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Kirsten Sellars

Excerpt

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1 The emergence of the concept of aggression

Just after the Germans signed the armistice ending the First World War on 11 November 1918, the British Prime Minister David Lloyd George visited Newcastle, electioneering on behalf of his incumbent Coalition Government. Addressing a packed audience at the Palace Theatre, he raised the theme that was to dominate that year's 'khaki election': the ex-Kaiser's responsibility for a criminal war. *The Times* republished his speech verbatim, complete with responses from the audience:

Somebody ... has been responsible for this war that has taken the lives of millions of the best young men in Europe. Is no one to be made responsible for that? (Voices, 'Yes.') All I can say is that if that is the case there is one justice for the poor wretched criminal, and another for kings and emperors. (Cheers.) There are ... undoubted offences against the law of nations ... The outrage upon international law which is involved in invading the territory of an independent country without its consent. That is a crime ... Surely a man who did that ought to be held responsible for it. (Voices. 'Fetch him out,' and 'We will get him out,' and cheers.)¹

Lloyd George's proposal, embodying the ideas that initiating a war was a crime and that individuals could be held responsible for it – the constituent elements of the latter-day 'crime of aggression' – was ahead of its time. It raised issues that prefigured future debates, such as whether national leaders could be held personally responsible for embarking upon war, and if so, whether their punishment should take a legal or a political form. But the idea soon stranded on the rocks of judicial disapproval: it was Lloyd George's own Solicitor-General, Sir Ernest Pollock, who disposed of the idea at the Paris Peace Conference a few months later.

¹ 'Prime Minister on German crimes', *The Times* (30 November 1918), 6.

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Thereafter, policy-makers and jurists looked towards the newly formed League of Nations – established to provide pacific methods for resolving differences between states – for solutions to the problem of war. The League signalled the beginning of the shift towards the delegitimisation of certain categories of war, and in the 1920s and 1930s, treaties and proposed treaties emphasised the unlawfulness of wars other than those of self-defence or international sanction. Some unratified drafts and resolutions went so far as to declare that aggression was an ‘international crime’. But the idea of holding individuals criminally liable for aggression did not reappear until after the Second World War, when, at the Nuremberg and Tokyo tribunals, the Allied powers charged the Axis leaders with ‘crimes against peace’.

The ‘rather delicate’ task

As soon as Lloyd George mooted the trial of the former Kaiser, he encountered opposition from his Cabinet colleagues. At an Imperial War Cabinet meeting on 20 November 1918, the Australian Prime Minister William Hughes rejected the idea outright: ‘You cannot indict a man for making war’, he said, because ‘he had a perfect right to plunge the world into war, and now we have conquered, we have a perfect right to kill him, not because he plunged the world into war, but because we have won.’² Munitions Minister Winston Churchill also rejected the idea, warning: ‘[Y]ou might easily set out hopefully on the path of hanging the ex-Kaiser ... but after a time you might find you were in a very great *impasse*, and the lawyers all over the world would begin to see that the indictment was one which was not capable of being sustained.’³ But Lloyd George did not let the matter drop. On 2 December he met with Georges Clemenceau, Vittorio Orlando and their ministers in London, and, notwithstanding the Italians’ reservations,⁴ they jointly decided that the ex-Kaiser should be surrendered to an international court for authorship of the war and breaches of international law by the German forces.⁵ A month later, Lloyd George and a large British delegation departed for France, where the victorious

² Imperial War Cabinet 37, 20 November 1918, 7, 8: CAB 23/43, TNA.

³ *Ibid.*, 8.

⁴ V.E. Orlando, ‘On the aborted decision to bring the German Emperor to trial’, *Journal of International Criminal Justice* 5 (2007), 1023.

⁵ FO to Washington and New York, 2 December 1918: FO 608/247, TNA.

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powers were gathering for the preliminary sessions of the Paris Peace Conference.

At Paris, the major entente powers – Britain, France, the United States, Italy and Japan – faced the task of drafting terms with the defeated powers, establishing a post-war international order, and (to borrow a phrase from a later era) keeping the Germans down, the Americans in, and the Russians out. Regarding the 'German question', they proposed reparations, part-occupation, and the redistribution of colonies and peripheries. For the 'Russian problem', they sought to undermine the new government and defuse revolutionary movements in Germany, Hungary and elsewhere. As for the United States, they hoped that it would permanently abandon its neutrality and take up international responsibilities within the proposed League of Nations.

On 25 January 1919, the preliminary Peace Conference delegated to the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' the task of deciding whether the Germans and their allies had violated international law by initiating or fighting the First World War, and, if so, recommending suitable penalties. This fifteen-member body was presided over by the American Secretary of State, Robert Lansing, and included among its members the British Attorney-General Sir Gordon Hewart and Solicitor-General Sir Ernest Pollock, Greek Foreign Minister Nicolas Politis, New Zealand Prime Minister William Massey, and the jurists Edouard Rolin-Jacquemyns of Belgium and Ferdinand Larnaude of France.

The Commission's task was 'rather delicate', Georg Schwarzenberger later observed, because it had to establish legal responsibility for some acts committed at the beginning of the war, which were then lawful but had subsequently become 'highly reprehensible'.⁶ Deep differences emerged between the American and European delegates. The Americans feared that a trial would establish legal precedents affecting sovereignty, and spark insurrection in Germany, and therefore wished to avoid the distortion of the law to deal with the ex-Kaiser and his ministers. But British and French delegates, who represented nations that had borne the brunt of the war in Western Europe, insisted upon the establishment of some kind of international tribunal to determine responsibility for crimes arising from the conflict.

⁶ G. Schwarzenberger, 'War crimes and the problem of an international criminal court', *Czechoslovak Yearbook of International Law* (1942), 77.

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Debates in the Commission and its subcommittees were frequently acrimonious. 'Feeling ran about as high as feeling can run', recalled the American delegate, James Brown Scott.⁷ 'It ran especially high in the British membership, and it ran especially high in the French members. It ran so high that relations were somewhat suspended.'⁸ This divergence of opinion resulted in a majority report, representing the views of the major European powers and their continental allies, and two reservations submitted by nations more insulated from the war's effects – the United States and Japan.

The alleged crimes of Germany

The Commission's majority report, produced on 29 March 1919, departed from positive international law on the question of 'laws of humanity', but not, as it turned out, on the initiation of the war. True, it stated at the outset that responsibility for the conflict lay 'wholly upon the Powers' – Germany and Austria, and their allies Turkey and Bulgaria – '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'.⁹ And further, it insisted (against the prevailing act of state doctrine) that there was no reason why 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 the point applied 'even to the case of Heads of States'.¹⁰ But it stopped short of making the connection between the two ideas by holding the ex-Kaiser and his ministers criminally responsible for starting the First World War.

Again, the British played a decisive role. Lloyd George had earlier led the advance on the issue of responsibility for the war, and now other British ministers, who had in the meantime fully digested its implications, led the retreat. At the conference, Sir Ernest Pollock advised most strongly against charging the ex-Kaiser for initiating hostilities.

⁷ J.B. Scott, 'The trial of the Kaiser', 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), p. 480.

⁸ Ibid.

⁹ 'Commission on the responsibility of the authors of the war and on enforcement of penalties' (Paris Peace Conference), LON Misc. 43, 29 March 1919, 3.

¹⁰ Ibid., 11.

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He articulated the legal view that 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 polic[y], rather than one of individual will'.¹¹ In his view, it was better to focus attention on traditional war crimes rather than on 'political crimes'.¹² And he warned of the dangers of bringing a case which would entail investigation of the causes of the war – a highly sensitive question involving many other nations aside from Germany – which 'must raise many difficulties 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'.¹³

Pollock was able, without much difficulty, to persuade his fellow members to support this line. As a result, the majority Commission report stated that despite conduct 'which the public conscience reproves and which history will condemn', they would not bring before the proposed tribunal acts which had provoked the war and accompanied its inception because 'by reason of the purely optional character of the Institutions at The Hague for the maintenance of peace ... a war of aggression may not be considered as an act directly contrary to positive law'.¹⁴ It concluded: 'We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.'¹⁵

The majority did, however, believe that the ex-Kaiser and others were liable for the second cluster of crimes: 'Violations of the laws and customs of war and the laws of humanity'.¹⁶ As with a charge of aggression, there was no precedent for bringing them before an international court. Trials for violations of the laws and customs of war, codified by the Geneva and Hague conventions, had hitherto only taken place in national courts, while indictments for the nebulous 'laws of humanity' had hitherto been unknown under international law. Nevertheless, the Commission proposed the constitution of an international 'High Tribunal' to try those that it held to be responsible for them.¹⁷

¹¹ 'Proceedings of a meeting of sub-committee No. 2 ...', 17 February 1919, 13–14: FO 608/246/1, TNA.

¹² *Ibid.*, 4. ¹³ *Ibid.*, 12.

¹⁴ 'Commission', 12. ¹⁵ *Ibid.*, 13.

¹⁶ *Ibid.* ¹⁷ *Ibid.*, 15.

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The American reservation, written by Robert Lansing and James Brown Scott, advanced a comprehensive critique of the Commission's approach – and would become a benchmark for discussions about international justice in future decades. They agreed that those responsible for causing the war and violating the laws of war should be punished, but not by legal means. They argued that it was important to separate law and morality, and accept that only offences recognised in law were justiciable. Moral offences 'however iniquitous and infamous and however terrible in their results' were beyond the reach of judicial procedure.¹⁸

In particular, they objected to the idea of subjecting the ex-Kaiser to criminal proceedings for actions taken when he was head of state. They argued that national leaders were answerable only to their own people, not to foreign entities. In consequence, they stated that: 'heads of States are, as agents of the people, in whom the sovereignty of any State resides, responsible to the people for the illegal acts which they may have committed, and ... should not be made responsible to any other sovereignty'.¹⁹

In their view, the idea of trying the ex-Kaiser for actions not designated as crimes at the time they were carried out smacked of retro-activity. They noted that an act could not be a crime in the legal sense 'unless it were made so by law', and an act declared a crime by law 'could not be punished unless the law prescribed the penalty to be inflicted'.²⁰ The acts cited by the majority did not meet those criteria: there was no precedent for making a violation of the laws and customs of war – never mind the 'laws of humanity' – 'an international crime, affixing a punishment to it'.²¹ They were therefore against the *ex post facto* creation of new law, new penalties and, in particular, a new tribunal, which were 'contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities', although they added that they *would* cooperate in the use of existing tribunals, laws and penalties.²²

The Japanese reservation, submitted by the delegates Adachi Mineichirō and Tachi Sakutarō, raised a number of points that were highly pertinent to the future 1946–48 Tokyo Tribunal. Anticipating debates about 'victors' justice', the Japanese questioned whether it could

¹⁸ Ibid., 51. ¹⁹ Ibid., 61. ²⁰ Ibid., 60.

²¹ Ibid. ²² Ibid., 61.

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be admitted as a principle of the law of nations 'that a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side'.²³ Attempting to foreclose the discussion about negative criminality, they advocated 'a strict interpretation of the principles of penal liability' when dealing with senior figures who had failed to prevent the commission of war crimes.²⁴ (The Tokyo Tribunal developed the law on precisely this issue.) Finally, in order to avoid the establishment of precedents that would affect the Emperor Meiji or his descendants, they requested the elimination of references to heads of state in the majority report. (The Japanese were not alone in wishing to preserve the monarchical principle: the Belgians also declined, on similar grounds, to host a trial of the ex-Kaiser.)

The compromise over the tribunal

With the entente powers at loggerheads over the handling of the ex-Kaiser, the only remaining option was to find a formula that would allow both sides to claim that they had achieved what they had set out to do. The 'Council of Four' – made up of Lloyd George, Clemenceau, Wilson and Orlando – considered the majority report and the reservations, and on 9 April 1919, they agreed a statement on penalties, which manifested the same differences over the use of criminal proceedings as those that had split the Commission. On one hand, it indicated that the ex-Kaiser should be delivered for trial before a special tribunal (in accordance with the views of Lloyd George and Clemenceau). On the other, it declared 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' (thus reflecting the views of Wilson and Orlando).²⁵ The Drafting Committee reworked this section of the statement so that by 26 April it 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.'²⁶ At a 'Council of Four' meeting on 1 May,

²³ Ibid., 64. ²⁴ Ibid.

²⁵ 'Outline suggested with regard to responsibility and punishment', signed by Clemenceau, Lloyd George, Orlando, Wilson and Saionji, undated, with cover note, Hankey to Dutasta, 10 April 1919: FO 608/247, TNA. Emphasis added.

²⁶ 'Draft clauses prepared by the drafting committee', 26 April 1919: FO 608/245, TNA.

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Lloyd George insisted upon the deletion of the words 'not for an offence against criminal law but', lest they be construed as an admission that the ex-Kaiser had *not* committed offences against criminal law.²⁷

The compromise between them appeared in Articles 227–231 of the Treaty of Peace Between the Allied and Associated Powers and Germany, or 'Treaty of Versailles', signed on 28 June 1919. These contained several pointers to the subsequent criminalisation of aggression. Article 227 emphasised the idea that a national leader could be called to account for violating international standards, while Article 231 advanced the idea that a nation which started an aggressive war would be subject to penalties. The intervening three articles set out proposals for the trials before national military tribunals of those accused of violating the laws and customs of war, and provided the framework for the war crimes trials held under German jurisdiction at Leipzig.

Addressing the question of aggression first, Article 231 emerged out of the conference's Commission on Reparations, which devised the formula to justify the entente powers' claims for damages from Germany. This article, which has attracted far less attention than Article 227 in the legal literature on aggression, reads as follows:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.²⁸

The use of the word 'aggression' introduced a new perspective on warfare. It signalled that a nation was not being punished for *losing* a war, as had traditionally been the case, but for *starting* one. While there had previously been no legal stigma attached to the initiation of conflict, this article suggested that the war that Germany had 'imposed' on the entente powers was not just morally reprehensible, but also unlawful.

This proposal did not derive its authority from pre-existing international statutes or conventions. Instead, it attempted to create a new standard. The drafters were explicit about this, stating in response to German protests that 'The present treaty is intended to mark a departure from the traditions and practices of earlier settlements, which have

²⁷ 'Notes of a meeting held at President Wilson's house', 1 May 1919: CAB 29/37, TNA.

²⁸ Treaty of Peace Between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920), *Consolidated Treaty Series*, C. Parry (ed.) (Dobbs Ferry: Oceana Publications, 1969–81), vol. 225, p. 286.

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been singularly inadequate in preventing the renewal of war.²⁹ Clyde Eagleton spelt out the significance of Article 231: 'Such a statement does not go so far as to outlaw war, in the sense of making it an international crime, but it effectively penalizes aggressive war by holding the aggressor responsible for losses resulting from the war – a ruinous cost!'³⁰

On the question of individual responsibility, Article 227 set out plans for the trial of the former Kaiser. Although sometimes posited as a forerunner of crimes against peace, it is rather ambiguously worded – a reflection of the aforementioned dispute between the entente powers over the reach of international law. It stated:

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.³¹

Other clauses stipulated that this 'special tribunal' be presided over by five judges (from France, Italy, Japan, United Kingdom and United States), and that the entente powers would ask the Netherlands to surrender the ex-Kaiser for trial.

In the light of the previous discussions, the most striking aspect of Article 227 was that despite referring to 'international morality', 'international policy' and 'international undertakings', it did not once refer to international *law*. The references to 'a supreme offence against international morality and the sanctity of treaties' suggested a delict (breach of treaties) and even hinted at a crime (an 'offence'), but nothing was defined. If Wilhelm II was to be arraigned for 'a supreme offence' – the 'a' suggesting that there was more than one of them – what exactly was that offence? Suffice it to say that jurists were unimpressed with this amorphous moral phraseology: Hans Kelsen condemned the first clause as 'insincere and inconsistent',³² while James Brown Scott enquired:

²⁹ S.E. Baldwin, 'The proposed trial of the former Kaiser', *Yale Law Journal* 29 (1919), 81.

³⁰ C. Eagleton, 'The attempt to define aggression', *International Conciliation* 264 (1930), 587.

³¹ Treaty of Peace, p. 285.

³² H. Kelsen, 'Collective and individual responsibility in international law with particular regard to the punishment of war criminals', *California Law Review* 31 (1943), 545.

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'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?'³³

But if the alleged offence against 'international morality or the sanctity of treaties' was not a crime and did not attract penalties, how might the ex-Kaiser actually be punished? James Garner, writing in 1920, speculated that the court might issue a formal pronouncement 'stigmatizing him perhaps as a treaty breaker primarily responsible for the war and holding him up to the execration of mankind'.³⁴ But as Article 227 had already pronounced him guilty, 'it is not quite clear what would have been gained by having a court try him on moral charges, for which he had already been convicted, and to pronounce a condemnation which he had already received'.³⁵ The last word on the subject should go to Hersch Lauterpacht, who later observed: 'Neither the accusation of the Treaty of Versailles nor the request subsequently made in pursuance thereof was primarily based on law. As M. Clemenceau put it in his Note of January 11, 1920, this "was not a case of a public accusation fundamentally of a legal character, but of an act of high international policy demanded by the conscience of mankind"'.³⁶

In the end, Article 227 ended up satisfying nobody. Lloyd George had wanted confirmation of the idea that the ex-Kaiser was criminally liable for starting an aggressive war, but was compelled to accept a construction that precluded both aggression and criminality. And Woodrow Wilson, who in the name of justice had opposed legal innovations, was prepared to submit to (in the words of historian James Willis) 'the kind of proceedings least likely to be conducted fairly'.³⁷ The Americans might have broken the stalemate by rejecting a trial outright, but other factors were at play: Willis speculates, for example, that Wilson conceded to the British the idea of arraigning the ex-Kaiser in exchange for British support over a reference to the Monroe Doctrine in the Covenant.³⁸

³³ Scott, 'Trial', in House and Seymour (eds.), *What really happened at Paris*, p. 239. Original emphasis.

³⁴ J.W. Garner, 'Punishment of offenders against the laws and customs of war', *American Journal of International Law* 14 (1920), 92.

³⁵ Ibid.

³⁶ Lauterpacht, 'Memorandum', 1942, 38: LCO 2/2973, TNA.

³⁷ J.F. Willis, *Prologue to Nuremberg: the politics and diplomacy of punishing war criminals of the First World War* (Westport: Greenwood, 1982), p. 80.

³⁸ Ibid., p. 79.