

# THE FIRST ATTEMPT TO PROSECUTE THE CRIME OF AGGRESSION

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## ABSTRACT

The crime of aggression, also known as the “supreme international crime,” is the most controversial international crime. It is the only international crime that requires state participation, therefore making it a political crime. Moreover, illegal war often includes other international crimes, including terrorism, torture, genocide, and crimes against humanity, and it differs only in that “it contains within itself the accumulated evil of the whole.” Aggression was included in the Rome Statute of the International Criminal Court in 1998 without a definition. The Assembly of States Parties to the International Criminal Court adopted a criminal definition of aggression at the ICC's first review conference in 2010. It remains unclear when, and under which conditions, the Court will have jurisdiction to prosecute perpetrators of aggression. The controversy over prosecuting heads of states for aggression dates back to at least 1919 when the Allied and Associated Powers of the First World War established the first international war crimes commission to consider prosecuting Wilhelm the Second for committing the crime of aggression. Through the use of archives, this paper analyzes the debates within the 1919 war crimes commission when it considered the first attempt to prosecute the international crime of aggression.

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## I. INTRODUCTION

The First World War commenced on July 28, 1914 and continued through November 9, 1918, when the Emperor of Germany, Wilhelm II, abdicated his throne and fled to Holland where he sought refuge.<sup>1</sup> The war ceased on November 11, 1918 when the armistice was signed between Germany and the Allied and Associated Powers.<sup>2</sup> Representatives of most states around the world considered the ex-Kaiser the chief villain for initiating the war.<sup>3</sup> On December 2, 1918, representatives of the British Empire, France, and Italy met in London and agreed that a demand should be presented to Holland for the ex-Kaiser's surrender so that he could be brought to trial "by an International Court to be appointed by the Allies, on the charge of being the criminal mainly responsible for the war and breaches of International Law by the forces of Germany by land, sea and air."<sup>4</sup>

The Peace Conference ("Conference") commenced in Paris in January 1919 and lasted until the signing of the Treaty of Peace Between the Allied and Associated Powers and Germany ("Peace Treaty") on June 28, 1919.<sup>5</sup> Many members of the Allied Powers supported establishing some mechanism to punish Wilhelm for initiating the First World War, which resulted in the deaths of around eight million combatants and seven million civilians.<sup>6</sup>

The Peace Conference established an international investigative commission on January 25, 1919 – The Commission

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1. See *The Events of WWI: Key Dates in the First World War*, NAT'L WWI MUSEUM & MEMORIAL, <https://www.theworldwar.org/learn/dates> (last visited Nov. 1, 2019).

2. See *id.*

3. Robert J. Menner, *The Kaiser and Germany in Popular Opinion*, 15 S. ATLANTIC Q. 101, 101 (1916); JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 37, 40 (1982); HENRY F. PRINGLE, 2 THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 872 (1939).

4. Telegram from Mr. Balfour to Mr. Barclay, the British Embassy to the Department of State (Dec. 2, 1918), reprinted in 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1919 (Joseph V. Fuller & Tyler Dennett eds., 1943).

5. *Post-World War I Peace Conference Begins in Paris*, HISTORY, <https://www.history.com/this-day-in-history/post-world-war-i-peace-conference-begins-in-paris> (last visited Nov. 1, 2019).

6. Erin Blakemore, *Why Kaiser Wilhelm Was Never Tried for Starting World War I*, HISTORY, <https://www.history.com/news/wwi-kaiser-wilhelm-war-crimes-leipzig-trial> (last visited Nov. 1, 2019).

on the Responsibility of the Authors of the War and on Enforcement of Penalties (“Commission”).<sup>7</sup> Most delegates on the Commission supported establishing an international criminal court to prosecute the accused, and after much debate, the Commission recommended establishing a High Tribunal to hold trials.<sup>8</sup> However, the Conference ultimately decided to reference a special tribunal, one without criminal jurisdiction, in Article 227 of the Peace Treaty.<sup>9</sup> Ultimately, no one was held culpable for the crime of aggression. Yet diplomatic discussions after the First World War were the initial steps in criminalizing the act of initiating an unjustifiable war. This paper analyses the discussions through consultation of the original minutes of the meetings of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its impact in the development of the crime of aggression, which is often overlooked in other studies.<sup>10</sup>

## II. ESTABLISHING THE COMMISSION

The Bureau of the Preliminary Peace Conference (“Bureau”) met on January 23, 1919 to discuss a draft resolution submitted by Prime Minister David Lloyd George (British Empire); the resolution proposed to establish a commission “to inquire and report upon the responsibility of the authors of the war, the facts as to breaches, [and] the [authors’] degree of responsibility, and [to create] a tribunal to try the offenders.”<sup>11</sup> According to the resolution’s first paragraph, the Commission’s primary

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7. See Mary Margaret Penrose, *War Crime*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/war-crime#ref750572> (last visited Nov. 1, 2019).

8. See *id.*

9. Treaty of Peace with Germany (Treaty of Versailles) art. 227, June 28, 1919–Jan. 10, 1920, S. Doc. No. 66-49, 225 Consol. T.S. 188 [hereinafter Treaty of Peace].

10. See BENJAMIN B. FERENCZ, 1 *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE* 7 (1975) (discussing only generally the Commission on Responsibility in its discussion of the League of Nations). See generally SERGEY SAYAPIN, *THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW: HISTORICAL DEVELOPMENT, COMPARATIVE ANALYSES AND PRESENT STATE* (2014) (studying the development of the international crime of aggression yet failing to discuss how these Commission on Responsibility meetings influenced this development); *THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION* (Stefan Barriga & Claus Kreß eds., 2012) (discussing summary and verbatim records and reports of the United Nations but only referencing the Commission on Responsibility’s final report); PATRYCJA GRZEBYK, *CRIMINAL RESPONSIBILITY FOR THE CRIME OF AGGRESSION* (2013) (omitting discussion of the Commission on Responsibility minutes in its study of the League of Nations).

11. *Excerpt from the Minutes of a Meeting of the Bureau of the Conference* (1919), *microformed on Records of the Am. Comm’n to Negotiate Peace, 1918–1931*, Record Group 256, 820 Roll 140 181.12/1 (Nat’l Archives Catalog), <https://catalog.archives.gov/id/26544844> [hereinafter *January 23 Conference Meeting*]. If downloading the PDF on the linked website, the source starts at page 330.

responsibility was to inquire and report on the responsibility of the authors of the war.<sup>12</sup> Paragraph three of the draft resolution declared that the Commission should establish the degree of responsibility of the authors of the war, “including members of the General Staffs, or other highly placed individuals.”<sup>13</sup>

The draft resolution demonstrated the British Empire’s eagerness to punish particular members, limited only to the General Staff and other highly placed individuals, for initiating the war. Mr. Sonnino (Italy) called attention to the limitation though, asserting that responsibility should not be restricted to highly placed individuals.<sup>14</sup> After some discussion, it was decided that “highly placed individuals” would be changed to “all other individuals, however highly placed.”<sup>15</sup> However, it was clear from the draft resolution that the British Empire was determined to punish only certain highly placed individuals for initiating the war.

The Bureau subsequently established the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties on January 25, 1919.<sup>16</sup> The resolution establishing the Commission read as follows:

That a Commission, composed of two representatives apiece from the five Great Powers and five representatives to be elected by the other Powers, be appointed to inquire into and report upon the following:

- (1) The responsibility of the authors of the war.
- (2) The facts as to breaches of the customs of law committed by the forces of the German Empire and their Allies on land, on sea and in the air during the present war.
- (3) The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.
- (4) The Constitution and procedure of a tribunal appropriate to the trial of these offences.

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12. *See id.* app. D.

13. *Id.*

14. *Id.* at 10.

15. *Id.*

16. *Excerpt from the Minutes of a Meeting of the Plenary Session-Protocol No. 2* (1919) *microformed on* Records of the Am. Comm’n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 140 181.12/3½ (Nat’l Archives Catalog). <https://catalog.archives.gov/id/26544844>. If downloading the PDF on the linked website, the source starts at page 338.

(5) Any other matters cognate or ancillary to the above which may arise in the course of the inquiry and which the Commission finds it useful and relevant to take into consideration.<sup>17</sup>

The Commission held its first meeting on February 3, 1919 at the Department of the Interior in Paris.<sup>18</sup> After the official list of Commission members was announced,<sup>19</sup> Secretary of State Robert Lansing (United States) was unanimously elected as Chair of the Commission.<sup>20</sup> After expressing his appreciation for being elected chair, Lansing stated that no similar commission had ever sat before and was without precedent; thus the Commission should give careful consideration to the scope and jurisdiction of each question in its mandate.<sup>21</sup>

### III. ESTABLISHING THE SUB-COMMISSIONS

Mr. Tardieu (France) moved to establish two sub-commissions,<sup>22</sup> one dealing with facts and the other dealing with legal questions.<sup>23</sup> Mr. Rolin-Jacquemyns (Belgium) insisted, however, that three sub-commissions be established, one dealing with facts and the other two dealing with legal questions.<sup>24</sup> The proposal to establish three sub-commissions was ultimately adopted.<sup>25</sup> The first sub-commission—the Sub-Commission on Criminal Acts—had the duty of discovering and collecting the

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17. *January 23 Conference Meeting*, *supra* note 11, at 11.

18. *Minutes of the First Meeting, February 3, 1919, at 3 P.M., at the Ministry of the Interior, Under the Temporary Chairmanship of Mr. Tardieu* (1919), reprinted in *Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties*, 1, microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 142 181.1201/16 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26546572> [hereinafter *First Meeting*]. If downloading the PDF on the linked website, the source starts at page 318.

19. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 96–97 (1920). Members of the Commission included: Mr. Robert Lansing and Mr. James Brown Scott (United States); Sir Gordon Hewart, Sir Ernest Pollock and Mr. W. F. Massey (British Empire); Mr. André Tardieu and Mr. F. Larnaude with Mr. R. Masson serving as an alternate (France); Mr. Scialoja, Mr. Raimondo, Mr. Brambilla, and Mr. M. d'Amelio with Mr. G. Tosti and Mr. Ricci Busatti serving as alternates (Italy); Mr. Adatci, Mr. Nagaoka, and Mr. S. Tachi (Japan); Mr. Rolin-Jacquemyns (Belgium); Mr. N. Politis (Greece); Mr. C. Skirmunt and Mr. N. Lubienski (Poland); Mr. S. Rosental (Romania); Mr. Slobodan Yovanovitch, with Mr. Koumanoudi and Mr. Novacovitch as alternatives (Serbia). *Id.*

20. *First Meeting*, *supra* note 18, at 2.

21. *Id.*

22. The terms in the archives include “sub-committees” and “sub-commissions” interchangeably. The author uses the term “sub-commissions” to relieve any confusion.

23. *First Meeting*, *supra* note 18, at 2.

24. *Id.*

25. *Id.*

evidence necessary to establish the facts relating to the culpable conduct that had brought about the war or accompanied its inception, or was committed during the course of war.<sup>26</sup> The second sub-commission—the Sub-Commission on the Responsibility for the War—was established to determine if the acts that had brought about the war were criminal and to create a list of individuals who should be prosecuted for the crimes.<sup>27</sup> The third sub-commission—the Sub-Commission on the Responsibility for Violations of the Laws and Customs of War—was responsible for determining the laws and customs of war and creating a list of individuals who had violated those laws.<sup>28</sup>

There was much debate on which members of the Commission would sit on which sub-commission. This was an important matter as each sub-commission would hold its own meetings and submit its report and recommendations to the entire Commission for consideration.<sup>29</sup> There was much stock in the sub-commissions, and members strategically attempted to be on the ones considering matters most pertinent to their countries.

Tardieu announced to the Commission at its commencement that the Commission's goal was to make a just peace that would "impose itself on the conscience of the people."<sup>30</sup> He immediately proposed prosecuting the authors of war for the crime of aggression:

How could we deny that before any question of peace can arise, justice should punish the authors of the aggression which has caused the deaths of so many million men? We wish to make a peace equal for all, assuring security and dignity to each nation, strong or weak. How could we neglect to affirm this conception before the tribunal of the

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26. *Plan of the Organisation of the Sub-Commissions of the Commission of Responsibility for the War* art. I (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 140 181.12/6 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26546572>. If downloading the PDF on the linked website, the source starts at page 346.

27. *Id.* art. II.

28. *Id.* art. III.

29. *Minutes of the Second Meeting, February 7, 1919, at 11.30 A.M.* (1919), reprinted in *Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties*, 25, microformed on Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 142 181.1201/16 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26546572> [hereinafter *Second Meeting*]. If downloading the PDF on the linked website, the source starts at page 330.

30. *First Meeting*, *supra* note 18, at 1.

universal conscience by seeking to fix the responsibility of the authors of the attack of which the whole world has been a victim?<sup>31</sup>

Lansing requested that documents collected by states should be sent to the Commission for consultation, claiming that the Commission itself was sitting to some extent as a grand jury charged not to determine guilt but to consult documentary evidence and decide if there was a case.<sup>32</sup> He thought that documents should be submitted to the Sub-Commission on Criminal Acts.<sup>33</sup> Mr. Scialoja (Italy) agreed that it would be advantageous for the Commission to have access to reports emanating from each government whose territory had been invaded.<sup>34</sup> It was finally agreed that the Sub-Commission on Criminal Acts would consult government documents and submit them along with its report making recommendations to the Commission.<sup>35</sup>

Mr. Politis (Greece) observed that the Sub-Commission should choose all culpable acts, even if they were not crimes in an exact sense, claiming that it was the Commission's duty to determine the limits of prosecution and to define criminality or culpability.<sup>36</sup> Mr. Larnaude (France) believed that whilst certain acts may not be crimes under municipal law, the Sub-Commission on Criminal Acts should be able to require that they were crimes established by evidence, i.e. aggression.<sup>37</sup> Larnaude recommended such crimes should include "the premeditated, carefully prepared commencement of hostilities, and the violation of the neutrality of Belgium."<sup>38</sup> Larnaude also argued that the duty of the Sub-Commission on Criminal Acts was not only to collect evidence and list and define punishable acts, but also to determine the crimes' relative values.<sup>39</sup>

A draft resolution of the organization of the sub-commissions, along with their proper titles and responsibilities, was eventually adopted.<sup>40</sup> Article I established the Sub-Commission on Criminal Acts, whose duty was "to discover and collect the evidence necessary to establish the facts relating to culpable conduct [that

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31. *Id.*

32. *Id.* at 2.

33. *Id.* at 3.

34. *Id.*

35. *Id.* at 4.

36. *Second Meeting, supra* note 29, at 19.

37. *Id.* at 20.

38. *Id.*

39. *Id.* at 21.

40. *Id.* annex I at 25.

had either] brought about the world war or accompanied its inception” or “[t]ook place in the course of hostilities.”<sup>41</sup> Article II established the Sub-Commission on the Responsibility for the War, whose duty was “to consider whether, on the facts established by the Sub-Commission on [C]riminal [A]cts in relation to the conduct which brought about the world war and accompanied its inception, prosecutions [could] be instituted.”<sup>42</sup> Article III established the Sub-Commission on the Responsibility for the Violations of the Laws and Customs of War, whose duty was “to consider whether on the facts established by the Sub-Commission on [C]riminal [A]cts in relation to conduct which took place in the course of hostilities, prosecutions [could] be instituted.”<sup>43</sup> The first two sub-commissions are most relevant to this article.

Members of the Sub-Commission on Criminal Acts included Mr. Tardieu (France), Mr. Brown Scott (United States), Mr. Massey (British Empire), Mr. Adatei (Japan), and Mr. Politis (Greece).<sup>44</sup> Members on the Sub-Commission on the Responsibilities for the War included Sir Gordon Hewart or Sir Ernest Pollock (British Empire), Mr. Larnaude (France), Mr. Scialoja (Italy), Mr. Rolin-Jacquemyns (Belgium), and Mr. Yovanovitch (Serbia).<sup>45</sup>

#### IV. INITIAL DISCUSSION ON THE CHARGE OF AGGRESSION

Delegates of the British Empire submitted a memorandum to the Commission on the Responsibility for the War clearly describing Britain’s intent to prosecute Wilhelm II, former Kaiser of Germany, for the crime of aggression.<sup>46</sup> The memo stated that it was unnecessary and inexpedient to discuss the responsibility of the authors of the war, except insofar as that responsibility could be treated as an offense recognizable by an international criminal tribunal, which the British Empire also proposed creating.<sup>47</sup> The memorandum acknowledged, but later dismissed, certain difficulties in prosecuting a Sovereign:

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41. *Id.* annex I at 25, art. I.

42. *Id.* annex I at 25, art. II.

43. *Id.* annex I at 25, art. III.

44. *Id.* annex I at 26.

45. *Id.*

46. *See id.* annex III. The memorandum was later attached pursuant to the direction of Sub-Commission No. 2, Mar. 8, 1919.

47. *Id.* annex IV at 28, sec. I.



So far as the share of the ex-Kaiser in the authorship of the war is concerned, difficult questions of law and of fact may be raised. It might, for example, be urged that the ex-Kaiser, being a Sovereign at the time when his responsibility as an author of the war was incurred and would be laid as a charge against him, was and must remain exempt from the jurisdiction of any Tribunal. The question of the 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 to-day. Moreover, a serious practical difficulty has to be considered. Any enquiry into the authorship of the war must, to be exhaustive, extend over events that have happened during many years in different European countries, and must raise many difficult and complex problems which might be more fitly investigated by historians and statesmen, than by a tribunal appropriate to the trial of offenders against the laws and customs of war. The need of prompt action is from this point of view important. Any tribunal appropriate to deal with the other offences to which reference is made might hardly be a good Court to discuss and deal decisively with such a subject as the authorship of the war. The proceedings and discussions, charges and counter-charges, if adequately and dispassionately examined, might consume much time and the result might conceivably confuse the simpler issues into which the tribunal will be charged to enquire. While this prolonged investigation was proceeding some witnesses might disappear, the recollection of others would become fainter and less trustworthy, offenders might escape, and the moral effect of tardily imposed punishment would be much less salutary than if punishment were inflicted while the memory of the wrongs done was still fresh and the demand for punishment was insistent.

Further, . . . there appears to be ample evidence on which a charge can be made against the ex-Kaiser as the chief director of the methods of warfare adopted—a charge, moreover, which can be presented with comparative directness and cogency and with which a tribunal can be well qualified to deal.<sup>48</sup>

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48. *Id.*

Larnaude and Mr. de Lapradelle (France) also submitted a lengthy memorandum, Inquiry into the Penal Liabilities of the Emperor William II, which was annexed to the minutes of the first meeting.<sup>49</sup> The memorandum detailed the actions leading up to the war and the crimes committed during the war.<sup>50</sup> It also recognized that national courts were not competent to pass judgment upon on a head of state for crimes against the law of nations, such as the crime of aggression.<sup>51</sup> The memorandum argued, “[t]o proclaim the solemn and purifying legal consequences which the public conscience requires” given the crimes “under consideration demands a higher Court.”<sup>52</sup> Accordingly, the facts charged against Wilhelm II were international crimes, and the delegates from France believed he must be tried before an international tribunal.<sup>53</sup> Thus, both France and the British Empire had immediately put the Commission on notice that their objective was to prosecute Wilhelm II for the crime of aggression in an international criminal court.

#### V. THE SUB-COMMISSION ON CRIMINAL FACTS

The first meeting of the Sub-Commission on Criminal Facts was held on February 17, 1919.<sup>54</sup> Under Article I, the Sub-Commission had been established to find out and collect the necessary proof to establish evidence to condemn the acts that had provoked the war.<sup>55</sup> Massey (British Empire)<sup>56</sup> suggested that the Sub-Commission request from states that had already established investigative committees, including the British Empire, France, and Belgium, any evidence they may have collected.<sup>57</sup> James Brown Scott suggested the Sub-Commission make formal requests to each of the delegations at the Conference to present official reports that had been prepared to deal with the initiation of the

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49. *First Meeting, supra* note 18, annex I at 14.

50. *Id.* annex I at 5, 7–9, 14.

51. *Id.* annex I at 14.

52. *Id.* annex I at 9.

53. *Id.* annex I at 10.

54. *Proceedings of a Meeting of “Sub-Commission No. 1,” Held at 10.30 O’Clock A.M., Monday, February 17, 1919*, 1 (1919), *microformed on* Records of the Am. Comm’n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/1 (Nat’l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 34. Note that the Sub-Commission on Criminal Facts is also referred to as “Sub-Commission No. 1.”

55. *Id.* at 2.

56. He is the Chairman in this meeting. *Id.* at 1.

57. *Id.* at 3.

war.<sup>58</sup> He thought it was best for the Sub-Commission to begin its duties with official records certified by governments. Mr. Politis agreed and stated that he knew of a certain number of reports that had been, or were almost, completed.<sup>59</sup> Politis urged the Sub-Commission to classify criminal acts in advance so as to allow the immediate classification of facts when the Sub-Commission received government reports.<sup>60</sup>

Mr. Larnaude suggested that the Sub-Commission prioritize collection of the most important facts instead of getting lost giving attention to individual acts committed by soldiers.<sup>61</sup> It was clear that Larnaude's goal was to prosecute highly ranked officials responsible for crimes during the war, as well as the crime of initiating the war. Larnaude supported the British point of view that priority should be given to investigating the violations that had been committed by the Germans against the law of nations.<sup>62</sup> Larnaude noted, "[t]he war, and especially the war as waged by the Germans, has demonstrated that it is impossible to prosecute such facts before national tribunals—individual tribunals."<sup>63</sup> He supported establishing an international tribunal to prosecute Germany's crime of aggression. It was eventually agreed that the Sub-Committee would systematically classify crimes that would later be prosecuted.

France submitted a twenty-five-page memorandum to Sub-Commission No. 1 on February 17th; the memo argued that the crime of aggression was an international crime.<sup>64</sup> Interestingly, the memorandum was dated January 29, which demonstrated that it had been completed before the first Commission meeting.<sup>65</sup> It stated, "[t]he League of Nations, founded January 25, 1919,<sup>66</sup> considers, in accord with the universal conscience, that a war

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58. *Id.* at 4.

59. *Id.* at 4–5.

60. *Id.* at 5.

61. *Id.* at 9.

62. *Id.* at 9–10.

63. *Id.* at 10.

64. *Memorandum Submitted by the French Delegation to the Bureau of the First Sub-Commission, February 17, 1919* (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/1 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314> [hereinafter *French Delegation Memorandum*]. If downloading the PDF on the linked website, the source starts at page 56.

65. *Id.* at 25.

66. See *Preliminary Peace Conference, Protocol No. 2, Plenary Session of January 25, 1919*, reprinted in 3 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, THE PARIS PEACE CONFERENCE, 1919 (Joseph V. Fuller & Tyler Dennett eds., 1943). The "Draft Resolution Relative to the League of Nations" was adopted on Jan. 27, 1919. *Id.* at 447. The resolution did not enter into force until the signing of the Treaty of Peace with Germany.

of ag[g]ression is a crime.”<sup>67</sup> The memorandum elaborated extensively on Germany’s responsibility for initiating the World War in 1914, claiming that punishment should be imposed both singly and collectively.<sup>68</sup> The first part of the memorandum presented the “Facts Characterizing the Crime and the Responsibility of Germany,” reading as follows:

The civilized world remembers the following:

- a) The premeditation, emphasized by the conditions under which the war broke out.
- b) The immediate violation of the treaties signed by Germany.
- c) The proceedings contrary to the Law of Nations and to the Laws of War, charged against the enemy’s armies in all the fields of operations.<sup>69</sup>

The memorandum continued by laying out the facts that the assassination of the Archduke of Austria on June 28, 1914, served as a pretext to Germany declaring war on Russia and France.<sup>70</sup> The memorandum demonstrates Germany’s premeditation to commit aggression by citing to two German reports.<sup>71</sup> The first report was issued March 19, 1913, and stated:

It (the German nation) must become accustomed to the thought that an offensive war on our part is a necessity. . . . It will be necessary to act prudently, in order to arouse no suspicions. . . . Affairs must be conducted in such a way that under the heavy pressure of powerful armaments, considerable sacrifices and a tense political situation, an outbreak of war will be considered as a deliverance. . . .

The small states must be forced to take the choice between siding with us or being conquered. Under certain conditions, their armies and forts can be rapidly vanquished and neutralized, which would probably be the case for Belgium and Holland. . . .

. . . We will remember then that certain provinces of the former German Empire, such as the County of Burgundy and a fine part of Lorraine, are still in the hands of the

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67. *French Delegation Memorandum, supra* note 64, at 1.

68. *Id.*

69. *Id.* at 2.

70. *Id.* at 2–3.

71. *Id.* at 3–4.

Franks, . . . that thousands of German brothers in the Baltic provinces are groaning under the Slavic yoke . . . .<sup>72</sup>

The second report was issued May 6, 1913, and stated: “The intention of the [German] General Staff is to act by surprise. Commonplaces on the responsibility of the ag[g]ressor must be disregarded, as General von Moltke said[:] ‘[w]hen war has become necessary, it must be waged by putting all chances of success on our side. Success alone justifies it.’”<sup>73</sup>

France argued that Germany had violated its 1831, 1839, and 1867 Treaties of London, all of which had confirmed certain neutralities and places under the guarantee of Austria, France, Great Britain, Russia, and Prussia.<sup>74</sup> The memorandum also claimed that Germany’s initiation of war violated the state’s commitment as a state party to the fifth Hague Convention of 1907, which stipulated that “[t]he territory of neutral Powers is inviolable” and that “[b]elligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.”<sup>75</sup> France accused Germany of violating the neutrality of Belgium and Luxembourg, thus violating its commitment under the fifth Hague Convention.<sup>76</sup>

As several states—including the British Empire, Belgium, Serbia, Greece, and Poland—at the time had developed domestic commissions to investigate crimes on their territories, Mr. Larnaude suggested that the Sub-Commission arrange a table of particular crimes and differentiate between crimes committed during Germany’s invasion of territories and those committed during Germany’s occupation of territories.<sup>77</sup> The list would not only include crimes in violation of treaties, but also “all criminal acts, committed against the laws of nations[, including those crimes] not” explicitly defined but sufficiently severe to investigate.<sup>78</sup> He further suggested that once the Sub-Commission received reports from these states, it should arrange a table of the particular crimes under four headings: the nature of the

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72. *Id.* at 4.

73. *Id.*

74. *Id.* at 6.

75. *Id.* at 6–8; see also Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land arts. 1–2, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654.

76. *French Delegation Memorandum, supra* note 64, at 6–8.

77. *Commission on the Responsibility for the War Sub-Commission I: Meeting of the Sub-Commission on Offences, Wednesday February 19, 1919* (1919), microformed on Records of the Am. Comm’n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/2 (Nat’l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 82 of the PDF.

78. *See id.* at 2.

crimes, the date on which they were committed, the place where the crimes were committed, and the authors of the crime.<sup>79</sup>

Delegates to the Sub-Commission subsequently discussed who should be arrested and prosecuted. The French memorandum suggested that individual perpetrators of crimes must not be chosen; instead, persons of exalted rank who were primarily responsible for the orders must be held accountable.<sup>80</sup> Mr. Rolin-Jacquemyns agreed with this perspective.<sup>81</sup> Larnaude also agreed, suggesting that the Commission would not be concerned with the cases in which low-level individuals had committed isolated crimes.<sup>82</sup> Emphasizing the Commission's duty to focus on the high-level offenses, Slobodan Yovanovitch, the Serbian Delegate presented the following statement:

[P]remeditation by a great power against the independence of a small state deserves to be condemned from the point of international right which has proclaimed the equality of all states. It is also one of its noblest duties to guarantee the small states against the violence of the large states.<sup>83</sup>

Finally, Larnaude stated that Sub-Commission No. 1 was "expected to collect all the facts which are condemnable and which can give rise to a prosecution. We are going to feed, as it were, the tribunal, with the charges—a tribunal, which, in the general opinion of the committee, will probably be an international tribunal."<sup>84</sup>

Italy had established a committee of inquiry for the purpose of enumerating and obtaining accurate information concerning the numerous violations of the rules of international law committed by

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79. *Id.* at 4–5.

80. See *The British Secretary's Notes of the Third Meeting of Sub-Commission I, held at the Ministry of the Interior on Wednesday 19th February, 1919, at 10.30 A.M.* (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/2 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 92.

81. *Id.*

82. *Id.*

83. *Proposition Presented to the First Sub-Commission of the Commission of Responsibility by the Serbian Delegate*, 3 (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/2 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 109.

84. *Proceedings of a Meeting of Sub-Commission No. 1, Held at Eleven O'Clock A.M. Monday February 24, 1919*, 3 (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/2 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 133.

Austria-Hungary.<sup>85</sup> This committee concluded that Austria-Hungary was guilty of having conducted the war by means contrary to international conventions, which it had signed, as well as the customs of war and the most elementary principles of humanity.<sup>86</sup> Italy's memorandum included a list of several violations of the laws and customs of war, including abusive treatment of the wounded and sick;<sup>87</sup> abusive treatment of prisoners of war;<sup>88</sup> use of forbidden arms and ammunition, including "expanding or explosive bullets"<sup>89</sup> and "asphyxiating gas";<sup>90</sup> "making use of the enemy flag";<sup>91</sup> "bombardment of undefended places";<sup>92</sup> and "destruction of private property."<sup>93</sup>

Sub-Commission No. 1 appointed a drafting committee at its meeting on February 24, 1919 in order to expedite its work.<sup>94</sup> The Drafting Committee was appointed to consider the different delegations' reports and prepare a list of offenses against international law.<sup>95</sup> The Drafting Committee included three members, one each from the British Empire, France, and Greece.<sup>96</sup> It submitted its report to the Sub-Commission two weeks later; the chairman subsequently read the report at a meeting on March 5, 1919.<sup>97</sup> Annexed to the report was a list of acts that had provoked

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85. *Memorandum Submitted by the Italian Delegation to Sub-Commission I on the 24th February 1919* (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/3 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314> [hereinafter *Italian Delegation Memorandum*]. If downloading the PDF on the linked website, the source starts at page 155.

86. *Id.*

87. *Id.*; see also Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of Battle art. 1, July 6, 1906, 35 Stat. 1885.

88. *Italian Delegation Memorandum*, *supra* note 85; see also Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention (IV)].

89. *Italian Delegation Memorandum*, *supra* note 85; see also Hague Convention (II) with Respect to the Laws and Customs of War on Land art. 23(e), July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter Hague Convention (II)].

90. *Italian Delegation Memorandum*, *supra* note 85; see also Hague Convention (II), *supra* note 89, art. 23(e).

91. *Italian Delegation Memorandum*, *supra* note 85; see also Hague Convention (II), *supra* note 89, art. 23(f).

92. *Italian Delegation Memorandum*, *supra* note 85; see also Hague Convention (II), *supra* note 89, art. 25; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War art. 1, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681.

93. *Italian Delegation Memorandum*, *supra* note 85; see also Hague Convention (IV), *supra* note 88, arts. 28, 46, 53.

94. *Notes on the Meeting of Sub-Commission No. 1* (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/3 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 160.

95. *Id.*

96. *Id.*

97. *Proceedings of a Meeting of "Sub-Commission No. 1," Held on Wednesday, March 5, 1919 at Eleven O'Clock*, 2 (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12101/4 (Nat'l Archives

the war, which the chairman claimed had clearly demonstrated that the Central Powers—Germany, Austria-Hungary, Turkey, and Bulgaria—had intended to and decided to provoke the war.<sup>98</sup> The chairman emphasized his hope that the perpetrators would be punished for their crimes by an international tribunal, for both retributive purposes, as well as to serve as “determent in the future to people of communities that might be inclined to follow the example of the Kaiser, and the leaders of the Central Powers, and others connected with them during the war period.”<sup>99</sup> It was clear that some members of Sub-Commission No. 1 had already convicted, in their own minds, the former German Kaiser for his participation in initiating the war. James Brown Scott was hopeful that there would be little difficulty “in the way of establishing a truly international jurisdiction for crimes committed against the law of nations.”<sup>100</sup>

The Drafting Committee submitted its report to Sub-Commission No. 1 on March 5th.<sup>101</sup> The report was three pages, excluding annexes, and was organized into three parts.<sup>102</sup> The first part discussed the responsibility of the authors of the war and violations of neutrality read as follows:

The Sub-Commission has examined a number of official documents relating to the commencement of the world-war and to the violations of neutrality which accompanied its inception.

Although the Sub-Commission has not yet concluded its labours, a number of facts summarised in Annex A are in its opinion already sufficiently established to justify the conclusion (*a*) that Austria-Hungary plotted with Germany in order to render a conflict with Serbia unavoidable; that Germany supported the Austrian policy, fully conscious of the consequences it would entail, and defeated all attempts on the part of the *Entente* Powers to bring about a peaceful settlement of the question at issue; that Turkey connived at and approved of the proceedings of the Central Powers, and

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Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 175.

98. *Id.*

99. *Id.* at 4.

100. *Id.*

101. *Interim Report of Sub-Commission I—Presented to the Commission on Responsibilities of the Authors of the War and Sanctions* (1919) microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12102/2 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 302.

102. *See id.*



prepared for her ultimate participation in the war by placing her land and sea forces under German leadership; that Bulgaria, whilst carrying on negotiations with the *Entente* Powers, had entered into a secret understanding with Germany, which culminated in a treacherous attack on Serbia; and (b) that the neutrality of Belgium and Luxemburg was deliberately and flagrantly violated.<sup>103</sup>

The report resulted in the following four conclusions:

1. The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable.
2. The neutrality of Belgium and Luxemburg was deliberately violated.
3. Acts of aggression were committed without warning in a number of places on French territory.
4. The war was carried on by the Central Empires together with their Allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary principles of humanity.<sup>104</sup>

## VI. COMMISSION MEETINGS

Sub-Commission No. 1 met on March 5, 1919, after each delegate had time to read the Drafting Committee's report, at which time the delegates discussed and approved the report.<sup>105</sup> The Commission on Responsibility held its third meeting on March 12th, at which time it approved the report of Sub-Commission No. 1.<sup>106</sup> Delegates at this meeting also considered the report of Sub-Commission No. 3 that recommended establishing a

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103. *Id.* at 1.

104. *Id.* at 3.

105. *Excerpt from the Minutes of a Meeting of the Sub-Commission on Criminal Acts Held on March 5, 1919* (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12102/3 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 308 of the PDF.

106. *Excerpt of the Minutes of a Meeting of the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties Held on March 12, 1919* (1919), microformed on Records of the Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 143 181.12102/6 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26547314>. If downloading the PDF on the linked website, the source starts at page 316.

High Tribunal<sup>107</sup> to prosecute highly ranked officials, particularly Wilhelm, and suggested that the Treaty of Peace should provide the tribunal.<sup>108</sup>

On behalf of the United States, Mr. Lansing proposed a resolution to Sub-Commission No. 3's report, that would describe the war as a "war of aggression" that should not go unpunished.<sup>109</sup> The resolution read:

The moral right to wage war only exists when there is an imperative necessity to employ force in the protection of national life, in the maintenance of national right or in the defence of liberty and humanity.

War inspired by any other motive is wanton, needless and violative of international morality and justice[.] It cannot be justified.

Judged by this standard the war which was begun in 1914 was unrighteous and indefensible. It was a war of aggression. The masters of the Central Powers, inflamed by the passion to possess the territory and sovereignty of others, entered upon a war of conquest, a war which in magnitude, in waste of life and property, in merciless cruelties and in intolerable woes surpasses all wars of modern times. The evidence of this moral crime against mankind is convincing and conclusive.

Restrained by reverence for law which is inseparable from that high sense of justice which is essential to social order, the nations which have suffered so grievously may be unable to mete out through judicial channels retribution to the guilty. But the authors of this atrocious war ought not to pass unscathed into history. They should be summoned before the bar of universal public opinion to listen to the verdict which mankind passes upon the perpetrators of this greatest crime against the world.

Therefore, in the name of those who sacrificed their lives that liberty might live, in the name of the helpless who endured unspeakable atrocities, in the name of those whose

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107. The "High Tribunal" is referred to as the "International Court" in other parts of the recommendations.

108. *Minutes of the Third Meeting, March 12, 1919, at 11 A.M.* (1919), reprinted in *Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties*, annex III at 53–54, microformed on Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 142 181.1201/16 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26546572> [hereinafter *Third Meeting*]. If downloading the PDF on the linked website, the source starts at page 338.

109. *Id.* at 37.

ruined and plundered lands bear witness to the wickedness of the accused, in the name of humanity, of righteousness and of civilisation, an outraged world denounces as infamous and demands the judgment of the ages against

Wilhelm of Hohenzollern, once German Emperor and King of Prussia . . . .<sup>110</sup>

However, Lansing conceded to customary law and suggested inserting a new clause into the report acknowledging under the common law of nations that every head of state enjoyed immunity from suit or prosecution in a court of justice that had no precedent in the law of nations.<sup>111</sup> He consequently proposed establishing a Commission of Enquiry to further investigate the crimes committed by Germany's hierarchy and to report its findings to the Peace Conference.<sup>112</sup> The proposal read as follows:

In view of the official and personal influence which the ex-Kaiser possessed and exercised upon the course and conduct of the war, and in view of the immunity from suit and prosecution which a Monarch and Chief of State enjoys according to the municipal law of every civilised country and also according to the Common Law of Nations, and lest because of this immunity from judicial process the ex-Kaiser escape the condemnation which his misdeeds require, the third Sub-Commission recommends that, instead of attempting to hale the ex-Kaiser before a Court of Justice for which there is no precedent in the accepted Law of Nations, an International Commission of Enquiry be instituted to investigate and to report upon the extent of the responsibility of the ex-Kaiser from the political, legal and moral point of view for the acts of the German authorities, civil and military, in violation of the laws and customs of war committed during the course of the war from the 1st day of August, 1914,<sup>113</sup> to the 11th day of November, 1918.

The International Commission of Enquiry to be instituted for this purpose should be composed of . . . Representatives of the United States, the British Empire, France, Italy and Japan, and of one Representative of each

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110. *Id.*

111. *Id.*

112. *Id.* at 37–38.

113. The First World War officially began on July 28, 1914. Germany declared war on Russia on Aug. 1st.

of the other countries at war with Germany. It should be appointed during the sessions of the Conference; the archives of the German Government should be placed at its disposal, and the report of the Commission based upon a careful examination of the evidence at its disposal should be presented by the members of the Commission to their respective Governments on the 11th day of November, 1919, and immediately made public by each of them, in order that the public opinion of the world thus enlightened and instructed may anticipate the verdict of history and render the judgment of posterity.<sup>114</sup>

Members of the Commission objected to Lansing's second proposal, which included the principle of a head of state's immunity from liability for criminal acts. Mr. Massey (British Empire) argued that there were examples of heads of state who had been prosecuted for crimes. He cited one British king that had been tried and executed for murder,<sup>115</sup> then recommended deleting the second proposal in its entirety, as it implied that the Commission did not intend to punish heads of state.<sup>116</sup> Lansing responded that there was no super-sovereign and there was only one modern example of a foreign sovereign prosecuting a head of state, Queen Mary.<sup>117</sup> According to Lansing, "[p]ublic condemnation and the detestation of posterity were the heaviest possible punishments" for the ex-Kaiser.<sup>118</sup>

Larnaude considered Lansing's proposals a surprise, as all the members of the Commission expected the United States to agree with establishing an international tribunal to prosecute Wilhelm.<sup>119</sup> France would not abandon the vindication of justice and thought Lansing's judicial argument regarding sovereignty was inapplicable.<sup>120</sup> Larnaude thought it would be inconsistent to prosecute those who had carried out the sovereign's orders without prosecuting the sovereign who unlawfully initiated

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114. *Third Meeting, supra* note 108, at 37–38.

115. *Id.* at 38 (referencing the trial of King Charles I, who was prosecuted and convicted for treason); see also JOHN LAUGHLAND, A HISTORY OF POLITICAL TRIALS: FROM CHARLES I TO SADDAM HUSSEIN 21, 28 (2008) (writing that "[t]he trial of King Charles was therefore the paradigm for all future trials of heads of state").

116. *Third Meeting, supra* note 108, at 38.

117. *Id.*

118. *Id.*

119. See *id.*

120. *Id.* at 39.

the war.<sup>121</sup> He did not see the purpose of morally condemning the ex-Kaiser, as the international community had already morally condemned him.<sup>122</sup>

Mr. Politis supported establishing an international court to prosecute Wilhelm II for aggression.<sup>123</sup> He urged Lansing to change his mind and stated that international justice would not carry the weight it should without the concurrence of the United States.<sup>124</sup> Politis argued that Lansing's proposal to protect the ex-Kaiser from prosecution had no legal basis, stating:

The principle of immunity was one of practical expediency in municipal law. Even there it was not above the Constitution, as prosecutions had often been undertaken against heads of States; there was nothing fundamental in the principle. From an international point of view there was even less difficulty; it was true that a foreign sovereign was exempt from being prosecuted in a national court, but there was something quite different even from that. The Commission was considering the establishment of an international tribunal and the trial before it of the former head of a State with the consent of that State itself.<sup>125</sup> There was consequently no sound objection to the trial of a sovereign. . . . [I]f the immunity of sovereigns were claimed to extend beyond the limits indicated of national or international law, it would be monstrous and would involve laying down that the most monstrous crime committed by such a person could in no circumstances be punished. Such a conclusion would shock the conscience, and would seem to him absolutely impossible.<sup>126</sup>

Lansing argued that trying the ex-Kaiser, whom he believed to be guilty of moral wrongs against the world, implied a doubt of Wilhelm's guilt and presented the opportunity of him being

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121. *Id.*

122. *Id.*

123. *Minutes of the Fourth Meeting, March 13, 1919, at 10.30 A.M.* (1919), reprinted in *Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties*, at 58–59, microformed on Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 142 181.1201/16 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26546572> [hereinafter *Fourth Meeting*]. If downloading the PDF on the linked website, the source starts at page 349.

124. *Id.* at 59

125. The argument here seems to be that Germany would be required to waive the Kaiser's immunity in the Peace Treaty, which was within its authority.

126. *Fourth Meeting*, *supra* note 123, at 58–59.

acquitted.<sup>127</sup> According to Lansing, the best option was to morally condemn Wilhelm and establish traditional domestic military commissions and courts-martial for the prosecution of soldiers accused of committing war crimes during the war.<sup>128</sup> Sir Ernest Pollock (British Empire) replied that everyone was considered innocent until proven otherwise in a court of law and that it was customary to prosecute common law crimes in the absence of a penal statute.<sup>129</sup>

According to Larnaude, only a judicial organ should pronounce judgment.<sup>130</sup> He also argued that *nulla poena sine lege* was not an absolute principle nor should it necessarily apply to international law.<sup>131</sup> He stated that some laws were retroactive and that such acts could be prosecuted and punished when they were crimes against natural law, against the most elementary principles of humanity, in which case they were forbidden by express provisions such as the Hague Conventions.<sup>132</sup> Lansing wished to have no further discussion on the matter and said that the United States would submit a memorandum stating its positions regarding the prosecution of Wilhelm.<sup>133</sup> All members agreed that the Commission should move on with its work. Sir Pollock and Mr. d'Amelio were nominated to draft the Commission's general report with Rolin-Jacquemyns and they were assisted by Mr. A de Lapradelle (France) and Lieutenant-Colonel O.M. Biggar (British Empire).<sup>134</sup> After further discussion on the proposed summary report, eight voted in favor and two (United States and Japan) voted against.<sup>135</sup>

A draft report was disseminated and discussed at the next meeting.<sup>136</sup> The Draft Report combined the Sub-Commissions'

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127. *Minutes of the Seventh Meeting, March 17, 1919, at 10.30 A.M.* (1919), reprinted in *Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties*, at 70, microformed on Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 142 181.1201/16 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26546572> [hereinafter *Seventh Meeting*]. If downloading the PDF on the linked website, the source starts at page 355.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* See also the "Martens Clause" in the preamble to the Hague Convention (II), *supra* note 89.

133. *Seventh Meeting, supra* note 127, at 72.

134. *Id.*

135. *Id.* at 73.

136. *Minutes of the Eighth Meeting, March 24, 1919, at 11 A.M.* (1919), reprinted in *Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties*, at 76, microformed on Am. Comm'n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 142 181.1201/16 (Nat'l Archives Catalog), <https://catalog.archives.gov/id/26546572>. If downloading the PDF on the linked website, the source starts at page 360.

reports and included their findings and recommendations.<sup>137</sup> The first conclusion found that the responsibility for declaring war in pursuance of a policy of aggression rested first on Germany and Austria, and secondly on Turkey and Bulgaria<sup>138</sup> and that Germany and Bulgaria had committed acts of aggression without warning.<sup>139</sup> The second conclusion found that the Central Powers, together with their allies, had carried out the war by barbarous methods in violation of the laws and customs of war and the principles of humanity.<sup>140</sup>

The Draft Report concluded that “[t]he degree of responsibility for these offences attach[ed] to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.”<sup>141</sup> It recommended that a High Tribunal be constituted and included in the Treaty of Peace so that the tribunal could prosecute the acts that had provoked the war and accompanied its inception and the violations of the laws of war, customs of war, and the principles of humanity.<sup>142</sup>

The envisaged High Tribunal would be composed of twenty-two persons with the United States, the British Empire, France, Italy, and Japan each appointing three persons and Belgium, Greece, Poland, Portugal, Romania, Serbia, and Czecho-Slovakia each appointing one person.<sup>143</sup> In 1919, such a court was considered to be international. However, compared to modern international criminal tribunals, it would actually have been a multinational court, as it was limited to the participation of twelve states.

The Commission met three more times before its conclusion. It submitted its final report to the Preliminary Peace Conference after its eleventh meeting on March 29, 1919.<sup>144</sup> The United States submitted its memorandum of reservations to the report on April 4, 1919.<sup>145</sup> Japan submitted its reservations on the same day.<sup>146</sup>

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137. *Id.* at 83–96.

138. *Id.* at 83, 87.

139. *Id.* at 89.

140. *Id.* at 90.

141. *Id.* (italics omitted).

142. *Id.* at 91, 93.

143. *Id.* at 93.

144. *Minutes of the Eleventh Meeting, March 29, 1919, at 10.30 A.M.* (1919), reprinted in *Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties*, at 112, microformed on Am. Comm’n to Negotiate Peace, 1918–1931, Record Group 256, 820 Roll 142 181.1201/16 (Nat’l Archives Catalog), <https://catalog.archives.gov/id/26546572>. If downloading the PDF on the linked website, the source starts at page 376 of the PDF.

145. *Id.* annex II at 162.

146. *Id.* annex III at 175.

## VII. THE TREATY OF PEACE

The Preliminary Peace Conference consulted the Commission's report and decided to make a political choice. It inserted a clause in the Treaty of Peace that would appease most members of the Commission. Article 227 reads:

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.<sup>147</sup>

The Conference carefully selected the wording of Article 227. The ex-Kaiser had been arraigned for committing "a supreme offence against international morality and the sanctity of treaties."<sup>148</sup> He had not been charged with a crime. Additionally, the word "international" was followed by the words "policy," "undertakings," and "morality."<sup>149</sup> The word "law" was not mentioned in the article, and there was no mention of aggression.<sup>150</sup>

The German delegation refused to recognize the Special Tribunal's competence for prosecuting its former Emperor.<sup>151</sup> Germany also confirmed that it could not agree with a demand to

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147. Treaty of Peace, *supra* note 9, art. 227.

148. *Id.*

149. *Id.*

150. *See id.*

151. *Observations of the German Delegation on the Conditions of Peace* (May 29, 1919), reprinted in 6 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, THE PARIS PEACE CONFERENCE, 1919 874-875 (Joseph V. Fuller & Tyler Dennett eds., 1943).



the Netherlands for the surrender of Wilhelm II.<sup>152</sup> The Allied and Associated Powers admitted that the Special Tribunal referenced in Article 227 was without juridical character. In their response, they clarified that “the public arraignment under Article 227 framed against the German ex-Emperor has not a juridical character as regards its substance but only in its form.”<sup>153</sup> This concession alleviated Germany’s concerns, and the Treaty of Peace was signed on June 28, 1919.

There was some indication immediately following the Conference that preparations had commenced for Wilhelm’s trial. For example, on July 3, 1919, Prime Minister Lloyd George announced to the House of Commons that the ex-Kaiser would be prosecuted in London.<sup>154</sup> However, one scholar has written that there was little interest in actually obtaining Wilhelm II.<sup>155</sup> The Supreme Council of the Preliminary Peace Conference did submit a formal request to Holland for the surrender of Wilhelm in January 1920.<sup>156</sup> It was ignored and no further requests were made for his surrender.<sup>157</sup> He lived out his days in Holland and died on June 4, 1941.<sup>158</sup>

#### VIII. THE EVOLUTION OF CRIMINALIZING AGGRESSION FOLLOWING THE TREATY OF PEACE

The Preliminary Peace Conference created the League of Nations for the purpose of preventing future wars by establishing friendly relations among states. The Covenant of the League of Nations was included in the Treaty of Peace.<sup>159</sup> The Assembly of the League of Nations adopted the Statute of the Permanent Court of International Justice on December 13, 1920, as per

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152. *Id.* at 875.

153. *Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace* (June 16, 1919), reprinted in 6 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, THE PARIS PEACE CONFERENCE, 1919 935, 962 (Joseph V. Fuller & Tyler Dennett eds., 1943).

154. *Preparations for Trial of the Former Kaiser*, CURRENT HIST. (N.Y.C.), Apr.–Sept. 1919, at 222; Allan Westcott, *Germany Ratifies Peace Treaty*, 45 U.S. NAVAL INST. PROC. 1463, 1465 (1919); *The Trial of the Kaiser*, INDEPENDENT (N.Y.C.), July 19, 1919, at 80.

155. WILLIS, *supra* note 3, at 101.

156. George Gordon Battle, *The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1, 4 (1921).

157. *Id.*

158. *Kaiser Wilhelm II*, HISTORY, [https://www.history.com/topics/world-war-i/kaiser-wilhelm-ii#section\\_4](https://www.history.com/topics/world-war-i/kaiser-wilhelm-ii#section_4) (last visited Nov. 3, 2019).

159. Treaty of Peace, *supra* note 9, arts. 1–26.

Article 14 of the Covenant.<sup>160</sup> The purpose of the Permanent Court of International Justice was to prevent war by resolving disputes between states through international law.

There were other efforts to prevent war during the years following the First World War. Fifteen states signed the Pact of Paris on August 27, 1928.<sup>161</sup> An additional forty-seven states would eventually sign the Pact.<sup>162</sup> Article 1 of the Pact confirmed, “[t]he High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”<sup>163</sup>

#### IX. POST-SECOND WORLD WAR ERA AND THE CRIMINALIZATION OF AGGRESSION

As a state party to the Treaty of Peace and the Kellogg-Briand Pact, Germany, along with Japan and Italy, were not deterred from developing into militaristic regimes. Germany initiated the Second World War when she invaded Poland on September 1, 1939. Japan attacked the United States two years later on December 7, 1941. As war ensued, victimized states developed the United Nations Commission for the Investigation of War Crimes (UNWCC) to investigate war crimes committed by the Axis powers.<sup>164</sup> During the UNWCC meetings, most delegates held favorable views for punishing the Axis power leaders for their crimes of aggression.<sup>165</sup>

On August 8, 1945, the United States, the United Kingdom, the Soviet Union, and France signed an agreement to establish an international military tribunal for the prosecution and punishment of major war criminals of the European Axis.<sup>166</sup> The International

160. *Statute of the International Court of Justice*, U.N. AUDIOVISUAL LIBR. INT’L L. (2012), [http://legal.un.org/avl/pdf/ha/sicj/sicj\\_ph\\_e.pdf](http://legal.un.org/avl/pdf/ha/sicj/sicj_ph_e.pdf) (last visited Nov. 3, 2019).

161. Renunciation of War as an Instrument of National Policy (Kellogg-Briand Peace Pact or Pact of Paris), Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Pact of Paris].

162. The Kellogg-Briand Pact, U.S. OFF. HISTORIAN, <https://history.state.gov/milestones/1921-1936/kellogg> (last visited Nov. 3, 2019).

163. Pact of Paris, *supra* note 161, art. 1.

164. *United Nations War Crimes Commission (UNWCC)*, INT’L SCH. HOLOCAUST STUD., [https://www.yadvashem.org/odot\\_pdf/Microsoft%20Word%20-%205901.pdf](https://www.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205901.pdf) (last visited Nov. 3, 2019).

165. Narrelle Morris & Aden Knaap, *When Institutional Design Is Flawed: Problems of Cooperation at the United Nations War Crimes Commission, 1943–1948*, 28 EUR. J. INT’L L. 513, 514 (2017).

166. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

Military Tribunal had jurisdiction over three crimes: crimes against peace, war crimes, and crimes against humanity.<sup>167</sup> Crimes against peace, as defined in Article 6 of the International Military Tribunal, were “[n]amely, [the] planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”<sup>168</sup>

Douglas MacArthur, Supreme Commander for the Allied Powers, established the International Military Tribunal for the Far East for the prosecution of Japanese war criminals.<sup>169</sup> The crimes and definitions in Article 6 of the Charter of the International Military Tribunal were carried over almost verbatim to Article 5 of the Charter of the International Military Tribunal for the Far East.<sup>170</sup> However, the problem with the definition of crimes against peace was that it referred to a “war of aggression” without defining aggression.

The United Nations General Assembly (UNGA) affirmed the Nuremberg Principles on December 11, 1946.<sup>171</sup> They were subsequently adopted on December 12, 1950, and included crimes against peace, war crimes and crimes against humanity.<sup>172</sup> The UNGA requested that the International Law Commission (ILC) prepare a draft code of offenses against the peace and security of mankind that would list and define international crimes.<sup>173</sup> In 1954, the UNGA assigned a special committee the task of preparing a detailed report on the question of defining aggression.<sup>174</sup> In the meantime, the UNGA decided to postpone further consideration of the draft code of offenses against the peace and security of mankind until the report was submitted.<sup>175</sup>

The definition of the crime of aggression was adopted twenty years later on December 14, 1974.<sup>176</sup> Article I of the UNGA’s Definition of Aggression states, “[a]ggression is the use of armed force by a state against the sovereignty, territorial integrity or

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167. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Tribunal].

168. *Id.*

169. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (as amended Apr. 26, 1946, 4 Bevans 27) [hereinafter Tokyo Tribunal].

170. Compare Nuremberg Tribunal, *supra* note 167, art. 6, with Tokyo Tribunal, *supra* note 169, art. 5.

171. G.A. Res. 95 (I), at 188 (Dec. 11, 1946).

172. See G.A. Res. 488 (V), at 77 (Dec. 12, 1950).

173. *Id.*

174. G.A. Res. 895 (IX), at 49 (Dec. 4, 1954).

175. G.A. Res. 897 (IX), at 50 (Dec. 4, 1954).

176. G.A. Res. 3314 (XXIX), at 142–44 (Dec. 14, 1974).

political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this [d]efinition.”<sup>177</sup> The ILC resumed its study on drafting a code of crimes against the peace and security of mankind, which was adopted in 1996.<sup>178</sup> However, two years earlier, the ILC had adopted a draft statute for the International Criminal Court (ICC), which had taken priority over the draft code of offenses.<sup>179</sup> The UNGA had subsequently developed an ad hoc committee<sup>180</sup> and a preparatory committee<sup>181</sup> to fine-tune the ILC’s draft, working towards a conference on the plenipotentiaries for an international criminal court.

The Rome Statute of the International Criminal Court was adopted on July 17, 1998.<sup>182</sup> Aggression was originally listed as a crime within the ICC’s jurisdiction, but without a definition.<sup>183</sup> A working group on the crime of aggression was subsequently established and held meetings in Princeton, New Jersey for several years. In 2010, the group submitted recommendations to the ICC’s First Review Conference in Kampala, Uganda. A definition of aggression was adopted at the Conference.<sup>184</sup> The definition read as follows:

For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>185</sup>

The Kampala resolution provided the ICC with jurisdiction over the crime of aggression committed “one year after the ratification or acceptance of the amendments by thirty states Parties.”<sup>186</sup> After receipt of the thirtieth state ratification, the

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177. *Id.* at 143. Acts of aggression are listed in Article 3. *Id.*

178. Int’l Law Comm’n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at 15–16 (1996).

179. Int’l Law Comm’n, Rep. on the Work of Its Forty-Sixth Session, U.N. Doc. A/49/10, at 27–67 (1994).

180. G.A. Res. 49/53, ¶ 2 (Dec. 9, 1994).

181. G.A. Res. 50/46, ¶ 2 (Dec. 11, 1995).

182. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

183. *Id.* art. 5.

184. R.C. Res. 6, annex I(1), (June 11, 2010); *see also* Rome Statute, *supra* note 182, art. 8 *bis*.

185. R.C. Res. 6, annex I(1), (June 11, 2010).

186. *Id.* art. 15(2) *bis*.

Assembly of States Parties to the ICC adopted a resolution on December 14, 2017, deciding to active the ICC's jurisdiction over the crime of aggression on July 17, 2018.<sup>187</sup> Consequently, the Court's jurisdiction over aggression was activated on the twentieth anniversary of the adoption of the Rome Statute. Around thirty-eight states have ratified the Kampala resolution.<sup>188</sup>

## X. CONCLUSION

The evolution of criminalizing aggression has been a long journey and has not yet reached the end of the road, and its impact has yet to be determined. Recent scholarly articles have focused on the criminalization of aggression from the International Military Tribunal at Nuremberg through to the 2010 Review Conference. Few, however, have reflected on the discussions of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and its Sub-Commissions after the First World War.

Ultimately, the decision not to indict Wilhelm II for the crime of aggression was based on the Preliminary Peace Conference's lack of political will. The Commission had recommended charging Wilhelm with aggression in its report to the Conference. However, the Conference morally condemned the ex-Kaiser rather than charge him with aggression.

Unfortunately, the Conference's lack of political will to charge the ex-Kaiser with aggression should not overlook the Commission's discussions, which influenced the development of criminalizing illegal war. For example, the UNWCC had consulted the minutes of the meetings of the Commission nearly 25 years later and furthered the criminalizing of aggression. As another example, prosecutors of the International Military Tribunal met with members of the UNWCC to discuss building a case to charge the Nazis with aggression. Most of the modern policies that supported the effort to criminalize aggression stemmed from the policies that had supported prosecuting Wilhelm for aggression after the First World War. It is important that the Allied and Associated Powers' lack of political will to prosecute the ex-Kaiser does not reflect the efforts of the Commission that had recommended that Wilhelm be prosecuted

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187. I.C.C. Res. 5, ¶ 1 (Dec. 14, 2017).

188. *Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression*, GLOBAL INST. PREVENTION AGGRESSION, <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> (last updated Apr. 11, 2019).

for the crime of aggression. Ultimately, the Commission's Report, which has been widely cited in international legal scholarship, laid the foundation for criminalizing aggression at Nuremberg.