

The Peacemaking Process After the Great War and the Origins of International Criminal Law *Stricto Sensu**

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ABSTRACT: Over two parts, this article explores the wider significance of the peacemaking process on the evolution of international criminal law and international criminal justice. First, it shows that the Paris experience has brought to light two problems which continue to haunt us at the present time: political resistance to the individualisation of responsibility after a conflict between collective entities, and the question of group-based selectivity of criminal proceedings. Secondly, the article explains why the peacemaking process after the Great War constitutes the prologue to, rather than the birth of, international criminal law *stricto sensu* – this body of international legal rules being understood as providing, on behalf of the international community as a whole, for criminal sanctions in cases of violations of a limited number of fundamental international legal rules of conduct.

KEYWORDS: History of International (Criminal) Law, Treaty of Versailles, Treaty of Sèvres, Immunities and International Criminal Law, *Ius Puniendi* of the International Community

I. Introduction

I would even say it is not worth making peace
if such crimes are to go unpunished!¹

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¹ Citation from William A. Schabas, *The Trial of the Kaiser* (2018), at 179 and 191.

David Lloyd George's observation, made on the afternoon of 2 April 1919 in the Council of Four,² highlights the importance that Great Britain attached to the question of punishment of individuals during the Peace Conference.³ France fully concurred with this position, and this firm consensus may be seen as reflecting the widespread perception among the allied and associated powers that they had been fighting a war not only in the national interest, but also in defence of international law and the international legal order.⁴

The United States (US) broadly shared that perspective, and Woodrow Wilson sought to establish a new and, as he saw it, better world order. However, the position of the US regarding the punishment of individuals and, most particularly, relating to the possibility and desirability of an international trial for the former German *Kaiser*, was markedly reserved. This is obvious from the 'Memorandum of Reservations' of 4 April 1919 that was presented by the two representatives of the US⁵ within the 'Commission on the Responsibility of the Authors of the War and on Enforcement

² The Council of Four – Georges Clemenceau, David Lloyd George, Vittorio Orlando, and Woodrow Wilson – had started working in the last week of March 1919. It had taken over from the Supreme Council, which (having emerged from the Supreme War Council of the Allied and Associated Powers) was composed of representatives (usually the Heads of States/Prime Ministers and the Foreign Ministers) of France, Great Britain, Italy, Japan, and the United States; see Margaret MacMillan, *Peacemakers. Six Months that Changed the World* (2001), at 281; see also Marcus M. Payk, *Frieden durch Recht? Der Aufstieg des Modernen Völkerrechts und der Friedensschluss nach dem Ersten Weltkrieg* (2018), at 246. For a more detailed presentation of the organisation of the negotiation and decision-making process, see Payk, at 220.

³ 18 January 1919 has often been referred to as the day of the opening of the Peace Conference. On closer inspection, it proves difficult to identify such a day, Payk, *supra* note 2, at 220. The use of the term Peace Conference also raises certain questions in view of the fact that the ensuing negotiations were also often referred to as a 'Preliminary Peace Conference' in view of the absence of the vanquished countries. Also, those negotiations resulted in separate treaties concluded at different times and locations with each of those States, Payk, *supra* note 2, at 173. In this essay, the term 'Peace Conference' is nevertheless used in order comprehensively to refer to the negotiation process beginning on 18 January 1919 and resulting in the several peace treaties.

⁴ For an important recent study making highlighting the unprecedented significance of 'international law' and 'international legal argument' in connection with the conclusion of peace after the Great War, see Payk, *supra* note 2, at 499, who makes the connection between the overall significance of the defence of international law and the question of punishment.

⁵ Those representatives were Robert Lansing and James Brown Scott. Lansing, who had before been in the recently established position of 'Counselor' within the State Department, had been appointed Secretary of State on 23 June 1915. Scott, a professor of law from Columbia University, had been appointed 'Solicitor' (a position established in 1891 with a view to provide international legal advice to the State Department) in 1906 and in 1907 he was an important figure at the Second Hague Peace Conference. In 1911, Scott became the director of the Division of International Law of the Carnegie Endowment for International Peace. Soon after his appointment as Secretary of State, Lansing made his friend Scott his Special Advisor. For more details, see Payk, *supra* note 2, at 113.

of Penalties' (Commission on Responsibility) to the 'Report Presented to the Preliminary Peace Conference' (Report) by the Commission of 29 March 1919.⁶

As a result of this divergence of opinions, the Council of Four, in its afternoon sessions of 2 and 8 April 1919, turned into what appears to the fascinated observer as a seminar on criminal law, public international law, and legal philosophy. This occurred at an important historic juncture, bringing together the leaders of the four Great Powers. In fact, Clemenceau, Lloyd-George, Orlando, and Wilson spent hours discussing the question of punishment, in particular that of the former *Kaiser*, as a matter of law – and as one might expect, even more as a matter of legal policy.⁷ This truly remarkable debate has paved the way to the formulation of Articles 227 to 230 Treaty of Peace with Germany (Treaty of Versailles)⁸ which, as will be shown, constitutes a compromise between the 'punitive approach' advocated by France and Great Britain, and the more reserved position of the US.

In one obvious sense at least, Versailles marks a turning point in the international practice regarding the punishment of individuals: The idea of a *perpetua oblivio et amnistia omnium* that had been articulated in the Westphalian Peace Treaties⁹ and had since been widely followed in the European practice of States,¹⁰ was

⁶ Reprinted in 14 *American Journal of International Law (AJIL)* (1920) 95 (Report) and 127 (Memorandum of Reservations). The Commission on Responsibility was created through a decision made at the plenary session of the Peace Conference of 25 January 1919 (*ibid.*, at 95). For summaries of the debate within the Commission on Responsibility, see Schabas, *supra* note 1, at 99; Harry M. Rhea, 'The Commission on the Responsibility of Authors of the War and on Enforcement of Penalties and Its Contribution to International Criminal Justice After World War II', 25 *Criminal Law Forum* (2014) 147; Jackson Nyamuya Maogoto, 'The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction', in Morten Bergsmo, Cheah Wui Ling, and Yi Ping (eds.), *The Historical Origins of International Criminal Law: volume I* (2014) 171, at 177.

⁷ Schabas devotes the entire twelfth chapter of his book (*supra* note 1) to summarising this historic debate, building on the transcripts produced by the 'gifted bilingual amanuensis of the Conference' (*ibid.*, at 175) Paul Mantoux; for further references, see *ibid.*, at 364 (sub 2.).

⁸ Treaty of Peace with Germany (Treaty of Versailles), 1919 For. Rel. (Paris Peace Conference, XIII) 55, 740, 743; Senate document 51, 66th Congress, 1st session.

⁹ Cf. § 2 Instrumentum Pacis Monasteriensis and Art. II Instrumentum Pacis Osnabrugensis, both 24 October 1648, available at <http://www.pax-westphalica.de/index.html>; Johann Friedrich Scheidt, *Traité systématique touchant La Connoissance De l'Etat Du Saint Empire Romain De La Nation Allemande, ou le Droit Public De Cet Empire, tiré Des Loix Fondamentales De La Jurisprudence Politique (et) des Auteurs Les Plus Célèbres Et Les Plus Désintéressés. Tome quatrième* (1754), available at https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10561571_00001.html, at 156.

¹⁰ See Hersch Lauterpacht, *Oppenheim's International Law* (5th ed., 1952), at 612, according to whom there was a presumption for amnesty in the interpretation of a peace treaty; see also Immanuel Kant, *Metaphysik der Sitten. Erster Teil Anfangsgründe der Rechtslehre* (1954), at 179 (para. 54), according to whom the very idea of a peace treaty implied the concept of amnesty.

abandoned.¹¹ As a consequence of developments since Versailles, today the question is whether there is still room for an amnesty for crimes under international law, a question which is of the greatest importance in situations of transitional justice.¹²

In the following analysis, the wider significance of the peacemaking process for the evolution of international criminal law and international criminal justice will be discussed in two parts. It will be shown, first, that the Paris experience has brought to light two problems which continue to haunt us at the present time: political resistance to the individualisation of responsibility after a conflict between collective entities, and the question of group-based selectivity of criminal proceedings. Secondly, the article will explain why the peacemaking process after the Great War constitutes the prologue to, rather than the birth of, international criminal law *stricto sensu* – this body of international legal rules being understood as providing for criminal sanctions in cases of violations of a limited number of fundamental international legal rules of conduct.¹³

The qualification of the post-Great War legacy as the prologue to international criminal law *stricto sensu* will be presented as follows: The idea of an international criminal law *stricto sensu* powerfully emerged during the Peace Conference, and thus, it was at this historic juncture that the foundations were prepared for this body of law's subsequent establishment in the international legal scene.

II. Paris After the Great War and the Early Encounter of Two Fundamental Challenges for International Criminal Law

A. The Individualisation of Responsibility in Case of a Conflict Between Collective Entities

As was seen at the outset, Great Britain as well as France attached central importance to the question of the punishment of individuals. It is fascinating to see

¹¹ Hervé Ascensio, 'Le Traité de Versailles aux origines du droit international pénal?', in Castellarin and Haman (eds.), *supra* note * (forthcoming). James F. Willis, *Prologue to Nuremberg. The Politics and Diplomacy of Punishing War Criminals of the First World War* (1982), at 85; cf. also the observation made by Orlando in the Council of Four: 'It would be too easy for the criminals if peace cancelled out responsibility. For those who have suffered over these five years, nothing would sow more hatred than an amnesty for the criminals', cited from Schabas, *supra* note 1, at 191.

¹² For war crimes, see Fania Domb, 'Treatment of War Crimes in Peace Settlements – Prosecution or Amnesties', 24 *Israel Yearbook on Human Rights* (1995) 253; for an overview about the current state of the debate, see Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th ed., 2019), at 539.

¹³ Claus Krefß, 'International Criminal Law', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, volume V (2012) 717.

how central the same question was for Germany, though obviously from the opposite point of view. Together with what was to become Article 231 Treaty of Versailles, a text that was (quite inaccurately) perceived as requiring Germany to recognise her 'war guilt', the draft provisions for the prosecution of Germans for crimes committed during the Great War formed the object of Germany's dramatic last minute attempt to formulate a reservation to the treaty.¹⁴ While this move remained unsuccessful, Germany's refusal to comply with its duty under Article 228 Treaty of Versailles to extradite its alleged war criminals¹⁵ bore fruit: The Allied Powers postponed their extradition request and allowed Germany to conduct national proceedings before the *Reichsgericht* at Leipzig.¹⁶

At its core, Aristide Briand's verdict about the Leipzig experience having been a '*parodie de justice*'¹⁷ remains unchallenged to date.¹⁸ Using the technical legal lan-

¹⁴ MacMillan, *supra* note 2, at 483; Willis, *supra* note 11, at 84; Walter Schwengler, *Versailler Vertrag, Völkerrecht und Auslieferungsfrage: Die Strafverfolgung wegen Kriegsverbrechen als Problem des Friedensschlusses 1919/1920* (1982), at 213.

¹⁵ Art. 228 Treaty of Versailles reads as follows: '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 the rank, office or employment which they held under the German authorities.'

¹⁶ Payk, *supra* note 2, at 516 (with a reference to the compromise formula that emerged from conversations among the allies 'to postpone the demand for surrender in order to give time for the accused to be tried before a German Court'); Schwengler, *supra* note 14, at 300–343 (with a special reference *ibid.*, at 334 to France's reluctance to demonstrate what was seen as a 'défaillance redoutable'); see further Gerd Hankel, *Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (2003), at 49.

¹⁷ Reprinted in 48 *Journal du Droit International* (1921) 444; see also the devastating criticism by Édouard Clunet, 'Les Criminels de guerre devant le Reichsgericht, à Leipzig', 48 *Journal du Droit International* (1921) 440.

¹⁸ In fairness, it should be mentioned, though, that the way in which the judges at Leipzig took international law into account, has increasingly been seen in a more positive light; see Dirk von Selle, 'Prolog zu Nürnberg – Die Leipziger Kriegsverbrecherprozesse vor dem Reichsgericht', 19 *Zeitschrift für Neuere Rechtsgeschichte* (1997) 193; see also Joseph Rikhof, 'The Istanbul and Leipzig Trials: Myth or Reality?', in Bergsmo, Cheah, and Yi (eds.), *supra* note 6, at 298. The conduct of the proceedings in the *Llandovery Castle* case should even be mentioned for its lasting significance for the subsequent legal evolution: The judgment in this case has made a decisive contribution to overcoming the doctrine of *respondeat superior* in international criminal law. More fundamentally, the judgment rejected the idea – widely held in German military circles at the time – of '*inter armis silent leges*' implied in the German sayings '*Not kennt kein Gebot*' and '*Krieg ist Krieg*'. For a vigorous criticism of the judgment guided by the spirit underlying these sayings, see Wilhelm Hofacker, 'Die Leipziger Kriegsprozesse', 43 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1921) 670. For a brief retro-

guage in Article 17 of the Statute of the International Criminal Court (ICC Statute),¹⁹ Leipzig constitutes the most important early example of the ‘unwillingness’ of a State ‘genuinely to carry out [an] investigation or prosecution’.²⁰ The reason for Germany’s unwillingness becomes apparent from the following passage of the memoirs of the then responsible Chief Prosecutor, Ludwig Ebermayer:

Even today I still find it hard to understand that we took on the obligation in the Versailles treaty to have these war crimes [...] prosecuted in Germany and in the German courts. We had lost the war, we had to submit to the harsh conditions of the enemy, dictated by hate and revenge, and we suffered losses, both of land and money, something which was unavoidable. We should, however, have never ever allowed ourselves to submit to the condition of prosecuting our own people for these so-called war crimes, when no other country involved in the war took it upon themselves to undertake such an obligation. Such a concession went against our honour.²¹

This passage does not evoke a distant historic memory: One main ambition behind international criminal law is to individualise responsibility instead of assigning collective guilt to an entire nation or group. Yet, this attempt repeatedly meets with the kind of deeply entrenched collective emotions that are all too often evoked by conflicts between powerful collective entities (which as a rule, constitutes the context within which proceedings for crimes under international law occur). Even in 1930, when he wrote his autobiography, the German prosecutor proved utterly incapable of overcoming this type of emotion and, characteristically, he portrayed his mind-set as one filled with a praiseworthy sense of national honour. Regrettably, many of the more recent instances of the exercise of international criminal justice suggest that little has changed with respect to popular emotions.

Subsequent lawmakers have been trying to deal with this challenge: The Leipzig experience has certainly contributed to the decision made after the Second World War to establish two international military tribunals and to provide them with

spective look at the *Llandovery Castle* case, see Claus Kieß, ‘Versailles – Nuremberg – The Hague: Germany and International Criminal Law’, 40 *The International Lawyer* (2006) 15, at 17.

¹⁹ Rome Statute of the International Criminal Court (ICC Statute) 1998, 2187 UNTS 90.

²⁰ See, most importantly, Hankel, *supra* note 16, at 518; see also Wolfgang Form, ‘Law as Farce: On the Miscarriage of Justice at the German Leipzig Trials: The *Llandovery Castle* Case’, in Bergsmo, Cheah, and Yi (eds.), *supra* note 6, 299, at 331; Matthias Neuner, ‘When Justice is Left to the Losers: The Leipzig War Crimes Trials’, in Bergsmo, Cheah, and Yi (eds.), *supra* note 6, 333, at 376.

²¹ Ludwig Ebermayer, *Fünfzig Jahre Dienst am Recht* (1930), at 190 (English translation by author). It would appear that the sentiment among most German scholars was not much different. In 1934, Hellmuth Weber prefaced his rather isolated study *Internationale Strafgerichtsbarkeit* as follows (English translation by author): ‘It has gone almost unnoticed by the German public that a movement to establish an international criminal jurisdiction has started after the World War. The German reservation is rooted in the fact that this movement has at its origin the allegation of Germany’s responsibility for and during the war. Such allegation made it impossible for a German to take a positive attitude towards the said movement.’

primacy *vis-à-vis* any conceivable national proceedings. In fact, Robert Jackson exclaimed in his opening speech before the Nuremberg Tribunal:

[T]he world-wide scope of the aggressions carried out by these men has left few neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the First World War we learned the futility of the latter course.²²

Also, the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) were vested with primary jurisdiction over any possible concurrent national criminal proceedings. It is true that States were not prepared to accept the same limitation on their national criminal jurisdiction during the negotiations of the ICC Statute. Yet, the Leipzig experience also resounds in the way the principle of complementarity has been enshrined in that Statute. For, as was indicated above, Article 17 ICC Statute subjects the primary right of States to exercise their jurisdiction to their willingness (in addition to their ability) 'genuinely to carry out the investigation or prosecution'. Crucially, in case of controversy, the last word is with the ICC.²³

It is worth recalling that a sort of complementarity *avant la lettre* had been provided for in connection with Germany's criminal proceedings:²⁴ Germany had consented to representatives of allied and associated powers observing those proceedings. A commission composed of representatives of those countries would subsequently conclude that Germany had not displayed a genuine willingness to conduct the proceedings. On that basis, the commission recommended activating the extradition right of the allied and associated powers under Article 228 Treaty of Versailles. This led to a difficult conversation between Great Britain and France in particular. The compromise arrived at was to convey to Germany that the right to seek extradition would remain suspended and could be activated in the future. France and Belgium would later conduct a number of proceedings *in absentia*.²⁵

At this juncture, it is convenient to have a brief look at the practice of States with respect to the punishment of individuals for crimes committed in the Ottoman

²² Opening Speeches of the Chief Prosecutors for The United States of America; The French Republic; The United Kingdom of Great Britain and Northern Ireland; and the Union of the Soviet Socialist Republics in *The Trial of German Major War Criminals* by the International Military Tribunal Sitting at Nuremberg Germany (Commencing 20th November, 1945) (2001), at 5.

²³ Claus Krefß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in Antonio Cassese (ed.), *The Oxford Companion on International Criminal Justice* (2009) 143, at 156.

²⁴ For a similar view, see Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law. Origin, Development and Practice* (2008), at 11; for the (limited) similar experience subsequent to the Treaties of St Germain, Trianon and Neuilly, see *ibid.*, at 18.

²⁵ Willis, *supra* note 11, at 140; Hankel, *supra* note 16, at 488.

Empire against Armenians during the Great War,²⁶ and which had given rise to the following Joint Declaration of 24 May 1915 by France, Great Britain, and Russia:

En présence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation, les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ses agents qui se trouveraient impliqués dans de pareils massacres.²⁷

Britain, in particular, pressed for the institution of criminal proceedings,²⁸ whilst the Turkish authorities, who had sought equal treatment with Germany, were given conditional permission to conduct national proceedings. These proceedings differed from those at Leipzig because high-level decision makers were included in the indictments that would sometimes result in significant sentences.²⁹ Yet, as with Germany, those national proceedings provoked strong nationalist sentiment, and the resulting national demonstrations prompted the Ottoman government to prevent the sentences from being executed.³⁰

B. The Selectivity of the Proceedings

The passage from Ebermayer's autobiography, as cited above, is telling for another reason: The former German prosecutor criticises the asymmetry of the proceedings to the detriment of his own country.³¹ Obviously, after the Great War, this challenge could not have been answered by imposing a requirement of instituting criminal proceedings against an equal number of members of each party to the conflict. In view of Germany's systematic disregard for the laws of war, justice after war de-

²⁶ Other allegations of crimes committed by Ottoman authorities referred to the mistreatment of prisoners of war.

²⁷ Reprinted in The United Nations War Crimes Commission (ed.), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), at 35. For a helpful appraisal of the declaration, see Sévane Garibian, *Le crime contre l'humanité au regard des principes fondateurs de l'Etat moderne. Naissance et consécration d'un concept* (2009), at 81.

²⁸ For a detailed account of the British criminal law policy regarding the Ottoman Empire after the Great War, see Michelle Tusan, '“Crimes against Humanity”: Human Rights, the British Empire, and the Origins of the Response to the Armenian Genocide', 119 *American Historical Review* (2014) 47.

²⁹ Rikhof, *supra* note 18, at 297; Lina Laurinaviciute, Regina M. Paulose, and Ronald G. Rogo, 'The Forgotten: The Armenian Genocide 100 Years Later', in Bergsmo, Cheah, and Yi, *supra* note 6, 379, at 387.

³⁰ El-Zeid, *supra* note 24, at 22–6; Rikhof, *supra* note 18, at 287.

³¹ See also the statement made by the German Minister of Justice at the time cited in 48 *Journal du Droit International* 48 (1921) 445.

mandated that the bulk of the proceedings be conducted against German suspects.³² In truth, however, there was never any real prospect of allegations of misconduct against the German side receiving similarly serious attention.³³ Even if such investigations had only led to the conclusion that such conduct was a lawful response to prior unlawful German activities like the use of gas,³⁴ this would have at least addressed some of the issues that would arise if no investigations were conducted at all. Indeed, the absence of investigations into crimes committed by the victors effectively delegitimised the entire enterprise of prosecuting German war crimes as an exercise of ‘victor’s justice’ in the eyes of the German public.

As is well known, the problem resurfaced even more sharply after the Second World War³⁵ and, in more subtle ways, was also of concern to the ICTY and the ICTR. The fact that the ICC Statute only allows the Prosecutor to open an investigation into a ‘situation’, from which ‘cases’ against suspects belonging to all parties of the relevant conflict may arise,³⁶ must be seen as a positive lesson resulting from the perception of illegitimacy that has tainted decisions to exercise jurisdiction over crimes under international law against only one party to a conflict.³⁷ Nevertheless, the fundamental problem of selectivity continues to haunt the international criminal justice enterprise because, at present and for the foreseeable future, the limitation of the ICC’s jurisdiction *ratione personae*, coupled with a lack of political will among the great powers to consistently investigate credible allegations of crimes under international law, nationals of a number of the most powerful States have largely avoided being probed.³⁸

³² See Isabel V. Hull, *A Scrap of Paper. Breaking and Making International Law during the Great War* (2014), at 317.

³³ For a helpful elucidation of the general context, see Marc Lewis, *The Birth of the New Justice. The Internationalization of Crime and Punishment, 1919–1950* (2014), at 33.

³⁴ See Hull, *supra* note 32, at 236; see also the response of the allied powers to the International Committee of the Red Cross’ appeal of 6 February 1918 directed to all warring parties to stop the use of gas, as reprinted in Michael Bothe, *Das völkerrechtliche Verbot des Einsatzes chemischer und bakteriologischer Waffen. Kritische Würdigung und Dokumentation der Rechtsgrundlagen* (1973), at 360.

³⁵ See Reinhard Merkel, ‘The Law of the Nuremberg Trial: Valid, Dubious, Outdated’, in Guénael Mettraux (ed.), *Perspectives on the Nuremberg Trial* (2008) 555, at 570.

³⁶ Cf. Art. 13 together with Art. 53 ICC Statute.

³⁷ On possible shortcomings in the ICC practice, see the research proposal submitted by Asad G. Kiyani, ‘The Three Dimensions of Selectivity in International Criminal Law’, 15 *Journal of International Criminal Justice* (2017) 624, at 633.

³⁸ Kreß, ‘The International Criminal Court’, *supra* note 23, at 145; for a current appraisal, see Cryer, Robinson, and Vasiliev, *supra* note 12, at 550.

III. The Place of Paris in the History of International Criminal Law

A. Not the Birth of International Criminal Law *stricto sensu* ...

1. *The Anglo-French and US-American Divide*

Un droit international nouveau est né.

This was the guiding spirit of a memorandum produced by the French professors Ferdinand Larnaude and Albert de Lapradelle³⁹ at the request of Clemenceau, in which they advocated the idea of an international trial of the former *Kaiser*,⁴⁰ and which had been sought by Clemenceau.⁴¹ The French memorandum made reference to '*la doctrine du président Wilson*' in support of its main point.⁴² Yet, a new international criminal justice project did not form part of Wilson's Fourteen Points. Perhaps the deference shown to the President was meant to encourage him to warm to the idea by persuading him that this project was somehow implicit in his grand design for a new world order.⁴³

Yet, Wilson had not been won over when the question of the punishment of individuals and the former *Kaiser* in particular came up in the Council of Four. Instead, he invoked the above-mentioned US-American reservation to the Report of the Commission on Responsibilities, as drafted by Robert Lansing and James Brown Scott.⁴⁴ One crucial passage of this reservation was as follows:

The American representatives know of no international statute or convention making a violation of the laws and customs of war [...] an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence. They felt,

³⁹ Larnaude was a Professor of Public Law at Paris University. At the time of the Peace Conference he served as the Dean of his Faculty and as one of the two French Members of the Commission on Responsibilities. De Lapradelle was a Professor of Public International Law at Paris University. He served as the second French Member in the Commission of Responsibilities and was the Commission's 'General Secretary'. Larnaude and de Lapradelle both served in the '*comité consultatif juridique*' convened by Clemenceau for the purposes of receiving legal advice on matters related to the Peace Conference; see Payk, *supra* note 2, at 285.

⁴⁰ Ferdinand Larnaude and Albert de Lapradelle, 'Examen de la responsabilité pénale de l'empereur Guillaume II d'Allemagne', 45 *Journal de Droit International* 45 (1919) 131.

⁴¹ Payk, *supra* note 2, at 112.

⁴² *Ibid.*, at 146.

⁴³ For Larnaude's (unsuccessful) efforts to reach out directly to Wilson after the President's arrival in Paris, see Payk, *supra* note 2, at 203.

⁴⁴ Schabas, *supra* note 1, at 176.

however, that the difficulty, however great, was not insurmountable, inasmuch the various states have declared certain acts violating the laws and customs of war to be crimes [...].⁴⁵

Arguably, this was an accurate description of the law existing at the time of the outbreak of the Great War.⁴⁶ This is confirmed by the fact that the eminent French international lawyer Louis Renault had analysed the legal situation much along the same lines in 1915.⁴⁷ The classic perspective, as set out by the US and Renault, was that international law did not itself provide for a criminal sanction in cases of grave violations of the laws of war, but that it authorised the warring parties to apply the criminal sanction on the basis of their national laws. Importantly, this classic bilateral perspective of the law on war crimes was in full accord with both Lansing's and Scott's policy preference for a State-centred international legalism.⁴⁸

However, in order to institute international criminal proceedings against the high-ranking German suspects, Britain and France were prepared to move towards a *droit international nouveau*, or to put this another way, to move beyond an international legal order essentially confined to regulating the relations between sovereign States.⁴⁹ This may explain why Clemenceau commissioned Larnaude and de Lapradelle, rather than Renault, to draft the formulation of the official French memorandum.⁵⁰ In the Commission of Responsibility, Sir Ernest Pollock, being Britain's Solicitor General – hence one of the two Law Officers of the Crown – articulated the progressive British mind-set in the following terms:

[W]e regard the occasion of the Peace Conference – with its association of, I think I am right in saying, something like fifteen or sixteen countries – as an opportunity when those countries, in accord with the traditions and principles of law, may bring up to date the duties which now arise from the settled opinion of civilised States.⁵¹

⁴⁵ Reprinted in 14 *AJIL* (1920) 127, at 146.

⁴⁶ For a more detailed analysis, see Claus Kreß, 'Crimes de guerre', in Olivier Beauvallet (ed.), *Dictionnaire encyclopédique de la justice pénale internationale* (2017) 288.

⁴⁷ Luis Renault, 'De l'application du droit pénal aux faits de guerre', 42 *Journal du droit international* (1915) 313. Renault was professor of law at Paris University and became '*jurisconsulte-conseil*' of the French delegations to the Hague Peace Conferences. His legal contribution to the work of those conferences had received much acclaim and in 1907 he was awarded the Nobel Peace Prize. De Lapradelle would be his successor at the Paris faculty. See further Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (2001), at 274; Payk, *supra* note 2, at 51.

⁴⁸ Payk, *supra* note 2, at 114 and 268.

⁴⁹ Kirsten Sellars, 'Trying the Kaiser: The Origins of International Criminal Law', in Bergsmo, Cheah, and Yi (eds.), *supra* note 6, 195, at 196.

⁵⁰ Payk, *supra* note 2, at 112.

⁵¹ Cited from Schabas, *supra* note 1, at 115.

While the majority in the Commission of Responsibility⁵² were willing to follow suit, Lansing and Scott remained adamant.⁵³ For them, the establishment of an international criminal tribunal and the institution of international criminal proceedings for crimes under international law would have constituted a revolution and would thus, as a matter of law, have violated the legality principle.⁵⁴ As a matter of legal policy, the French and British vision smacked of ‘Mundanism’, which was diametrically opposed to Lansing’s preferred vision of an international legal order centred around sovereign States: ‘Let me repeat’, he would write soon after the Peace Conference, ‘Nationalism must be maintained at all hazards. It must not be supplanted by Mundanism’.⁵⁵

2. The Reflection of the United States’ Script in Articles 227 to 230

On close inspection of Articles 227 to 230 Treaty of Versailles, it is difficult to avoid the conclusion that, ultimately, Lansing and Scott prevailed.⁵⁶

⁵² The Commission on Responsibility was composed of the following fifteen members: Robert Lansing (Chairman) and James Brown Scott from the United States, Sir Gordon Hewart or Sir Ernest Pollock (Vice-Chairmen) (for further information, see Payk, *supra* note 2, at 297) and Mr. W. F. Massey from Great Britain, André Tardieu and Ferdinand Larnaude from France, Vittorio Scialoja. (Alternates: Arturo Ricci-Busatti and Gustavo Tosti) and Mr. Raimondo (Mr. Brambilla on 3 February and Mariano d’Amelio on 16 February) from Italy (for further information, see Payk, *supra* note 2, at 307), Mr. Adatei and Harukazu Nagaoka (Sakaturo Tachi on 15 February) from Japan (for further information, see Payk, *supra* note 2, at 308), Édouard Rolin-Jacquemyns from Belgium (for further information, see Payk, *supra* note 2, at 309), Nikolaos Politis from Greece (for further information, see Payk, *supra* note 2, at 310), Mr. C. Skirmunt from Poland (Mr. N. Lubienski on 14 February), Mr. S. Rosental from Roumania, and Slobodan Yovanovitch from Serbia. Albert de Lapradelle from France was named General Secretary; for further administrative details, see 14 *AJIL* (1920) 96.

⁵³ For the ‘Reservations by the Japanese Delegation’, see 14 *AJIL* (1920) 151. The Japanese representatives stated (among other things): ‘It may further be asked whether international law recognizes a penal law as applicable to those who are guilty.’

⁵⁴ Cf. *Lansing’s* response to *Pollock*, as cited in Schabas, *supra* note 1, at 115.

⁵⁵ Robert Lansing, ‘Some Legal Questions of the Peace Conference’, 13 *AJIL* (1919) 631, at 649. Yet, as Garibian, *supra* note 27, at 75 (note 296) has helpfully observed, this should not be Lansing’s word on the topic of a State centred international legal order vs. an international community legal order.

⁵⁶ For a similar view, see Lewis, *supra* note 33, at 50.

a) Waging a War of Aggression

Article 227 Treaty of Versailles reads as follows:

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 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.

While this formula for diplomatic compromise contains a small window of constructive ambiguity ('the sanctity of treaties' and 'the solemn undertakings'),⁵⁷ the references to 'supreme offence against international morality', 'highest motives of international policy', and 'the validity of international morality' reflect the unanimous rejection by the Commission of Responsibility for recognising the existence of a crime of aggression under international law. The Commission's conclusion was couched in the following terms:

The premeditation of a war of aggression, dissimulated under a peaceful pretence, the suddenly declared under false pretexts, is conduct which the public opinion reproves and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace [...] a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference.⁵⁸

Importantly, Article 227 Treaty of Versailles relegates the question of international proceedings against the former *Kaiser* to the realms of international politics and morality – even with respect to allegations other than aggression.⁵⁹ This is no

⁵⁷ Payk, *supra* note 2, at 508.

⁵⁸ 14 *AJIL* (1920) 95, at 118.

⁵⁹ According to Ascensio, *supra* note 11, the drafter's intention was to provide for '*juger, en la forme d'un procès pénal, de la responsabilité morale de Guillaume de Hohenzollern*' and thus to create a '*chimère juridique*'. This is a persuasive reading of Art. 227, though there was arguably also some limited scope for reading Art. 227 and 228 together as allowing for the institution of genuinely legal international proceedings against the former *Kaiser* for the commission of war crimes; see Paul Mevis

accident: Wilson, who himself drafted the provision after the debate within the Council of Four had come to a close, had been provided with possible wording options by Lansing – with the crucial references in Article 227 Treaty of Versailles to politics and morality ultimately mirroring Lansing's input.⁶⁰ Against this background, it is not a matter of the greatest surprise that Lansing should later comment favourably on the ultimate outcome.⁶¹

The victorious powers continued struggling with how best to implement the perplexing Article 227 Treaty of Versailles, and the conversation had not reached an overly promising stage when the Netherlands, to the relief of even a number of allied and associated powers,⁶² declined the request for the surrender of the former *Kaiser*.⁶³ Hence, Article 227 Treaty of Versailles remained a dead letter.⁶⁴

b) Crimes Against Humanity

In connection with its proposal to set up a 'high tribunal', the Commission of Responsibility – inspired by the Martens Clause⁶⁵ – had suggested the following:

The law to be applied by the tribunal shall be 'the principles of the law of nations as they result [...] from the laws of humanity and from the dictates of public conscience'.⁶⁶

and Jan Reintjes, 'Hang Kaiser Wilhelm! But for what? A Criminal Law Perspective', in Bergsmo, Cheah, and Yi, *supra* note 6, 213, at 228.

⁶⁰ Schabas, *supra* note 1, at 183, 193; Payk, *supra* note 2, at 506.

⁶¹ Lansing, *supra* note 55, at 647–648. For an appraisal by James Brown Scott along the same lines, see James Brown Scott, 'The Trial of the Kaiser', in Edward M. House and Charles Seymour (eds.), *What Really Happened at Paris. The Story of the Peace Conference. By American Delegates, 1918–1919* (1921) 237. In his article 'Il processo del Kaiser', written in 1937, Vittorio Orlando has taken essentially the same position; the article was republished in Orlando, *Scritti vari di diritto pubblico e scienza politica* (1940), at 101–104, and an English translation can be found in 5 *Journal of International Criminal Justice* (2007) 1015.

⁶² Payk, *supra* note 2, at 515.

⁶³ Schabas, *supra* note 1, at 213, 224.

⁶⁴ For two hypothetical case studies, see Mevis and Reintjes, *supra* note 59, at 213–257, Schabas, *supra* note 1, at 293–316.

⁶⁵ The Martens Clause forms part of the preamble of Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907; 2 *AJIL* Supplement 90–117 (1908). The Clause carries its name after Friedrich Fromhold Martens, a professor of law at St Petersburg and a Russian diplomat, see Payk, *supra* note 2, at 60. For the reference to the Martens Clause in the Commission of Responsibility, see Maogoto, *supra* note 6, at 177.

⁶⁶ 14 *AJIL* (1920) 95, at 122 (sub (3)).

Although this formulation did not unambiguously embrace the idea of crimes against humanity as a category of international criminal law independent from war crimes,⁶⁷ the US representatives in the Commission vigorously dissented:

The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.⁶⁸

Article 228's Treaty of Versailles silence regarding possible 'crimes against the laws of humanity' appears to reflect the US position.⁶⁹

c) War Crimes

The Commission of Responsibility recommended the establishment of a high tribunal which, in the adjudication of 'violations of the laws and customs of war', should apply 'the principles of the law of nations as they result from the usages established among civilized peoples [...]'.⁷⁰ As in the case of 'crimes against the laws of humanity', this recommendation implied the possibility of recognising war crimes as a category of crimes under international law.

As mentioned above, the US-American representatives were opposed to the idea of conceptualising war crimes as crimes under international law. In conformity with that position, the same representatives rejected the idea of establishing an international criminal tribunal:

In a matter of such importance affecting not one but many countries and calculated to influence their future conduct, the American representatives believe that the nations should use the machinery at hand, which had been tried and found competent, with a law and a procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice, or procedure.⁷¹

The US-American representatives rejected the idea of an international criminal tribunal even with respect to allegations of direct concern to more than one country.

⁶⁷ For the historic evolution of this idea, see Claus Kreß, 'Actes de terrorism: nouvelles formes de crimes contre l'humanité?', in Bruno Cotte, Peimane Ghaleh-Matzban, Jean-Paul Jean, and Michel Massé (eds.), *70 ans après Nuremberg. Juger le Crime contre l'Humanité* (2017) 89.

⁶⁸ 14 *AJIL* (1920) 127, at 134.

⁶⁹ This was later duly noted by Lansing, *supra* note 55, at 648.

⁷⁰ 14 *AJIL* (1920) 95, at 122 (sub (3)).

⁷¹ *Ibid.*, at 127, 141 – 142.

In their view, the countries concerned should delegate their national jurisdictions and thereby establish a mixed military tribunal.⁷²

Article 229(2) Treaty of Versailles closely mirrors the US inter-State vision⁷³ of the prosecution of war crimes:

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

3. *The Treaties of Sèvres and Lausanne*

As we have seen, a hostile national sentiment within the Ottoman Empire had prevented the national criminal proceedings that had been instituted after the Great War from coming to full fruition. The ensuing attempt to internationalise the prosecution of *crimes de la Turquie contre l'humanité et la civilisation*, to use the language chosen in the Joint Declaration of 24 May 1915, would pose a specific legal challenge because they had been committed by Ottoman authorities against Ottoman citizens on Ottoman territory. From a State-centred international legal perspective, the crimes in question were not of international legal concern, despite having been committed during the Great War. The existing law applicable to war crimes reflected this classic perspective, and it would have subsequently been an innovation to characterise the crimes committed against the Armenians as war crimes. Despite the wording of the Joint Declaration, it would have been audacious to maintain that existing international law included a concept of crimes against humanity that intruded on State sovereignty.

Of course, Britain, being the driving force behind the prosecution of the crimes in question,⁷⁴ was aware of all these issues.⁷⁵ But, building on her previous policy in support of military intervention in the Ottoman Empire in the name of humanity, the British were now prepared for a *judicial* intervention on the same basis.⁷⁶ Importantly, the US was not involved in the negotiations of a treaty regime for the

⁷² *Ibid.*, at 127, 142.

⁷³ This was later duly noted by Lansing, *supra* note 55, at 648.

⁷⁴ Tusan, *supra* note 28, at 62; for the complementary Greek role, see Payk, *supra* note 2, at 511.

⁷⁵ Tusan, *supra* note 28, at 66.

⁷⁶ *Ibid.*, at 52. Interestingly, David Lloyd George, on 16 July 1920, addressed the Ottoman Delegation in terms anticipating the idea of a 'responsibility to protect': 'There is a great deal of proof that it (the government of the Ottoman Empire; C.K.) took upon itself to organize and lead attack of the most savage kind on a population that it ought to have protected'; cited from *ibid.*, at 63.

prosecution of crimes against the Armenians, which began in February 1920.⁷⁷ This explains why Article 230 of the Treaty of Sèvres of 10 August 1920⁷⁸ contains a provision that may well be seen as the *avant-gardist* articulation of the idea of crimes against humanity as a category of crimes under international law. Article 230 of the Treaty of Sèvres' first three paragraphs read as follows:

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 for themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.

While the concept of 'crimes against humanity' is not used, and the first paragraph appears to require a temporal connection between the 'massacres' and the existence of a state of war, the second and the third paragraph provide for the possibility of an international prosecution of the Ottoman crimes against humanity under a different name.⁷⁹ By framing this in legal terms, the drafters of Article 230 of the Treaty of Sèvres came closer to establishing an international criminal law *stricto sensu* than Wilson did in his formulation of Article 227 of the Treaty of Versailles.

However, in addition to the fact that the US had not lent their support to the drafting of Article 230 of the Treaty of Sèvres, this provision's precedential value is weakened because it was not implemented and would soon be replaced. Indeed, as a result of the military successes of Mustafa Kemal Atatürk's nationalist Turkish forces,⁸⁰ in 1922, Great Britain felt compelled to release those Turkish suspects that she had kept detained in Malta in order to subject them to subsequent criminal

⁷⁷ Payk, *supra* note 2, at 513. The Report submitted by the Commission of Responsibility had not dealt with the Ottoman crimes.

⁷⁸ Art. 230 Treaty of Peace Between the Allied and Associated Powers and Turkey Signed at Sèvres August 10, 1920, as published in Carnegie Endowment for International Peace (ed.), *The Treaties of Peace 1919–1923*, vol. 2 (1924) 787, at 863.

⁷⁹ For a particularly illuminating analysis, see Garibian, *supra* note 27, at 95–96 (see also Sévane Garibian, 'From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International Law in Progress', 52 *Armenian Review* (2010) 87, at 92), who emphasises the fact that the use of term 'massacres' constitutes a point of departure for developing 'crimes against humanity' as an autonomous crime under international law, distinct from the category of war crimes; see also Maogoto, *supra* note 6, at 191; Payk, *supra* note 2, at 514.

⁸⁰ MacMillan, *supra* note 2, at 377.

proceedings. The Treaty of Lausanne of 24 July 1923,⁸¹ which came to supersede the Treaty of Sèvres, remained completely silent regarding the punishment of the crimes against the Armenians. An unpublished annex to that treaty even provided for a general amnesty.⁸²

4. *The League of Nation's Appraisal*

In 1920, the Third Committee of the Assembly of the League of Nations stated that '[...] there is not yet an international penal law recognized by all nations [...]'.⁸³ Despite the audacious formulations contained in Article 230(2) and (3) of the Treaty of Sèvres, it is difficult to disagree with this conclusion.

B. The Prologue to International Criminal Law *Stricto Sensu's* Appearance on the International Legal Scene

Despite this conclusion, it is important not to under-estimate the significance of the Versailles' and Sèvres' treaties on the subsequent evolution of the law. Their significance emerges from the fact of the broad articulation by both international lawyers and State representatives of the sentiment that crimes committed during the Great War had been of such a nature that they warranted a response that exceeded the classic inter-State legalist framework.

It is noteworthy that even Renault voiced this sentiment in his above-mentioned study of 1915, in which he meticulously set out the traditional legal framework for the prosecution of war crimes committed in the Great War. At one point in his analysis, Renault expressed himself as follows:

Il est difficile de soutenir qu'il suffit que la paix intervienne pour que le voile soit jeté sur toutes les horreurs dont nous avons été victimes, parce que, à mon avis, ce n'est pas simplement en ce qui nous concerne, c'est en ce qui concerne le monde entier, que la proclamation de l'impunité serait immorale et scandaleuse.⁸⁴

Here, Renault cannot refrain from articulating the conviction, though understandably in embryonic form, that the crimes committed concerned the interna-

⁸¹ Treaty of Peace with Turkey Signed at Lausanne 1923, as published in Carnegie Endowment for International Peace (ed.), *supra* note 78, at 959.

⁸² Garibian, *supra* note 27, at 98; Maogoto, *supra* note 6, at 193; Payk, *supra* note 2, at 517.

⁸³ Cited from the *Historical Survey of the Question of International Criminal Jurisdiction – Memorandum Submitted by the Secretary-General*, United Nations (UN) Doc. A/CN.4/7/Rev.1 (1949), at 11.

⁸⁴ Renault, *supra* note 47, at 339.

tional community as a whole. Accordingly, it would be unsatisfactory to squeeze their prosecution into the confines of essentially bilateral inter-State legal relationships, where the warring parties would have the power to grant amnesties. Hence, the idea that the international community would maintain an *ius puniendi* emerges even between the lines of Renault's generally more cautious articulations.

Larnaude and de Lapradelle took up this idea and developed it further with a view to calling for international criminal proceedings against the former *Kaiser* for having waged a war of aggression:

Alors que l'infraction à la paix publique d'un Etat entraîne les peines les plus graves, on ne comprendrait pas qu'une atteinte à la paix du monde demeurât sans sanction. [...] Qu'on réfléchisse enfin, et ce sera notre conclusion, à l'irréversible atteinte que porterai au droit international nouveau l'impunité de l'empereur allemand. [...] Le principal de la démonstration est acquis: Guillaume II peut être accusé d'avoir commis des crimes, et les crimes qu'il a commis – guerre préméditée dans l'injustice, violation de la neutralité de la Belgique et du Luxembourg, violation des règles établies par la coutume internationale et les conventions de la Haye – sont des crimes de droit international.⁸⁵

Here again, the crime in question is conceptualised as one directed against a genuinely global value. From this follows the demand that the *nouveau droit international* must include an international criminal law *stricto sensu*.

Regarding the proper forum, Larnaude and de Lapradelle rejected the idea that one allied or associated power could have exercised universal jurisdiction over the former *Kaiser*:

Pour prononcer contre les crimes dont il s'agit la sanction solennelle et purificatrice réclamée par la conscience publique, il faut une juridiction plus élevée, des débats plus retentissants, une scène plus grande. [...] Or, cette solution, c'est le droit international seul qui peut nous la fournir. Les faits reprochés à Guillaume II sont des crimes internationaux: c'est par un Tribunal international qu'il doit être jugé.⁸⁶

As we already know, their proposed solution was to set up an international criminal tribunal. In their reflections on the legal basis for such a tribunal, Larnaude and de Lapradelle first allude to the idea of a delegation of pre-existing national criminal jurisdictions. However, they then make it clear that this legal avenue does and should not exhaust the matter. In the following words, they clearly assert that there must exist an *ius puniendi* which should reside in the international community as a whole:

⁸⁵ Larnaude and Lapradelle, *supra* note 40, at 149, 151 – 152.

⁸⁶ *Ibid.*, at 142 – 144; it may perhaps be noted in passing that an eminent French international lawyer, Georges Scelle, should develop the idea of *dédoublement fonctionnelle* which would very well lend itself to provide a theoretical basis for the idea of universal jurisdiction over crimes under international law; see Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law', 1 *European Journal of International Law* (1990) 210.

Et quant aux crimes que, séparément, elles ne pourraient atteindre, ne peut-on dire qu'en réunissant, elles prennent sur lui compétence parce qu'elles constituent le seul organisme de fait capable d'élaborer la loi du monde? Elles agissent comme un gouvernement de fait international.⁸⁷

In order to fully appreciate the weight that these considerations add to the subsequent legal development discussed, it is important to recall that Larnaude and de Lapradelle did not write their 'Examen' in the capacity of two 'lonely scholars' lost in utopian thoughts. In fact, the 'Examen' had been commissioned by Clemenceau himself. He would also have it circulated at the Peace Conference.⁸⁸

It is thus unsurprising that, when the question of the punishment of individuals came up in the Council of Four, Clemenceau and Lloyd George, while not expressing themselves in technical legal terms, presented their argument in support of international criminal proceedings in a manner which appeared more than tangentially inspired by the vision articulated in Larnaude's and de Lapradelle's 'Examen'. Consider the following exchange, for example, when Wilson hesitatingly observed:

I question whether we have the right to set up a tribunal made up only by the belligerents. The parties to the dispute would also be the judges.

To this, Lloyd George replied:

In my view, England and the United States should not be seen as injured parties [...]. We both made war for justice.

Wilson remained unconvinced and asked:

Suppose that, sometime in the future, one country was victorious over another that had attacked it in a violation of international law. Would it alone be able to judge those guilty of crimes against international law of which it had been the victim?

Lloyd George responded as follows:

Not at all. Then the League of Nations would intervene in accordance with fundamental rules that we will have laid down. In the present case, it is not Belgium and France that will have to judge the offenders. If we want to have the League of Nations to have a chance to succeed, it must offer more than mere lip service. The violation of treaties is precisely the sort of crime in which the League of Nations has a direct interest.⁸⁹

⁸⁷ *Ibid.*, at 154.

⁸⁸ Schabas, *supra* note 1, at 103; Payk, *supra* note 2, at 500.

⁸⁹ Schabas, *supra* note 1, at 178. 'Let me think about it' was Wilson's immediate reaction and he added that it 'would be accepted to declare that in the future if such crimes are committed during an international conflict they may be punished by an international court'. The fact that Wilson, during the conversations in the Council of Four, opened his mind as regards the future legal development is not overly astonishing in view of the fact that he had been keeping a safe distance from the United States international legalist camp spearheaded by his Secretary of State (on the most difficult personal

It would not be difficult to reformulate this last point in the more technical legal terms of the direct enforcement of the international community's *ius puniendi*. The point, it bears emphasising, was made by the British Prime Minister in the course of international negotiations of the most important kind.

This is not to suggest that the great debate at Paris produced an *acquis* that could answer all the questions and outline all the implications pertaining to the existence of a *ius puniendi* of the international community.⁹⁰ But it is difficult to deny that the idea of such a *ius puniendi* had emerged from the practice of States in the lead up to, and in the course of, the Peace Conference.

It is equally difficult to ignore the fact that the debate after the Great War includes a weighty body of State practice supporting the absence of immunity in certain instances relating to crimes under international law. Already under the classic legal regime, immunity *ratione materiae* had not been seen as an obstacle to the prosecution of enemy prisoners of war for war crimes by a national military tribunal or commission. Yet, after the conclusion of peace, their plan to conduct a large number of criminal proceedings against the organs of a foreign State, including the former head of that State, made it imperative for the British and the French to carefully consider the immunity question at large in the course of their preparations for the Peace Conference. As a result, Larnaude's and de Lapradelle's 'Examen' devotes the following long paragraph to the issue:

La solution que nous adoptons a d'ailleurs le mérite d'être en harmonie avec ce principe nouveau des peuple libres et honnêtes qui veut que tout droit s'accompagne d'un devoir. Le droit moderne ne connaît plus d'autorités (sic) irresponsables, même au sommet des hiérarchies. Il fait descendre l'Etat de son piédestal en le soumettant à la règle du juge. Il ne peut dès lors être question de soustraire au juge celui qui est au sommet de la hiérarchie, soit dans l'application du droit interne, soit dans l'application du droit international. Chef d'Etat, l'empereur allemand avait droit à toutes les prérogatives du droit international: immunité juridictionnelle, honneurs, préséances. Au regard du droit international, il doit avoir aussi la charge de responsabilités internationales. *Ubi emolumentum, ibi onus esse debet*. Qu'on réfléchisse enfin, et ce sera notre conclusion, à l'irréparable atteinte que porterai au droit international nouveau l'impunité de l'empereur allemand.⁹¹

relationship between Wilson and Lansing, see MacMillan, *supra* note 2, at 13) and had been favouring a more progressive world order vision, see Payk, *supra* note 2, at 268. This opening of mind may also explain why Wilson eventually declared his willingness to go along with a compromise on the matter presently before the Council of Four, see Schabas, *supra* note 1, at 187.

⁹⁰ For some of these questions, see Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May in the Jordan Referral re Al-Bashir Appeal* (2019), at 12–22.

⁹¹ Larnaude and Lapradelle, *supra* note 40, at 150–151.

The British experts concurred.⁹² In particular, the British ‘Macdonell Committee’, established in the lead up to the Peace Conference, also emphasised that the legitimacy of a punitive reaction to the crimes committed by Germany during the Great War depended on not shielding the former *Kaiser* from the proceedings. For allowing him ‘to go free and unpunished while minor offenders acting under his orders, or with his sanction, were tried and punished, would be inequitable’.⁹³ Along those lines, on 13 February 1919, the British submitted to the Commission of Responsibility a legal memorandum arguing against the former *Kaiser*’s immunity. The memorandum stated as follows:

So far as the share of the ex-Kaiser in the authorship of the war is concerned, difficult questions of law and fact may be raised. It might, for example be urged that the ex-Kaiser, being a Sovereign at the time when his responsibility was incurred and would be laid as a charge against him, was and must remain exempt from jurisdiction of any Tribunal. The question of immunity of a Sovereign from the jurisdiction of a foreign Criminal Court has rarely been discussed in modern times, and never in circumstances, similar to those in which it is suggested that it might be raised today. [...] [W]e are of the opinion that it is desirable to take proceeding against the German ex-Kaiser. We have already referred to the question of his being proceeded against as ‘the author of the war’ and have indicated certain difficulties. In view, however, of the grave charges which may be preferred and established against the ex-Kaiser, the vindication of principles of International Law and the laws of humanity, which he has violated, would be incomplete if he were not brought to trial, and if other offenders less culpable were punished. Moreover, the trial of other offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a Sovereign against whom no steps had been taken or were being taken.⁹⁴

The last part of this passage would later be incorporated in the Report of the Commission of Responsibility.⁹⁵ The Report concluded as follows:

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.⁹⁶

⁹² This has recently been recalled in great detail by four judges of the ICC Appeals Chamber in their Joint Concurring Opinion on the question of the immunity of the State of Sudan with respect to its (initially incumbent and then) former head Mr. Al-Bashir; see ICC Appeals Chamber, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision, 06 May 2019, Joint Concurring Opinion of Judges Oboe-Osuji, Morrison, Hofmánski, and Bossa, ICC-02–05/01–09–397-Anx1-Corr17–05–2019 1/190 NM PT OA 2, at paras. 77–86.

⁹³ Cited from *ibid.*, at para. 94.

⁹⁴ Cited from *ibid.*, at paras. 104–105 (with footnote 142).

⁹⁵ 14 *AJIL* (1920) 95, at 117.

⁹⁶ *Ibid.*

It is true that the Report also refers to the fact that Germany's consent should be 'secured by articles in the Treaty of Peace'.⁹⁷ But it is clear from all the preparatory work that Britain and France did not see the absence of immunity as being dependent on such consent and accordingly declared themselves unprepared to enter into negotiations with Germany on that question.⁹⁸ It is worth observing that the representatives of the US did not dissent to this conclusion in its entirety. Instead, they confined their reservation to the question of immunity *ratione personae* of incumbent heads of States:

These observations the American representatives believe to be applicable to a head of state actually in office and engaged in the performance of his duties. They do not apply to a head of state who has abdicated or has been repudiated by his people. Proceedings against him might be wise or unwise, but in any event, they would be against an individual out of office and not against an individual in office and thus in effect against the state.⁹⁹

In his recent book, *The Trial of the Kaiser*, William A. Schabas opines that judges at the ICC 'surely overstate[d]' things by citing the Report of the Commission of Responsibility in support of the proposition that heads of State do not enjoy immunity before international tribunals. Such reliance, in the view of Schabas, unduly diminishes the weight of the 'dissenting views' as well as the 'total neglect of the Report by the real lawmakers'.¹⁰⁰ However, as was shown, there was ultimately no dissent at all regarding the absence of immunity *ratione materiae*, and this, it should not be forgotten, equally applies to national war crimes proceedings as envisaged under Article 228 of the Treaty of Versailles.¹⁰¹ Furthermore, the US insistence on immunity *ratione personae* is no reason to ignore the fact that the British and French did not distinguish between immunity *ratione materiae et personae* when they vigorously argued in support of the 'vindication of the principles of International Law' through criminal proceedings before an international criminal tribunal. The four judges, who attached a Joint Concurring Opinion to the Immunity Judgment of the

⁹⁷ *Ibid.*

⁹⁸ Joint Concurring Opinion, *supra* note 92, at paras. 117–123.

⁹⁹ 14 *AJIL* (1920) 131, at 136.

¹⁰⁰ Schabas, *supra* note 1, at 119.

¹⁰¹ Ascensio, *supra* note 11. This point has received too little attention by the International Law Commission during its (ongoing) work on the customary international law with respect to 'Immunity of State Officials from Foreign Criminal Jurisdiction'. In particular, it would appear that a reference to the legacy of the Peace Process after the Great War is missing in the *Fifth report on immunity of State officials from foreign criminal jurisdiction*, by Concepción Escobar Hernández, *Special Rapporteur*, UN Doc. A/CN.4/701, 14 June 2016, which has laid the ground for the ensuing debate within the Commission; see, however, Claus Kreß and Sévane Garibian, 'Laying the Foundations for a Convention on Crimes Against Humanity: Concluding Observations', 16 *Journal of International Criminal Justice* (2018) 909, at 943–944.

ICC Appeals Chamber of 6 May 2019 in the *Jordan Referral re Al-Bashir* Appeal were therefore right to conclude that:

[A]rticle 227 and its antecedents of the Treaty of Versailles marked an early trend in international law's march in the direction of individual criminal responsibility, and it marked the first steps towards the development of a customary international law norm that rejects official position of immunity – even for Heads of State – before international criminal courts. That said, the majority of the international community – to the extent represented in the most important gathering of the period, to stitch up a global wound – could have affirmed uniformly (as a salutary part of the operation) the idea of Head of State immunity to the jurisdiction of an international criminal court. But, they refused to do so. Quite to the contrary, they positively rejected the idea in an emphatic way.¹⁰²

IV. Conclusion

In Paris, the US international legalist reservation against giving birth to an international criminal law *stricto sensu* ultimately prevailed, and the Treaty of Lausanne excluded the emergence of such a body of law through the backdoor of the Treaty of Sèvres. Nevertheless, the idea of a *nouveau droit international* including crimes under international law, and an international criminal jurisdiction forms part of the legacy of the Paris Peace Conference. On such fertile ground, the study of international criminal law developed as an academic discipline in the interwar period.¹⁰³ When the US officially changed direction and embraced the idea of international criminal justice in 1945, the ground had thus already been prepared for international criminal law's appearance on the international legal scene. The politics of trying to punish the war criminals of the Great War would hereby, in retrospect, turn into the prologue of Nuremberg.¹⁰⁴ Yet, the world had to wait for more than another four decades until, in 1998, the decision was made to establish the ICC – that is, the first permanent court with international criminal jurisdiction. The story is even more complicated with respect to the crime of waging a war of aggression. This crime had been at the heart of the great debate about trying the former *Kaiser*. Hersch Lauterpacht wrote in one of his Draft Nuremberg Speeches that Article 227 of the Treaty of Versailles should have provided the world leaders with a 'solemn warning'.¹⁰⁵ Hitler, however, would trample on Versailles' precious legacy. The Nuremberg International Military

¹⁰² Joint Concurring Opinion, *supra* note 92, at para. 124.

¹⁰³ For an early example, see William Loubat, 'De la nécessité d'un code pénal international', 47 *Journal de Droit International* (1920) 905; for a summary reference, see Claus Kreß, *Towards a Truly Universal Invisible College of International Criminal Lawyers* (2014), at 1–2.

¹⁰⁴ This is to play with the title and the subtitle of Willis' book, *supra* note 11.

¹⁰⁵ Hersch Lauterpacht, 'Draft Nuremberg Speeches', repr. in 1 *Cambridge Journal of International and Comparative Law* (2012) 45, at 55.

Tribunal would respond through the solemn statement: 'To initiate a war of aggression [...] is not only an international crime; it is the supreme international crime.' And yet, it would take more than another 70 years – and almost a century since Versailles – until, on 17 July 2018, the ICC would activate its jurisdiction over the crime of aggression. It is hard not to call ironic how close Britain and France, the passionate driving forces in Paris, came to preventing their extraordinary legal idea (from after the Great War) from being realised through their intransigent insistence on the imposition of the most stringent jurisdictional hurdles on the ICC's exercise of jurisdiction.¹⁰⁶ Those two States have yet to ratify the relevant amendments to the ICC Statute.

¹⁰⁶ Claus Kreß, 'On the Activation of the ICC's Jurisdiction over the Crime of Aggression', 16 *Journal of International Criminal Justice* (2018) 1.

