the character of a dark conspiracy against the peace of Europe'.⁷³ At this stage, then, the 'conspiracy' to embark upon aggressive war – later the subject of charges at Nuremberg and Tokyo – was seen as being between states, not between individuals. Nevertheless, the majority report did assert, contrary to the principle of sovereign immunity, that there was no reason why a person's official rank 'should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal', and that this applied 'even to the case of Heads of States'.⁷⁴ The majority therefore declared that the ex-kaiser and his associates *could* be charged for violations of the laws and customs of war and 'the laws of humanity',⁷⁵ and they proposed the formation of a 'High Tribunal' to consider these.⁷⁶

⁷⁰ *Ibid.*, at 4. ⁷¹ *Ibid.* ⁷² *Ibid.*

⁷³ 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (Paris Peace Conference), LON Misc. 43, 29 March 1919, at 3.

⁷⁴ *Ibid.*, at 11. ⁷⁵ *Ibid.* ⁷⁶ *Ibid.*, at 15.

The American reservation, written by Robert Lansing and James Brown Scott, challenged the majority's approach, and later became a touchstone for criticisms of untimely innovations in international law. It took issue with the idea of trying the ex-kaiser for his actions when head of state, on the grounds that heads of state were answerable solely to their own people 'in whom the sovereignty of any State resides', and should not be held accountable to another sovereignty, such as an international court.⁷⁷ They also objected that charges against the ex-kaiser would be retroactive enactments, and were therefore contrary to an express provision within the US Constitution.⁷⁸ An act, they wrote, did not become a crime in the legal sense 'unless it were made so by law', and an act made a crime by law 'could not be punished unless the law prescribed the penalty to be inflicted'.⁷⁹ The charges against the ex-kaiser did not meet these conditions; there was no precedent for making violations of the laws and customs of war – let alone the 'laws of humanity' – international crimes with punishments affixed to them.⁸⁰ Lansing and Scott agreed that those ultimately responsible for initiating war, violating treaties, and orchestrating war crimes should be subject to moral censure, but they insisted on retaining the distinction between morality and law. Offences recognised only by morality 'however iniquitous and infamous' were in their view beyond the law's reach.⁸¹

The Americans were not the sole dissenters. The Japanese were also concerned about the implications of a trial of a head of state, and submitted a reservation, written by Adachi Mineichirō and Tachi Sakutarō, which prefigured issues at the Tokyo tribunal. Anticipating debates about victors' justice, they questioned whether 'a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side'.⁸² On negative liability, they proposed 'a strict interpretation of the principles of penal liability' when dealing with leaders who, on being informed of war crimes, had failed to prevent further crimes occurring.⁸³ Finally, the Japanese requested the deletion of references to heads of state in the majority report, on the likely grounds that this approach had the potential to undermine the position of Emperor Meiji and his descendants. (Among them, as it turned out, his successor, the Emperor Shōwa, whose indictment would be considered after the next war.)

1.9 The Creation of Article 227

When the members of the Council of Four – David Lloyd George, Georges Clemenceau, Woodrow Wilson and Vittorio Orlando – received the Commission's report, they effectively reversed the majority's recommendations on the aggression

⁷⁷ *Ibid.*, at 61. ⁷⁸ *Ibid.* ⁷⁹ *Ibid.*, at 60. ⁸⁰ *Ibid.* ⁸¹ *Ibid.*, at 51. ⁸² *Ibid.*, at 64. ⁸³ *Ibid.*

charge. Lloyd George and Clemenceau continued to push for the ex-kaiser's trial on this and other grounds, while Wilson, demonstrating the same expedient fastidiousness towards international law as had Lansing, held out against it. On 9 April 1919, however, they agreed between them a statement on penalties. This specified that the ex-kaiser should be tried before a special tribunal, but also indicated (on Wilson's insistence) that 'the offence for which it is proposed to try him [is] *not to be described as a violation of criminal law* but as a supreme offence against international morality and the sanctity of treaties'.⁸⁴ This was reworked by the drafting committee to read: 'The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, *not for an offence against criminal law*, but for a supreme offence against international morality and the sanctity of treaties.'⁸⁵ At a meeting of the British Empire Delegation meeting, the Australian Prime Minister William 'Billy' Hughes mocked this latest effort as being vague, inconsistent and ineffective ('We would never get a conviction'), and pointed out that the phrase 'not for an offence against criminal law but' amounted to a limitation on the proposed tribunal.⁸⁶ Lloyd George took the issue back to the Council of Four, and, on 1 May, secured the deletion of the phrase on the grounds that it might be construed as an admission that the ex-kaiser had *not* committed any offences against criminal law.⁸⁷

The Council of Four's drafts provided the basis for article 227 of the Treaty of Versailles. This article announced the formation of a 'special tribunal' to try the ex-Kaiser once the Netherlands had surrendered him. It read:

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 . . .

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.⁸⁸

On the one hand, this article was notable for summoning a vaporous mixture of politics and morality – in sum, 'international policy', 'international morality' and

⁸⁴ 'Outline Suggested with Regard to Responsibility and Punishment', signed by Clemenceau, Lloyd George, Orlando, Wilson and Saionji, undated, with cover note, M. Hankey to P-E. Dutasta, 10 April 1919: FO 608/247, TNA (emphasis added).

⁸⁵ 'Draft Clauses Prepared by the Drafting Committee', 26 April 1919: FO 608/245, TNA (emphasis added).

⁸⁶ 'Peace Conference: British Empire Delegation 29', 28 April 1919, 6: CAB 29/28, TNA.

⁸⁷ 'Notes of a Meeting Held at President Wilson's House', 1 May 1919: CAB 29/37, TNA.

⁸⁸ Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920), in C. Parry (ed.), *Consolidated Treaty Series*, vol. 225 (231 vols., Dobbs Ferry, NY: Oceana Publications, 1969–81), at 285.

‘international undertakings’ – to its task. On the other hand, and in deference to Woodrow Wilson, it was notable for *not* invoking international law. Yet precisely because it was amorphous and unfettered by legal restraints, it offered considerable latitude for creative interpretation. The phrase ‘a supreme offence against international morality’ seemed to readmit the possibility of arraigning the ex-kaiser for the crime of starting the war. And the phrase ‘supreme offence against the . . . sanctity of treaties’ seemed to invite the prospect of arraigning him for the treaty breaches with Belgium and Luxembourg. In other words, the Council of Four effectively repealed the Commission’s recommendations on these two issues.

This formula offered a partial victory to all parties in the Council of Four. Lloyd George, as the prime minister most exposed to potential accusations of renegeing on election promises about the ex-kaiser, could point to the tribunal and, if pressed, even hint at the possibility of aggression charges. And Wilson, as the president most vulnerable to accusations of conceding his nation’s sovereign rights, could stress the absence of any legal strictures connected with the enterprise. Lansing was quick to underline this latter point in a piece for the *American Journal of International Law* in which he explained: ‘Manifestly the tribunal . . . is not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly.’⁸⁹

The vagueness of article 227 was both its beauty and its curse. Senior officials had absolutely no idea what charges the Council of Four had intended when they drew it up. Later in the year, for example, James Headlam-Morley wrote to a Foreign Office colleague to ask whether the ambiguity had ever been clarified. ‘As I read Article 227’, he wrote, ‘it would be open to interpret the words “supreme offence against international morality” to include [the ex-kaiser’s] responsibility for the war, but in interpreting the Treaty, the lawyers of course might be guided by any authoritative pronouncement about the intention which has been made. Is there any such pronouncement?’⁹⁰ His colleague replied: ‘So far as I am aware, the question has not been dealt with at any other meeting of any of the various bodies which have acted as the Supreme Council of the Conference. As you will see, the resolution of April 9th contains no specific mention of the violation of Belgian neutrality or of the conduct of the war any more than of responsibility for the war, nor is there any indication of the interpretation which the Council of Four attached to the words “a supreme offence against international morality”.’⁹¹ Article 227 remained an enigma to the last.

⁸⁹ R. Lansing, ‘Some Legal Questions of the Peace Conference’, *American Journal of International Law*, 13 (1919), 631–50, at 647.

⁹⁰ J. Headlam-Morley to Norman, 22 October 1919, FO 608/147, TNA.

⁹¹ Norman to J. Headlam-Morley, 24 October 1919: FO 608/147, TNA.

Needless to say, the more sceptical participants in the negotiations offered some of the harshest criticisms of this article. Shortly after the Conference, the American delegate James Brown Scott asked: ‘What is morality? What is international morality? What is an offense against international morality? And what is a *supreme* offense against this thing, whatever it may be?’⁹² And some years later, in 1937, Vittorio Orlando, the Italian member of the Council of Four, argued that: ‘The concept of “morality” assumed in a proposition like the one in Article 227 is in antithesis to the concept of law: at the very least it shows the absence of the legal rule, by the mere fact that it is not cited.’⁹³ He continued:

Normally, it must be held that the whole of law is in conformity with morality; but the contrary proposition, namely that an offence against morality is always an offence against law, is not at all the case; a given precept or rule of the moral order may not have been taken up by the law and transformed into a legal rule. That is why we said that the very formulation of Article 227 contains the confession that there is no norm stating the presumed crime.⁹⁴

1.10 The Trial Plans Take Shape

After the signing of the Treaty of Versailles on 28 June 1919, some delegates at the Paris Peace Conference thought they detected a distinct cooling of British interest in trying the ex-kaiser.⁹⁵ Political priorities had shifted, and well-founded rumours were circulating that the British had secured a behind-the-scenes deal with the Dutch to *not* deliver Wilhelm II, thereby sparing the entente the effort of having to put him before a tribunal. But appearances were deceptive. The British could not predict for certain how the Netherlands would deal with the matter once the Treaty came into force, or, for that matter, whether the ex-kaiser would stay put or flee to another country. So just when it was assumed that plans to try him were being shelved, the British Attorney General, Sir Gordon Hewart, quietly began to lay the groundwork for his prosecution, in case the ex-kaiser *did* happen to fall into the entente’s hands.

These plans – unheralded then and overlooked since – were set in motion on 18 August 1919, when Hewart convened a meeting between himself, the Solicitor General Sir Ernest Pollock, the Procurator General Sir John Mellor and two senior barristers, Frederick Pollock and George Branson. Their objective, he explained, was ‘to prepare on behalf of the Allied and Associated Powers the Case against the ex-German Emperor under Article 227 of the Treaty of Peace’.⁹⁶ The participants

⁹² J. B. Scott, ‘The Trial of the Kaiser’, *supra* note 43, at 239 (emphasis in original).

⁹³ V. E. Orlando, *supra* note 2, at 1017. ⁹⁴ *Ibid.*

⁹⁵ A. Walworth, *Wilson and His Peacemakers: American Diplomacy at the Paris Peace Conference, 1919* (New York: Norton, 1986), at 216.

⁹⁶ G. Hewart to F. Pollock, 15 August 1919: TS 26/3, TNA.

were well aware of the ambiguities of article 227, and decided to investigate the kaiser's responsibility for both the authorship of the war and the breaches of the laws and customs of war. It was agreed that R. W. Woods, a lawyer in the Procurator General's department under Mellor, would be responsible for the collection of the necessary material.⁹⁷ He would then pass this evidence to the two barristers, Pollock and Branson, who had been engaged to advise during the preliminary stages.

Mellor and Woods put out feelers straight away. Mellor wrote to Hugh Bellot at the International Law Association, asking him for the documents that were used as the basis for the Attorney General's Committee of Enquiry (including the 'Special Sub-committee on Law'),⁹⁸ and Woods wrote to the publishing house, Hutchinson & Co., with a view to securing advance proofs of the translation of General Ludendorff's book.⁹⁹ Woods spent the following weeks casting around for documents from government archives, publishers and lending libraries. In early September, he sent the first batches of material to Frederick Pollock¹⁰⁰ and George Branson.¹⁰¹ These included Charles Oman's *The Outbreak of the War of 1914–18*, Louis Renault's *First Violations of International Law by Germany*, and extracts from Walter Dodd's *Modern Constitutions*, and Lawrence Lowell's *The Governments of France, Italy and Germany*. He also sent them copies of the Attorney General's Committee of Enquiry reports, and the Bryce Committee on Alleged German Outrages report of 1915. (Pollock, a member of both bodies, dismissed some of the material considered by the Bryce Committee as 'worthless' from an evidentiary point of view because of the manner in which it had been taken.)¹⁰²

Having exhausted the most obvious avenues of enquiry, Woods then wrote a letter to the Foreign Office (possibly dispatched under Mellor's name) on 13 September, asking for material in their possession. His request was presented in broad terms, because, he explained, it was not possible to frame charges until the available evidence had been marshalled, although 'pre-meditated crimes of policy sanctioned by the Authorities responsible for the conduct of the War in Germany as distinguished from incidental outrages committed by individual officers in the German Army suggest themselves as most likely to be susceptible of proof'.¹⁰³ These crimes of policy included the by now familiar list: the invasions of Belgium and Luxembourg; breaches of laws of naval warfare; and breaches of laws of land

⁹⁷ R. W. Woods to D. M. Hogg, 4 April 1923: TS 3/44, TNA.

⁹⁸ J. Mellor to H. H. Bellot, 20 August 1919: TS 26/3, TNA.

⁹⁹ R. W. Woods to Hutchinson & Co., 20 August 1919: TS 26/3, TNA.

¹⁰⁰ R. W. Woods to F. Pollock, 9 September 1919: TS 26/3, TNA.

¹⁰¹ R. W. Woods to G. Branson, 5 September 1919: TS 26/3, TNA.

¹⁰² F. Pollock to R. W. Woods, 21 September 1919, 1: TS 26/3, TNA.

¹⁰³ R. W. Woods to Under-Secretary of State, 13 September 1919, 1: TS 26/2, TNA.

warfare.¹⁰⁴ He added, rather more cautiously, that ‘it will be for consideration hereafter . . . whether any general charge should be made of . . . waging an aggressive and unjust War’.¹⁰⁵ In a separate letter of the same date, which illustrated one line of investigation, Woods asked the Foreign Office for a copy of the letter ‘addressed by the German Emperor to the Emperor of Austria justifying the deportation of women and children from occupied areas, and any other documents of a similar character which directly affect the responsibility of the ex Kaiser’.¹⁰⁶

The following day, Frederick Pollock wrote to Woods, setting down his thoughts about the prospects for a prosecution. Pollock, by then in the latter part of his career, was a public lawyer well known for his somewhat immoderate anti-German views.¹⁰⁷ Yet he advanced a measured appraisal of the proposed case. He hoped, above all, that the Allied indictment would be concise, ‘putting its strength on the main points, relegating minor details to the *pièces justificatives* (inevitably voluminous I fear), and not overloaded with anticipation of possible defences’.¹⁰⁸ He added that if the indictment were too elaborate, ‘the public won’t read it’.¹⁰⁹

The problem, Pollock pointed out, was that some allegations against the ex-kaiser were stronger than others. He believed that there *was* a sound case on the grounds of authorship of the war, as well as on breaches of treaties and submarine warfare. Taking these in order, he thought there was a clear crime deriving from Wilhelm II’s ‘Determination to force a European war within a short time, formed not later than the summer of 1913 . . . The French Yellow Book clinches this.’¹¹⁰ He also argued that there was a ‘Wilful violation of Belgian neutrality – this being a matter of high policy he can’t get out of it. The case of Luxembourg is similar.’¹¹¹ In addition, he opined that: ‘As regards submarine warfare the case is very clear, as it could not be undertaken without *imperial* orders: the navy being absolutely German whereas the German armies were State armies under the Kaiser’s war command.’¹¹² Pollock drew the line, however, at charging the ex-kaiser with responsibility for war crimes committed on land. He wrote: ‘I feel great doubt whether the ex-Kaiser can be made liable for German military atrocities in detail. He had no executive command and there is nothing to show that he was personally consulted as to the policy of terrorism . . . I should rather think that he believed, as the German public did, the story told by his own officials, and thought the Allies’ charges were fictions.’¹¹³

If Pollock was fairly sanguine about the case to be made about the ex-kaiser’s starting the war, Woods was anything but. He expressed the fear to Pollock that

¹⁰⁴ Ibid., at 1–2. ¹⁰⁵ Ibid., at 2.

¹⁰⁶ R. W. Woods to Under-Secretary of State, 13 September 1919 (second letter): TS 26/2, TNA.

¹⁰⁷ N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004).

¹⁰⁸ F. Pollock to R. W. Woods, *supra* note 102, at 1. ¹⁰⁹ Ibid. ¹¹⁰ Ibid., at 2–3. ¹¹¹ Ibid., at 3.

¹¹² Ibid. ¹¹³ Ibid., at 2.

discussion about this ‘might attain such dimensions and prove so inconclusive as to divert attention from these matters which are more readily susceptible of proof’.¹¹⁴ He also expressed his unease to John Mellor, writing that, ‘No doubt Sir Frederick Pollock is quite right in his view that the dominant factor in German politics was the determination to provoke war at an early date, but I am inclined to think that to embark upon this subject will raise a discussion to which there will be no end.’¹¹⁵ While Mellor clearly shared Woods’ concerns, he reminded him that they had to prepare for the contingency nonetheless: ‘I agree that the case on the responsibility for the war will open the floodgates – but we shall have to assume that there will be a court on this pending further consideration.’¹¹⁶

Mellor was himself mulling over the material at the time, and trying to work out the grounds for an aggression charge against the Germans. On 21 September, he observed: ‘The German defence of the invasion of Belgium – if on the line of “Who are the Huns” is very thin & we ought to be able to establish that the real motive was . . . to lay out France before the Russians became dangerous which could only be done by going through Belgium according to v. Schliffen’s plan.’¹¹⁷ After the release of the Austrian Red Book that same day, which chronicled the agitation for war by Count Berchtold and other Austrian diplomats in July 1914, Mellor – clearly influenced by an article in *The Times* a few days earlier¹¹⁸ – also suggested that disclosures about German actions to prevent Austria from settling with Russia and Serbia in 1914 would be vital to the case.¹¹⁹ ‘If only we could get hold of communications between B. Hollweg & Berchtold we should probably clinch the matter,’ he wrote.¹²⁰

1.11 The Discoveries at Wilhelmstrasse

It was also expected that the German Government would release documents about the ex-kaiser’s role in the initiation of the war, but these were a long time coming. Back in the final months of 1918, Karl Kautsky, the Independent Socialist leader, and his wife Luise Kautsky-Ronsperger, had collated four volumes of documents from the German Foreign Office archives at Wilhelmstrasse, covering the period leading up to the outbreak of war in 1914. Their aim was to establish responsibility for starting the war, and Kautsky later told reporters that the findings would cause

¹¹⁴ R. W. Woods to F. Pollock, 22 September 1919: TS 26/3, TNA.

¹¹⁵ R. W. Woods to J. Mellor, 22 September 1919: TS 26/3, TNA.

¹¹⁶ J. Mellor to R. W. Woods, 24 September 1919, 2: TS 26/3, TNA.

¹¹⁷ J. Mellor to R. W. Woods, 21 September 1919, 4: TS 26/3, TNA. The reference is to: E. Müller-Meiningen, *Who Are the Huns?: The Law of Nations and its Breakers* (abr. *Der Weltkrieg und der Zusammenbruch des Völkerrechts*), introduction and trans. R. L. Orchelle (pseud. of H. G. Scheffauer) (Berlin: Georg Reimer, 1915).

¹¹⁸ ‘New Light on the War’, *The Times* (22 September 1919), at 10.

¹¹⁹ J. Mellor to R. W. Woods, *supra* note 116, at 2. ¹²⁰ *Ibid.*

a ‘sensation’.¹²¹ But the postwar republican government, with an eye to developments within Germany and at the Paris Peace Conference, held back publication. Then, in September 1919, around the time that Woods was starting to voice his concerns about charging the ex-kaiser with starting the war, the Weimar administration decided to mount a new war guilt enquiry. Taking Kautsky’s materials as a starting point, it commissioned Albrecht Mendelssohn-Bartholdy, Max Montgelas and Walther Schücking to further investigate the circumstances leading to the outbreak of the war, focusing on the Austro-Serbian crisis and the Russian mobilisation.

While awaiting these disclosures, Mellor and Woods, who clearly felt they had received insufficient support from the British Foreign Office, approached the department once again. Mellor wrote to Cecil Harmsworth, the Under-Secretary of State, reminding him that he, Mellor, was considering the question of whether a charge should be made of waging an aggressive and unjust war. ‘The question’, he continued, ‘is one which presents special difficulties, inasmuch as any change under this head would probably lead to a discussion, or an attempted discussion, of all the circumstances which, for a number of years previously, had combined to produce the political situation in Europe which resulted in the outbreak of war in 1914.’¹²² Anticipating a potential German defence, he added: ‘It seems not improbable that the German version of these matters will lay stress on the interposition of Russia in the Balkans in 1912, and seek to attribute to her an intention, with the support of Great Britain and France, to encourage Serbia in her attitude towards Austria, the object being to form a solid Balkan front against the Central Powers’ – an approach, he observed, that was foreshadowed by Bethmann-Hollweg’s book.¹²³

Woods meanwhile tackled the Foreign Office lower down, approaching James Headlam-Morley of the Political Intelligence Department, from whom he requested a memorandum about the ex-kaiser’s responsibility for the war.¹²⁴ Headlam-Morley was the right person to ask. Although a classicist by training, he had specialised in modern German history, and, after publishing the 1915 book, *A History of Twelve Days* about the origins of the First World War, was well aware of the difficulties of ascribing sole blame to Germany for starting the war. During the postwar period, he repeatedly warned his colleagues of the perils of mounting a potentially unsuccessful case against Wilhelm II on grounds of aggression.

Headlam-Morley had first raised these issues in December 1918, at the height of Lloyd George’s election campaign, when he wrote a memorandum about the proposed trial of the ex-kaiser. In this, he argued – in line with the prevailing

¹²¹ ‘Germany to Print War Blame Papers’, *New York Times* (26 July 1919), at 3.

¹²² J. Mellor to Under-Secretary of State, 23 October 1919, 1: TS 26/2, TNA. ¹²³ *Ibid.*

¹²⁴ R. W. Woods to J. Headlam-Morley, 20 October 1919: TS 26/2, TNA.

legal view – that the aggression charge was a leap into the unknown. He noted that prior to 1914, international relations were conducted on the premise that in certain circumstances wars were ‘the legal and natural method’ for settling disputes.¹²⁵ 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’.¹²⁶

What prospect, then, was there of bringing criminal charges against the ex-kaiser for aggression? Although the proposal was ‘something absolutely new’,¹²⁷ Headlam-Morley thought that this was not an insurmountable obstacle because it could be justified as the precedent for future law.¹²⁸ In his view, a far bigger stumbling block was the weakness of the case against the ex-kaiser. He argued that if the prosecuting powers charged him for mere recklessness, incompetence or folly in foreign affairs, then an injustice might be perpetrated against him. ‘It 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 wrote, 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.’¹²⁹ For this reason, he thought that it was not enough for the prosecution to just prove that Wilhelm II was reckless or foolish; it also had to prove that he had *intended* to start the general war in Europe¹³⁰ (as distinct from merely *supporting* a localised war between Austria and Serbia). The question was: could it be established that he had *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 that this was ‘extremely doubtful’.¹³¹

When Woods canvassed his opinion nearly a year later, in late 1919, Headlam-Morley saw no reason to revise his view. Around this time he wrote another memorandum, in which he argued once again that the evidence against Wilhelm II on aggression did not stack up. He acknowledged that the kaiser had headed a German ‘system’ which had ‘caused’ the First World War, and, more specifically, that he was among those responsible for the violation of Belgian neutrality. But if Wilhelm II were to be charged for responsibility for the war *in toto*, it would, he thought, have to be proved that he calculatedly and deliberately embarked on this course, and not just proved that he had violated Belgian neutrality (or, for that matter, abetted a war between Austria and Serbia). He continued:

¹²⁵ ‘Memorandum by Mr Headlam-Morley’, 12 December 1918, 1: FO 371/3227, TNA. ¹²⁶ *Ibid.*, at 2.
¹²⁷ *Ibid.*, at 1. ¹²⁸ *Ibid.*, at 3. ¹²⁹ *Ibid.*, at 1. ¹³⁰ *Ibid.*, at 3–4. ¹³¹ *Ibid.*

It . . . seems to me very doubtful whether this could be shown. [T]he evidence available is still incomplete, but so far as it goes, it certainly tends to show that the Emperor, in the latter stages, quite genuinely tried, though perhaps in a very unfortunate manner, to stop the war and, so far I do not see that we have any positive evidence that he personally deliberately willed it . . . We cannot punish a man because he was the head of a system which he inherited; we can only do so if it can be shown that he deliberately used this system for evil purposes.¹³²

Connected to this, Headlam-Morley also recognised that the question of Wilhelm II's personal guilt had in the intervening year acquired vastly more significance because 'the very severe terms of the [Versailles] treaty have been officially justified by the Allies on the grounds of Germany's responsibility'.¹³³ He therefore had already concluded that if he were asked, 'I shall strongly advise against including the charge for bringing about the war on general grounds.'¹³⁴

For all that, the Foreign Office was remarkably slow to disgorge information to the people most closely involved in the construction of the case: namely, Mellor and Woods. After Woods' first approach to Cecil Harmsworth a month passed without any response, and in November, Woods was compelled to write to him again. He pointed out that *The Times* had just announced the forthcoming publication of documents gathered by the Kautskys at Wilhelmstrasse,¹³⁵ and requested from the Foreign Office a translation of this collection, which, he wrote, 'appears to contain material of great importance'.¹³⁶ Perhaps in response to this prodding, Headlam-Morley wrote back to Woods to explain that he had been unable to finish the promised memorandum on Wilhelm II's responsibility for the war because of problems in appraising new information and 'the extreme perplexity of the situation with regard to the Kaiser's attitude'.¹³⁷ He did, however, confide that several weeks earlier General Neill Malcolm, chief of the British Military Mission to Berlin, had been in touch with Kautsky,¹³⁸ who had hold him that the publication of documents was imminent – which, of course, Woods already knew by now, courtesy of *The Times*. Headlam-Morley continued:

What we were anxious about was whether or not these [German documents] would be bowdlerized; our information, which comes from Kautsky, is . . . that as far as he knows they will be complete and that nothing will be omitted except some documents or dispatches which are left

¹³² J. Headlam-Morley, 31 November 1919: Box 19, HDLM, Acc. 727, Headlam-Morley Papers, Churchill Archives Centre, Cambridge (CAC).

¹³³ J. Headlam-Morley, Memorandum to W. G. Tyrrell and E. Crowe, 22 June 1920: Box 3, HDLM, Acc. 727, Headlam-Morley Papers, CAC.

¹³⁴ J. Headlam-Morley to Norman, *supra* note 90.

¹³⁵ 'The Kaiser's Guilt', *The Times* (26 November 1919), at 12.

¹³⁶ R. W. Woods to Under-Secretary of State, 27 November 1919: TS 26/2, TNA.

¹³⁷ J. Headlam-Morley to R. W. Woods, 2 December 1919: TS 26/2, TNA. (Headlam-Morley's memorandum of 31 November, *supra* note 132, may have been a draft of the promised but undelivered memorandum for Woods.)

¹³⁸ *Ibid.*

out for [the] quite proper reasons that they contain references to the Governments of other States which it would be contrary to all official etiquette and propriety to publish.¹³⁹

Despite Woods' own reservations about charging the ex-kaiser with authorship of the war, he recognised the significance of the revelations emanating from Berlin. 'Kautsky's Book is the most important work we have yet obtained bearing, as it does, directly upon the responsibility of William II for the war,' he wrote to George Branson.¹⁴⁰ By the end of the month, newspapers began to speculate about the effect the release of the Wilhelmstrasse documents was having on the ex-kaiser himself, who was residing in Amerongen. According to the Dutch newspaper *Handelsblad*, the revelations about his part in the war's outbreak had left him 'furious', 'uneasy' and 'very scared'.¹⁴¹ His marginal notes to the documents uncovered by the Kautskys – describing Leopold Berchtold as a 'blockhead', Edward Grey as a 'blackguard' and Giovanni Giolitti as a 'rascal'¹⁴² – cast him in a particularly poor light, and he was apparently keen to stress that these outbursts did not influence government decisions.¹⁴³ Nevertheless, as the newspapers reported, he was now spending much time working on his defence.

The ex-kaiser was not the only one preoccupied by this question. In September, Frederick Pollock had tried to put himself in the shoes of the defence, and asked: 'What would I do if I were William's counsel?' He answered:

I should advise him to follow Charles I's example – protest against the jurisdiction and the Court, and say nothing more. But if he decided to plead, then

1. Admit nothing, claim all the rights of a prisoner in an English criminal court, require strict proof of all material facts[.]
2. Make all possible dilatory objections.
3. Rely on the usual German arguments only as a last resource, and then not as being absolutely correct (which might only exasperate the Court) but as being plausible enough from a German point of view to convince a reasonable German in William II's position. Did they not convince highly respectable learned Germans such as Wilamowitz-Möllendorf[f]?

I would make the trial last for the rest of William's life or till the world was bored with it, or at need ride for a scene in Court that would more or less discredit the tribunal even if it did my client no direct good.¹⁴⁴

By December 1919, Headlam-Morley joined in with the speculation about the ex-kaiser's defence. He told Woods that he had been reading an article by Clemens von Delbrück, the nationalist politician, in *Preussische Jahrbücher*, which he thought indicated a likely German approach. Delbrück's point, according to

¹³⁹ Ibid. ¹⁴⁰ R. W. Woods to G. Branson, 2 December 1919: TS 26/3, TNA.

¹⁴¹ Hague Embassy to Foreign Office (enclosing a translation of a piece from *Handelsblad*), 30 December 1919: TS 26/2, TNA.

¹⁴² 'Ex-Kaiser is Busy on his Defense', *New York Times* (28 December 1919), at 3.

¹⁴³ Hague Embassy to Foreign Office, *supra* note 141. ¹⁴⁴ F. Pollock to R. W. Woods, *supra* note 102, at 4.

Headlam-Morley, was that ‘action against Serbia was, whether wisely or foolishly, undertaken not with the object of bringing about a European War, but of avoiding one by a surgical operation’.¹⁴⁵ Nine days later, he contacted Woods again to let him know that the *Morning Post* had acquired some prewar letters between the kaiser and Tsar Nicholas, which were being examined by the Political Intelligence Department: ‘I have glanced hastily at some of them, and they certainly are of great value as throwing light upon the Emperor’s personality and political methods; Mr. Saunders says that the light they throw is very unfavourable.’¹⁴⁶ By the end of the month, Headlam-Morley was beginning to revise his opinion about whether Germany had pushed harder for war than Austria had. Back in 1915, he admitted, ‘It seemed to me . . . that the Austrians were attempting to back out and the Germans were pressing them on; I do not think that on the documentary evidence we can continue to hold this view at any rate so strongly as we did.’¹⁴⁷

Whatever Germany’s role, Headlam-Morley made it completely clear to Woods that he still rejected the idea of trying the ex-kaiser for starting the war. ‘As you know’, he wrote, ‘I hold strongly that it is very undesirable to extend the subjects dealt with in the trial so as to bring in the whole political situation in Europe during the preceding years; none the less the material clearly ought to be at the disposal of those in charge of the prosecution.’¹⁴⁸ Woods needed no persuasion on this score, and passed Headlam-Morley’s views on to John Mellor, who in turn communicated them to the Attorney General Gordon Hewart.¹⁴⁹

Woods, meanwhile, continued his quest to extract evidence from the Foreign Office. He waited seven weeks for the Kautsky documents. Then Headlam-Morley wrote to say that the Treasury was presenting difficulties about translating them (presumably on financial grounds) ‘unless they are told that it is essential for the purpose of the Kaiser’s trial’.¹⁵⁰ Woods, clearly aggravated, unburdened himself to Mellor, pointing out that the law officers could not decide on a charge of authorship of the war until they had seen these documents. He added: ‘I pointed out to him [Headlam-Morley] how important it was that the translations should be made promptly. A month seems to have passed without any action being taken at all although these documents are the crux of the whole case.’¹⁵¹ It was by now perfectly clear to all concerned that the prosecution plans were going nowhere.

¹⁴⁵ J. Headlam-Morley to R. W. Woods, 9 December 1919: TS 26/2, TNA.

¹⁴⁶ J. Headlam-Morley to R. W. Woods, 18 December 1919: TS 26/3, TNA.

¹⁴⁷ J. Headlam-Morley to R. W. Woods, 31 December 1919: TS 26/2, TNA.

¹⁴⁸ J. Headlam-Morley to R. W. Woods, *supra* note 146.

¹⁴⁹ R. W. Woods to J. Mellor, 1 January 1920: TS 26/3, TNA.

¹⁵⁰ J. Headlam-Morley to R. W. Woods, 13 January 1920: TS 26/3, TNA.

¹⁵¹ R. W. Woods to J. Mellor, 16 January 1920: TS 26/3, TNA.

1.12 Conclusion

The ‘special tribunal’ to try the ex-kaiser was never established. Six days after the Versailles Treaty came into force on 10 January 1920, Georges Clemenceau – writing on behalf of the entente powers – requested from the Netherlands the delivery of Wilhelm II. It was, he explained, the entente’s duty to ensure the execution of article 227 ‘without allowing themselves to be detained by arguments’, because it was ‘not a question . . . of a public accusation having fundamentally a judicial character, but of an act of high international policy imposed by the conscience of the world’.¹⁵² The Dutch refused. Claiming a tradition as a ‘land of refuge’, and turning the entente’s words back on them, they stated that they did not wish to accede to ‘this act of high international policy’.¹⁵³ They also rejected a second request dated 14 February 1920. Between these two refusals, Gordon Hewart pulled the plug on the British prosecution project, explaining that under the circumstances (as Woods put it) ‘the matter had better remain in suspense for the moment’.¹⁵⁴ The undertaking was never revived. Woods returned the accumulated books and files to their respective owners, and awaited developments. In July 1920, he was given a new project, which propelled him out of the frying pan and into the fire: implementing article 228 of the Versailles Treaty. Over the next few years, Woods would devote himself to the ill-fated war crimes trials at Leipzig.

In the meantime, the entente powers, having wrung the political benefits from the threatened trial of the ex-kaiser, were now content to leave him in the hands of the Dutch authorities. During the ensuing decades, he lived more or less undisturbed at Doorn Castle, insulated from the new political forces buffeting Europe. In the late 1930s, many more refugees fled across the Dutch border from Germany, among them Wilhelm II’s old adversaries, the Kautskys. Karl Kautsky, then in his eighties, died shortly after his arrival in Amsterdam in October 1938. Luise Kautsky-Ronsperger was not so fortunate: she died in Auschwitz in November 1944.

By then, of course, another world war was entering its final phase, and thoughts had turned once again to trials of German leaders. Throughout the latter stages of the Second World War, European jurists had been discussing the possibility of mounting aggression charges, and in the same November as Luise Kautsky-Ronsperger’s death, an American, Colonel William Chanler, submitted a memo to the US War Department proposing that the German leadership be prosecuted for breaching international peace. Henry Stimson thought the proposal was ‘a little in advance of the progress of international thought’,¹⁵⁵ but Franklin Roosevelt

¹⁵² ‘Text of a Communication Made by M. Clemenceau . . .’, 16 January 1920, 2: CAB 29/29, TNA.

¹⁵³ ‘Note from the Dutch Government’, 21 January 1920, 2: CAB 29/42, TNA.

¹⁵⁴ R. W. Woods to J. Headlam-Morley, 27 January 1920: TS 3/43, TNA.

¹⁵⁵ H. Stimson to J. J. McCloy, 28 November 1944, reprinted in B. F. Smith, *The American Road to Nuremberg: the Documentary Record 1944–1945* (Stanford: Hoover Institution Press, 1982), at 69.

signalled his approval.¹⁵⁶ And so the idea of prosecuting a national leader for embarking on a war, stillborn at the Paris Peace Conference, was reborn a full quarter of a century later as ‘crimes against peace’ at the first international military tribunal, held at Nuremberg.

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¹⁵⁶ F. D. Roosevelt, 3 January 1945, reprinted in Smith, *ibid.*, at 92.

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