Leipzig's Shadow

The War Crimes Trials of the First World War & Their Implications from Nuremberg to the Present

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and *to Mom and Dad*, to whom this thesis is dedicated, just because.

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"Whatever lasting significance the effort to punish the war criminals of the First World War may have remains uncertain. That endeavor did mark the appearance of a new design for a world order. It was the prologue of a revolutionary development in international law, and like other revolutions it emerged from varied influences and motives, some noble, others base … Imperfectly conceived and implemented, marred by vengeful politics and expedient diplomacy, it represented nonetheless in its ideals a desire to establish a world community. If the failure of the effort illustrates in certain respects the magnitude of the obstacles to creation of a new world order, the sad history of the wars and war crimes of the twentieth century attests to the necessity of its realization." – James F. Willis

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility … Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events.[1]
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> *Justice Robert H. Jackson, 21 November 1945*

> [I] began to understand the importance of the legacy of the Nuremberg trials. Not only were they the first serious attempt to bring war criminals to account for their conduct, but it … was the first time in legal history that certain crimes were identified as being of such magnitude that they injured not only the immediate victims and not only the people in the country or on the continent where they were committed but also all of humankind.[2]
>
> *Justice Richard J. Goldstone, 2000*

Justices Jackson and Goldstone, lead prosecutors at two of the four international war crimes tribunals during the twentieth century, both viewed the Nuremberg tribunal of 1945 and 1946 as the first attempt of its kind. They were both wrong, for the international community had made a similar attempt in the aftermath of the *First* World War, with far less fanfare—and with far less success. This thesis is the story of those war crimes trials. It is the story of the trials, and yet, it isn't, for the trials themselves were ultimately anti-climactic. Instead, it is the story of the trials inasmuch as it is the story of the before and the after. It is the story of the unprecedented legal debate that provided the framework for the first war crimes trials of the twentieth century. It is the story of the contrasting political forces that hampered the best efforts of diplomats from the outset. It is

[1] Robert H. Jackson, "Opening Address for the United States," in The Nuremberg War Crimes Trial 1945-46: A Documentary History, Michael R. Marrus, Ed., (New York: St. Martin's, 1997), 79-80.

the story of the eventual disintegration of the effort for international trials and the decision to hold separate, national tribunals. It is the story of the aftermath of the trials, which would all eventually collapse under their own weight. It is the story of the complete disappearance of the trials—and the extensive debates surrounding them—from the historical consciousness. Lastly, it is the story of the future attempts at similar trials, and how the failed project after the First World War changes their interpretation.

So thorough was the disappearance of the World War One trials from the historical consciousness that, two decades later, Justice Jackson stood before a packed courtroom in the Nuremberg Palace of Justice and declared that the International Military Tribunal (IMT) at Nuremberg was a first, unlike anything preceding it in the annals of international law. Justice Goldstone, the former lead United Nations prosecutor for the Yugoslavian war crimes tribunal, provides evidence that Jackson's belief is still widely held. The Yugoslavian tribunal, with the bulky official name of the International Criminal Tribunal for the former Yugoslavia (ICTY), like its slightly younger sister, the International Criminal Tribunal for Rwanda (ICTR), has been dubbed a "Nuremberg-model" war crimes trial, a moniker that few have disputed.

Along with Jackson and Goldstone, a half-century of scholars, both legal and historical, have placed the Nuremberg trial in the middle of almost every

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[2] Richard J. Goldstone, For Humanity: Reflections of a War Crimes Investigator, (New Haven: Yale Univ. Press, 2000), 75.

debate over war crimes trials as the precedent-setting moment. Yet, one of the important ideas that this thesis hopes to demonstrate is that, by viewing it through the lens of the First World War's trials, the Nuremberg trial's utility as a model becomes greatly overestimated, and its place in history becomes grossly incongruous.

Indeed, Nuremberg was not the first attempt in legal history to create individual accountability for actions undertaken during a war. Furthermore, it was not the first time that the international community had encountered the concepts of crimes against humanity, crimes against peace, and, perhaps most surprisingly, genocide. The Nuremberg trial's only real first, besides some of the logistics surrounding it, was its success. Even that, as we will see, was at least partially the result of the specific conditions surrounding the IMT and not the achievement of the higher legal principles underlying its efforts.

The next question, however, is why it would make any difference whether or not Nuremberg was the first attempt at an international war crimes trial. In a larger context, the question is why an historical project focusing on its failed predecessor should matter. To answer that, we must fast-forward to the present, and the heated debate over the creation of an International Criminal Court (ICC). As of the beginning of this month, 139 different nations had become signatories to the Rome Statute creating the Court, and 29 of those nations had ratified the

accord.[3] Once the latter figure reaches 60, the ICC will come into existence, even though it is almost definite that the United States will not be one of the ratifying parties.[4]

The debate over the creation of the ICC, which is inextricably linked to the "founding" moment in the field of international war crimes trials, the London Charter and the Nuremberg war crimes trial, has elevated the entire issue surrounding such trials back to the forefront of academia. Because the historical reaction to the Nuremberg trial has largely been a positive one,[5] few have challenged the notion that the contemporary tribunals are improved versions built on the same solid foundation, and are therefore likely to enjoy the same success. Therefore, in demonstrating the exceptionalism of the Nuremberg trial, the trials after the First World War raise a very real concern that the ICTY, ICTR and ICC are being held to an historical standard to which they cannot possibly adhere. Instead, the fortuitous circumstances surrounding the IMT created a situation in which the multitude of problems—both logistical and ideological—that have plagued each of its successors were a complete non-issue.

Consequently, this is also a thesis about the differences between the trials that took place after the First World War and those that followed the Second, and the similarities between the former and the trials of the present—the ICTY, ICTR

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[3] Information obtained from the homepage of the Coalition for an International Criminal Court (CICC), http://www.igc.apc.org/icc/index.html, most recently accessed on 2 April 2001. *(N.B.: On 30 April, Andorra became the 30th nation to ratify the Rome Statute, getting the international community halfway to the target of 60).*

[4] Though outgoing President Bill Clinton *did* sign the accord on 31 December 2000.

[5] Though the legal reaction is, a half-century later, still mixed.

and the future ICC. The former implies the invalidation of the Nuremberg-model war crimes trial in contemporary international affairs, while the latter suggests a more accurate, more troubling alternative.

That alternative, the comparison of the World War One trials to the trials of the present, raises some unpleasant implications for the ICC *in utero*. Further, it demands that we better understand why the effort to hold trials after the First World War fell apart, if for no other reason, so we will be better equipped to understand the challenges facing the ICC and the roadblocks to its success. Therefore, as I said in the beginning, this is a thesis about the First World War's war crimes trials, and yet it isn't. It does, however, start with those trials, because, while the argument itself is difficult to digest, it is somewhat easier to unpack, for it unfolds chronologically.

Chapter I begins with a brief examination of the historical evolution of war crimes trials up to 1914, before looking more closely at the sentiment during the four gruesome years of the First World War. Focusing on the proposed trial of Kaiser Wilhelm II, the chapter develops the history of the move towards trials with an analysis of the diplomatic wrangling between the British, French and the Americans. The maneuvering came to a head in the months leading up to—and including—the Paris Peace Conference of 1919, which resulted in the 28 June Treaty of Versailles, a compact that included four clauses, Articles 227-230, specifically dealing with war crimes and war crimes trials.

As Chapter I will demonstrate, the effort to try Kaiser Wilhelm II, which was at the center of the calls for trials in Europe, was already in deep trouble long before the treaty was signed, thanks largely to the intransigence of the United States. The United States never accepted the idea that justice superseded legalism, even though the British, whose country boasted the very legal tradition on which the American system was based, accepted precisely that. The chapter concludes with the aftermath of Versailles, when the steadily evaporating desire for a trial of Wilhelm was further enforced by the Netherlands' refusal to surrender the maligned former despot. At a fundamental level, the inflexibility of the Americans was a sign to the Dutch and the Germans that the will of the Allies was not unbreakable, and that the trials were not a necessary aspect of the post-war world. Except in fiction, therefore, Wilhelm never stood trial for plunging Germany—and, arguably, the world—into a war that started as a regional conflict. He died a free man, in a Netherlands occupied by the Nazis, in the middle of 1941.

With the collapse of the effort to try the ex-Kaiser, the Allied governments next turned their attention towards the hundreds of named Central Powers war criminals that, under the Treaty of Versailles, could stand trial in international court for their crimes. Again, however, the Allies met resistance from the United States, this time from the United States Senate, which refused to ratify the Treaty of Versailles. By not ratifying the Treaty, the U.S. was neither a party to its terms nor a willing participant in its projects, including the League of Nations and the

war crimes trials. Instead, as we will see in Chapter II, the U.S. quickly moved towards the isolationist foreign policy that would dominate American government during the 1920s, a move that had dramatically deleterious effects on the British and French efforts to push the trials forward.

With the impetus for international trials fading fast, the British and French agreed to a desperate compromise, allowing the suspected war criminals to be tried before national courts in their home nations. The results were disastrous, as the two primary sites of the trials—Leipzig for the German defendants and Constantinople for the Ottoman—saw repeated acquittals, pardons and commuted sentences for the rare few defendants who were actually found guilty. The Leipzig and Constantinople trials, by the time they finally happened, were a complete farce, and, one by one, the involved Allied nations withdrew their representatives as the extent of the sham became public. Consequently, the project to hold war crimes trials after the First World War failed. It failed primarily because it was operating without a precedent, yet that fact, in and of itself, was not enough, since Nuremberg would also operate without a precedent. Instead, the failure of the First World War's war crimes project was a combination of the lack of a precedent *and* the lack of sufficient will, popular and political, on the part of the participating nations to overcome that dearth.

In the aftermath of the failed effort, the diplomats attempted to create legal precedent, particularly with the Kellogg-Briand Pact. The treaty, the "peace to end all peace," was the Europeans' attempt to codify by treaty what the failure

of the trials had kept out of case law, specifically the concept that aggressive war was a crime. The non-binding nature of these agreements, however, would prevent them from serving their intended purpose when the next war came about. Nevertheless, though the trials were doomed long before they ever had a chance to succeed, that did not stop the diplomats of the West from attempting to learn their lessons.

One of the questions underlying Chapters I and II, as we will see, is which specific factors actually caused the trials to fail. Was it merely that they were first, and therefore doomed by history to failure? What was the impact of the United States' withdrawal from European politics in 1920 and 1921? Were there other, broader reasons behind the lack of success of the movement for international trials?

These questions become particularly important in Chapter III, where we skip ahead to 1945 and examine the period from the aftermath of the Second World War to today. By 1945, the world had once more endured the horrors of a devastating war, this time a conflict that left no nation unharmed, and upwards of 50 million people dead, almost four times the total number of fatalities from the First World War. As opposed to 1919, however, there was not the same confusion after the war over its outbreak. Clear aggressors—Nazi Germany in Europe and Imperial Japan in Asia—had emerged, had destroyed the peace, and had plunged the world into the most destructive war mankind has ever known. The screams for vengeance after the war, especially as details of the Holocaust

began to be made public, were deafening. Strikingly, the United States, the same nation that had fought so feverishly against an international war crimes trial in 1919, led the legalist calls for fair trials instead of summary executions, even though the Soviets and many key members of the British government—including Churchill—supported the latter policy.

When the concept of trials returned to the mouths of diplomats in the early stages of the Second World War, however, the statesmen of Europe found themselves, once again, operating without a precedent. What few references anyone made to the project after the First World War viewed those trials as failures and mistakes, and as a learning experience only in what *not* to do. Never were the First World War trials looked at as precedent-setting, and, for the most part, the entire project as a whole was, with a few noted exceptions, overlooked in the far-different political climate of war-ravaged Europe in the early 1940s. Consequently, at Nuremberg, the Allies started over, creating a new precedent and a new model for international war crimes trials.

This time around, time and political willpower were not issues, for the Allies had plenty of both. For the former, the Allies were in total control of Germany, and, as such, had in their possession all of the evidence, all of the witnesses, and, most importantly, all of the defendants. For the latter, the Allies also had no problems for a couple of different reasons. First, the Americans, clearly the least scarred power to emerge from the Second World War, were ardent supporters, at least after a while, of the trial effort. Second, the Soviets

were also onboard. Perhaps they were anxious to have the West forget their complicity with the Nazis prior to the latter's invasion of the former, or perhaps they just wanted to guarantee their seat at the post-war table. Regardless, with the Americans and the Soviets both onboard, the British and French soon fell in line, and the entire project continued forward unabated. Eventually, 22 top Nazi leaders would stand trial. Though there have been some questions about the fairness of the Nuremberg tribunal historically, there is no doubt that it was a watershed moment in the development of international criminal law.

Almost simultaneously, a similar tribunal was taking place in Tokyo, and it was one that was created almost entirely on Nuremberg's foundations. At Tokyo, however, some of the problems that doomed the First World War's trials began to reappear, as the tribunal dragged on for almost three years. Allegations of impropriety surfaced after some procedural and logistical challenges, and the final verdict of the judges was controversial in its divisiveness, with several questioning the validity of such trials, particularly given Emperor Hirohito's absence from the list of defendants.

The next tribunals built on Nuremberg's foundation would not take place for almost 45 years, thanks largely to the political climate occasioned by the Cold War, and they too would suffer from some of the problems that beset the First World War's trials. The ICTY would suffer from the lack of big names, and the ICTR would suffer from the huge numbers of defendants and its attempt to reconcile itself with the Rwandan national justice system. The ICTY and ICTR

both made some positive modifications to the Nuremberg model, but they also represented further imperfections in the precedent, many reminiscent of the problems that doomed the World War One project. Further, and having nothing to do with the World War One trials, the ICTY and ICTR suggested that, finally, 80 years after it was first proposed, it might be time for a permanent International Criminal Court.

Part of what Chapter III will conclude is that the Nuremberg trials, and the Tokyo trials to a lesser extent, were the result of an unprecedented series of circumstances, not the least of which was the U.S. and Soviet occupation of Germany and the U.S. occupation of Japan. By their very titles, these were *military* tribunals, and differed dramatically from what had been proposed in the aftermath of the First World War, not 26 years earlier.

The aftermath of the Nuremberg and Tokyo war crimes trials saw an incredible series of steps forward in the codification of an international legal system. The United Nations Charter, the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide would all follow in the next five years. Yet, it would be almost 50 years before the establishment of the ICTY in April 1993, the next attempt at an international war crimes trial. Chapter III will also look extensively at the problems that have beset the two *ad hoc* tribunals—the ICTY and its Rwandan twin, the ICTR—since their inception, including the logistical nightmares that both have endured, and the

legal issues that have particularly affected the Rwandan tribunal.[6] These problems are ones that, for the most part, were never the slightest concern for the Nuremberg and Tokyo tribunal. Even after the arrest of Slobodan Milosevic on 1 April, we begin to see similarities between the efforts to bring the Milosevic's and Karadzic's of the world to justice and the efforts to try the likes of Kaiser Wilhelm and Talaat Pasha after the First World War. Chapter III, which concludes with the road to the ICC, will show where the ICTY and ICTR diverge from the Nuremberg-model war crimes trial. Instead, they are trials whose foundation began much earlier, created by diplomats of another time, after the war of an entirely different generation.

The thesis itself concludes in the present, with the debate over the creation of the ICC. Like all of the war crimes trials before it, the ICTY and ICTR were both *ad hoc* tribunals, and the arguments for and against the creation of a permanent international criminal court have only further served to revisit the entire debate over war crimes trials. Yet, for the most part, this is not a thesis about the principle of war crimes trials. The legal theory behind such trials is fascinating, and the debates for and against them—and for and against the creation of the ICC—are complex and worthy of their own thesis entirely.[7]

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[6] Including the conflict between the Rwandan justice system, which has the death penalty, and the ICTR, which prohibits it.

[7] Which we have, thanks to Kathryn S. Klein, Individual Actions, International Response: The ICC and the Pursuit of Universal Justice, Amherst College, Department of Law, Jurisprudence and Social Thought, April 2000.

This thesis, however, is concerned first and foremost with the history behind the first war crimes trials of the twentieth century, both as a means to justify the importance of the failed World War One prosecutions and as a better lens through which to understand the challenges facing the ICTY, ICTR and the ICC. As Mr. Justice Jackson concluded in his legendary opening statement before the IMT,

> The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. [Furthermore,] we are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.[8]

If the hope for universal justice, for making all men answerable to the law, truly lies in the ICC, as many maintain, then every attempt must be made to allow the ICC the chance to succeed. Such attempts must include a comprehensive understanding of the flaws of the ICC's predecessors and of the flaws inherent within its own constitution. To that understanding, this thesis can provide but a tiny contribution, but hopefully one that has, as yet, not been made, for it is undertaken in the desperate, fervent hope that we do not, once again, doom ourselves to repeat the past.

[8] Jackson, in Marrus, 85.

II – CHAPTER ONE:
The Great Debate & The Trial of Kaiser Wilhelm

On 10 November 1918, the day before the new German government signed a formal armistice that finally brought an end to the bloodiest war that, until then, the world had ever seen, Wilhelm Hohenzollern—Kaiser Wilhelm II of Germany up until his coerced abdication on 9 November—fled to the Netherlands, handing his sword to a stunned Dutch border guard as he crossed.[1] Wilhelm, who had been the emperor of one of the greatest nation-states in the modern world since 1888, was now running from two different entities, both of which held him out as their greatest, most lethal enemy. The first, the throng of socialist revolutionaries that had seized control of the government in the final days before the armistice, wanted to see the Kaiser hanged for the suffering of the German people under his rule.[2] The second group was the governments of the victorious nations, who had spent much of the war debating the eventual fate of the Imperial German sovereign, grandson of Queen Victoria and cousin to King George V of England.

The debate raged both in public and private circles for many of the 51 months of the conflict, but it was not until two highly charged meetings of the Imperial British War Cabinet, on 20 and 28 November 1918, that a course of

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[1] Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton, Princeton University Press, 2000), 64.

action was effectively decided upon. In a step that was almost unparalleled in history, Wilhelm was to stand trial, before an Allied court, for his "crimes" of war against the Allies, most particularly Belgium. The former Kaiser, whom the British and French governments held personally responsible for the outbreak of hostilities in 1914, was to be the defendant in the century's first international war crimes trial.

That was the plan, at least, until the peace negotiations at Paris in the spring of 1919 and the resulting Treaty of Versailles. Instead, by the end of the peace conference, the plan to put Wilhelm on trial had unraveled, done in by a series of ideological conflicts between the American and European delegations. Though provisions indicting Wilhelm for war crimes—and calling for a trial—were included in the final Treaty of Versailles, they were significantly weaker than what the British and French had been proposing, and "[the Allies] let it be known, especially to the Dutch (who had granted Kaiser Wilhelm II political asylum at the end of the war), that they would not enforce these sections of the peace treaties."[3] How the proposed trial of the Kaiser collapsed under its own weight, and the political maneuvering that went on behind the scenes to ensure such an outcome, provides a critical jumping-off point for a more focused look at

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[2] Lamar Cecil, Wilhelm II, Volume 2: Emperor and Exile, 1900-1941 (Chapel Hill: University of North Carolina Press, 1996), 290-295. The socialists, as Cecil writes, were not only in political control of the government, but were also in physical control of much of Berlin itself.

[3] Howard Ball, Prosecuting War Crimes and Genocide: The Twentieth-Century Experience (Lawrence: University Press of Kansas, 1999), 22.

the Leipzig and Constantinople war crimes trials, and the lessons lost from the century's first war crimes trials.

The concept of an international war crimes trial dates back to 1474, when Hagenbach, a knight under the command of Duke Charles of Burgundy, was "charged with responsibility for the commission by those under his command of murder, rape, perjury and other serious crimes in his attempt to subjugate the citizens of Breisach in the Upper Rhine."[4] Hagenbach, whose counsel pleaded that he had been following orders from his superior, Duke Charles,[5] and was therefore in no place to question the acts, was tried before an *ad hoc* international tribunal of 28 judges.[6] Hagenbach was convicted, stripped of his knighthood, and condemned to death.

The Breisach trial, named after the region in which the atrocities were supposedly committed, was based on little to nothing in the way of legal precedent. By the outbreak of hostilities in 1914, however, the international community had begun serious efforts to codify standards for the conduct of war. Various treaties throughout the seventeenth and eighteenth centuries had included provisions for the safe return of captured prisoners and the "amelioration" of the condition of sick and wounded soldiers in the field,

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[4] Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations (London: Martinus Nijhoff, 1992), 18-19.

[5] A defense that the Allies would intentionally circumvent by prohibiting it at Nuremberg.

[6] Though, as Sunga notes, the judges were "international" only in the sense that they came from different states of the Holy Roman Empire.

culminating with the Geneva Convention of 1864, the "first instrument of international humanitarian law."[7]

The 1864 Geneva Convention, later expanded by the Hague Conventions of 1899 and 1907, began to set out standards of treatment that were required of both sides during wartime, touching on everything from prisoner-of-war camps to types of weapons that were illegal. From the Hague Conventions, which borrowed a number of ideas from the "Lieber Code,"[8] a series of provisions drafted by the Union Army during the U.S. Civil War in 1863, came the concept that it was "illegal" under international law to fail to abide by such humanitarian standards.[9] Four centuries after the Breisach trial, the precedent for such a legal proceeding was finally codified.

Consequently, it was not long after the outbreak of hostilities in August 1914 that voices in Britain and France were effectively screaming for trials. On the morning of September 5, 1914, the *London Times*, quoting a speech by British Prime Minister Herbert Asquith, denounced the 'Sack of Louvain,' carried out by the advancing German army on the neutral medieval Belgian city, as "the greatest crime against civilization and culture since the Thirty Years' War."[10] The attack, in which 200 Belgian civilians were killed and a substantial part of the

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[7] Yves Beigbeder, Judging War Criminals (New York: St. Martin's Press, 1999), 6.
[8] Columbia University President Dr. Francis Lieber was asked by President Lincoln to draw up a series of provisions, titled "General Orders No. 100," which would eventually form the backbone of all international law on the subject of the treatment of prisoners-of-war.
[9] These standards include the right of prisoners to food, shelter and adequate medical treatment.
[10] James F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War (Westport: Greenwood Press, 1982), 9-10.

city, including the library at the University of Louvain, was destroyed, was just one of a number of reported atrocities committed by the Germans in their brutal march through Belgium. It was the invasion of Belgium—whose neutrality was guaranteed by Britain in the Treaty of 1839—that had brought the British into the war on August 4, and it would be British outrage over the German army's actions *in* Belgium that would prompt the first calls for war crimes trials.

In a piece titled "Germany and the Laws of War" in the October 1914 issue of The Edinburgh Review, an anonymous author made a case that would eventually—though not immediately—be adopted by vocal members of the various Allied governments:

> The thinkers of Europe must combine to find a sanction for the principles of international law; must make it clear that civilization does not ultimately rest upon Might but upon Right ... In particular the dignity and authority of international law must be asserted by the setting up of a special tribunal to deal with the men responsible for the violation of Belgian neutrality. The invasion of Belgium was not an 'act of war' but a criminal act, and the nations of the world must devise means to bring the authors of such crimes to trial and punishment.[11]

Initially, however, the Allied governments themselves, particularly the British, did not intend to pursue post-war trials of the Kaiser or of his soldiers because they were not convinced that such trials would be called for, let alone possible.[12] In Brussels, London and Paris, as in Berlin, the expectation was for a quick and decisive war, with the overriding sense that the fighting, however bloody and vicious, would be over by Christmas. With the British and French

[11] Quotation appears in Willis, 11.

victory at the First Battle of the Marne, and the stalemate that followed the ensuing "Race to the Sea," hopes of a brief war were short-lived, and the Allied governments turned their attention towards increasing popular support for continued fighting.

As the war dragged on into 1915, the Allied governments—particularly in Britain and Russia—launched massive propaganda campaigns on the home front, attempting to portray the actions of the Germans as frightful and barbaric. More concerned with public opinion than with possible post-war actions, the governments desperately sought popular support for the conduct of the war, particularly so that it would be easier to recruit new troops. Consequently, "Reports of Atrocities," began to appear as early as December of 1914, produced by the governments themselves. Oftentimes, however, the worst atrocities reported were largely exaggerations or outright fabrications.[13]

By the middle of 1915, with summary trials and executions of prisoners of war gaining increasing popularity on both sides of the front-lines,[14] Allied governments, particularly Britain's, began to quietly examine the possibility of trying certain German leaders, primarily the Kaiser, upon the war's then-uncertain conclusion.[15] In April 1915, Lord Kitchener, the British War Secretary, argued for treating *all* Germans responsible for atrocities, including the common

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[12] Bass, 60-61.
[13] The best comprehensive look at the efforts of the Allied governments is in James M. Read, *Atrocity Propaganda* (New Haven: Yale University Press, 1941).
[14] Ball, 18-19.
[15] Ball, 19.

soldier and Kaiser Wilhelm II himself, as war criminals. Kitchener further proclaimed, somewhat optimistically given the present state of the war, that, until such criminals were delivered to the British government, the war would continue.[16] The problem with Kitchener's bold claim, however, was a problem that got in the way of British efforts to begin trial preparations. As authors Gary Bass and James Willis both argue, the issue was that the war was far from over in 1915 and 1916. Any preoccupation with post-war questions such as punishment was far-sighted and misplaced.[17]

As the tide of the war turned slightly in favor of the British and French with the entry of Rumania in the Summer of 1916, and more dramatically with the United States' entrance into the war in April 1917, preparations were resumed behind the scenes in the British government. The British actions were accompanied by an intensification of the calls for punishment of the Kaiser and other German leaders from the British public.[18] Not coincidentally, the renewed calls for vengeance—for retribution after the war—coincided with a resumption of Germany's unrestricted submarine warfare, which the British—whose entire nationhood depended upon open seaways—took as the most outrageous of the German actions.[19]

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[16] Charles Hobhouse, Inside Asquith's Cabinet: From the Diaries of Charles Hobhouse, Edward David, Ed. (London: John Murray, 1977), 238.
[17] Willis, 35. Also see Bass, 62-63.
[18] Bass, 63.
[19] Bass, 64.

Most notable among the quasi-official preparations for post-war punishment was Lord Robert Cecil's "Government Committee on the Treatment by the Enemy of British Prisoners," a committee that fed confidential reports to the British cabinet about suspected German war crimes.[20] Clearly, the British government was already considering the possibility that they would need evidence after the war of the culpability of German war criminals. It was a small step, but it was the first of many such steps towards an unprecedented idea. As Willis concludes,

> Even such tentative official preparations for postwar trials was one indication, among many, that the First World War had taken on a revolutionary character ... From various sources and motives in some Allied countries, an extraordinary claim of another kind against the traditional order was advanced to hold enemy leaders and soldiers criminally responsible for violations of international law.[21]

By October of 1918, with the war all but won, the British and the Americans—who took a leading role in the ensuing armistice negotiations—were loathe to make the surrendering of "war criminals" part of any peace settlement, lest such a request further draw out the negotiation process. Separately, U.S. President Woodrow Wilson, desperate for creating a firm foundation for his as-yet unborn League of Nations, sought a peace devoid of any allegations of "Victor's Justice." Wilson's primary concern, one which events would prove to

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[20] Willis argues that the documents produced by Lord Cecil's committee allowed the Cabinet, upon the end of the war, to decide which German prison camp personnel to include on its list of "war criminals."
[21] Willis, 22.

be valid, was that "extraordinary war crimes trials might impair rather than contribute to the establishment of lasting peace."[22]

It should be noted that Wilson himself was not specifically against the concept of war crimes trials. Repeatedly throughout 1917 and 1918, the U.S. President had invoked calls for post-war justice. He also faced pressure from American public opinion. During the war, the Americans were as unified behind the concept of trials, particularly of the Kaiser, as there comrades were in Britain and France. On Armistice Day, several high-profile New York attorneys even went so far as to stage a mock trial, with the help of a night court judge.[23]

The problem confronting Wilson was the League of Nations, for which he had developed a fanatical obsession with bringing into existence. Though "many Americans probably found the internationalism of a trial of the Kaiser for violations of international law as appealing as the idea of a League ... [and] undoubtedly thought these two innovative approaches complemented each other,"[24] Wilson himself was not as convinced. Wilson held an inherent belief in the rule of law and in the twin concepts that it should ultimately govern interactions between states and that all people, including sovereigns, must be forced to abide by it. Nevertheless, he was worried that the law and precedent for such trials did not exist yet. Consequently, he feared that such trials, which would therefore be unable to escape claims of "Victor's Justice," would only

[22] Willis, 48.
[23] Willis, 43-45.
[24] Willis, 47.

plague the entire peace process, and hamper the efforts to establish the League of Nations.[25] Therefore, though the U.S. public was clearly in favor of trying the Kaiser, Wilson had deep-rooted doubts that such trials would, in the long term, be in the best interests of peace.

Such doubts were nowhere to be found in London and Paris, where most of the limited governmental opposition to the inclusion of trials among the armistice terms was only a move to expedite the armistice process. Public opinion had been clamoring for trials, particularly of the ex-Kaiser, in both capitals. The public was primarily concerned with Germany's aggression in instigating the war, its violation of Belgian neutrality, and its unrestricted submarine warfare. As David Lloyd George, who replaced Asquith as Prime Minister in the 1916 elections, recalled in his memoirs, "[there was] a growing feeling that the war itself was a crime against humanity, and that it would never be finally eliminated until it was brought into the same category as all other crimes by the infliction of condign punishment on the perpetrators and instigators."[26] The Prime Minister himself was very much a supporter of this premise of retributive justice, telling the National Council of Evangelical Free Churches in an August 1918 meeting that, amongst British war aims was, "above

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[25] Arthur S. Link, Woodrow Wilson, Revolution, War, and Peace (Arlington Heights: AHM Publishing Corp, 1979), 13.

[26] David Lloyd George, Memoirs of the Paris Peace Conference, Vol. I., (New Haven: Yale University Press, 1939), 54-55.

all, making sure that war shall henceforth be treated as a crime, punishable by the law of nations."[27]

In France, the actions of the German army while on French soil—including the scorched earth that they had left behind—infuriated the populace to a point of national rage. Yet, the French government, led by Georges Clemenceau, Lloyd George's counterpart, held fast to the desire for trials instead of summary executions. As Clemenceau told Lord Curzon—one of Lloyd George's emissaries—in an impromptu meeting in Paris in November, a trial of Kaiser Wilhelm, "as an act of international justice [and] of world retribution ... would be one of the most imposing events in history and the conception [is] well worthy of being pursued."[28]

Consequently, by the end of the war, "British and French public clamor for such a tribunal, unprecedented in world history, forced the issue into the peace settlement discussions among the Allies."[29] Wilson, despite his concerns, was willing to discuss the issue at the upcoming peace negotiations. What remained was for the idea to be approved by the British government, where, despite Lloyd George's own approval, the issue still rested with the Imperial War Cabinet. The council of ministers, which had already begun to consider the issue in October, was largely pre-disposed against war crimes trials. One of the

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[27] Quote appears in Willis, 56.
[28] Lloyd George, 55.
[29] Ball, 21.

council's biggest concerns was centered around the questions of legalism that, as it would turn out, would plague the effort for trials.

Unlike the War Cabinet, the *Imperial* War Cabinet included key ministers from throughout the Commonwealth, and it was this body that had decided in October that trials should not be part of the armistice terms. Yet, despite the open opposition to the concept of trials from some of its members, the Cabinet nevertheless concluded its October meeting with instructions to Frederick Smith, the attorney general, to begin sifting through evidence in the Foreign Office and War Office files that could, if needed, be used in a future trial.[30] Smith subsequently formed a "Committee of Enquiry," and its investigation—and Smith's own personal views—would play a pivotal role over the course of the Cabinet's debate.

After Curzon relayed his mid-November conversation with Clemenceau back to Lloyd George, Curzon, himself an ardent supporter of trying the Kaiser, convinced the Prime Minister to re-visit the issue at the next cabinet meeting. As Bass writes, "there, and in the next such meeting, the British and Commonwealth governments would have one of the most extraordinary debates over international justice on record."[31]

Curzon opened the 20 November meeting at noon with a stinging indictment of Wilhelm, arguing that "the Kaiser is the arch-criminal of the world,

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[30] CAB 23/8,War Cabinet 484 and Imperial War Cabinet 35, 11 October 1918, 4 p.m. N.B.: Copies of these, and all other Cabinet and Foreign Office papers cited herein, were obtained through Her Majesty's Public Records Office at Kew, website: http://www.pro.gov.uk..

and just as in any other sphere of life when you get hold of a criminal you bring him to justice, so I do not see, because he is an Emperor and living in exile in another country, why he should be saved from the punishment that is his due."[32] Curzon also reiterated his and Clemenceau's staunch opposition to a summary execution of the Kaiser, arguing that legalism precluded shooting him.

Lloyd George followed Curzon, arguing emphatically for a trial not nearly as much on legal terms as on moral ones. Kaiser Wilhelm, argued Lloyd George, "has put to death hundreds of thousands of prime young fellows from this country and did it very recklessly ... I do not think it is sufficient punishment to this man that he should get away with twenty millions of money, as I see is stated, to Holland or Corfu, or wherever he goes."[33] The Prime Minister, who, by this point, had raised his voice to fever pitch, also addressed the issue of legal precedent, making a similar argument to the one that Robert Jackson would make in his legendary opening statement at the Nuremberg trial some 27 years later. "With regard to the question of international law," stormed the Prime Minister, "well, we are making international law, and all we can claim is that international law should be based on justice ... there is a sense of justice in the world which will not be satisfied so long as this man is at large."[34]

Despite the fury and passion of Lloyd George's oration, the Cabinet remained unmoved, instead inundating Curzon and the Prime Minister with

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[31] Bass, 65.
[32] CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon, pg. 6.
[33] CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon, pg. 7.

political and legal challenges to such a trial. William Hughes, the Prime Minster of Australia, gave one of the most direct legal arguments against a trial of Wilhelm. "You cannot indict a man for making war," argued Hughes. "War has been the prerogative of the right of all nations from the beginning, and if you say, well, as a result of this war, millions have died, you can say that much of Alexander and of Moses and of almost anybody."[35] Lloyd George promptly retorted that "I am not so sure that they also ought not to be brought to justice," but Hughes had made the critical point. Since Wilhelm's actions, particularly his aggression in invading Belgium, were nothing new in the annals of European history, there was no pressing reason, at least legally, to create a new means of punishing him.

Lloyd George's munitions minister, who had previously served as Asquith's First Lord of the Admiralty, agreed with Hughes, and also raised the issue of command responsibility. Winston Churchill, who remained uneasy with legalist principles up to—and through—the Nuremberg tribunal, argued that trying Wilhelm without trying every other German of similar—or greater—culpability would completely overlook the importance of other forces within Germany, including the Parliament, in pressing the war. Churchill was also skeptical about placing the entire blame for the war's instigation on the Kaiser, worried that the questions surrounding the role of the Russians in escalating the

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[34] CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon, pg. 7.
[35] CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon, pp. 7-8.

July Crisis in 1914 could lead to Wilhelm's exoneration. As Bass notes, "In 1918, Churchill had his doubts even *before* Allied war crimes policy began to crash and burn. He saw the ambiguities of meting out blame, and the risk that legal procedure would let Wilhelm II of the hook."[36]

Separately, and without much support, Sir Robert Borden, Prime Minister of Canada, argued for exiling Wilhelm, as the European powers had done to Napoleon Bonaparte a century earlier. General Jan Smuts, the Prime Minister of South Africa, and Lord Reading, who shortly thereafter would become Lord Chief Justice, foresaw what Reading called "very great difficulties" in convicting Wilhelm for waging an aggressive war.[37] Aggression, which would never really catch on as a crime in the aftermath of the First World War, became one of the most important charges pinned on the 22 Nazis who stood trial at Nuremberg after the Second.

Austen Chamberlain next raised a concern that a trial would make a martyr out of Wilhelm, and, he worried, would generate a nationalist backlash in Germany. History would bear out Chamberlain's concerns in the aftermath of the Leipzig trials. For the moment, though, the larger—or, at least louder—verbal sparring between Lloyd George and Hughes drowned them out. Lloyd George, who refused to give an inch, eventually began, over the group's objections, to stage a mock trial of the Kaiser in the middle of the meeting. After over 40

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[36] Bass, 67.
[37] CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon, pg. 8-9.

minutes of such a demonstration, when it had become clear that Lloyd George's ministrations were leading nowhere, Curzon stepped in with a suggestion that the matter be referred to Attorney General Smith's Committee of Enquiry, and the Cabinet agreed to postpone debate until Smith was ready to report back.[38]

Smith, who, despite later statements, never made any pretenses that he was against trying the Kaiser, referred the matter to the Committee's "Subcommittee on Law," which deliberated, off the record, for six days.[39] It returned to Smith with a series of guidelines, all arguing in favor of trying the Kaiser, noting, in part, that otherwise, the "vindication of the principles of International Law [sic]," would otherwise remain "incomplete."[40] Further, the Subcommittee proposed that the tribunal consist only of Allied judges, so as to avoid the possibility of neutral judges calling into question possible war crimes committed by the Allies.[41]

The group of lawyers would eventually determine that, although Wilhelm was the head of a state, he was also the leader of the armed forces, and could therefore be charged with ordering the violations of the laws of war as codified by the Hague Conventions of 1899 and 1907. Further, they suggested fifteen categories of offenses, ranging from submarine warfare to executions of hostages

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[38] CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon, p. 10-11.
[39] Willis, 58.
[40] CAB 24/72 (G.T. 6550), "Report of Special Sub-Committee on Law to law officers of the crown, 28 November 1918," in Interim Reports from the Committee of Enquiry into Breaches of Laws of War, 13 January 1919, pp. 95-96.
[41] Here, we see the *tu quoque* issue 27 years before it was supposedly "first raised" at Nuremberg.

and ill-treatment of prisoners of war.[42] Lastly, by a vote of 4-3, the Subcommittee recommended including aggression in the indictment, concluding that Wilhelm "provoked or brought about an aggressive and unjust war."[43]

Smith, who has been characterized as "among the finest extemporaneous speakers of his era,"[44] returned to the Imperial War Cabinet on 28 November, and, speaking without notes, opened the 11:45 a.m. meeting with a moving, passionate 45-minute presentation that, by its close, led the Cabinet to Lloyd George's banner of trying Kaiser Wilhelm. In one of the most poignant moments, the attorney general urged the Cabinet to understand the long-term implications of failing to put Wilhelm on trial with an impassioned plea for command responsibility:

> It is necessary for all time to teach the lesson that failure is not the only risk when a man possessing at the moment in any country despotic powers, and taking the awful decision between peace and war, has to fear. If ever again that decision should be suspended in nicely balance equipoise, at the disposition of an individual, let the ruler who decides upon war know that he is gambling, amongst other hazards, with his own personal safety.[45]

Over the course of his presentation, Smith delivered a point-by-point argument that addressed—and debunked—most of the Cabinet's concerns over such a trial.[46] The attorney general echoed most of his Subcommittee's findings, including the specific violations of the 1899 Hague Conventions, the atrocities

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[42] Willis, 58. Lloyd George also comments extensively on Smith's oratorical skills in Memoirs, 58.
[43] CAB 24/72 (G.T. 6550), "Report of Special Sub-Committee on Law to law officers of the crown, 28 November 1918," in Interim Reports from the Committee of Enquiry into Breaches of Laws of War, 13 January 1919, pp. 97-99.
[44] Willis, 58.
[45] CAB 23/43, Imperial War Cabinet 39, 28 November 1918, 11:45 a.m., pp. 2-3.

carried out by the German Army in occupied Belgium and France, and, in an argument that would echo through the Palace of Justice in Nuremberg 27 years later, the concept that violating the principles and the spirit of international law, where not specifically codified, was still akin to violating international law itself.

Smith danced around the issue of charging the Kaiser with aggression, not because he was against the idea, but because he was worried that such a charge could not be proven, and would therefore hamper the trial efforts. Instead, he focused on the "unquestionable crimes" of the Kaiser, including the actions of the German armies and the policy of unrestricted submarine warfare. Finally, touching on an issue that would plague several of the century's later attempts at international war crimes trials, Smith concluded that, "as chief Law Officer of the Crown I say quite plainly that I should feel the greatest difficulty in being responsible in any way for the trial of subordinate criminals if the ex-Kaiser is allowed to escape."[47] In other words, because Kaiser Wilhelm was the commander-in-chief of the army, the sovereign of the nation, and, consequently, the man most responsible for Germany's atrocities during the First World War, he must be the first defendant in any post-war German war crimes trial.

Swayed by Smith's dramatic presentation, the Cabinet subsequently voted to endorse such a trial. Bass and Willis both note that Churchill and Chamberlain, two strong opposition voices at the 20 November meeting, were

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[46] The entire transcript of Smith's presentation, which also appears in Lloyd George, Memoirs, 59-65, is included as Appendix A, given its importance to the comparisons with Nuremberg.
[47] CAB 23/43, Imperial War Cabinet 39, 28 November 1918, 11:45 a.m., pp. 4-5.

absent from the 28 November proceedings due to other business. It is questionable, however, as to whether their presence would have made a difference.[48] The Cabinet, including the two absent ministers, had agreed to seek the counsel of the crown's chief law officer, and Smith had returned with not only his counsel, but also with a well-constructed argument in support of a recommendation to try the Kaiser. With the December elections less than two weeks away and the British public rabidly supporting any candidate who ran under a "Hang the Kaiser" platform, the Cabinet was not about to go against popular sentiment. In retrospect, perhaps all that the council was looking for was the excuse to go forward, and Smith had done his part to provide one. Preparations for a trial of Kaiser Wilhelm were to commence.

Four days later, meeting in Paris, Lloyd George, Clemenceau and Vittorio Orlando, the Prime Minister of Italy, agreed that their respective governments—and citizenries—supported a trial of Wilhelm, and that such a trial was in the Allies' best interests, a sentiment which they cabled to Wilson, still stateside in Washington. Clearly conscious of Wilson's zealous interest in guaranteeing the long-term stability of the League of Nations and the concept of "peace in our time," the three ministers cabled that,

> The certainty of inevitable personal punishment for crimes against humanity and international right will be a very important security against future

[48] Curiously, Lloyd George, in his memoirs, claims that "those who expressed doubts at the first discussion were all present on this occasion and all now concurred in the Attorney-General's recommendation." (Memoirs, 65). The record disagrees, noting Chamberlain and Churchill's absence.

> 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.[49]

Wilson, for his part, remained somewhat non-committal throughout November and December of 1918, responding to the cable from Clemenceau, Lloyd George and Orlando with a pledge to discuss the issue at length upon his arrival in France the following spring.[50] After Lloyd George and his subordinates won an overwhelming electoral victory in the ensuing British elections on 14 December, further affirming Britain's desire to put Wilhelm on trial, the stage was set for the Paris Peace Conference, scheduled to convene at Versailles. Over limited objections from Wilson—limited at the time, anyway—and from isolated members of the British Imperial War Cabinet, the European Allies had reached a consensus that war crimes trials, first and foremost a trial of Kaiser Wilhelm, would be an important aspect of the negotiations, with the British government, thanks to Smith and Lloyd George, leading the way.[51]

The Americans had tacitly consented, in November and December, to including war crimes trials as an important agenda item at Versailles. Once the conference opened in January 1919, however, it was the American delegation, behind Wilson and Secretary of State Robert Lansing, which, over and over again, fought the hardest against the inclusion of trials and of an indictment in the final peace treaty.

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[49] CAB 28/5, I.C.-99, Allied conversation, London, 2 December 1918, 4:00 p.m., pp. 3-4.
[50] In his memoirs, Lloyd George would write that "Wilson subsequently intimated that he was in agreement with the decision arrived at by the Allies on this subject." See Lloyd George, 86.

As the five-month-long conference dragged on, the momentum for trials, particularly for one of Kaiser Wilhelm, was gradually dissipated by the Americans, the one power that had suffered the least during the war and was affected the least by a guttural desire for vengeance. With objections that were primarily legalist in nature, the U.S. delegation fought bitterly against any international war crimes trials, eventually acquiescing to their inclusion in the final treaty only to remove their support soon thereafter.

Thanks largely to the United States, by its signing on 28 June 1919, five years to the day of the assassination of Archduke Franz Ferdinand in Sarajevo, the Treaty of Versailles "was a landmark in the international law of war crimes punishment, but it was a flawed landmark. Events at Paris did not encourage hope of practical achievements."[52]

The first such event came on 18 January 1919, the opening day of the conference, when, thanks to Lloyd George and Clemenceau, the subject of war crimes and punishment was the first item on the agenda.[53] The two Europeans, along with Orlando and Wilson, had agreed on 13 January to the establishment of a special commission to settle the question of where war crimes and punishment would fit into the peace negotiations. The creation of the Commission on the Responsibility of the Authors of the War and the

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[51] Again, both Bass and Willis make this point. See Bass, 75 and Willis, 64.
[52] Willis, 65.
[53] Willis, 68.

Enforcement of Penalties (CRAWEP) was, therefore, one of the conference's first official acts.[54]

Only two of the Commission's 15 members were Americans,[55] Lansing, who was named the Commission's chair, and Dr. James Brown Scott, a leading expert on international law who had been hand-picked by Lansing. The problem, however, was that the two were, arguably, the Commission's two leading figures. Their opposition to the idea of trying Kaiser Wilhelm, stronger than even Wilson's, helped to turn the proceedings of the Commission into a protracted—and rancorous—debate between the Americans and the Europeans.[56] As Scott would later write, "feelings ran about as high as feelings can run [during the meetings]. 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."[57]

Lansing, who was convinced that Lloyd George's only reason for desiring a trial of Wilhelm was to validate his December electoral platform, seemed, for reasons that are difficult to ascertain, to have little respect for both the British and French members of the Commission, and he "used every tactic he could think of to frustrate their efforts."[58] The Secretary of State, who hid his own personal

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[54] Lloyd George, 178.
[55] Along with two delegates each from France, Britain, Italy and Japan, and one delegate each from Belgium, Greece, Poland, Rumania and Yugoslavia.
[56] Willis talks about this somewhat (69), but the more authoritative source is Scott himself; see James Brown Scott, "The Trial of the Kaiser," in What Really Happened at Paris, Edward House and Charles Seymour, eds. (New York: Charles Scribner's Sons, 1921), 233-238.
[57] Scott, 480.
[58] Willis, 70.

opposition to war crimes trials in the cloak of Wilson's challenges of legality and precedent, tried, above all, to slow the proceedings to a grinding halt in an attempt to thwart the British, who "came to Paris ready for quick action on war crimes."[59]

Behind Lloyd George and Sir Frederick Pollock, the solicitor-general and one of the two British members of the CRAWEP, the push for war crimes clauses survived the initial clashes between Lansing, Scott and the rest of the Commission. Part of that was due to Frederick Smith's Committee of Enquiry, which had been busy since the Attorney General's 28 November presentation, formulating three reports that totaled 472 pages. Contained within the Smith reports were arguments covering everything from a response to a superior orders defense to actual briefs for *prima facie* cases against specific individuals within the German army and government.[60] With unwavering support for trials, particularly one of Wilhelm, coming from the French delegation—headed by Fernand Larnaude, dean of the Faculty of Law at the University of Paris—the Commission broke into three subcommittees that would be responsible for the bulk of the final report.[61]

The first subcommittee, overseen by William F. Massey, the Prime Minister of New Zealand (and without American influence), had the relatively

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[59] Willis, 70.

[60] Willis references the three reports (70), which are: CAB 24/72 (G.T. 6550), Interim Reports from the Committee of Enquiry into Breaches of Laws of War, 13 January 1919; CAB 24/85 (G.T. 7806), Interim Reports from the Committee of Enquiry into Breaches of Laws of War, 3 June 1919; CAB 24/111 (G.P. 1813), Final Reports from the Committee of Enquiry into Breaches of Laws of War, 26 February 1920.

straightforward task of synthesizing the overwhelming amount of literature documenting war atrocities, including the high volume of "atrocity reports" published by the Allied governments in 1915 and 1916, and Lord Cecil's aforementioned report to the British Cabinet. Upon its conclusion, Massey's subcommittee reported that the Central Powers had waged war by "barbarous or illegitimate methods," documenting 32 different types of war crimes, accompanied by references to specific incidents.[62]

The second subcommittee was charged with the legal consequences of war guilt, and it was here that the American influence had the largest impact. After Larnaude attempted to pin penal responsibility on Wilhelm for starting an "unjust" war, a concept not specifically codified in the then-existing canons of international law, Scott cut him off. The American, as Willis describes, began "a curt lecture on the contemporary state of international law that clearly recognized any sovereign state's unrestricted right to make war, an act of state for which an individual leader might be called to moral, not legal, account."[63] Pollock, who did not share Scott's impressive background in international law, was forced to defer.

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[61] Willis, 71.

[62] The report of the subcommittee is only published in French, but is referred to extensively in the final report of the Commission. See Carnegie Endowment for International Peace, Violations of the Laws and Customs of War: Report of the Majority and Dissenting Reports of the American and Japanese Members of the Commission on Responsibilities at the Conference of Paris, 1919. Pamphlet No. 32. (Oxford: At the Clarendon Press, 1919), 18-21, 28-57. (Hereafter referred to as CRAWEP Report).

[63] Willis, 73.

Scott's argument, that the Allies lacked enough positive law to make the aggression charge stand, swayed enough of the rest of the subcommittee to the American side, and the final report of the Commission included a statement that, since the 1899 and 1907 Hague Conventions were non-binding instruments for the maintenance of peace, "a war of aggression may not be considered an act directly contrary to positive law."[64] As if that was not damaging enough to Britain's plans for a trial of Wilhelm, the subcommittee further concluded that Germany's violation of Belgium's neutrality was also not a criminal act. Again, the report cited the absence of positive international law on the topic.[65] Lastly, in a statement that embodied, at the very core, the historic opportunity that the Paris Peace Conference presented (and that the Allies would not capitalize on), the subcommittee suggested that, "for the future, penal sanctions should be provided for such grave outrages against the elementary principles of international law."[66]

The third subcommittee, which featured the dueling presences of both Lansing and Pollock, was charged with determining responsibility for violations of the laws of war, and turned, primarily, into a debate over the establishment of a general international war crimes tribunal. The debate continued back and forth for the entire month of February, until Pollock forced a vote on the question of whether the subcommittee would support the establishment of such an

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[64] CRAWEP Report, 22-23.
[65] CRAWEP Report, 23-26.
[66] CRAWEP Report, 25-28.

international court. Lansing, who, thanks to the rules of procedure, could not object to the motion, lost the vote handily and subsequently backed down, leaving the remaining deliberations to the Europeans.[67]

The Commission resumed deliberations as a whole on 12 March, and Lansing would, over the course of the next five days, suggest a number of far-fetched proposals in an attempt to stall the delegation's final report. As Bass suggests, "Lansing was driven by two motivations: a narrower kind of legalism that would not allow prosecutions for which there was no clear precedent, and a muted American sensitivity to British and French outrage."[68]

The most striking characteristic of Lansing's actions, however, is that he was less against the general idea of a war crimes tribunal—which he was on the record as supporting in a limited fashion—than he was against the specific notions of an *international* tribunal and the concept of trying a head of state. Lansing, a legalist to the end, was absolutely convinced that sovereign immunity naturally extended into international law, and the lack of contradictory precedent only further supported his claim. Further, if sovereigns were exempt from international trial, then it could only follow that civilians were as well, and that the only courts that could—and should—try such defendants were national courts, sitting in judgment of its own citizens—or in cases where its own citizens were the victims.

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[67] Willis describes the proceedings (73), which, again, are only documented elsewhere in the French minutes to the subcommittee meetings.
[68] Bass, 101.

By the conclusion of the Commission's contentious deliberations, Wilson instructed Lansing to write the equivalent of a dissenting opinion to accompany the final report of the Commission. Lansing and Scott's "dissent," which was also supported by the Japanese delegation,[69] disagreed with the "majority" opinion in four specific provisions that the Americans claimed were "unprecedented."[70] First was the opposition to an *international* tribunal, which the Commission strongly endorsed. Second, Lansing and Scott were steadfastly opposed to the principle of trying a head of state. To that end, the memorandum cited an obscure U.S. Supreme Court case that supposedly guaranteed a sovereign's immunity from foreign jurisdiction, even though the case in question specifically *failed* to apply in times of war.[71]

The third difference between the minority and majority reports was over the doctrine of "negative criminality,"[72] which the British and French had pushed through subcommittee proceedings. The Europeans claimed that the failure to prevent war crimes by the government and military leaders in Germany was, in and of itself, a war crime. Otherwise, the claim of command *ir*responsibility would clear the way for endless acts of barbarism. The Americans did not

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[69] Japan, still a militaristic empire in 1919—and in 1945, for that matter—was also thoroughly concerned with any potential challenge to sovereign immunity.

[70] See, specifically, pp. 58-79 of the CRAWEP Report for the dissent.

[71] The case they cite, *Schooner Exchange* v. *McFaddon and Others*, 11 U.S. 116, February 1812, includes a statement by Chief Justice John Marshall, in the majority opinion, that one exception to territorial jurisdiction "is admitted to be the exemption of the person of the sovereign from arrest or detention within foreign territory." The problem with Lansing's use of the case is that Marshall specifically includes a caveat that the decision applies to foreign sovereigns "with whom the government of the United States is at peace." Marshall never addressed—at least in this case—the application of a similar tenet in wartime.

[72] The concept that one can be charged with a crime for *not preventing* something from happening.

disagree on point, but wanted to draw a clear distinction between when a commanding officer had knowledge that could prevent a war crime—which they argued should not be a case of negative criminality—and when the same officer had "the duty and authority" to prevent such a crime.[73]

Lastly, the most theoretical disagreement between the two sides was over the concept of the "laws of humanity." The Europeans, showing an uncanny prescience of what was to come—or, as Willis suggests, reacting to the situation in Armenia—wanted to codify the principles of "crimes against humanity" that were first echoed in the preamble to the 1907 Hague Conventions as crimes under international law, even though they were not war crimes *per se*.[74]

The Americans, however, balked at the sentiment, arguing instead that such an arbitrary standard was not tenable because it varied "with individual consciences."[75] With a sentiment that would be turned on its head by Americans at Nuremberg, the primary strength of Lansing and Scott's position, as Willis concludes, "rested upon the presumption, and little else, that because nothing had been done in the past, nothing should be done."[76] At a fundamental level, the Americans and the Europeans disagreed over whether or not to hold a trial of Kaiser Wilhelm II, a disagreement that, in the end, was as much an outcome of political differences as it was a result of contrasting legal approaches.

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[73] CRAWEP Report, 63-68.
[74] Willis, 75.
[75] CRAWEP Report, 68-71.
[76] Willis, 76-77.

Again, it is also possible that, had America borne more of the brunt of the war, it is entirely likely that Lansing and Scott would not have been so heavily wrapped in higher legalistic principles. As Bass writes, "Lansing thought that the British and French delegates had been swept away by public opinion, whereas Lansing had not ... In the 1945 negotiations leading to Nuremberg, Robert Jackson would specifically repudiate Lansing and Scott's views as immature."[77]

The CRAWEP's final report returned the issue of war crimes trials to the Council of Four (Clemenceau, Lloyd George, Orlando and Wilson), along with notes from Lansing and Pollock to their respective leaders. In a message to Wilson, Lansing once again showed his distrust of the British and French, arguing that their reasons for desiring a trial of Wilhelm were, "[for the British], because of promises on the hustings ... [and for the French], because the French members of the Commission had previously written a monograph in favor of his trial and punishment."[78] The British and French both wanted "international Lynch law," in the words of the U.S. Secretary of State, which he would not tolerate. Pollock, meanwhile, in his communiqué to Lloyd George, informed the Prime Minster that the U.S. "remained reluctant to create the possibility of their President ever being incriminated."[79]

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[77] Bass, 104.
[78] Willis, 77.
[79] Willis, 77. It is interesting, if not terribly ironic, to note that this was almost the precise sentiment adopted by Senator Jesse Helms (R-N.C.) in the Senate Foreign Relations Committee's debate over ratification of the 1998 Rome Statute and the creation of the International Criminal Court.

As Willis writes, the Council of Four's debate about trials "occurred during the nadir of the peace conference," in early April.[80] Wilson, as opposed to Lansing, was not necessarily against the notion of an international tribunal; he even favored the establishment of such a court—and the laws from which it would derive its jurisdiction—so long as it was part of the League of Nations project. He was, however, specifically against a trial of Wilhelm, for reasons that, along with the entire administration's attitude towards the Kaiser are a subject of significant historical debate.[81] Regardless of his motives, over the course of the next week, Wilson returned to the Council of Four, time and again, with arguments that came from his fundamental concern that a trial of the Kaiser would be subject to allegations of victor's justice and would create a dangerous precedent in international law.[82] Orlando budged slightly, but Clemenceau and Lloyd George, remaining true to their promises of the previous fall, held fast on the CRAWEP's report.[83]

From this impasse, outside forces began forcing the Council of Four to seek a compromise. Wilson, whose dream of an international community of

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[80] Willis, 77.

[81] Echoing a number of historians, in a comprehensive 1958 article, political scientist Fred Sondermann argues that various key members of the U.S. government, particularly Wilson, were actually in favor of keeping the Kaiser on the throne in the war's aftermath, and that a combined fear of the influence of Bolshevism from Russia, and of radicalization within German politics, led the U.S. to fight against the war crimes clauses of the Treaty of Versailles. (See Fred A. Sondermann, "The Wilson Administration's Attitude Towards the German Emperor," in *Colorado College Studies*, Spring 1958, Number One, pp. 3-16).

[82] Drawn from the transcripts of three Council of Four meetings, 1 April 1919, 4:00 p.m., 2 April 1919, 4:00 p.m., 8 April 1919, 3:00 p.m., in Arthur S. Link, The Deliberations of the Council of Four (March 24 – June 28, 1919), Vol. I., (Princeton: Princeton University Press, 1992), 105-112, 118-122, 187-196.

[83] Willis notes, however, that even if Lloyd George had considered giving in, he received a telegram on 8 April signed by 370 members of Parliament, demanding that he live up to his pledges from the December election, including his pledge for a trial of Wilhelm. See Willis, 79.

nations was in perilous jeopardy, was desperate for Lloyd George's overall support, particularly on two issues—the controversy over the French annexation of the Saar and the recognition, in the League of Nations' covenant, of the Monroe Doctrine and its guarantee of the United States' authority to intervene in any Western Hemisphere matter involving the European powers.[84] Though no official record exists to support such a claim, as Willis argues, the coincident timing of Wilson's reluctant assent to war crimes trials on 8 April, Lloyd George's surprising support of Wilson's compromise resolution to the Saar situation on 9 April, and the passage, with British support, of the Monroe Doctrine amendment over the objections of the French on 10 April, all seem to suggest that a massive and dramatic compromise was brokered by the Council of Four.[85] At the very least, in a matter of three days, the Council of Four shoved the Paris negotiations back on track, resolving three critical impasses in short order.

Wilson's assent to the war crimes provisions, however, did not come blindly. Instead, the CRAWEP's recommendations were approved with several modifications, each drafted and proposed by the American president upon Lansing's recommendations. The modified provisions, which Wilson drafted on the evening of 8 April—and which were approved at the following morning's

[84] This was a condition that the U.S. Senate had mandated to Wilson as necessary if they were ever to ratify the treaty. Wilson came through on his end, but the U.S. never signed the Treaty of Versailles.
[85] Willis, 79.

Council of Four meeting—became the bulk of the four "war crimes" articles of the final Treaty of Versailles: Articles 227, 228, 229 and 230.[86]

In the first clause, Wilson proposed a trial before Allied national or mixed military tribunals for those accused of violating the laws of war. Wilson's proposal excluded references to a specifically international tribunal, the entire laws of humanity debate, and the negative criminality issue. The second clause—which became Article 227 of the final treaty—stated that the Allies sought the surrender, by the Netherlands, of Wilhelm II, so that he might stand trial before a "special tribunal," and that the charge "not be defined as an offence against criminal law, but a supreme offence against international morality and the sanctity of treaties."[87]

As Willis concludes, Wilson's compromise was out of place, since "it did not serve the purposes of either Lloyd George or Wilson."[88] The former sought a new precedent in international law, under which sovereigns could be held individually responsible for the consequences of their actions, particularly as it related to aggressive war. Instead, the compromise—and, in the end, the final treaty itself—set little in the way of legal precedent,[89] and opened any future trial of Wilhelm to a barrage of critiques, both from legal and political standpoints.

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[86] Wilson's 8 April exploits are outlined in Willis, 81. For his reading of his proposal, and the vote adopting it, see "9 April 1919, 11 a.m.," in Council of Four, 197-203.
[87] "9 April 1919, 11 a.m.," in Council of Four, 197-198.
[88] Willis, 80.
[89] Though, at Nuremberg, the issue would not be the *absence* of precedent so much as it would be the ignorance of the World War One efforts.

In the end, the entire debate over the question of war crimes and punishment resulted in a compromise that none of the Allies—let alone the Germans—were truly content with. Articles 227-230 were nowhere near as strong as the British and French had hoped they would be, yet they went further than Wilson had ever intended. Consequently, despite the best efforts of Pollock and Larnaude, and Clemenceau, Lloyd George and Smith before them, Wilson's subtle maneuvering—and the Council of Four's desperate need for compromise when the issue arose—led to a less than stellar result. With a few minor changes along the way, the four war crimes clauses in the 28 June Treaty of Versailles would, from the outset, seriously hamper the ensuing efforts to actually put Kaiser Wilhelm II on trial. As Ball concludes, "because of clashes between the United States and its allies regarding this 'uncharted area of international law,' there was no unanimity among the victors regarding the establishment of the war crimes tribunal. Without unanimity, the will to enforce the *Schmachparagraphen*[90] was absent."[91]

On paper, the Treaty was a monumental step forward in the development of international law. As Willis argues, "for the first time, a major international peace treaty had established the principle in international law that war crimes

[90] "Shame paragraphs," as Articles 227-231 (including the "War Guilt Clause") were referred to in post-war Germany.
[91] Ball, 23.

punishment was a proper conclusion of a peace, [and] that the termination of war did not bring a general amnesty as a matter of course."[92]

The underlying problem, however, requires a caveat to such a conclusion. Along with the lack of unanimity at the peace conference itself, the idealism and the positive steps in international law embodied in the Treaty of Versailles were seriously hampered, if not destroyed, by the United States Senate's refusal to ratify the Treaty. With the lack of U.S. approval and support, two different entities, both established by the Treaty, were doomed to failure. The first, as has been well-documented historically, was Wilson's League of Nations, which, without American support, survived on life support throughout the 1920s, but was manifestly unable to resolve the economic and political crises that tore Europe apart in the early-1930s.

The second casualty of America's failure to ratify the Treaty, much less discussed historically, were the war crimes clauses, which, as would also be the case in 1945, the European powers found very difficult to enact without the support of the strongest nation in the world. Without the U.S., the British and French governments were unwilling to risk a protracted fight with the Netherlands over extradition of the Kaiser, and were likewise unwilling to press sanctions against Germany for the debacle that became the Leipzig war crimes trials—the national trials that were the eventual compromise to satisfy the mandate of Articles 228 and 229. Instead, by 1923, the most tenable political

[92] Willis, 85.

solution for both the British and French was to cut the cord on the failed war crimes trials experiment. In the ensuing years, the international community would, instead, attempt to codify the concept that aggressive—and unjust—wars were illegal under international law, a chance they had already missed at Versailles. As we will see in Chapter III, these efforts were largely unsuccessful.

Insofar as Wilhelm was concerned, by the time the British and French governments formally filed an extradition request with the Dutch government on 16 January 1920,[93] the measure was purely *pro forma.* As Willis notes, "Premier Francesco Nitti of Italy told the Dutch minister in Paris on January 19 that he would not insist upon extradition of the ex-Kaiser. Nitti said what the Allies really wanted was to prevent the Kaiser from living close to the German border where he might plot a return to power."[94] Nitti also informed the Dutch minister that Lloyd George agreed, and that French Foreign Minister Stephen Pinchon had communicated similar assurances. Since the signing of the Treaty the previous June, the Dutch government had stood firm, unconvinced that the trial of Wilhelm was a necessity, especially given the public disagreements between the Allies that had dominated the Paris negotiations. It would have taken significant—and unified—diplomatic pressure from Britain, France and, in all likelihood, the United States to sway the Dutch, who had never signed the Treaty of Versailles and therefore argued that they were not subject to its provisions.

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[93] Ironically, one of Clemenceau's last official acts as Prime Minister of France.
[94] Willis, 107.

Further, the Dutch government was nervous about setting a new precedent in which the monarchs of one country could fall under the legal jurisdiction of the governments of another, given that the Netherlands was still a monarchy.[95]

The reaction to the Treaty also had a negative impact on the push for a trial in Britain, where Lloyd George found many of his supporters—including Lord Curzon—abandoning him in the aftermath of the peace conference. With sentiment in the British government wavering by August 1919, the Dutch only grew more resolute, and the French government was not willing to stand alone against the Dutch government's refusal to surrender Wilhelm. As a result, "when the demand for surrender of the Kaiser was finally made, neither the British government nor any other Allied government would have been ready to institute proceedings if the Dutch had handed him over."[96] Even when the French, in 1920, proposed to try Wilhelm *par contumace*, Britain, lacking a similar precedent in their own domestic law, would not cooperate.[97] As Willis concludes,

> Conceivably, if the Allies had been united, they could have compelled the Netherlands to surrender the Kaiser ... The war-weary people of the Allied nations probably would not have approved such action so long after the war had ended. Certainly, most Allied leaders had become convinced that a trial of the Kaiser was no longer worth the effort. In a world in which neutrality and political refuge remained acceptable, profound problems in gaining custody of accused war criminals also remained.[98]

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[95] Willis, 105-106.
[96] Willis, 104.
[97] Bass, 87.
[98] Willis, 112.

The ex-Kaiser, for his part, stayed off of the radar during his exile in the Netherlands. Early in 1920, he relocated from his quarters in Amerongen to a castle that the Dutch government allowed him to purchase at Doorn. With the exception of the Kaiserin's death on 11 April 1921 (after which Wilhelm sought permission to accompany the body to the funeral in Potsdam, a request which was denied by the Dutch and German governments), Wilhelm became a subject of decreasing importance to the Allied governments. He spent much of his 21 years at Doorn plotting his return to the German throne, and watched, first with glee and later with disgust, as the Nazi party rose to power with outright contempt for Wilhelm and most of his progeny.[99] In funeral instructions drafted after a mild heart attack in 1933, Wilhelm specified that should the German monarchy be restored, he was to be buried in Potsdam. Otherwise, he was to be buried at Doorn until such time as the Hohenzollerns returned to power. The ex-Kaiser died on 4 June 1941, and he remains buried at Doorn to this day.[100]

The closest that the world would ever come to trying Kaiser Wilhelm would be on paper, in George Sylvester Viereck's 1937 The Kaiser on Trial. Viereck, editor of the *American Monthly* and an illegitimate descendant of Wilhelm I,[101] conducted an extensive trial based on the provisions of the Treaty of Versailles, with five justices from the five Allied powers sitting in judgment of Wilhelm II. Writing just months after Adolf Hitler's 1937 repudiation of the "War

[99] Cecil, 296-356.
[100] Cecil, 354-355.
[101] Cecil, 308.

Guilt" clause (Article 231) of the Treaty of Versailles, Viereck tried Wilhelm in "the High Court of History," and, in the end, left the matter of the verdict in the hands of the reader.[102] Yet, of perhaps the most interest, at least for the purposes of this paper, is Viereck's preface, in which he opens his 449-page tome with the comment that, "once again, as in 1914, the War God casts his shadow over the earth."[103] War was quickly returning to Europe, and yet, too many lessons from the first conflict had gone unheeded.

Despite Viereck's best efforts to simulate such an event, Wilhelm II was never put on trial, leaving the entire issue of command responsibility and of sovereign immunity unresolved in the canons of international law. Worse still, because there never was a trial, and therefore never any legal precedent save the disputed Treaty of Versailles itself, the Allies, upon the conclusion of the Second World War in 1945, were once again in a difficult position. For the second time in 27 years, the governments of the victor nations found themselves, at Nuremberg, forced to create international legal precedent where none previously existed, having missed their first chance to do so in the aftermath of the First World War.

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[102] Viereck's entire work merits a comparison with Hannah Arendt's Eichmann in Jerusalem, particularly her Epilogue, in which she becomes the judge and issues her own verdict. The conclusion in Viereck's book leaves the matter to "the 12th, masked, juror," which, he later writes, is the reader.
[103] George Sylvester Viereck, The Kaiser on Trial (New York: Greystone Press, 1937), xiii.

III – CHAPTER TWO:
The Project Fails: Leipzig & Constantinople

As the efforts to try Kaiser Wilhelm were beginning to collapse, the Allies turned their attention towards the other war crimes provisions of the Treaty of Versailles. The specific focus was on Article 228, which called for the surrender by the German government of those accused by the Allies of war crimes, and the subsequent trial of the defendants before military tribunals.[1] The failure of the effort to try the Kaiser had put a serious dent in the momentum that the war crimes project had enjoyed in the war's immediate aftermath, and so it was "not without trepidation" that the Allies drew up lists of suspected war criminals.[2] Though the trepidation was largely linked to the collapse of Article 227, it was also motivated by a pronounced fear in London and Paris of the German government's domestic weakness. As Willis argues, "the Allies feared that the collapse of moderate forces would leave the way open for a monarchist restoration or a Communist revolution."[3] Consequently, the war crimes project was seen as a potentially fatal challenge to the stability of the democratic German regime.

In Germany, the government had spent much of the summer and fall of 1919 reluctantly preparing for the surrender of war criminals, including the establishment of the "General Committee for the Defense of Germans Before

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[1] For the specific text of the war crimes clauses, see Appendix B.
[2] Bass, 78. (Also see Willis, 113).
[3] Willis, 116.

Enemy Courts."[4] The Committee, which was not officially connected to the government after its creation, sought to unite opposition to Articles 228, 229 and 230 of the Treaty of Versailles among the German press and public. It also was charged to offer legal assistance to those who might end up before such an Allied tribunal.[5] Matthias Erzberger, one of the leading figures in the new government, called for a national tribunal to investigate the claims made by the Allies, and worked behind the scenes to help prepare for the delivery of the accused war criminals to the British and French governments. Erzberger, however, was in the minority insofar as the war crimes issue was concerned. Most of the rest of the German government felt that the new regime could not survive without the support of the German military, which, understandably, was vehemently against the war crimes clauses. Instead, Erzberger's suggestion of a national tribunal was quickly adopted as an *alternative* to an international court, instead of as a precursor, as he had originally intended.

To help ease the perceived pressure the trials were placing on the German government, on 11 August 1919, Clemenceau suggested the first possible compromise to the impasse. The French prime minister argued for limiting the trials to "a few symbolic persons," noting that the Germans probably would not object to a limited number of trials. The Italian Foreign Minister, Tommasco

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[4] In German, *Die Hauptstelle für Verteidigung Deutscher vor feindlicher Gerichten.*
[5] Willis, 113.

Tittoni, agreed.[6] Lloyd George and Wilson, neither of whom were at the 11 August meeting, were both also in favor of a limited approach, hoping to agree to a list of somewhere between 50 and 75 Germans to put on trial.[7] When the British and French prime ministers met on 15 September for the first time since the signing of the Treaty of Versailles, they further affirmed the concept of a small number of trials, with Lloyd George arguing the point that had become the party line. "We only want to make an example," he said. "To try very large numbers would be to create great difficulties for the German government."[8]

As Willis argues, "the decision was easier to make than to implement ... [and] Allied leaders [soon] found themselves trapped by public opinion."[9] In France, where November's general election was looming, the press clamored for trials of an amazingly high number of Germans, including those who had merely occupied French property during the war. The pressure from the public was so great, Clemenceau would eventually comment that "it was such a serious political question ... [that] he could not stand up against it."[10] Similar public pressure in Belgium met with a similar result, with both nations compiling absurdly long lists of defendants, naming as many as 1,132 war criminals in the

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[6] "Heads of Delegation Meeting, 11 August 1919, 3:30 p.m." in Documents on British Foreign Policy, E.L. Woodward et al., Ed. 18 vols. (London: His Majesty's Stationery Office, 1947-72), 1:387-398. (Hereafter referred to as "Documents").
[7] Willis, 117.
[8] "Heads of Delegation Meeting, 15 September 1919, 10:30 a.m." in Documents, 1:685, 699.
[9] Willis, 117.
[10] Willis, 117.

Belgian case.[11] The British government, without an election pending, was able to stand a little more firm in keeping their list short, but the British were also not as scarred by the war, having been able to fight it from afar. All told, when the Commission on the Organization of Mixed Tribunals (COMT), the body charged with the logistical planning of the Article 228 trials, finally set to the task of planning the tribunals on 19 November 1919, it was confronted with a list with well over 3,000 names on it.[12]

The COMT, headed by France's undersecretary of state for military justice, Edouard Ignace, pared the list down somewhat, eventually sending 1,580 names back to the Allied governments. To the British, who continued to be concerned about the tenuous political situation in Berlin, the number was unacceptable. As with the effort to try the Kaiser, where the vacillations by the Allied governments only stiffened the resolve of the Dutch to not extradite Wilhelm, the debate between the British and French over the question of the other war criminals only heightened the resolve of the Germans to oppose the project. In a meeting to discuss treaty implementation in Paris earlier in November, Baron Kurt von Lersner had pleaded with the Allies that no German government could survive the surrendering of its citizens to a foreign military tribunal. Since the Allies

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[11] Both Willis and Bass argue that, even under the loosest conception of what constituted a war crime, there were, at most, somewhere around 1,000 Germans who were responsible for such acts during the war.

[12] "Commission on the Organization of Mixed Tribunals meeting, 19 November 1919," in Documents, 2:809-22.

could not easily renounce the penalty clauses, he argued, Germany should be allowed to try the accused before a national court.[13]

For the time being, the German suggestion went unheard, and the British attempted to further shorten the list, sending Lord Birkenhead—formerly Attorney General Smith—to Paris to attempt a compromise with the COMT. After a month of delicate legal maneuvering, the COMT finally arrived, on 13 January 1920, at a "final" list of 890 names, 36 of which were duplicates named by multiple countries. All told, the formal list totaled 854 defendants, a number that no one actually believed was tenable.[14] Events in Germany only further served to reinforce such a notion, culminating with the attempted assassination of Erzberger by an ultra-nationalist ex-army officer on 26 January.[15] As Willis notes, "Von Lersner, with some exaggeration, told Allied statesmen in Paris that the attempted assassination of Erzberger 'was due to the fact that he is looked upon as being the German representative who advocated agreeing to the surrender' of war criminals."[16]

With the political situation in Germany not getting any better and with the inability of the Allies to reduce the list to a reasonable number of defendants, Lloyd George apparently became convinced that the national model would make

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[13] "Crowe to Curzon, 6 November 1919," in Documents, 6:332-34.
[14] Willis, 120.
[15] Klaus Epstein, Matthias Erzberger and the Dilemma of German Democracy (Princeton: Princeton University Press, 1959), 355-359.
[16] Willis, 120.

the most sense.[17] Though Millerand, Clemenceau's successor, agreed, he still wanted to present the list to the Germans, a step that, once undertaken on 3 February, ignited the exact crisis Lloyd George had hoped to avoid. With the situation in Berlin—where the German army was plotting to overthrow the government—worsening, the Allies were backed into a corner.[18] Because the Germans refused to surrender the military and political leaders demanded primarily by the French and Belgians, the Allies were left with two choices—war or compromise. In 1920, that was no choice at all. Millerand gave in, and on 17 February, the Germans were informed of the change in policy. An "Inter-Allied Mixed Commission" would choose the cases to present to the *Reichsgericht*—the German supreme court in Leipzig, beginning with 45 "test cases," to see if, as Lloyd George wondered, whether Germany was "actually determined to judge them themselves before the Court of Leipsig [sic]."[19]

Regardless, the effort to establish international criminal tribunals after the First World War had failed. It had failed for a number of reasons, not the least of which was the lack of consensus among the Allied governments. Other factors in the collapse of the international effort included the intransigence of the Americans, the role of German nationalism in preventing the German government from cooperating, and the general loss of momentum that the project incurred as the politics behind it dragged on. Yet, the biggest obstacle to

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[17] See particularly his note to Alexandre Millerand, Clemenceau's successor, on 30 January. ("Lord Hardinage to Derby, 30 January 1920," in Documents, 9:626.
[18] Willis, 121-122, and Epstein, 363-370.

the success of the project had to have been the logistical one. At least in the German case, the Allies did not *have* the accused criminals whom they wished to try; lacking the willpower to get them was only a secondary issue. What was left to determine was whether the lack of an international tribunal doomed the entire war crimes project, or whether the national courts could make up for the political stalemate that had sunk the international attempt.

It would be over a month before the Allies would all select their test cases, and when they finalized the list on 31 March 1920, "the breakdown of cases was, once again, proportionate to Allied suffering: sixteen from the Belgian list, eleven from the French, seven British, five Italian, and six from smaller countries."[20] Another month and a half of wrangling between the British and French over the extent to which Allied witnesses and observers would be involved delayed the formal presentation to the German government of the list of the 45 defendants until 7 May.[21] A myriad of "legal difficulties and political obstructions" delayed the actual start of the trials by almost a year, though, as Willis argues, "Allied suspicion of German bad faith was, perhaps, excessive."[22]

The Leipzig war crimes trials finally began, with little in the way of fanfare, on 23 May 1921 with the British test cases. Of the seven names on the British list, the Germans would prosecute four—the other three had either died or disappeared, as many accused war criminals did upon learning of their status.

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[19] Bass, 80.
[20] Bass, 80.
[21] Willis, 128-129.

The British had chosen their cases carefully, naming only low-ranking officers whose actions could be corroborated by both British and German witnesses. For the first three Germans named by the British, each of whom was accused of mistreating prisoners of war, the strategy worked, as all three were convicted. The sentences, however, left much to be desired, as the three men were each sentenced to between six and 10 months of imprisonment despite their roles.[23]

If the sentences in the first three British cases had upset the English delegation, the fourth case absolutely mortified them. In the case, Lieutenant Karl Neumann, commander of the U-boat U-67, was accused of violating the standards of war for torpedoing—and sinking—the British hospital ship *Dover Castle*. Neumann, who claimed that he was just following superior orders, was acquitted in less than two hours by the court, which *nol-prossed*[24] the case, calling no witnesses. The decision effectively destroyed all of Britain's U-boat cases, since all U-boat commanders could use a similar defense.[25]

With the British test cases over, the *Reichsgericht* turned towards the cases submitted by Belgium, arguably one of the nations most scarred by the war. In the seminal trial from the Belgians' point of view, the court acquitted, on 11 June, Max Ramdohr, who had run the secret military police at Grammont during the war. Ramdohr was accused of torturing children, several of whom appeared

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[22] Willis, 130.
[23] Willis, 133.
[24] If the court finds insufficient evidence to sustain the charges, then they can "nol-pros" the case, which, at least in 1919, meant that they could rule on the defendant's guilt (or lack thereof) without any testimony and without the deliberations of a jury.

before the court to testify against him. With no German corroboration, however, the *Reichsgericht* maintained that the accusations were the "wildly imaginative stories of impressionable adolescents," even though the physical evidence strongly implicated Ramdohr.[26] Outraged, the Belgians abandoned the Leipzig trials, returning to Brussels and reporting that the decision was a "travesty of justice."[27]

A similar outcome befell the trials of the defendants on the French list, primarily the case of General Karl Stenger. It had been Stenger, in the German march into France in August 1914, who had ordered his soldiers to kill scores of wounded and captured French soldiers, and his actions had prompted the first French calls for post-war punishment. Yet, because no one testified that Stenger himself had ever ordered the killings, and because he was tried jointly with one of his subordinates, Major Benno Crusius, who admitted his own participation, Stenger was acquitted, while Crusius was sentenced to two years imprisonment.[28]

Outraged, the French, like the Belgians before them, withdrew. Though neutral observers, including a Dutch judge, felt that the French had overreacted, the fact remained that the Leipzig trials were quickly falling apart. The French,

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[25] Bass, 81, and Willis, 133-134.
[26] Willis, 134.
[27] Bass, 81.
[28] Claud Mullins, The Leipzig Trials (London: H.F.G. Witherby, 1921), 151-173. Mullins' book actually has accounts of all of the trials mentioned above, but Bass and Willis summarize the arguments in the other cases very clearly, whereas Mullins' presentation of the Stenger/Crusius case is the most detailed and comprehensive.

led by new president Aristide Briand, wanted to resort to military action, including the occupation of the Ruhr Valley, and also wanted to push ahead with trials *par contumace,* a proposal that had been previously rejected by the British. The Belgians also reserved the right to reinstate Articles 228-230 of the Treaty of Versailles, including the right to physically enforce the treaty if necessary.[29]

The British, who, by the end of 1921, were "heartily sick of the whole business,"[30] were as fed up with the French as they were with the Germans. For one, the British government was convinced that the French government saw the war crimes project as a means through which to bring about the occupation of the Ruhr.[31] Secondly, with the publication of John Maynard Keynes' The Economic Consequences of the Peace, many in the British public were quickly becoming ashamed of the "Carthaginian peace," as Keynes dubbed the Treaty of Versailles. By 1922, the British government accepted the concept that Article 228 was a dead letter.[32]

The French and Belgians did not, however, reverting to massive numbers of trials and courts-martial *par contumace.*[33] With the withdrawal of the British, French and Belgian delegations, the Leipzig trials quickly disintegrated as the

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[29] Bass, 89-90.
[30] Bass, 81.
[31] Indeed, the bitterness with which the French conducted themselves at Leipzig was met with a series of anti-France rallies throughout Germany during the conduct of the trials in 1922. Both Bass and Willis note, with significant historical irony, that it was at one of these rallies in 1922 when a young Hermann Göering was first introduced to a disillusioned Austrian corporal from the First World War by the name of Adolf Hitler.
[32] Bass, 82, and Willis, 139.

cases of countless defendants were *nol-prossed*. Finally, in late 1925, the signing of the Locarno Pact, which guaranteed the Belgian, French and German borders and admitted Germany to the League of Nations, signified the transition to a new period in post-war relations. Shortly thereafter, the Belgian and French governments both announced that they would cease their trials. The only remnant of the hundreds of trials conducted *in absentia* were lists of Germans who were not allowed into Belgium of France, and even those suspected war criminals were not to be arrested, only "discreetly returned" to Germany.[34]

All told, the *Reichsgericht* eventually convicted approximately three dozen Germans of war crimes, though, in all but three cases, either the verdict was later overturned or the already-lenient sentences were further commuted. The prosecutor's office in Leipzig continued to exist, as a formality, until a few months after the Nazi seizure of power in 1933. On 7 June 1933, all outstanding proceedings were formally quashed, and the twentieth century's first war crimes trials were, with complete ignominy, finally over.

Without any doubt, the Leipzig trials failed. They failed to accomplish what the British wanted, which was a clear and unfettered precedent in international law. They failed to accomplish what the Belgians and French wanted, which was retribution. They failed to accomplish what the Americans wanted, which was no trials at all, and they failed to accomplish what the

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[33] A modification of the concept of a trial *in absentia*, trials *par contumace* assume that the defendant's absence is a sign of guilt, and affords the defendants significantly fewer rights to assert the contrary. No jury is usually required, nor are the same evidentiary burdens in place.

Germans wanted, by further ingraining into the world's public opinion the concept of German war guilt. The lasting question, however, is whether they ever had a chance of succeeding. Bass argues that they did not, claiming that, "in the end, the only way to carry out Lloyd George's plans for war crimes trials would have been to occupy and control Germany completely, so that the Allies could hunt down the war criminals themselves."[35] The other international attempt at national war crimes trials after the war, which took place in the remnants of the collapsing Ottoman Empire, would support just such a contention.

Part of the problem in the German case after the First World War was the lack of a clear understanding of what constituted a war crime. The British wanted simple aggression to be a crime, so that those responsible for the inception of the war would be punished. The French were concerned with larger issues of conduct during the war, including the actions of some nowhere near the front lines. Yet, despite the disagreements in the German case, there was little—if any—debate among the Allies over the criminality of what the Ottoman Empire had done to the Armenians. As Vahakn Dadrian, one of the leading historians of what came to be known as the "Armenian Genocide" writes,

> During World War I, as the rest of the world looked on, the Ottoman Empire carried out one of the largest genocides in the world's history, slaughtering huge portions of its minority Armenian population ... In all, over one million Armenians were put to death [and] the European powers, who defeated the

[34] Willis, 144.
[35] Bass, 82.

> Turks time and again on the battlefield, were unable or unwilling to prevent this slaughter.[36]

The facts surrounding the Armenian Genocide have been relatively well established over the past two decades. After two similar, but smaller rounds of massacres in the mid-1890s and in 1909, the Ottoman government used the cover of the First World War to shield their forced deportation—and execution—of hundreds of thousands of Armenians primarily during 1915. The Ittihad Government, which could not tolerate the large, Christian population dividing the Turkish Muslims from their Caucasian relatives, systematically exterminated the Armenians as they deported them, convinced that no one in the West could—or would—intervene.[37]

Yet, despite the subsequent disappearance from history that led many to call the fate of the Armenians "the forgotten genocide,"[38] the mass executions did not go unnoticed at the time by the West, particularly the British. As the genocide was beginning, on 24 May 1915, the Allies issued a joint declaration which stated that, "In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly ... that they will hold

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[36] Vahakn N. Dadrian, "Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications," in *The Yale Journal of International Law*, vol. 14, no. 2, (Summer 1989), 223. (*Hereafter referred to as* "Genocide").

[37] Though there are a number of good histories of the Armenian Genocide, Dadrian's The History of the Armenian Genocide, which incorporates her previous article, may well be the seminal work in the field. See Dadrian, The History of the Armenian Genocide (Providence: Berghahn Books, 1995), 203-248. (*Hereafter referred to as* History).

[38] Dadrian, "Genocide," 224.

personally responsible ... all members of the Ottoman government and those of their agents who are implicated in such massacres."[39]

In the immediate aftermath of the war, the Allies (again, particularly the British) seemed true to their word, making the punishment of Ottoman war criminals as much a concern at the Paris Peace Conference as was the punishment of the Germans. Articles 227-230 of the Treaty of Versailles found mirror images in Articles 226-230 of the Treaty of Sévres, the Ottoman peace treaty that was signed 10 August 1920 in a quiet suburb of Paris.[40] Among the five clauses, Article 230 specifically dealt with those responsible for perpetrating the massacres of Armenians, codifying into international law for the first time the concept that flagrant violations of human rights invalidated any national claims to sovereignty.

Whereas the Allies had been attentive to the massacres during the war and had made every effort to ensure the punishment of those responsible in the war's aftermath, the situation that had arisen by the signing of the Treaty of Sévres quickly undermined the effort. In April of 1919, as the Council of Four had fought over the question of German war crimes trials at Versailles, Damad Ferid, the new Grand Vizier, began a national military tribunal in Constantinople. In the first case, the court convicted two high-ranking officers of the robbery and murder of Armenians during the war, sentencing the first to 15

[39] Dadrian, "Genocide," 262.
[40] See Appendix B for the specific text of the war crimes clauses.

years of hard labor, and sentencing the second to hang. Though the harshness of the verdicts outraged parts of the Ottoman population, the tribunal continued its work, opening a trial on 27 April that included as defendants 20 leaders of the Young Turk movement, including trials *in absentia* of those who had escaped to Germany after the war.[41]

The trial had been underway for just over two weeks when, on 15 May 1919, the Council of Four permitted Greece to occupy the Smyrna region. Aside from sparking a Nationalist movement against appeasement of the Allies—which was led by a young Mustapha Kemal—the Smyrna landing seriously discredited the idea of war crimes trials. It did so because, during the occupation, the Greek forces committed atrocities themselves that, when left unpunished, prompted outrage over the double-standard.[42] As Willis notes, "Immediately following the incidents at Smyrna, some prison authorities, influenced by nationalistic protests, freed forty-one alleged war criminals." In response, the British deported 67 of the remaining prisoners to Malta on 28 May.[43]

The trials continued for almost a year with most of the proceedings conducted *in absentia,* but without British support, and with rising Nationalist sentiment undermining the efforts, the Turkish tribunal was disbanded immediately after the Treaty of Sévres handed jurisdiction over to the Allies on

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[41] Willis, 154-155.
[42] Paul C. Helmreich, From Paris to Sévres: The Partition of the Ottoman Empire at the Peace Conference of 1919-1920 (Columbus: Ohio State University Press, 1974), 98-99.
[43] Willis, 155.

10 August.[44] As Bass concludes, "With the most important indicted Turks now either hiding out in Germany or in British custody on Malta or Mudros, the Ottoman court-martial was left toothless,"[45] and eventually collapsed. The Allies' attempts would prove even less successful.

At first, the British seemed to be on much better footing with the Ottoman trials than they were with the Germans. With continued arrests of suspects through 1920, well over 100 suspected Ottoman war criminals were in British custody by the beginning of 1921, and plans for trials were proceeding. The problem did not come from the British so much as it came from Turkey, which was quickly descending into civil war.[46] After the Nationalists arrested several dozen British officers and diplomats in response to the British arrests of suspected Ottoman war criminals on 16 March, the Nationalists blackmailed the British government into a prisoner exchange. After months of complicated negotiations, the British abandoned the war crimes project in favor of getting their own people back, and, on 1 November 1921, the last remaining Ottoman war criminals were released from British custody on Malta.[47] When Kemal and the Nationalists defeated the British and the Greeks on the battlefield one year later, the Treaty of Lausanne, which replaced the defunct Treaty of Sévres, completed the formal renunciation of the war crimes project. In his memoirs,

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[44] Willis, 156.
[45] Bass, 128.
[46] Bass, 132.
[47] Willis, 159-162, Bass, 138-144, and Dadrian, "Genocide," 286-289.

Lloyd George would call the Treaty an "abject, cowardly and infamous surrender."[48]

Two important series of events took place after the collapse of the Constantinople effort. First, the frustrated Armenians resorted to personal vengeance, assassinating six of the Young Turk leaders, including Talaat Pasha, during 1921 and 1922. Second, the British, absolutely humiliated by the fact that they had held the suspected criminals in custody for two years without trying any of them, did not look back, collectively erasing the entire effort from their post-war history. Even when the British and Americans were searching for a precedent for the concept of crimes of humanity in the preparatory conferences for the Nuremberg tribunal, they both would forget that they had used the precise term to refer to the Armenians in 1915.[49] As Dadrian concludes,

> The international efforts of the European powers to bring the perpetrators of the Armenian Genocide to justice fell victim to the overarching principle of national sovereignty and the machinations of international politics ... The series of mistakes and failures on the part of the European victors in World War I rendered the Armenian Genocide impervious to both prevention and punishment.[50]

Just two decades after the collapse of the effort to prosecute the perpetrators of the Armenian Genocide, Adolf Hitler would ask, in 1942, "Who, after all, speaks today of the annihilation of the Armenians?"[51] The answer, tragically, was no one, and much of that was due to the conditions under which

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[48] Bass, 144.
[49] Bass, 144.
[50] Dadrian, "Genocide," 322-323.
[51] Dadrian, "Genocide," 225.

the British abandoned the project in 1922. As Bass concludes, "During the Great War, Allied leaders knew the risks they were taking by pressing for trials of ... war criminals, but in an abstract way. After Leipzig [and Constantinople], the problems were depressingly concrete. No one could pretend that idealism alone would be enough to bring such a task to a successful conclusion."[52]

In the aftermath of the failed trials, the diplomatic community would attempt to codify many of the principles that the trials had hoped to embody. The Kellogg-Briand Pact of 1925 attempted to outlaw all forms of aggressive war, and the Geneva Conventions of 1929—two of which dealt specifically with the treatment of prisoners of war and of sick and wounded soldiers in the field—sought to outlaw much of the German behavior during the First World War that had so outraged the British. The new series of conventions, however, still lacked means of enforcement, and many went unsigned by some of the world's strongest nations. The concept of an international criminal tribunal became inextricably linked to the League of Nations during the inter-war years, since the League was held out as the only body of sufficient jurisdiction to preside over such a court. Consequently, with the collapse of the League in the years leading up to the outbreak of the Second World War, the concept of an international tribunal for war crimes also collapsed, not to resurface until 1943, when the "new" Allies began debating the fate of post-war Nazi Germany.[53]

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[52] Bass, 105.
[53] Willis, 163-167.

In setting up the Nuremberg tribunal, the Allies, particularly the British and the Americans, were absolutely convinced of the need to avoid "repeating" the mistakes of the war crimes project after the First World War.[54] Such a statement begs the larger question, what *were* these mistakes? In other words, is the true question underlying a study of the war crimes trials of the First World War whether they ever could have succeeded? As Bass and Willis both argue, in order for the international effort to have any chance, the war crimes clauses of the Treaties of Versailles and Sévres would have to have been backed up with force, a move that would have likely instigated another war. Without the force to compel Germany to surrender its war criminals, the Allies were left with no choice but to allow national trials, which never truly had a chance to succeed themselves. Consequently, the failure of the Leipzig trials is understandable, especially since no civilian American or British court has ever convicted one of its own citizens of war crimes. Similarly, though the British delay hampered their chances at successfully trying the suspected perpetrators of the Armenian Genocide, events in Turkey were just as quickly undermining the entire attempt to try those accused.

If the Leipzig and Constantinople war crimes trials never had a legitimate chance of succeeding, then what was their failure? In the end, perhaps their biggest failure was historical, since future attempts at international war crimes trials looked only to the World War One efforts for evidence of what *not* to do.

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[54] Willis, 168, and Bass, 148-150.

Yet, as with the Armenian case, much of that failure resulted from the forgetting, in the immediate aftermath, of the horrors that the trials were attempting to assign responsibility for. The trials themselves, therefore, were unsuccessful primarily because they were first; because there was no precedent, no historical example, no foundation on which to build a case. The Nuremberg trial, which would cite the aftermath of the First World War as its foundation, seems, at first, to be a much better point from which to examine the trials of international war criminals in the twentieth century, since no such trials had taken place prior to 1945. Yet, to highlight Nuremberg as the seminal moment in the movement towards an International Criminal Court is to overlook two very important factors.

First, the efforts to establish international tribunals after the First World War were not insignificant, and included some of the most profound debates over the very notion of international criminal law on record. Simultaneously, the aftermath of the effort's collapse, including the disappearance from historical consciousness of the Armenian Genocide, has important repercussions in the present, where every effort must be made to avoid a similar fate from befalling the ICTR. Second, and perhaps most importantly, such an assumption overlooks the extent to which Nuremberg was working under a different series of circumstances. As Dadrian notes, "While the post-World War II trials in Nuremberg have shaped much of the current thought on the prevention and punishment of genocide, the trials resulted from a set of conditions that will

rarely arise .. [and that] were not present during or after the slaughter of the Armenians."[55]

Therefore, it stands to reason that the effort to punish war criminals after the First World War was doomed to failure before it ever began. Because Germany and the Ottoman Empire, the Allies' two major antagonists, remained intact and sovereign in the war's aftermath, jurisdiction over suspected war criminals was difficult, if not impossible, to attain. Principles of legalism and questions of the extent to which such an undertaking was legal and just were completely overshadowed by larger, simpler questions of possession. Without the German defendants in custody, beginning with the most notorious of all, Kaiser Wilhelm, the British refused to proceed towards trials *in absentia*, and were also worried about the tenuous political situation in the Weimar Republic. In the Ottoman case, the British *had* possession, but lacked cooperation, with Kemal and the Nationalists opposing their every move.

The inescapable conclusion, therefore, is that the effort to establish international war crimes trials in the aftermath of the First World War was never threatened by issues of legalism. Rather, it was doomed by the logistical situation and by the lack of a strong Allied consensus, with constant bickering between the British and French governments about how to proceed, and with the intransigence of the Americans.

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[55] Dadrian, "Genocide," 226.

When the concept of an international war crimes trial returned to the forefront of debate in the aftermath of the Second World War, the two major issues that had doomed the first effort to establish international criminal tribunals were complete non-entities. For one, the Allies occupied all of Germany and Japan, and, thanks to the conduct of the Axis powers, the consensus was for vengeance first, peace later. Nuremberg's exceptionalism, however, becomes significantly more apparent under the lens of the century's first attempt to try war criminals before an international tribunal. Despite the beliefs of Justice Jackson and Justice Goldstone, that attempt came after the First World War, eventually culminating with the Leipzig and Constantinople war crimes trials.

IV – CHAPTER THREE:
The New Precedent: Nuremberg, Tokyo & The Hague

> I am convinced that we should avoid commitments to "try the war criminals" and to "hang the Kaiser" (*alias* Hitler). I am fortified in this opinion by the experience of that ill-starred enterprise at the end of the last war. Long lists of war criminals were prepared by the Allies in accordance with … the Treaty of Versailles, but, when the carrying out of the provisions for trial by Allied courts was considered, the difficulties were seen to be insuperable and the scheme was abandoned.[1]
>
> *Sir Anthony Eden, British Foreign Secretary, 1941*

Unlike its forgotten predecessor, the story of the Nuremberg war crimes trials, one of two international efforts after the Second World War to try the criminals of the Axis powers, is one that has been told time and again throughout the last half-century. On the Silver Screen, the story began with the 1961 classic *Judgement at Nuremberg*[2] and continued up through last year's *Nuremberg*, a made-for-TV movie based on Robert Persico's book, Nuremberg: Infamy on Trial. Persico's description is just one of an endless stream of personal accounts and narratives that dominate the literature of the trials, not to mention the countless comparative works prominently featuring the tribunal in American popular culture.[3] In all, there has been a truly overwhelming mountain of work, both popular and academic, focused on the International Military Tribunal (IMT)—the trials' formal name.

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[1] CAB 66/19, Eden memorandum, WP(41)233, 5 October 1941.

[2] Which was actually about one of the *subsequent* trials, not the original trial of the top Nazi criminals.

[3] The latest of which, Lawrence Douglas's The Memory of Judgement: Making Law and History in the Trials of the Holocaust, is due out later this spring.

Along with the motion pictures, the focus of an overwhelming majority of the literature has been predominantly on the trials and their aftermath. Only a few works have been devoted to the long and complicated diplomatic maneuvering that led to Nuremberg, implying that the trials almost had a certain historical inevitability. In reality, nothing could be further from the truth. Instead, the political wrangling that eventually resulted in the London Charter of August 1945 was as complicated and ultimately fortuitous as the parallel circumstances that confronted the Allies in the winter of 1918, if not more so.

Furthermore, in many places, the Allies, wary of repeating the "mistakes" of the last war, reinvented the wheel, ignoring the efforts of their predecessors insofar as trials were concerned. The war crimes trials project of the First World War, as evidenced by Eden's statement in 1941, was only taken into account as what *not* to do the next time around. The result was that the Nuremberg tribunal represented the attempted creation, all over again, of a new precedent in international criminal law. It was a precedent that, with few exceptions, completely ignored the failed efforts of 30 years earlier, and the result, as embodied in the London Charter, was a watershed in international criminal law. The Nuremberg tribunal, most famous for its first trial of the top 22 defendants, laid a foundation that three successive international tribunals would build on, to varying levels of success.

Those tribunals, the International Military Tribunal for the Far East (IMTFE), the International Criminal Tribunal for the former Yugoslavia (ICTY)

and the International Criminal Tribunal for Rwanda (ICTR), each attempted to perfect the Nuremberg model. To varying degrees, as we will see, the three successive courts would each improve upon the Nuremberg precedent, yet each would also further highlight fundamental problems with that model.

To fully understand the extent to which the World War One trials figured into the creation of the Nuremberg model (or didn't, as the case may be), it is first necessary to establish how the Allies ended up favoring trials in the first place. As with the First World War, the first cries for post-war punishment came early in the Second World War, and were geared towards vengeance and retribution, not justice.

The calls began, at least in Europe, with protests from the Polish government-in-exile in the spring of 1940.[4] With some support from the British government, the Polish government released a statement from Paris on 18 April 1940 that accused the Nazis of "brutal attacks upon the civilian population of Poland in defiance of the accepted principles of international law."[5] Citing violations of numerous international agreements, most notably the 1907 Hague Conventions, the declaration sought to characterize the actions of the Nazis as criminal. The problem, however, was twofold. First, the failure of the First World War's trials weighed heavily on the British government. Indeed,

> The Foreign Office wanted to avoid any undertaking to punish war criminals. It was deemed too problematic and sensitive an issue for London

[4] Already, the actions of the Japanese armies in China and Manchuria had begun to receive limited attention around the world.

> to become entangled in ... [and] the failure of the Allies after World War I to implement their threats to punish war criminals only strengthened reservations about making unequivocal obligations at this stage of the new war.[6]

Of more pressing concern than the failure of the World War One efforts was the state of the war, which, in the spring and summer of 1940, was downright gloomy for the Allies. France capitulated in June, and with the United States serving as little more than a biased neutral, the British were left to fend for themselves. Survival became slightly more important than post-war punishment, and the entire subject of post-war trials was, at least for the moment, dropped. Instead, the British reaction to the growing number of alleged atrocities being carried out in France and in Eastern Europe was centered on retaliation. In an address to the French nation on 21 October 1940, Churchill promised "a retribution that many of us will live to see,"[7] the first of many times that the British Prime Minister would call for vengeance.

The war continued to worsen for the Allies, culminating with the German invasion of the Soviet Union on 22 June 1941. The British government continued to issue statements condemning the escalating numbers of reported atrocities, particularly in the East, yet, the statements were largely vague, issued more as propaganda than as threats.[8] Nevertheless, the position of the British government, even in its darkest hours, was completely centered behind

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[5] From the PRO, FO 371 / 24423 / C5591, press notice, 17 April 1940.
[6] Arieh J. Kochavi, Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment (Durham: University of North Carolina Press, 1998), 9.
[7] Quotation appears in Kochavi, 10.

summary executions upon the war's conclusion should the conflict turn in their favor. As Churchill argued in 1940, "there could be no justice, if in a mortal struggle, the aggressor tramples down every sentiment of humanity, and if those who resist remain entangled in the tatters of violated legal convention."[9] The British, for their part, were intent on not entangling themselves, and, until very late in the process, ardently supported the idea of executions.

As late as the winter of 1944, it appeared that the Americans would support summary punishments as well, thanks to the efforts of Henry Morgenthau, Jr., the Secretary of the Treasury. One of the most influential members of Franklin D. Roosevelt's cabinet, Morgenthau, himself Jewish, was not against punishment *per se*, he just wanted it to be swift and based on vengeance.[10] The result was what became known as the "Morgenthau Plan," which was not precedent-setting in any way. Rather, the plan, which called for the complete de-industrialization and de-militarization of post-war Germany, including the executions of tens of thousands of Nazi political and military leaders, was more reminiscent of the aftermath of the wars of the Middle Ages than anything else.[11] Yet, despite opposition from other cabinet members, most notably Secretary of War Henry Stimson, it was Morgenthau's proposal that

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[8] Kochavi, 14.

[9] Joseph E. Persico, Nuremberg: Infamy on Trial. (New York: Penguin Books, 1994), 272. During the British cross-examination of him at the IMT, Göring paraphrased the quote as "In the struggle for life and death, there is, in the end, no legality" in an attempt to undermine the legitimacy of his trial.

[10] Bass, 152 and Kochavi, 80-83.

[11] Kochavi, 83. Morgenthau told his subordinates that he "Want[s] to make Germany so impotent that she cannot forge the tools of war."

Roosevelt took to the Quebec Conference of September 1944, the first time that the Americans and the British specifically discussed the issue of post-war punishment for the Nazis.[12]

Part of the support for the Morgenthau Plan had to do with fears of repeating the mistakes of the First World War, in which Germany's industrial capacity was left largely untouched despite the harshly punitive measures of the Treaty of Versailles. Also, as Roosevelt and Churchill would write in a draft memorandum at the Quebec Conference, trials would not bring about the swift justice that Hitler, Himmler, Goebbels and Göring so richly deserved. In their words, "apart from the formidable difficulties of constituting the Court, formulating the charge, and assembling the evidence, the question of their fate is a political one and not a judicial one. It could not rest with the judges however eminent and learned to decide finally a matter like this."[13] It seemed, at least for the time being, as if the Morgenthau Plan was to be the centerpiece of Allied war crimes policy.[14]

Stimson, however, had other ideas. Just a few weeks later, Stimson, or one of his allies, leaked the details of the Morgenthau Plan to *The New York Times*. On 24 September, the front page of the nationally-read paper shouted: "Morgenthau

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[12] Marrus, 20-21. The Allies issued the "Moscow Declaration" on 1 November 1943 as a vaguely-worded threat of post-war punishment, but it was not until the Quebec Conference that the specifics were truly entertained.
[13] FO 371 / 39003, Memorandum by Eden, WP(44)555, 3 October 1944.
[14] Bradley F. Smith, The Road to Nuremberg (New York: Basic Books, 1981), 44-47.

Plan on Germany Splits Cabinet Committee."[15] The story centered the split over the issue of "pastoralization," the complete eradication of Germany's industrial infrastructure. As Bass writes, "Most of Morganthau's ideas were fairly popular, but not pastoralization ... Stimson's protestations of innocence notwithstanding, if someone had meant to use public opinion against Morgenthau, pastoralization was a clever issue."[16] The leak, and the popular opinion polls that showed Americans dramatically against such an economic fate for post-war Germany,[17] combined to effectively sink the Morgenthau Plan.[18] More importantly, it bought Stimson time to prove Roosevelt and Churchill wrong, which he could do by creating a structure for trials that would actually be feasible.

To this point, the discussion of the debates over war crimes policy during the Second World War has assumed that there were clear ideas about what acts did and did not constitute such crimes. There was no such consensus. Even the United Nations War Crimes Commission (UNWCC), formed in 1942 specifically to begin documenting atrocities and war "crimes," operated without a definition until very late in the war.[19] Despite the creation of a limited vocabulary of war crimes in the aftermath of the First World War, including the concept of crimes against humanity as it applied to the Armenian Genocide, the Allies failed to accept the same standards. Many worried that the lists in 1919 had been so long

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[15] *The New York Times*, 24 September 1944, 1.
[16] Bass, 169.
[17] The Americans were wary of another punitive post-war settlement, since many had blamed the Second World War on the harshness of the Treaty of Versailles.
[18] Bass, 169.

that similar definitions would only replicate the diplomatic confrontations that helped to sink the World War One effort. In the interim, the UNWCC distinguished between "war crimes"—committed by soldiers against soldiers—and others, including crimes committed by soldiers against civilians. Yet, without a clear precedent to follow—or, ignoring such a precedent, at the very least—the Commission was left mostly with the task of compiling information.[20]

The beginnings of a solution came from the Americans, specifically from Lt. Col. Murray C. Bernays, an obscure lawyer in the War Department's "Special Projects" Branch. Bernays, using precedents from America's domestic antitrust laws, came up with the idea of charging entire organizations within the Nazi party as criminal conspiracies. Consequently, if such a case could be made, then proving that a German was a member of one such organization would, immediately, prove guilt by association.[21] Immediately, the idea gained credence and support in the War Department, particularly because it made large numbers of trials a completely feasible proposition, since they would, for the most part, not be long trials by any means.

Ironically, the "Bernays Plan," as it came to be known, was sent to the White House on 15 September 1944, the same day that Churchill and Roosevelt signed the Quebec Directive supporting the Morgenthau Plan. Regardless of the coincident timing, Bernays had created a scenario in which trying such high

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[19] Kochavi, 95.
[20] Kochavi, 107-110.
[21] Persico, 16-19, Bass, 171-172, and Kochavi, 205-212.

numbers of defendants was possible, at least logistically. What remained was to see whether it was a political possibility.

Soon thereafter, it became obvious that it was more than a political possibility—it was perfect. After all, the situation was entirely without comparison to the aftermath of the First World War. As soon as the tide turned against the Nazis in the winter of 1942-43, it was clear that the European war would not end without the *unconditional* surrender of the Germans. Morgenthau Plan or not, the scars of the war's wounds—and the fear of the dominance of Nazi ideology throughout Germany—combined to create a scenario in which the Americans, the British and the Soviets would not be happy until someone else's flag flew over the *Reichstag*.[22] Consequently, the apprehension of suspected war criminals would not put Allied soldiers at any extra risk, since it would naturally occur with the occupation of a defeated Germany.

It seems like a simple point, yet it created a fundamentally different political climate in which the war crimes project proceeded, largely because of the occupation. This time around, there were no worries about right-wing backlash in post-war Germany. Any issues of extradition, should they come up with neutrals such as Switzerland, would feature a dramatic international consensus on one side, the same kind of consensus that may well have forced the Dutch to surrender Kaiser Wilhelm in 1920. Long before the Allies even agreed to

[22] Though the Americans, as previously mentioned, did not want to impose a terribly punitive post-war regime upon the Germans.

trials instead of executions as their post-war policy, many of the most significant challenges to the First World War's trials had already been resolved, often by default. All that remained, if the Allies could agree in principle to the trials of the Nazis, were the logistics.

With the collapse of the Morgenthau Plan, the Bernays Plan became the perfect segue, and Stimson, sensing the opportunity to push his own pro-trial agenda, jumped on it. Quietly, Bernays and a number of staffers at the War Department began to iron out details of how the trials could proceed, with Stimson overseeing the efforts. The final catalyst for the Americans' desire for trials, however, did not come from Washington. It came from Malmédy, a small town in Belgium, where, during an early stage of the Battle of the Bulge, 70 American prisoners of war (POWs) were brutally gunned down by members of the First SS Panzer Regiment on 17 December 1944.[23]

As Bass argues, "This was not a particularly unusual event for the SS, which had carried out countless worse atrocities against Soviet prisoners of war."[24] It *was* unusual in that it was a widely-publicized atrocity carried out against Americans, and though the United States had taken notice of the countless other atrocities committed against POWs, the incident at Malmédy outraged the American government and rallied American public opinion behind

[23] Smith, 114. Also see James J. Weingartner, Crossroads of Death: The Story of the Malmedy Massacre and Trial (Berkeley: University of California Press, 1973).
[24] Bass, 178.

the concept of war crimes trials. Indeed, "American opinion had been shaken by Malmédy, and the depth of the popular shock was real."[25]

The Malmédy massacre also convinced the last hold-outs in Roosevelt's cabinet that the Bernays plan was necessary. As Francis Biddle, the Attorney General and later an American judge at Nuremberg, would write 17 years later, "what chiefly influenced our judgement ... was the shooting of American officers and soldiers after their surrender at Malmédy by an SS regiment, acting under orders."[26] If nothing else, what happened in the Ardennes Forest convinced the Americans of the need to use Bernays criminal conspiracy plan, since the attack was carried out by an SS unit who, it was feared, could claim "superior orders" as a defense at trial. Consequently, the Malmédy incident simultaneously galvanized the top echelons of the American government and U.S. public opinion towards support of the trials. In the inner circles, that support was centered behind the Bernays Plan.[27]

Over the course of the final three months of 1944, the Americans had reversed their position from favoring summary executions to supporting the legalist method, war crimes trials for the true architects of the Nazi regime. Public opinion in the aftermath of the leaking of the Morgenthau Plan—and later with the massacre at Malmédy—played a significant role in turning the tide towards trials, though the intra-cabinet war of words between Morgenthau and

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[25] Smith, 114-115.
[26] Francis Biddle, In Brief Authority (New York: Basic Books, 1962), 470.
[27] Bass, 172.

Stimson also helped to guarantee, upon the collapse of the Morgenthau Plan, that trials would be a possibility. Further, the Americans, as details of the Holocaust began to slowly leak out of Eastern Europe, were intent, as after the First World War, of taking the moral and ethical high ground, something that the Morgenthau Plan would clearly not have condoned. As the raw hatred and emotions of the war slowly gave way to more rational though upon the conflict's conclusion, it seems only natural that the Americans dropped the summary retribution project.

One question that remains, however, is how the complete reversal in the political position of the United States, the most vehement opponents to international war crimes trials at Versailles, can be explained. One possible explanation is that, like almost all participants, America's wartime suffering was far greater during the Second World War than during the First. Approximately 51,000 U.S. servicemen lost their lives in the "Great War" of 1914-1918, out of a mobilized force of about 4.3 million. By contrast, the Second World War saw 292,100 American military fatalities, with just under 15 million men mobilized. With six times as many American battle-related deaths,[28] combined with the surprise attack on Pearl Harbor, the only attack on U.S. soil[29] during either World War, America felt the impact of the Second World War far more than the First.

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[28] The Harper Encyclopedia of Military History, Trevor N. Dupuy, Ed. (New York: Harper Collins Books, 1993), 1083, 1309.

[29] Not including provinces and territories such as the Philippines, which are today independent.

Also significant is the extent to which American foreign policy had changed during the 20 years between the wars. The U.S. had all-but withdrawn from Europe in the aftermath of the First World War, going into an isolationist mold that it did not begin to break out of until the middle of the Second World War. By the end of the war, however, America, by far the least scarred of the war's major participants, had emerged, alongside the Soviet Union, as an economic and military superpower. With Britain hit extremely hard by the war, and with the capitulation of France, it was up to the Americans to take the lead in most areas of post-war negotiations, and that naturally extended to war crimes issues.

Yet, though America took the lead on war crimes issues, it certainly did not mean that the Allies followed the U.S. blindly. Meeting at Yalta in February of 1945, the Big Three[30] "never took up with any thoroughness the subject of a common policy towards war criminals." In the end, "the only decision reached at Yalta on the subject of war criminals was to transfer the matter to the respective foreign ministers upon the conclusion of the conference."[31] In addition to their continued stance in support of summary executions, the British also had something else to worry about. By early 1945, with the collapse of the Nazi regime apparently imminent, there was a very real concern in London about what would happen if Hitler was captured alive and brought to trial. Amidst the

[30] Roosevelt, Churchill and Marshal Joseph Stalin.
[31] Kochavi, 212-213.

ruin of the Third Reich, would such a trial allow the Nazis a weapon of propaganda to further the support of Nazi ideology? Better the Nazis be silenced, the British maintained.[32]

For their part, the Soviets were less against the idea of trials than the British. Stalin, much to the chagrin of Churchill and Roosevelt, had originally suggested the post-war liquidation of some 50,000 Nazis at the Teheran Conference of 1943. Yet, he had himself already ordered a series of war crimes trials within the Soviet Union. In mid-July of 1943, 11 Soviet citizens, accused of collaborating with the advancing Nazis, were convicted in the Krasnodar Trial, with eight of the 11 receiving death sentences. In a trial with more international attention, three Germans and a Russian collaborator were tried, convicted and sentenced to death by the Fourth Ukrainian Front's military tribunal at Kharkov in the winter of 1943.[33] Stalin, eager to show Soviet commitment to the Moscow Declaration of a few months earlier, was not against the notion of war crimes trials for the same reasons that the British were. He just preferred the two-tiered method in which the Soviets would shoot the Nazi party's ruling elite first, and ask questions of the subordinates later. Eventually, however, Stalin would acquiesce to the concept of putting the Nazi leaders on trial, so long as the Soviets had a stake in the efforts.[34]

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[32] Marrus, 33. Also see Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, London 1945 (Washington, D.C.: Department of State, 1949), 19.

[33] Kochavi, 64-66.

[34] Marrus, 32-33. This raises all kinds of questions as to the motives of the Soviets, who were probably also overeager to have the other Allies forget that they were on Germany's side until Hitler stabbed them

The British, by comparison, were still less interested in the trials than their Allies. As opposed to the Americans, who largely ignored the failed efforts after the First World War, the failures at Leipzig and Constantinople resounded heavily though the offices at Whitehall. Led by Churchill, who still had painful memories of the failures of the Leipzig and Constantinople trials, the Brits were absolutely terrified that a similar result this time around would leave the perpetrators of some of the most heinous acts on record free to roam the streets of Berlin.

Churchill *did* support the idea of trials for the lower-ranking members of the Nazi regime, but was emphatic that somewhere between 50 and 100 of the top leaders would have to be shot. As Bass writes, "the essence of the British objection to such a trial was that it would be a fair one, in keeping with British principles. It was precisely because the British knew what those domestic principles were that they did not want to apply them to the Nazi leadership."[35] Indeed, Churchill's proposal was far less brutal than Stalin's proposed 50,000 executions, or Morgenthau's 2,500, yet, by 1945, it was still too many for the Americans, now resolute in their desire for trials.[36]

When Roosevelt died on 12 April 1945, the Americans only intensified the trials effort, thanks largely to Harry S Truman, who eventually gave his full

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in the back in 1941. Indeed, the question of the Katyn Massacre, a war crime that the Soviets pinned on the Nazis at Nuremberg despite the evidence that they themselves committed it, supports the idea that Stalin wanted very much for the U.S. and Britain to see the Soviets as an ally, not a former enemy, at least at Nuremberg.

[35] Bass, 191.

support to the idea. Truman favored trials, and was unwavering in his attempts to persuade the British and the Soviets to join the effort.[37] Again, this was a difference from 1919, when none of the Allied leaders were willing to stand firm on such a controversial issue.

After Hitler committed suicide during the Soviet occupation of Berlin on 30 April, the British were also slightly less concerned about the propaganda issue, since Hitler's death removed the possibility that he would defend himself before an international court. With the Americans refusing to budge, the British and Soviet governments finally gave in during the preparatory conference for the formation of the United Nations that took place in San Francisco over the first week of May. In a memorandum to Vyacheslav Molotov—the Soviet foreign minister—and Eden, Edward Stettinius, the U.S. Secretary of State, effectively told the two diplomats that the time of indecision was over. As Marrus concludes, "Truman's determination had a decisive impact. Faced with a resolute policy in Washington, the British, and soon the French and the Soviets as well, accepted the American plan in principle."[38]

The political wrangling that had effectively sunk the war crimes trials effort in the aftermath of the First World War had been overcome by the steadfastness of the Americans, who had used a similar pertinacity to undermine the World War One trials. For various reasons, the United States had reversed its

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[36] Bass, 181.
[37] Smith, 193-196.
[38] Marrus, 38.

position on international war crimes trials, and that reversal was critical in bringing the Nuremberg and Tokyo trials to reality.[39]

In the aftermath of the agreement to proceed with trials, a number of American, British, French and Soviet jurists met in London to draft what came to be known as the London Charter, the founding document of the IMT. From the start, the Americans dominated the deliberations. For one, the Bernays Plan, which was adopted almost in its entirety, was an American creation. Secondly, as Marrus argues, "the American prosecution team drove the decision making, setting a brisk pace for their Allied colleagues and pouring more human and material resources into the enterprise than all of the latter put together."[40] Leading the American efforts was Robert H. Jackson, an associate justice of the U.S. Supreme Court, whom Truman had named as America's lead prosecutor. Jackson had a keen sense of the historical importance of the trials, and pushed a number of initiatives through—including the site of the trial, American-held Nuremberg instead of Soviet-held Berlin—largely by himself.[41]

Two essential questions remained. First, under what grounds could the Nuremberg trials be justified, given that international law was largely silent on the specific crimes charged by the Allies, particularly "crimes against peace," or aggressive war as a crime. Second, would the Bernays Plan survive the ministrations of the other three delegations, or would the result be an impossible

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[39] Bass, 150.
[40] Marrus, 39.
[41] Smith, 243-246.

amalgam of concepts from the different legal systems? There was concern, especially from the Americans, that the differences between the Anglo-American and continental legal systems would create impossible conflicts in the legal details of the trial's procedure.[42]

To the latter, the answer was fairly straightforward. The Soviets and French had far more objections to the plan than the British, primarily because conspiracy was not a crime under the continental legal system. Nevertheless, though the Bernays Plan advocated using a distinctly Anglo-American legal idea to try Germans, it was eventually approved by all four nations, and became one of Nuremberg's unique features.[43] Furthermore, the Americans had significant leverage to use in order to push through their proposals, since almost all of the top-named war criminals were in U.S. custody. Therefore, when the Soviets refused to budge on the issue of the site of the trial, Jackson threatened an American withdrawal, which, given the extent to which the project had become dominated by the U.S., would only have hurt the Europeans.[44]

To the former, the answer was much less clear-cut. With the exception of the Kellogg-Briand Pact, which the Americans claimed made aggressive war a criminal activity,[45] the same legal precedents were used in 1945 as had been attempted in 1919, specifically the Martens Clause in the Hague Conventions of

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[42] Persico, 54-66.
[43] Indeed, once the criminal conspiracy defense failed at Tokyo, it was largely abandoned as a tenable argument in war crimes trials.
[44] Marrus, 46-48.

1907.[46] Jackson would also mention the Geneva Conventions of 1929 in his famous opening speech, but in principle, the law of the London Charter was based on three conventions—the fourth 1907 Hague Convention, the Treaty of Versailles (which Germany had repudiated) and the Kellogg-Briand Pact. Indeed, the American dominance of the negotiations meant that the precedent of the World War One trials, which had witnessed the same arguments, the same references to the Hague Convention, and the same concepts of crimes against humanity (from the Armenian Genocide) and war crimes, was completely ignored. Instead, as Jackson would erroneously say in his opening, "never before in legal history has [such] an effort been made."[47]

Consequently, the London Charter, which was formally signed on 8 August 1945, truly incorporated only one lesson from the trials of the First World War—the use of the criminal conspiracy charge. Logistically, there was no need to take any of the failures from the prior attempt into account, since none of the same logistical challenges were at issue. All of the indicted defendants were in Allied custody, and all of the evidence to be used against them was slowly being gathered by the offices of the newly-constituted IMT. Nuremberg was on a different level than Leipzig or Constantinople had ever been.

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[45] Even though the Americans had claimed, after the First World War, that "a war of aggression may not be considered an act directly contrary to positive law." (See pg. 42).
[46] Beigbeder, 9. The Martens Clause specifically stated that the general intention of international law was to identify acceptable conduct during war, and to therefore create a link between unacceptable conduct and violations of international law.
[47] Jackson, in Marrus, 80.

The course of the trial itself is largely anti-climactic within the larger argument, for the purpose is to show where the Nuremberg effort differed from the World War One project, and those differences were most evident in the setup.[48] Over the course of 11 months, beginning in November 1945, the Allies tried 22 top Nazi officials, chief among them Hermann Göring, head of the *Luftwaffe*, on four counts: crimes against humanity, crimes against peace, war crimes and conspiracy. In the end, three defendants were acquitted, four were sentenced to prison terms that varied from 10 to 20 years, three were sentenced to life imprisonment, and the other 12 were sentenced to death (though one, Martin Bormann, was tried *in absentia*).[49]

Nuremberg had its warts, including allegations of Victor's Justice and the questionable application of *ex post facto* legislation, but, for the most part, it was a landmark success in international law. The system worked; Nuremberg was never a show trial nor a farce of any kind. It contributed vast amounts of physical evidence to establish the extent of the Holocaust. It showed that different nations could come together in the interests of international justice. It also established a precedent for future such prosecutions, at least in theory. The first application of the precedent came nearly simultaneously, but halfway around the world, as similar attempts to set up a tribunal to punish Japanese war crimes used much of the legwork of its Nuremberg cousin.

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[48] Also, comparisons between the trials themselves are misleading, for the trials are really not comparable.
[49] Marrus, 261.

In a somewhat similar fashion to the war crimes trials after the First World War, the Tokyo war crimes trials, which author Arnold Brackman labeled as "The Other Nuremberg," have been largely overlooked historically. A bibliography of works related to war crimes trials published in 1979 listed 1,290 entries for the trial at Nuremberg and some 143 entries dedicated solely to the war crimes issues arising from the My Lai Massacre during the Vietnam War. By contrast, the Tokyo trial, which, as Brackman notes, saw "a thousand My Lais emerge,"[50] has 231 entries, most of which are Japanese-language works.[51]

The comparative lack of literature on the Tokyo trials, however, does not mean that there were not important differences between the IMT and IMTFE. Indeed, with the IMTFE, some of the issues that arose in the aftermath of the First World War began to reappear, poking the first holes in the model created at Nuremberg. In the end, the tribunal that was established at approximately the same time as its cousin at Nuremberg unfolded in two quite different ways.

First, the Nuremberg trial was predicated on the criminality of the Nazi regime in total. In order to use the Anglo-American concept of criminal conspiracy, the Allies founded their entire prosecution on the notion that the Nazi government was a criminal organization, and therefore, members were

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[50] Arnold C. Brackman, The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials (New York: William Morrow & Co., 1987), 9.
[51] See John R. Lewis, Uncertain Judgment: A Bibliography of War Crimes Trials (Santa Barbara: Clio Books, 1979).

guilty by association.[52] Consequently, all that the Allies had to do at Nuremberg to convict on at least one of the four counts was to demonstrate that each defendant had been an active and willing participant in the upper echelons of the Nazi government. Further, the conspiracy concept allowed for *international* trials *en masse* of lesser war criminals, each of whom needed only to be linked to the Nazi leaders to establish their criminality thereto.[53] The same argument would not work in the Tokyo case for a number of reasons, most specifically because the Americans guaranteed the continued rule of Emperor Hirohito as part of the peace negotiations. With Hirohito free, it was more of a difficult proposition to convict those below him.

The second fundamental difference between the Tokyo and Nuremberg trials had to do more with logistical and procedural issues. All along, the Nuremberg trial was administered by a coalition of the Big Four—the United States, Britain, France and the Soviet Union. Though the single-handed efforts of the United States helped to bring the trial about, no one of the four participating countries held significant power over the other three under the tribunal's charter. All four nations agreed to the London Charter, and it was the four nations together, in conjunction with 17 other Allied nations, who represented the ultimate authority behind the Nuremberg trial. By contrast, the United States was the dominant player behind the Tokyo trial, and the ultimate authority was

[52] This is, at its very core, the Bernays Plan, which remained largely intact up to—and through—the London Charter establishing the IMT.
[53] A dramatic difference from any other such tribunal.

not a coalition of the participating nations, nor was it a group of the international jurists who presided over the trial. The ultimate authority behind the IMTFE was General Douglas MacArthur, the Supreme Commander of the Allied Powers and the leader of the occupation government, and it was his authority alone.

As Yves Beigbeder notes, "the supremacy of the USA was ... asserted by the authority granted to the Supreme Commander of the Allies Powers [MacArthur] to appoint the eleven members (judges) of the tribunal" from lists submitted by the 11 participating nations.[54] MacArthur was vested with the authority to appoint the President of the Tribunal and the Chief Prosecutor, and he was also the ultimate authority to whom appeals were to be directed. By contrast, at Nuremberg, the judges were appointed specifically by the participating nations, the President of the Tribunal was elected by those judges, and there was no Chief Prosecutor—each nation had its own team of lawyers.

The differences were occasioned by one simple fact—from the start, the IMTFE was completely an American project, with nowhere near the same level of international and non-partisan control and input into the process. The Tokyo Charter was drafted by the Americans only, and was approved unilaterally by MacArthur in the form of an executive order on 19 January 1946. The Allies were only consulted after its issuance.[55] The end result of the two fundamental structural differences between the Tokyo trial and its Nuremberg cousin was

[54] Beigbeder, 55.
[55] Beigbeder, 54-55.

that, by the time the first trial before the IMTFE officially opened on 3 May 1946, there was little doubt that the tribunal had taken significant steps away from the Nuremberg model.[56]

Over the course of the next 23 months, the trial of the Allies' 28 "Class A" war criminals[57]—the commanders and political leaders—was bogged down in the same procedural and logistical problems that had hampered the Class B trials in American military courts in the preceding months.[58] These were the very issues that had terrified Jackson in the months leading to Nuremberg. For starters, the tribunal admitted significant amounts of evidence that would likely have been thrown out for lack of verification by the Nuremberg courts. In a few cases, prosecutors offered stories of atrocities that were not supported by any physical evidence, including eyewitnesses, yet were still admitted to the record. Further, whereas the Nuremberg trial was a complicated balancing act between eyewitness testimony and documentary evidence, the Tokyo trial was

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[56] Already, a number of trials of lesser Japanese war criminals, held before U.S. military courts, had raised serious questions of the U.S.'s jurisdiction and the entire concept of command responsibility. One of the trials, of General Tomoyuki Yamashita, was appealed all the way to the U.S. Supreme Court. The series of "Class B" war crimes trials that the Americans conducted prior to the beginning of the IMTFE's "Class A" trial were, as Tim Maga writes, fraught with procedural inconsistencies and jurisdiction challenges. As Yamashita's defense team argued before the U.S. Supreme Court, the case was entirely without precedent, and what little legal footing the concept of command responsibility was based on, it was certainly a novelty in international law to try a war criminal because of his *failure* to do something, and was therefore *ex post facto*. Indeed, in 1919, the United States government, particularly Lansing, had specifically argued *against* the concept of negative criminality, arguing that it would create a precedent of trying one person for the crimes of others. See Timothy Maga, Judgment at Tokyo: The Japanese War Crimes Trials (Lexington: University Press of Kentucky, 2000), 41-73.

[57] Two of the accused would die during the trial, and a third would be declared unfit, leaving the final number of defendants at 25.

[58] Persico, 25-45. Specifically, Jackson was afraid that the larger mission and purpose would be clouded by issues arising from procedural questions.

inconsistent, with some charges supported only by the former and others supported solely by the latter.[59]

As historian John Appleman concludes, across the board, "with reference to the procedure to be followed, the [IMTFE left] much to be desired."[60] Specifically, with regard to the nature of evidence to be introduced and the rules of procedure, the Tokyo proceedings did not live up to the same high procedural standards as those at Nuremberg.[61] Even the translation system, developed by IBM specifically for the Nuremberg trial, suffered from practical and logistical difficulties, as prosecution and defense attorneys repeatedly came to blows over questionable translations.[62] In short, the Tokyo trial became so thoroughly tied up in procedural controversies that the legal questions were never given a suitable chance to come up. Justice Henri Bernard, the French representative to the 11-member tribunal, summed up the problem in his dissenting opinion, concluding that, "A verdict reached by a tribunal after a defective procedure cannot be a valid one."[63]

In one of the most famous lines of his opening statement at Nuremberg, Jackson had warned that, "to pass these defendants a poisoned chalice is to put it to our own lips as well."[64] For the most part, Jackson and his colleagues had

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[59] Maga, 51-53.
[60] John A. Appleman, Military Tribunals and International Crimes (Westport: Greenwood Press, 1954), 147-150.
[61] Appleman, 150-151.
[62] Maga specifically address the translation issue throughout his Chapter 2, 43-68.
[63] Appears in Richard Minear, Victors' Justice: The Tokyo War Crimes Trial (Princeton: Princeton University Press, 1971), 125.
[64] Persico, 101.

avoided just such an outcome at Nuremberg, at least from a procedural standpoint. Their Tokyo colleagues had not been as successful, and, as Beigbeder concludes, "while there were a few procedural flaws at Nuremberg, they never amounted to the levels reached at Tokyo."[65]

It also did not help that, whereas the Nuremberg tribunal reached one decision, which was presented as the decision of the court, the Tokyo tribunal resulted in six separate written decisions by the 11 judges, including dissents from three of the Justices. Bernard dissented on two procedural grounds, as well as on the ground that Hirohito had not been indicted. Justice Radhabinod Pal of India, the most-outspoken dissenting member of the tribunal, voted against convictions on all counts on the grounds that the rules of evidence had been distorted, that aggressive war was not a crime under international law, and that even the conventional war crimes counts had not been proved. Lastly, Justice B.V.A. Röling of the Netherlands dissented over concerns with the means in which aggressive war was proven.[66] In the nearly 1,300-page decision, it is not even mentioned until page 1,212 that the verdict, in which seven of the 25 remaining defendants were sentenced to death, was not unanimous.[67]

All told, it was a less-than ringing conviction, since "the final division of the judges ... seriously weakened the value and impact of the Tribunal's findings

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[65] Beigbeder, 64.
[66] Minear, 32.
[67] Minear, 32.

and sentences."[68] Clearly, there was not the same consensus or uniformity of viewpoint at Tokyo that there had been at Nuremberg. Indeed, the Tokyo trial was the first chance for the Nuremberg precedent to be put to the test, and, at best, it was a mediocre demonstration. For one, the overwhelming international consensus that brought about the Nuremberg trials gave way to an effort that, from the start, was dominated by America and by American interests. The procedural conflicts that Jackson and his staff had worked so tirelessly to avoid at Nuremberg had haunted the Tokyo proceedings from the outset, and incidents such as the Yamashita case further called into the question the validity of what the United States was doing. Further, by leaving Hirohito in power, the Americans attempted to prosecute the vestiges of a regime while its figurehead remained free and immune from prosecution not 10 miles from the site of the tribunal.

Nevertheless, it is important to remember that, despite the preceding argument, the Tokyo trial was not an unmitigated disaster. To a certain extent, the goals of the tribunal were met. Except for Hirohito, the top members of the Japanese wartime government had been brought to justice, and, with only a couple of exceptions, all would either serve significant prison time or hang. In the short term, few could complain with such results, since "the Tokyo trial confirmed and reinforced the Nuremberg precedent in recognizing the individual criminal responsibility of high-level officials for launching an

[68] Beigbeder, 73.

aggressive war, for conventional war crimes and for crimes against humanity."[69]

As with the aftermath of the post-First World War effort at trials, the aftermath of the Second World War's attempts was also followed by a dramatic period of advancement in international law, primarily thanks to the formation of the United Nations in late 1945. Seven principles arising from the Nuremberg and Tokyo trials were formally codified into international law in December 1946, including a formal codification of individual responsibility, the removal of any form of sovereign immunity, the guarantee of a fair trial, and the invalidity of "superior orders" as a defense.[70] In the following years, the United Nations ratified the Genocide Convention (1948), the Universal Declaration of Human Rights (1948) and the four Geneva Conventions of 1949, which were extensive modifications of the 1929 accords of the same name.[71] As Howard Ball argues, "By 1950, then, there was the beginning of a much expanded codification of international criminal law through treaty, convention, and customary law. Because of the gross horrors that took place during the Nazi-Japanese era, the molecular move from nation-state to international community picked up a little speed."[72]

Yet, while the *codification* of international criminal law picked up speed in the aftermath of the Second World War, the *adjudication* certainly did not, with a few exceptions. In 1961, less than fifteen years after the IMT and its Tokyo

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[69] Beigbeder, 75.
[70] Ball, 86-87.
[71] Ball, 87-89.

counterpart concluded their work, Adolf Eichmann, one of the chief Nazi architects of the Holocaust, was brought to Israel to stand trial for his crimes. Twenty-seven years later, Klaus Barbie, the so-called "Butcher of Lyons," was tried in France, like Eichmann, for crimes against humanity committed during the Second World War. To some extent, both trials affirmed the legacy of the Nuremberg and Tokyo proceedings of 1945-1948, further demonstrating that those who had committed unspeakable atrocities during the course of war were going to be punished for their actions.[73]

The two trials' status before the mid-1990s as the two most prominent war crimes trials since Nuremberg and Tokyo, however, testifies to something far less positive. From the conclusion of the IMTFE through 1991, despite countless, well-documented violations of international law,[74] the only war criminals brought to justice were holdovers from a war that belonged to another generation. The notion of a permanent international criminal court, first proposed shortly after Nuremberg, languished amidst the turbulent waters of the Cold War.

With the collapse of the Soviet Union in 1989, the idea of establishing such a court again returned to the UN General Assembly's agenda, only to be endlessly filibustered by the United States. Indeed, as Michael Scharf concludes,

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[72] Ball, 90.

[73] Though as Hannah Arendt argues in Eichmann's case in Eichmann in Jerusalem, and as Alain Finkielkraut argues in Barbie's case in Remembering in Vain, the trials themselves each had significant failings, and did not necessarily allay the criticisms of the IMT.

"the commission [assigned to work on the proposal] might well still be debating the matter to this day if it were not for the developments in the Balkans in the summer of 1992."[75] Instead,

> In the summer of 1992, the world learned of the existence of Serb-run concentration camps in Bosnia-Herzegovina, with conditions reminiscent of the Nazi-run camps of World War II. Daily reports of unspeakable barbarity committed in the Balkans began to fill the pages of our newspapers. The city of Sarajevo ... was transformed from a symbol of ethnic harmony into a bloody killing ground. For the first time since World War II, genocide had returned to Europe. The international outcry was deafening.[76]

What happened in the Balkans following the disintegration of Yugoslavia in 1991 was ethnic conflict the likes of which sent shivers through the world community. After the British Independent Television News network (ITN) broadcast horrifying images from the Omarska detention camp on 6 August 1992, the wheels of action finally began to move, albeit slowly, within the UN.[77] The repeated failures of the UN and the West to take preventative action in Bosnia notwithstanding,[78] eventually, the Security Council formally passed Resolution 827 on 25 May 1993, establishing the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY).

After an extended period of complicated political maneuvering, including the selection of a prosecutor and of judges, not to mention a funding crisis that

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[74] The most prominent, of course, being the Khmer Rouge regime in Cambodia. See Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice (New York: Times Books, 1998), 24-25.
[75] Scharf, 17.
[76] Scharf, xiv.
[77] Neier, 134-135.
[78] Scharf, 32-36.

threatened the very solvency of the tribunal, the trial of Dusko Tadic finally began on 7 May 1996, the first international war crimes trial since the late-1940s.

The statute establishing the ICTY, though different in wording in most parts from the London Charter of 1945 that established the IMT, echoes many of the same principles, including the same basic crimes. Article 3 established "Violations of the Laws of Customs of War" as one such crime, though the definition is almost entirely similar to that of "war crimes" under the London Charter.[79] Article 5 established crimes against humanity, again under roughly the same definition as the London Charter, as another crime under the tribunal's jurisdiction, adding rape to the list of offenses that come under that title. The only slight differences between the crimes of the ICTY statute and those of the IMT come in Articles 2 and 4. Article 2 establishes one of the crimes under the ICTY's jurisdiction as "Grave Breaches of the Geneva Conventions of 1949," which primarily protects the rights of noncombatant civilians and prisoners of war, while Article 4 explicitly deals with the crime of genocide, which did not even exist as a term at the time of the IMT.

Two other important statutory differences between the London Charter and the ICTY statute are the inclusion in the latter of the defendant's right to appeal (and provisions to protect and safeguard those rights), and the exclusion of the re-trial of defendants by national courts after the international trial has concluded. The double jeopardy protection and the increased rights of

defendants are characteristic of a larger pattern in the differences between the ICTY and its earlier predecessors. Fifty years of criticism of the Nuremberg proceedings had not gone unnoticed, and the differences rippled all the way to the judge's bench.

For the IMT, the judges and the prosecutors all came from each of the four signatories to the London Charter—Britain, France, the Soviet Union and the United States. For the IMTFE, the concept had been the same, just with 11 participating nations instead of four. The ICTY, which was established by the UN—via the Security Council—also adopted an 11-judge panel, but one that consisted of two three-judge trial chambers and a five-judge appeals chamber. The Security Council invited any nation to submit nominations for the positions, and, after receiving 41, narrowed the list down to 23 candidates before sending it back to the General Assembly to select 11. The Security Council was also vested with the power to select the prosecutor for the tribunal, though, in the case of the ICTY, it took them 14 months to do so.[80]

However, while the ICTY represented significant strides forward from the statutory perspective, the role of the Security Council would actually become one of the three major problem areas for the new tribunal. As Scharf argues, the power that the Security Council had over the selection of prosecutors and judges cannot be ignored.[81] An obvious solution, it would seem, would have been to

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[79] Scharf, 244.
[80] Scharf, 63-66.
[81] Scharf, 72.

give more of the power for the setup of such *ad hoc* tribunals to the General Assembly, a much more representative body than the 15-member Security Council.[82]

Another major source of criticism of the ICTY since its establishment in 1993, and one that traces much more directly to the validity of the Nuremberg precedent, has been the complicated question of legality and jurisdiction of the tribunal, given the changing nature of warfare. In a series of pre-trial motions, Michail Wladimiroff and Alfons Orie, Tadic's lawyers, shoved the issues into the spotlight. While the appellate chamber quickly settled most of the questions concerning the legality of the indictment and the question of jurisdiction,[83] one matter was not so easily disposed with—the question of whether the Bosnian conflict was international or internal, a question that the Nuremberg model had never been designed to answer.

Arguing that the conflict was not an international armed conflict under the conventional definitions, Tadic's lawyers challenged the lawfulness of Articles 2 and 3 of the ICTY's statute, specifically the "Grave Breaches" and war crimes articles. In a ruling that came as a bit of a surprise, the judges held that while Article 2 cannot apply unless a state of international armed conflict exists, they held the opposite for Article 3, noting that "the distinction between interstate wars and civil wars is losing its value as far as human beings are

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[82] We will see how the role of the Security Council comes back as an issue in the Rome Statute creating the ICC.
[83] Scharf, 104-106.

concerned."[84] In one bold step, the tribunal created a critical bridge from the principles of the IMT, which were based on the international wars that dominated the early part of the century, to the internal wars and ethnic conflicts that have come to dominate the latter half. Though the exclusion of Article 2 during internal conflicts weakened the prosecution's case against Tadic, the inclusion of Article 3 set a new precedent that the ICTY would repeatedly invoke, and one that its twin sister in Rwanda would shortly write into its own statute.[85] As such, it seems reasonable to conclude that "this decision [was] the most important legacy of the Tadic trial."[86]

The last major source of criticism has been one of the most lasting, and is also the most damaging sign of a flaw in the Nuremberg model. Specifically, the concern has been over the tribunal's inability to try the so-called "big fish," the masterminds of the ethnic cleansing, including Slobodan Milosevic, Ratko Mladic and Radovan Karadzic. As Scharf argues, "the challenge for the Tribunal is to work backwards from the likes of Tadic to those who fanned the flames of hatred ... [but] bringing Karadzic and Mladic to justice has turned into an uphill battle."[87] Indeed, though indictments have been issued against all three, as well as most of the other directors of the conflict, the ICTY, unlike the IMT,[88] is specifically forbidden from conducting trials *in absentia*, the Rule 61 proceedings

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[84] Scharf, 107.
[85] Neier, 144.
[86] Scharf, 107.
[87] Scharf, 224.
[88] Which convicted Martin Bormann, Hitler's secretary, *in absentia* and sentenced him to death.

notwithstanding. With all three in hiding in Serbia—a nation that had, before last month, refused to arrest and to extradite them—and with the UN's inability, due much more to a lack of political will than a lack of resources, to go in after them, the worst war criminals of the Bosnian conflict, except for Milosevic, who was dramatically arrested on 31 March of this year, are still free. In the same fashion that Hirohito's freedom served to constantly undermine the Tokyo trial, so too has the ICTY been undermined by its inability to bring the equivalent of the Yugoslavian conflict's Class A war criminals to justice, including its inability, at least until now, to bring Milosevic to trial.

The ability to detain and extradite accused war criminals, which was never an issue in post-war—and Allied-occupied—Germany or Japan, is not a trivial problem in the least. The international reputation of tribunals such as the ICTY and ICTR is predicated far more on their ability to try the likes of Mladic and Milsoevic than it is on their ability to try middlemen like Dusko Tadic. Consequently, in the middle of the 1990s, the international community was faced with the same political dilemma that effectively collapsed the attempt to put Wilhelm II on trial after the First World War.

As with Nuremberg, however, the shortcomings of the ICTY were not completely without important achievements. In many ways, the ICTY represented a remarkable step forward, both from the many criticisms of the IMT and when considering the absence of such initiatives at any point between 1946 and 1993. As Neier concludes, "the ad hoc tribunal for ex-Yugoslavia was a

significant advance over the tribunals at Nuremberg and Tokyo, [in part] because it had a mandate to prosecute and punish malefactors from all sides in the wars in Croatia and Bosnia and has carried out its charge."[89] Though the role of the Security Council has still led to some accusations of "Victor's Justice," the dual-sided nature of the Tribunal, reflecting the dual-sided nature of at least part of the conflict, elevates the ICTY over its historical predecessor.

Tragically, "soon after the [Yugoslavian] Tribunal had been established, the Security Council found itself faced with an even greater genocide when over half-a-million Tutsis were massacred by the Hutus in Rwanda during a one hundred-day period in the spring of 1994."[90] Though the ICTY was meant to be a one-time-only institution, the scale of the horrors in Rwanda—and remorse over the lack of preventative action on the part of the international community—compelled the UN to act once more.

On 8 November 1994, seven months after the beginning of the Rwandan genocide, the Security Council passed Resolution 955, establishing the International Criminal Tribunal for Rwanda (ICTR). The process leading to the passage of the Resolution was nowhere near as long and involved as that for the ICTY, primarily because the machinery was already in place. "The genesis of the ICTR followed a pattern established by the UN with regard to the tribunal for the

[89] Neier, 259.
[90] Scharf, 226.

Former Yugoslavia,"[91] and consequently, the tribunal was, in design, very much a mirror image of its twin. However, it is equally important to note that the speed with which the tribunal was chartered and established may also be related to a sense of guilt on the part of the UN and the Western allies, who sat idly by and watched as the three-month genocide took place.[92]

Regardless of the speed with which the tribunal was established, the ICTR still ran into three significant early challenges to its existence—problems with recruiting personnel, poor funding and mismanagement.[93] After the 12 February 1997 release of the UN Office of Internal Oversight Services (OIOS) report criticizing the administration and the management of the ICTR, the tribunal had "a second chance to earn the trust and credibility it needs to fulfill its mission."[94] The funding and mismanagement issues led some to dismiss the ICTR as the "weak sister" of the ICTY,[95] in much the same way that Tokyo was dismissed as "the other Nuremberg." Insofar as the results are concerned, however, that characterization almost seems reversed.

From a statutory perspective, the ICTR closely resembles its older twin, with only slight changes in a few rules of procedure and associated definitions. The ICTR statute did finally codify into general international law what had only

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[91] The Lawyers Committee for Human Rights, Prosecuting Genocide in Rwanda: The ICTR and National Trials (New York: Lawyers Committee for Human Rights, 1997), 4. *Hereafter referred to as* "Prosecuting Genocide."
[92] L.R. Melvern, A People Betrayed: The Role of the West in Rwanda's Genocide (New York: Zed Books, 2000), 52-67, 227-237.
[93] Prosecuting Genocide, 39-40.
[94] Prosecuting Genocide, 42-43.

been assumed as customary law in the years before, specifically that "egregious violations of human rights law—not only of international humanitarian law—[are] offenses under international law."[96] In short, while the ICTY dodged around the problems of applying the Nuremberg principles to an internal conflict, the ICTR explicitly solved them, using pre-existing international law—the 1977 Geneva Protocol—to assert that such tribunals had jurisdiction over *any* and *all* violations of the Geneva conventions, whether the conflict was international or not.

Yet, the ICTR was not without its own problems. For one, there were just too many defendants to try them all in international court.[97] Many of the Hutu in custody were, at best, minor functionaries. The same fears after World War One that the lists of accused war criminals were too long were a very real problem in Arusha. To solve it, the ICTR turned towards the Rwandan national courts, in an analogous solution to the Class B and Class C war crimes trials conducted before U.S. Military Courts after the Second World War in the Pacific.[98]

Again, however, the specific problems encountered by the ICTR are at least partially overshadowed by its achievements. The adaptation of the Nuremberg principles to internal wars as well as international conflicts is a

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[95] Steven Lee Myers, "In East Africa, Panel Tackles War Crimes, and Its Own Misdemeanors," in *The New York Times*, 14 September 1997, pg. A6.
[96] Prosecuting Genocide, 9.
[97] A similarity to 1919, when the list of over 1,000 war criminals proved a daunting obstacle for the efforts for international trials to overcome.
[98] Which was not a perfect solution, since it created discrepancies whereby those tried in national courts in Rwanda, usually lesser criminals than those sent to Arusha, often faced stiffer sentences, including the death penalty, legal in Rwandan courts but not legal under the ICTR's charter.

critical step forward given the evolving nature of warfare at the end of the century. Also, the ICTR never suffered from the "big fish" criticism of the ICTY, since some of the most important leaders who orchestrated the genocide have come before the tribunal in Arusha, including former Prime Minister Kambada.[99]

Together, the ICTY and ICTR both made positive modifications to the Nuremberg model, but they also each represented further imperfections in the precedent, some reminiscent of the problems that doomed the World War One war crimes trials project.

[99] Ball, 181.

V – CONCLUSION:
Leipzig's Shadow & The International Criminal Court

After the stunning arrest of Slobodan Milosevic in Belgrade on 31 March of this year, it now seems possible that the most notorious figure of the entire Bosnian conflict may not be that far away from answering for his actions before an international court. For years, the continuing freedom of Milosevic had served as a slap in the face to the efforts of the ICTY, who finally indicted the former Serbian leader in 1999, despite the court's inability to do anything about the indictment. The difficulties that the United Nations have had in bringing Milosevic to justice, difficulties that, at least so far, have not ceased with his arrest, are yet another reflection of some of the problems with the Nuremberg model for a war crimes trial. As we have seen, though the IMTFE, ICTY and ICTR were each international war crimes tribunals built on Nuremberg's foundations, each operated under a different set of circumstances than their archetype.

In a way, Nuremberg was the perfect setup for an international war crimes trial. Logistically, the Allies had all of the defendants. They had all of the evidence. They physically controlled all of the areas in which the alleged crimes were perpetrated. They set the rules for the trial's procedure. Politically, there was one powerful nation throwing its weight behind the project, and the rest of the Allies were either unwilling to expend the political capital to fight the

Americans, or were interested in joining all along. Either way, the result was the same—an international political consensus for the trials the likes of which had never been seen before, and has not been seen since. Though a few of these conditions would be repeated at each of the three ensuing international war crimes trials, the subsequent trials, as shown, each highlighted places where the Nuremberg precedent created problems in different circumstances.

Consequently, though the Nuremberg trial was largely a success insofar as the specific criminals it was meant to try and punish, it was not successful at fulfilling one of its larger, historical charges. The IMT emerged from a unique series of circumstances that made its entire operation significantly easier. The problems confronting Jackson and his comrades were philosophical ones, not necessarily because they solved the more immediate logistical and procedural questions, but because those were non-issues. By contrast, the successors of Nuremberg would each struggle through logistical and procedural headaches long before they could get to philosophical issues. Consequently, the inescapable conclusion is that the IMT only created a precedent for a tribunal that takes place under *similar* circumstances. Since 1945, there has not been such a situation.

Certainly, this is an interesting development, but this is not a thesis about the exceptionalism of the Nuremberg trial. So, what does Nuremberg's exceptionalism have to do with the trials after the First World War? The place where the two relate is in linking the past with the present, specifically the impending establishment of the International Criminal Court (ICC).

The project to hold international war crimes trials after the First World War was like nothing the international community had previously undertaken. Little—if any—precedent existed for holding individuals responsible for actions that were viewed as collective, and the complicated machinations of international politics consistently challenged the effort, which desperately sought a consensus. Such a consensus would eventually be realized, just not until some 26 years later, after another terrible war had ravaged the world. The war crimes trials after the First World War, as we examined, could have been a dramatic step forward in international law, yet in the end, became little more than an obscure historical footnote. Perhaps, however, they are worthy of a more important role in the history of international law? We will return to this shortly.

Returning to the present for a moment, the ICC, which will come into existence as soon as 60 of the signatory nations at Rome ratify the treaty through their own legislatures,[1] would solve a number of the problems presented by the twin *ad hoc* tribunals of the 1990s. For one, there would not need to be specific proceedings in an area for someone to be indicted on war crimes or crimes against humanity, which would mean that no signatory party to the treaty, and no citizen of that nation, would be immune from the reach of the ICC's universal jurisdiction. Second, the ICC will be able to act much more quickly than any *ad hoc* tribunal, and as such, would do away with accusations both in the former

[1] As of 12 February 2001, the Rome Statute had been signed by 139 countries, and had been ratified by 29, halfway to its target of 60. See the website of the Lawyer's Committee for Human Rights,

Yugoslavia and Rwanda that the international community had not acted with enough speed. Third, and perhaps most importantly, as a permanent entity, its very existence would be a deterrent, since almost no one, under the statute, would be immune from the scope and authority of such an institution.

The ICC, like the ICTY and ICTR, would be based in The Hague. There would be 18 judges from an equal number of countries, each appointed for a nine-year term, and the ICC would have universal jurisdiction over all crimes under the Rome Statute—genocide, war crimes, crimes against humanity and the crime of aggression[2]—so long as the nation in which the alleged crimes took place was a signatory party, *or* so long as the victims were citizens of a signatory nation.[3]

The vote to establish the ICC at Rome was 120-7, yet, amazingly, perhaps the biggest roadblock standing in the way of the possible effectiveness of the ICC is the United States, one of the seven no votes. According to David Scheffer, at the time the U.S. Ambassador At-Large for War Crimes Issues, "on the practical side, no other nation matches the extent of US overseas military commitments through alliances and special missions such as current peacekeeping commitments in the former Yugoslavia ... [On the legal side], the proposed

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http://www.lchr.org, accessed 22 March 2001. *(N.B.: As noted in the introduction the number of ratifications has since risen to 130 with the ratification of the statute by Andorra on 30 April).*

[2] Though there has been significant debate in the Preparatory Conferences (PrepCons) about how to define aggression.

[3] See the Rome Statute, online through the Lawyers' Committee, http://www.lchr.org/ICP/statute1.htm. (Accessed 21 March 2001).

treaty violates a fundamental principle of international law that a treaty cannot be applied to a state that is not a party to it."[4]

The United States' opposition to the ICC comes down to two fundamental reasons. First, the US is afraid of the prospect that an American soldier, in a country that is a signatory party to the treaty, could be brought before the ICC for committing acts of aggression, acts which the US has committed repeatedly throughout the latter half of the century, such as in Grenada. Even more predominant is the fear that the command responsibility sections of international criminal law, which owe their existence to the work of the American government in 1945 and 1946, could be used against the U.S. to put the nation's leadership on trial, including even the President. Second, the US wanted the Security Council to have the right to veto cases, which would give each of the permanent members of the Council, including the US, the right to block the trial of any defendant, including its own citizens.[5]

The opposition of the United States notwithstanding, the Rome Statute is well on its way to receiving enough ratifications to enter into effect. When it does, with or without the support of the Americans, the world's first permanent international criminal court will come into existence, and, it stands to reason,

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[4] Ball, 201.

[5] Sarah B. Sewall, Carl Kaysen & Michael P. Scharf, "The United States and the ICC: An Overview," in The United States and the International Criminal Court: National Security and International Law, Sewall and Kaysen, Ed. (New York: Rowman and Littlefield Publishers, 2000), 8-11. (*Book hereafter referred to as* The US and the ICC).

another step forward will be taken in international criminal law, particularly if the ICC does not struggle too much in its nascent stages.

Based on the Nuremberg model, it seems, on the surface, that the ICC should be in good shape. Certainly, there is enough interest on the part of the international community, and the Rome Statute fully incorporated the ICTY and ICTR's improvements on the London Charter into its text. However, the exceptionalism of Nuremberg, which partially undermined the effectiveness of the model for the IMTFE, ICTY and ICTR, presents a more serious challenge to the ICC. The creation of a *permanent* international court means that prosecutions will not always result from international outrage in quite the same way that the IMT, IMTFE, ICTY and ICTR each did. Further, the intransigence of the Americans puts a serious dent in the international consensus that helped Nuremberg enjoy the success that it did. Factor in the same issues of funding and of apprehension of suspects that were issues for the twin *ad hoc* tribunals of the 1990s, and it becomes clear that, for the purposes of understanding the challenges facing ICC, the Nuremberg war crimes tribunal hardly provides a precedent, and is certainly not a model.

The question, therefore, is whether an historical model exists that may provide, at least at some level, a better lens through which a picture of the ICC emerges? I submit that this is where the abortive efforts to have international war crimes trials in the aftermath of the First World War factors in. As we saw in Chapters I and II, the willpower of the victorious nations was not as strong, the

impetus for trials was not as pressing, and the circumstances were not as perfect in 1919 as was the case at Nuremberg.

But what were the lessons of the failed post-World War One trials? First, the efforts showed that political willpower on the part of the participating nations was a crucial aspect of the international community's ability to push the trials forward. When countries such as Britain began to question the necessity of moving ahead on the trials, it had a domino effect on the willpower of the other Allied nations. Smelling blood in the water, the Dutch increased their resolve to not surrender the Kaiser for extradition, citing the lack of a consensus among the Allies as their chief reason for non-compliance with the Treaty of Versailles. In Turkey, this was even more dramatic, as the British grew more and more weary of the entire issue of post-war trials, and did not want to risk starting a new conflict with the Nationalists.

Second, and related to the issue of political will, the question of enforceability and apprehension of accused criminals stymied the entire German project, beginning with the failed extradition of the Kaiser. Without access to almost all of the accused war criminals and without access to most of the evidence, the Allies had little in the way of leverage to use with Germany, particularly since the end of the First World War had left the former empire intact as a political entity. No one wanted to risk *another* war over the subject of war criminals, and the Allies grew more concerned every day that the push for international trials was further energizing the right wing in Germany. Again, the

situation in Turkey was not much different, save for the British possession of most of the key defendants. Even that advantage, however, fell victim to the political willpower issue, as the British were more concerned with getting their own prisoners-of-war home, and a prisoner exchange with their accused war criminals was the quickest, neatest way to accomplish that.

Third, there was no clear leader in the project to hold trials after the First World War. After the Second World War, the American delegations dominated both the Nuremberg and Tokyo war crimes trials, at times pushing the efforts ahead single-handedly. No such role was played by any of the participating nations after the First World War, including Britain, where the government's internal politics prevented there from being a consensus within Whitehall, let alone amongst the Allied nations.

Lastly, the longer the process dragged on, the less interested the Allies were. The less interested the Allies were, the less political capital they were willing to expend. In the immediate aftermath of the war, the idea of trials were popular throughout the victorious nations, yet support for the trials eroded quickly, as Europe set about to the task of rebuilding. Looking ahead to Nuremberg and Tokyo, the former, which finished in a surprisingly-rapid 11 months, never suffered from a serious lack of political will. The latter, which dragged on for over two years, often did.

In the end, the result was a series of trials that were doomed to fail long before they ever had a chance to succeed. Without the political will to hold

international trials, the British and French governments were baited into a position where they had no leverage, and where their only means of saving face was to accept what they were offered. In the German case, that meant national trials conducted by the *Reichsgericht* at Leipzig. In the Turkish case, the national trials preceded the international attempt, and the nationalist independence movement, led by Kemal Ataturk, would ensure that no future trials would ever occur. Without precedent to guide them, without sufficient political willpower to overcome the lack of a precedent, and without one group or nation leading the charge, the effort to hold international war crimes trials after the First World War collapsed under its own weight.

What does this mean for the ICC? It is too early to tell, but it seems that a couple of conclusions follow almost immediately. First, the ICC needs to be efficient. It cannot afford to have trials drag on for months and years while the nations involved lose interest. Second, the ICC *desperately* needs an enforcement arm. Without the ability to arrest any indicted war criminals, the court could quickly become a mockery, as the war criminals of the world flee to the nearest country that is not a signatory of the Rome Statute.[6] Third, the ICC needs to be well-funded and well-supported by the UN, the larger funding problems of that organization notwithstanding. As we saw with the IMTFE, ICTY and ICTR, logistical or procedural problems can undermine the work of the courts, and if

[6] The United States, for one.

the ICC has to scrap for funding, it stands to reason that such an outcome would also undermine that institution.

Further, we cannot discount the impact of the participation—or lack thereof—of the Americans, despite the fact that the U.S. government's insistence on maintaining its sovereignty is as selfishly motivated as it is misplaced. Since "the success of the ICC depends on the willingness of powerful nation-states, chief among them the United States, to support and to assist the ICC in [apprehending criminals],"[7] the U.S., it can be argued, has a responsibility to the international community to actively participate in the ratification and establishment of the ICC.

Nevertheless, to this point at least, the U.S. has shirked that responsibility. When Bill Clinton signed the Rome Statute on 31 December 2000, the last possible day he could do so, the move was immediately dismissed as the act of a lame duck. Instead, the administration of President-elect George W. Bush vowed that it would do everything it could to "un-sign" the treaty.

The series of issues raised by the Americans' intransigence in participating in the ICC belies a much larger question—to what extent does the ICC need the United States in order to flourish? Can an institution so reliant on international support (and consensus) long exist without the active participation of the United States, the world's leading economic and military power? This is where the study of the war crimes trials after the First World War can once again figure in.

In the traditional history of international war crimes trials of the twentieth century, the United States has always been a player. It was the U.S. that came up with the bulk of the procedures to be adopted in the London Charter for the IMT, it was the Americans who, largely single-handedly, administered and oversaw the IMTFE. Indeed, in the aftermath of the Second World War, the leading player in the entire push towards international war crimes accountability was, without question, the United States. As we saw in Chapter III, the British and the Soviets, still licking their wounds from a war that they endured on the homefront, were perfectly happy to line the entire whole of Nazi elite up against a wall and execute them. The United States, however, standing on principles of legalism and the need to create precedent, won the day, though not by as large a margin as history has attempted to hold out.

Over the course of the next 40 years, the U.S. remained a key player in international war crimes issues. When the end of the Cold War precipitated dramatic steps towards a more consistent international justice system, there was the U.S. at the head, helping to word the UN Resolutions that established the ICTY and ICTR, and contributing the resources and the manpower to help make those two *ad hoc* institutions work. Consequently, such a critical war crimes project lacking American involvement is, within the traditional narrative, without precedent. The Americans, for better or for worse, have been part of each major international war crimes effort in the entire (short) history of the field.

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[7] Ball, 216.

Except that they have *not*, at least once the trials of the First World War are included. As discussed in Chapters I and II, the entire project to prosecute Kaiser Wilhelm II and the other war criminals of the First World War was undermined by the determination of the American government, particularly Lansing, to not allow such a result to unfold. The U.S. fought ardently *against* the war crimes clauses of the Treaty of Versailles, coming up with excuse after excuse about why the international community lacked such authority, and, as mentioned, using a misinterpreted 1812 Supreme Court decision as a key part of their justification.

The failed efforts after the First World War *do* provide a rather stern lesson about the importance of international consensus. As we saw earlier, without an international consensus, with the British and the French fighting with each other and with the Americans content to sit out and let the Europeans squabble, the entire World War One project collapsed. Such a fate could also be in store for the ICC, should the United States continue to refuse to participate.

In the end, that is the lesson of the efforts to try Kaiser Wilhelm, Talaat Pasha, and their subordinates. The international community's attempt to punish war criminals in the aftermath of the First World War was groundbreaking and it was novel, but it was doomed by a lack of consensus and by the logistical problems that such a void was unable to overcome. Their failure, however, should not remove them from the historical consciousness, for there are lessons in failure as much as there are lessons in success, if not more so. As Bass writes in

his conclusion, "the task is to do a tribunal, and to do it properly. If at first you don't succeed, try again."[8]

The successive tries, however, must also not forget the previous failures, and in the same fashion, the international community would be guilty of serious myopia if it failed to take into account the lessons from the twentieth century's first international effort to hold war crimes trials. As ICTY judge Gabrielle Kirk McDonald[9] said in a speech to the US Judge Advocate General's School in Charlottesville, Virginia in 1998,

> The twentieth century is best described as one of split personality; aspiration and actuality. The reality is that this century has been the bloodiest period in history. As improvements in communications and weapons technology have increased, the frequency and barbarity of systematic uses of fundamental rights have likewise escalated, yet little has been done to address such abuses … In the prospect of an ICC lies the promise of universal justice.[10]

Without understanding the efforts of the precedent-setters in London and Paris in the dark days of 1918 and 1919, we ignore one of the best empirical examples of the difficulties that nations face when attempting to create an international justice system. If the promise of universal justice truly lies in the prospect of an ICC, as McDonald maintains, then an understanding of why the war crimes trials of the First World War failed is of unquestionable importance in guaranteeing the future of the ICC, and is therefore of unquestionable importance in the continuing quest for universal justice.

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[8] Bass, 310.
[9] Amusingly, one of Amherst's honorary degree recipients for 2001.
[10] Ball, 215.

VI – APPENDIX A:
Excerpts from the Imperial War Cabinet, 28 November 1918

As highlighted in Chapter I, one of the pivotal moments in the movement towards war crimes trials after the First World War was the meeting of the British Imperial Cabinet on 28 November 1918. At that meeting, Sir Frederick Smith, the Attorney General, gave one of the most eloquent arguments in favor of war crimes trials on record. For the purposes of supporting the argument in Chapter I, and for the entertainment of the reader, the following is Smith's argument, in its entirety.[11]

Sir Frederick Smith: Prime Minister, Lord Curzon conveyed to the Law Officers of the Crown some days ago the desire of the Cabinet that they should give their opinion on this matter. The Law Officers pointed out the extreme importance, delicacy and difficulty of the matter submitted to them, and the fact that they themselves were very much engaged in other matters, and asked what period of time could reasonably be allowed them to produce a written opinion adequate to the gravity of the topic. Lord Curzon at that time took the view that they might be allowed ten days. Well, of these ten days, only, I think, four or five have elapsed, and therefore the Cabinet will excuse any imperfection of form in the statement I am about to make. We have, however, arrived at a clear conclusion, otherwise we should have informed the Cabinet that we were not yet in a positive to give definite and final advice. The matters involved here are partly legal and partly matters of policy. So far as they are matters of policy, the Cabinet will, of course, merely treat our views as the opinions of colleagues who are not entitled to, and who are not claiming, any special weight. The main question here which we, in common with our Allies, have to consider is whether the taking of proceedings against, or any punitive treatment in relation to, the Kaiser should become the declared policy of the

[11] CAB 23/43, Imperial War Cabinet 39, 28 November 1918, 11:45 a.m., 2-5.

Government. The Law Officers of the Crown answer this question in the affirmative. They point out to the Cabinet that the choice now to be taken is between two diametrically opposed courses, and that no half-way house is possible in the matter. The first is a decision in favour of complete impunity, an immunity which will be described as luxurious and wealthy; the second is in favour of punishment. We wish the Cabinet to consider very carefully how it will be possible for them to justify a decision in favor of impunity. The ex-Kaiser's personal responsibility and supreme authority in Germany have been constantly asserted by himself, and his assertions are fully warranted by the constitution of Germany. Accepting, as we must, this view, we are bound to take notice of the conclusion which follows: namely, that the ex-Kaiser is primarily and personally responsible for the death of millions of young men; for the destruction in four years of 200 times as much material wealth as Napoleon destroyed in twenty years; and he is responsible—and this is not the least grave part of the indictment—for the most daring and dangerous challenge to the fundamental principles of public law which that indispensable charter of international right has sustained since its foundations were laid centuries ago by Grotius. These things are very easy to understand, and ordinary people all over the world understand them very well. How then, I ask, are we to justify impunity? Under what pretext, and with what degree of consistence, are we to try smaller criminals? Is it still proposed—it has been repeatedly threatened by the responsible representatives of every Allied country—to try, in appropriate cases, submarine commanders and to bring to justice the governors of prisons? Is it proposed to indict the murderers of Captain Fryatt? In my view you must answer all these questions in the affirmative. I am at least sure that the democracies of the world will take that view, and among them I have no doubt that the American people will be numbered. How can you do this if, to use the title claimed by himself, and in itself illustrative of my argument, "the All Highest" is given impunity? Must we not, at the moment of our triumph, avoid the sarcasm: *Dat veniam corvis, vexat censura columbas*? In order to

illustrate the point which is in my mind I will read to the Imperial War Cabinet a very short extract, which represents our view with admirable eloquence, from Burke's speech in the trial of Warren Hastings:

"We have not brought before you an obscure offender, who, when his insignificance and weakness are weighed against the power of the prosecution, gives even to public justice something of the appearance of oppression; no, my Lords, we have brought before you the first man of India in rank, authority, and station. We have brought before you the chief of the tribe, the head of the whole body of eastern offenders: a captain-general of iniquity, under whom all the fraud, all the peculation, all the tyranny in India are embodied, disciplined, arrayed and paid. This is the person, my Lords, that we bring before you. We have brought before you such a person, that, if you strike at him with the firm and decided arm of justice, you will not have need of a great many more examples. You strike at the whole corps if you strike at the head."

Prime Minister, in my judgment, if this man escapes, common people will say everywhere that he has escaped because he is an Emperor. In my judgment they will be right. They will say that august influence has been exerted to save him. It is not desirable that such things should be said, especially in these days. It is necessary for all time to teach the lesson that failure is not the only risk which a man possession at the moment in any country despotic powers, and taking the awful decision between peace and war, has to fear. If ever again that decision should be suspended in nicely balanced equipoise, at the disposition of an individual, let the ruler who decides upon war know that he is gambling, amongst other hazards, with his own personal safety.

For these reasons we think the ex-Kaiser should be punished. If this view is accepted, the question arises: How is his person to be secured? And the question has been asked, and will be asked, whether or not he can be extradited. Now, Sir, the French have apparently expressed the view that he can. My own clear opinion is that that view is wrong, and I think my colleague, the Solicitor-General, is, on the whole, of the same opinion; but it is not necessary to argue that question, because we do not propose to

involve ourselves in a doubtful technical argument when we have more powerful weapons at our disposal. Infinite vistas of litigious disputations are opened by an argument whether according to the law of Holland he can be extradited or not. And if, contrary to my opinion, he could be extradited, he could only be charged for the very offence (possibly a limited one) which had been successfully alleged as the ground in law of his extradition. I think it is unnecessary to ask whether in law we can extradite him, because it seems to me that Holland must, in effect, give him up. The League of nations, or the Conference of the Allies which will precede the formation of the League of Nations, has, or will have, powerful arguments to address to Holland, and the internal condition of Holland seems to me to be such that it would be very difficult for her to reject arguments of the kind indicated. This is not a point of law, but my own conclusion is that the difficulty of obtaining control of the person of the ex-Kaiser from Holland will not be an insuperable one, though I should naturally defer to the views of the Foreign Office upon such a point. It may, perhaps, be assumed that the difficulty will not arise which would be occasioned in this connection by the ex-Kaiser's return to Germany. The taking of unnecessary risks has not up to the present been a distinguishing feature of his career. Different considerations might arise if the reconstitution of Germany should really bring with it an honest desire to deal with the Kaiser themselves.

The few observations, therefore, which I have still to make will be made upon the assumption that it will be possible to obtain control of his person. I have made it clear that in our judgment control should not be sought through the machinery of extradition. Supposing control of his person has been obtained, how is he to be dealt with? There are two alternative courses. In the first place, he might be treated by the Allies as Napoleon was treated, that is to say, by a high assertion of responsibility on the part of the conquering nations. The Allies might say "We are prepared, before the bar of history, to take upon ourselves the responsibility for saying that this man has been

guilty of high crimes and misdemeanours, that he has broken the peace of the world, and that he ought either to be exiled or otherwise punished in his own person." That course may be recommended by powerful argument, and I do not myself exclude it, Prime Minister. I do not say more of it at this stage than this, that by its adoption we should avoid the risks of infinite delays and of a long drawn-out impeachment. We should carry with us the sanction and support of the overwhelming mass of civilization, and we are bold enough to feel that we have nothing to fear from the judgment of the future. It is even possible—as Austria and Germany will be reconstituted—that there will be few dissentients in the governing classes of these countries.

The second alternative is that he should be tried by a Court which must evidently be international in its composition. There are obvious advantages in this method upon the moral side, if this method of dealing with the situation be carried to a logical conclusion. It is, of course, very desirable that we should be able to say that this man received fair-play, and that he has had a fair trial, but grave difficulties beset this course in its complete application. In this connection, how is the Court to be constituted? Are neutrals to be members of the Court? Are Germans to be members of the Court?

The only advantage of judicial procedure over the other alternative—a high exercise of executive and conquering force submitting itself to the judgment of history—lies in the fact that for all time it may claim the sanction of legal forms and the protection—in favour of the prisoner—of a tribunal whose impartiality can be established in the face of any challenge. This advantage, it must be observed, largely disappears if the fairness of the tribunal can be plausibly impeached. The Law Officers are not, indeed, of opinion that before a tribunal which consisted in part even of Germans, as Germany appears to be developing to-day, an indictment would necessarily fail. But it is unwise to ignore the difficulties. German and neutral representation would undoubtedly be claimed by the Kaiser. We can only qualify the

consequent risk by saying that the German representatives would certainly be less German than they were, and the neutral representatives less neutral.

On the whole, if a Court be constituted, I confess that I myself incline on the whole to the view that the members of the Court should consist only of citizens of the Allied countries. Grave judges should be appointed, but we should, as it seems to me at present, take the risk of saying that in this quarrel we, the Allies, taking our stand upon the universally admitted principles of the moral law, take our own standards of right and commit the trial of them to our own tribunals.

I cannot, because time is short, develop the matter as I should like now, and therefore I merely place it on record that I am well aware that the opposite view may be supported by formidable arguments.

The great question which I shall probably be asked—and here again inter-Allied discussion will be necessary—is: for what offences, in your view (assuming the adoption of judicial proceedings), should the ex-Kaiser be made justiciable? The first charge which will occur to many persons is one which raises in limine [*sic*] the question of his responsibility for the origin of the war. Well, Sir, I can only say, without giving a decision, that the trial of such a charge would involve infinite disputation. We do not wish to become involved in a trial like that of Warren Hastings in its infinite duration. We do not wish to be confronted by a meticulous examination of the history of European politics for the past twenty years. It is very easy to see that no German advocate of the ex-Kaiser would find it difficult to enlarge the area of discussion, carrying it to what would be described in Germany as the "ringing round" system, and discursively spreading from the question of the origin of the war to a close discussion of the military significance of the Russian strategic railways. The view which I have at present is that it would not be wise to add so general a charge, but this provisional view might easily be modified if new and decisive documents were produced like those

recently disclosed by the Bavarian Minister, who was in Berlin in August 1914. Such revelations are very likely to be made.

The second charge is extremely clear, and it is, in my judgment, a decisive one. A count should certainly be inserted in the indictment charging the Kaiser with responsibility for the invasion of Belgium in breach of international law, and for all the consequent criminal acts which took place. That is an absolutely clear issue, and upon it I do not think that any honest tribunal could hesitate. It is even possible, obscure as the present position in Germany is, that a partly German tribunal convened under existing circumstances in Germany would reach the same conclusion.

The next charge, in my judgment, which should be brought against him is that he is responsible in the matter of unrestricted submarine warfare. It may be necessary to associate other defendants in this charge. But it will, in my judgment, be absolutely impossible for us to charge or punish any subordinate if the ex-Kaiser escapes with impunity all responsibility for the submarine warfare. I wish to press submarine warfare, as it has been carried on since the incident of the "Lusitania." Since then, thousands of women and children, in our clear and frequently expressed view, have been brutally murdered. I am dealing with the case where a ship is torpedoed carrying no munitions of war, but which it is known must or may be carrying women and children, and where it is equally known that such passengers had no possible means of escape, and I do not in this connection deal with the vile cases of assassination when helpless boats, vainly attempting to escape, have been fired on and destroyed. Excluding the last class of cases, it is our view, and the view of the whole civilized world, that those acts amount to murder. It is surely vital that if ever there is another war, whether in ten or fifteen years of however distant it may be, those responsible on both sides for the conduct of that war should be made to feel that unrestricted submarine warfare has been so branded with the punitive censure of the whole civilised world that it has definitely passed into the category of international crime. "If I do it and fail," the Tirpitz of the next

war must say, "I, too, shall pay for it in my own person." How can we best secure that no one in future will dream of resorting to submarine warfare of this kind? You can best secure it by letting the whole world know that, by the unanimous consent of the whole of that part of the civilised world which has conquered in this war, the man responsible for those acts is responsible in his own person for that which he has done. To us of all people it is not possible to exaggerate the weight and force of these considerations. Nothing more vitally concerns these islands than that it should be recognised that these acts are crimes. The commission of such crimes and their possible future development, menace us more directly than any other nation in the world.

The above are suggestions, and not necessarily exhaustive suggestions, in regard to the offences for which the Kaiser should be tried. There are other individual cases with which I do not think it necessary to trouble the Cabinet at this stage.

28 November 1918, 11:45 a.m.

VII – APPENDIX B:
War Crimes Clauses of the Post-1919 Peace Treaties

Almost all of the peace treaties entered into at the conclusion of the First World War contained some provisions for war crimes, the first such articles in the history of international law. Excerpts from the most important of those treaties have been included as a point of reference.

GERMANY – THE TREATY OF VERSAILLES – 28 JUNE 1919[12]

Article 227

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

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

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

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

Article 228

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

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

Article 229

[12] All excerpts taken from Carnegie Endowment for International Peace, The Treaties of Peace, 1919-1923 2 vols., (New York: Carnegie Endowment for International Peace, 1924).

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

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

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

Article 230

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

AUSTRIA – THE TREATY OF SAINT-GERMAIN-EN-LAYE – 10 SEPTEMBER 1919

Article 173

The Austrian Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Austria or in the territory of her allies.

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

Article 174

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

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

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

Article 175

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

Article 176

The provisions of Articles 173 and 175 apply similarly to the Government of the States to which territory belonging to the former Austro-Hungarian Monarchy has been assigned, in so far as concerns persons accused of having committed acts contrary to the laws and customs of war who are in the territory or at the disposal of the said States.

If the persons in question have acquired the nationality of one of the said States, the Government of such State undertakes to take, at the request of the Power concerned and in agreement with it, all the measures necessary to ensure the prosecution and punishment of such persons.

BULGARIA – THE TREATY OF NEUILLY-SUR-SEINE – 27 NOVEMBER 1919

Article 118

The Bulgarian Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Bulgaria or in the territory of her allies.

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

Article 119

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

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

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

Article 120

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

HUNGARY – THE TREATY OF TRIANON – 4 JUNE 1920

Article 157

The Hungarian Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Hungary or in the territory of her allies.

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

Article 158

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

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

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

Article 159

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

Article 160

The provisions of Articles 157 and 159 apply similarly to the Government of the States to which territory belonging to the former Austro-Hungarian Monarchy has been assigned, in so far as concerns persons accused of having committed acts contrary to the laws and customs of war who are in the territory or at the disposal of the said States.

If the persons in question have acquired the nationality of one of the said States, the Government of such State undertakes to take, at the request of the Power concerned and in agreement with it, all the measures necessary to ensure the prosecution and punishment of such persons.

TURKEY – THE TREATY OF SÈVRES – 10 AUGUST 1920

Article 226

The Turkish Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by the law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Turkey or in the territory of her allies.

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

Article 227

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

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

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

Article 228

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

Article 229

The provisions of Articles 226 and 228 apply similarly to the Government of the States to which territory belonging to the former Turkish Empire has been or may be assigned, in so far as concerns persons accused of having committed acts contrary to the laws and customs of war who are in the territory or at the disposal of the said States.

If the persons in question have acquired the nationality of one of the said States, the Government of such State undertakes to take, at the request of the Power concerned and in agreement with it, all the measures necessary to ensure the prosecution and punishment of such persons.

Article 230

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

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

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

The provisions of Article 228 apply to the cases dealt with in this article.

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The following are various website cited in the thesis as sources of included material, including their most recent access dates:

http://www.igc.apc.org/icc/index.html, providing updated information on the number of signatories to the Rome Statute, most recently accessed on 2 April 2001.

http://www.lchr.org, the homepage of the Lawyers Committee for Human Rights, most recently accessed on 22 March 2001.

http://www.lchr.org/IJP/statute1.htm, the text of the Rome Statute, most recently accessed 21 March 2001.