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Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

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When Justice Is Left to the Losers: The Leipzig War Crimes Trials

Matthias Neuner[*]

In the period from 10 January 1921 to 3 July 1922, the German Supreme Court (*Reichsgericht*) in Leipzig conducted 12 trials involving 17 accused Germans on charges relating to allegations of criminal conduct by German citizens during the First World War ('Leipzig War Crimes Trials'). Apart from few exceptions,[1] these proceedings found a consistent critical echo, whether within the then Weimar Republic or outside Germany, in the countries of the Allied Powers. The French Prime Minister, Aristide Briand, saw these trials as a comedy, a parody of justice and a scandal, and was not the only one to voice such harsh criticism.[2] *The Times* wrote that these proceedings were "little better than a farce";[3] others spoke of a "judicial farce".[4] Alexander Cadogan, then a

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[*] **Matthias Neuner** has been a Trial Counsel at the Office of the Prosecutor, Special Tribunal for Lebanon (STL) since 2009. Prior to that he was a Trial Attorney at the Office of the Prosecutor, International Tribunal for Crimes committed in the Former Yugoslavia ('ICTY') for almost 10 years. He holds a German First State Exam in Law from the Free University Berlin, Germany, and a German Second State Exam in Law, from the Berlin Higher Regional Court, Berlin.

1 Ernest Pollock, then British solicitor general declared to be "much impressed by the Supreme Court of Leipzig – the trials were conducted very impartially with every desire to get to the truth". Ernest Pollock, *Memorandum about the Leipzig Trials*, 2 June 1921, The National Archives, UK ('TNA'), CAB 24/125, C.P.-3006); Claud Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Study of German Mentality*, H.F. & G. Witherby, London, 1921; G. van Slooten, "Beschouwingen naar aanleiding van het geding Stenger – Crusius voor het Reichsgericht te Leipzig", in *Militair-rechtelijk Tijdschrift*, Mouton & Co., The Hague, 1921, vol. 17, p. 7; G. van Slooten, "Betrachtungen aus Anlass des Prozesses Stenger-Crusius", in *Zeitschrift für Völkerrecht*, Duncker & Humblot, Berlin, vol. 12, 1923, p. 174.

2 Aristide Briand, Declaration before the French Parliament, printed in *Journal du Droit International*, 1921, vol. 48, pp. 442 ff. The Belgian Minister of Justice criticised the proceedings in Leipzig in a similar way. Kai Müller, "Oktroyierte Verliererjustiz nach dem Ersten Weltkrieg", in *Archiv des Völkerrechts*, 2001, vol. 39, p. 217. Sheldon Glueck calls these trials a "trago-comedy" in *War Criminals: Their Prosecution and Punishment*, A.A. Knopf, New York, 1944, p. 34.

3 *The Times*, London, 2 June 1922.

British Foreign Office official who later served as the British Permanent Under-Secretary for Foreign Affairs during the Second World War, expressed the British view that the Leipzig "experiment has been pronounced a failure".[5] More recently, Gary Jonathan Bass labelled these proceedings a "disaster".[6] Moving beyond such emotional assessments, this chapter analyses the facts surrounding these war crimes proceedings and presents them in seven sections.

11.1. If the *Reichsgericht* Convicted, Then Sentences Were Lenient

None of the 12 war crimes trials conducted in front of the *Reichsgericht* in Leipzig resulted in sentences that exceeded five years' detention. Each trial and its result (conviction or acquittal) are listed in chronological order in Table 1:

Table 1: War Crimes Trials at the *Reichsgericht*, Leipzig, 1921–1922

Trial No.	Accused	Charge(s)	Result	Sentence
1	Dietrich Lottmann Paul Niegel Paul Sangerhausen	Plunder[7]	Convicted	5 years 4 years 2 years[8]

4 Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, Oxford University Press, Oxford, 2012, p. 11.

5 British Foreign Office, FO 371/7529/C17096, Allied-German Negotiations on War Criminals, 9 December 1922 (TNA).

6 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials*, Princeton University Press, Princeton, NJ, 2000, p. 80.

7 Bundesarchiv (BA) Berlin-Lichterfelde R3003 ORA/RG a J 8/20, vol. 6, p. 5, Indictment from 19 November 1920.

8 Reichsgericht, the Case of Lottmann, Niegel and Sangerhausen, Judgment, dated 10 January 1921 ("Lottmann, Niegel and Sangerhausen Judgment") a J 8/1920 – IX.52/1921, reprinted in German in BA Berlin-Lichterfelde R3003 ORA/RG a J 8/1920, vol. 4, pp. 44–50; see also R3003 ORA Generalia 62.

Trial No.	Accused	Charge(s)	Result	Sentence
2	Karl Heynen	47 acts of mistreatment of prisoners of war ('POWs')[9]	Partial conviction for 15 acts of mistreatment and three acts of insult of subordinates;[10] otherwise partial acquittal	10 months[11]
3	Emil Müller	14 acts of mistreatment and/or slander of POWs as well as six insults[12]	Convicted for 13 acts of slander/ mistreatment of POWs and for 2 insults; otherwise partial acquittal[13]	6 months[14]
4	Robert Neumann	17 acts of mistreatment of POWs[15]	Partially convicted (for 12 acts); otherwise partial acquittal[16]	6 months[17]

9 BA Berlin-Lichterfelde R3003 ORA/RG, vol. 4, pp. 43–46, Indictment from 12 May 1921; BJ 903/20, ORA bJ 903/20-3 of 14 May 1921 to the Second Senate of the Reichsgericht with Indictment 903/20 from 14 May 1921, also vol. 8, pp. 26, 29.

10 Reichsgericht, the Case of Karl Heynen, Judgment, dated 26 May 1921 ("Heynen Judgment"), reprinted in German in Weißbuch, *Deutscher Reichstag, Reichstagsprotokolle*, 1920/24,25, ("Weißbuch") pp. 2542–43; reprinted in English in *German War Trials, Report of Proceedings Before the Supreme Court in Leipzig*, presented to the British Parliament by Command of his Majesty, 1921, His Majesty's Stationery Office, London, ("UK Report"), appendix II, p. 19.

11 Heynen Judgment, sections XII and XIV, see *supra* note 10.

12 PA AA R 48432z b J 588/20-31, Indictment from 11 April 1921; BA Berlin-Lichterfelde R3003 ORA/RG b J 901.20, Indictment from 12 May 1921, p. 15; Reichsgericht, the Case of Emil Müller, Judgment, dated 30 May 1921 ("Müller Judgment"), reprinted in German in Weißbuch, p. 2547, see *supra* note 10; reprinted in English language in UK Report, appendix III, p. 27, see *supra* note 10.

13 Müller Judgment, p. 2547, see *supra* note 12.

14 *Ibid.*

15 PA AA R 48433j: ORA b J 589/20, Indictment from 11 April 1921; ORA b J 902.20, Indictment from 9 May 1921.

16 Reichsgericht, the Case of Robert Neumann, Judgment, 2 June 1921 ("Robert Neumann Iudgment"), reprinted in German in Weißbuch, pp. 2552–53, see *supra* note 10; reprinted in English in UK Report, appendix IV, p. 36, see *supra* note 10.

17 *Ibid.*

Trial No.	Accused	Charge(s)	Result	Sentence
5	Karl Neumann (*Dover Castle* case)	Murder of six men[18]	Acquittal[19]	—
6	Max Ramdohr	Several acts of illegal deprivation of liberty, of prolonging such illegal deprivation of liberty and/or of assault in exercise of the office[20]	Acquittal[21]	—
7	Karl Stenger Benno Crusius	Misuse of official position by instigating subordinates to criminal acts Also attempted manslaughter and intentional killing of at least seven wounded soldiers or POWs	Acquittal[22] Conviction (for negligent manslaughter); otherwise partial acquittal[23]	— 2 years[24]
8	Adolph Laule	Manslaughter[25]	Acquittal[26]	—

18 PA AA R 48433i: ORA b J 586/20, application dated 28 May 1921 to hold a main trial.

19 Reichsgericht, the Case of Karl Neumann (also referred to as the "*Dover Castle* case"), Judgment, dated 4 June 1921 ("Karl Neumann Judgment"), reprinted in German in Weißbuch, p. 2556, see *supra* note 10; reprinted in English in UK Report, appendix V, p. 43, see *supra* note 10.

20 BA Berlin-Lichterfelde R3003 ORA/RG b J 46/20, vol. 6, Indictment from 21 March 1921, pp. 29–35.

21 Reichsgericht, the Case of Ramdohr, Judgment, 11 June 1921 ("Ramdohr Judgment"), reprinted in German in Weißbuch, p. 2558, see *supra* note 10.

22 Reichsgericht, the Case of *Stenger and Crusius*, Judgment, 6 July 1921 ("Stenger and Crusius Judgment"), reprinted in German in Weißbuch, p. 2563, section I, see *supra* note 10.

23 *Ibid.*

24 Stenger and Crusius Judgment, section II, see *supra* note 22.

Trial No.	Accused	Charge(s)	Result	Sentence
9	Hans von Schack Benno Kruska	Murder of more than 3,000 men[27]	Acquittal[28]	—
10	Ludwig Dithmar John Boldt Helmut Patzig (*Llandovery Castle* case)	Murder[29]	Conviction	Dithmar and Boldt: 4 years for aiding and abetting manslaughter[30] No proceedings against Patzig
11	Oskar Michelson	Mistreatment of wounded[31]	Acquittal[32]	—
12	Karl Grüner	Theft and plunder[33]	Conviction for plunder, otherwise acquittal[34]	2 years[35]

The Leipzig War Crimes Trials resulted in convictions of 10 men. The sentences imposed ranged from six months (twice),[36] ten months

[25] Compare Albert Feisenberger, "Zusammenstellung der bisher durch das Reichsgericht abgeurteilten Kriegsverbrechen", in *Deutsche Strafrechtszeitung*, 1921, col. 267.

[26] Reichsgericht, the Case of Laule, Judgment, 7 July 1921 ("Laule Judgment"), reprinted in German in Weißbuch, p. 2572, see *supra* note 10.

[27] BA Berlin-Lichterfelde R3003 ORA/RG b J 296/20, vol. 1, pp. 142–47, RS: ORA b J 296/20 application dated 9 July 1921 to hold a main trial.

[28] Reichsgericht, the Case of von Schack and Kruska, Judgment, 9 July 1921 ("von Schack and Kruska Judgment"), reprinted in German in Weißbuch, p. 2573, see *supra* note 10.

[29] PA AA R 48429l, Indictment from 11 June 1921 (a J 95/21).

[30] Reichsgericht, the Case of Dithmar and Boldt, Judgment, 16 July 1921 ("*Llandovery Castle* case"), reprinted in German in Weißbuch, pp. 2579–80, see *supra* note 10.

[31] PA AA R 48432v, ORA b J 512/20-72, Indictment from 23 March 1922, pp. 9–10.

[32] Reichsgericht, the Case of Dr. Oskar Michelson, Judgment, 3 July 1922 ("Michelson Judgment"), BA Berlin-Lichterfelde R3003 ORA Gen. 62: b J 512/20 – IX.281/22.

[33] PA AA R 48427i, ORA a J 13/21-57, Indictment from 18 September 1922.

[34] Reichsgericht, the Case of Karl Grüner, Judgment, 17 November 1921 ("Grüner Judgment"), BA Berlin-Lichterfelde R3001 RMJ 2017, p. 278: ORA Gen. I 8-191 of 9 February 1923; PA AA R 48427i, R 48427j and R 48427j and R48427m.

[35] *Ibid.*

[36] Namely against Emil Müller and Robert Neumann.

(once),[37] two years (three times)[38] and a sentence of five years (once) that was imposed for plunder.[39] A four-year sentence was imposed for plunder[40] in the Lottmann, Niegel and Sangerhausen case, and twice for aiding and abetting murder in the *Llandovery Castle* case.[41] In 1922 the Conference of Ambassadors, which contained among others representatives from Belgium, France, Italy and Britain, regarded these sentences as too lenient.[42] Georg Schwarzenberger called the proceedings at the *Reichsgericht* fair, but criticised the sentences imposed as "lenient beyond any justification".[43]

11.2. Quashing of Sentences, Amnesty and a Practice of Suspensions (*Nolle Prosequi)*

The Leipzig War Crimes Trials drew criticism not only for their lenient sentences, but also for the ineffective policy of the German authorities to secure the imposed sanctions in the execution of sentences phase following the judgments.

11.2.1. The Shadow of the *Llandovery Castle* Case[44]

The *Llandovery Castle* case deserves further scrutiny. After the Second Senate of the *Reichsgericht* had convicted Dithmar and Boldt in 1921, they served their sentences in different detention facilities, but both managed to

[37] Namely against Karl Heynen.

[38] Namely against Crusius, Grüner and Sangerhausen.

[39] Namely against Lottmann (see also Lottmann, Niegel and Sangerhausen Judgment, see *supra* note 8).

[40] Namely against Niegel (*ibid.*).

[41] Namely Dithmar and Boldt, see *supra* note 30.

[42] Note issued by French Prime Minister Poincaré on 23 August 1922, Conference of Ambassadors, sent to Dr. Mayer, para. 5 (MAE Paris 580, pp. 35–37: Conférence des Ambassadeurs, Le Président; PA AA R 48415j: telegram Paris Pax of 23 August 1922, note of Conference of Ambassadors, re question of war suspects; BA Berlin Lichterfelde R3003 ORA Gen. 47, pp. 71–76: note of the conference of ambassadors; Conference of Ambassadors to German Embassy in Paris, 23 August 1922, FO 371/7529 (C16860/555/18), Confidential Print 11990; compare Woods to Foreign Office, 16 August 1922, FO 371/7529 (C11741/555/18).

[43] Georg Schwarzenberger, *International Law and Totalitarian Lawlessness*, Jonathan Cape, London, 1942, p. 72.

[44] *Llandovery Castle* case, see *supra* note 30.

escape from detention.[45] Notwithstanding these ongoing flights, in 1926 the German President (Reichspräsident) Hindenburg informed Wilhelm Marx, the German Minister of Justice, that he would consider pardoning both Dithmar and Boldt if they would return to the law enforcement authorities.[46] Marx refused to countersign this request.[47] Only months after this attempt to pardon Dithmar and Boldt had failed, on 5 and 10 July 1926 the defence of both convicted persons requested the *Reichsgericht* to reopen the proceedings. Without expressing any reasons, the Fifth Senate of the *Reichsgericht* reopened the proceedings, which resulted in a ruling suspending the further imposition of the "outstanding" sentences against Dithmar and Boldt.[48] Almost two years later, on 4 May 1928, the Fifth Senate proceeding in closed session quashed the initial judgment of the Second Senate convicting Dithmar and Boldt on 16 July 1921 and acquitted both men.[49] Dithmar and Boldt also obtained financial compensation for their periods of detention.[50]

The third co-accused in the same proceeding, Patzig, had absconded before the trial against the co-defendants, Dithmar and Boldt, had begun

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45 Glueck, 1944, p. 33, see *supra* note 2, referring to a telegraph of a correspondent of the *Daily Mail* from 20 November 1921; Peter Maguire, *Law and War: An American Story*, Columbia University Press, New York, 2002, p. 82; Harald Wiggenhorn, *Verlierjustiz: Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg*, Nomos, Baden-Baden, 2005, pp. 304–5, 325–26; Bass, 2000, pp. 80–81, see *supra* note 6.

46 PA AA R 48429l: RP.1075/26, 8 March 1926.

47 PA AA R 48428t: Marx, Reichsminister of Justice to the Reich President, Hindenburg, correspondence dated 17 March 1926.

48 PA AA R 48433o, Decision b j 585/20-60/XI. 182, pursuant to § 112, 123, 124, German Criminal Procedural Code.

49 BA Berlin Lichterfelde R3003 ORA/RG a J 95/21, vol. 2, p. 1: reprint RG, V. senate a J 95/21/XII. 117 of 4 May 1928; R 3003 ORA Generalia 62; PA AA R 48429l; compare Albert Feisenberger, *Strafprozessordnung und Gerichtsverfassungsgesetz*, Gruter & Co., Berlin, 1926, p. 302, remark 3 to § 371 German Code of Criminal Procedure. Peter Maguire, 2005, p. 82 sees this procedure as a "crude form of strategic legalism – post-trial, *nonjudicial* sentence modification", see *supra* note 45, emphasis added. However, Maguire overlooks that in this case a *judicial* sentence modification of Dithmar and Boldt occurred through a *judicial* body: by quashing the convictions of the Second Senate, the Fifth Senate of the *Reichsgericht* set the four-year sentences of Dithmar and Boldt aside and completely acquitted both men. The amnesty in favour of Patzig was also declared by the Fourth Senate of the *Reichsgericht*, again a judicial body.

50 Wiggenhorn, 2005, p. 381, see *supra* note 45.

in 1921.[51] German law not providing for trial proceedings *in absentia* in criminal matters barred the *Reichsgericht* from litigating the question of guilt or innocence of Patzig. Thus, this court could only try and convict Dithmar and Boldt, who had been accused of the same transaction as Patzig. However, even before the Fifth Senate of the *Reichsgericht* quashed the convictions rendered in 1921 by the Second Senate, the German authorities made attempts to avoid pursuing proceedings against Patzig. On 19 July 1926 the Fifth Senate decided to suspend the warrant of arrest against Patzig, claiming that no urgent suspicion existed.[52] The reasoning of this decision consisted of two sentences only.

Other attempts by the judiciary and political actors to suspend or dispose of the pending proceedings against Patzig met with opposition from the German Foreign Office as it feared a critical echo from the international community, particularly from Britain, whose citizens had been killed as a result of actions ordered by Patzig.[53] However, in October 1930 the German Parliament amended the amnesty law adopted initially in 1928 to also provide amnesties for criminal procedures instituted for politically motivated killings.[54] Relying on this law, five months later on 20 March 1931, the Fourth Senate of the *Reichsgericht* decided to suspend and thereby terminate the criminal proceedings relating to war crimes against Patzig.[55] Thereby, the Fourth Senate dismissed the Second Senate's earlier *obiter dictum* relating to Patzig, which contained indirect findings about the criminality of his behaviour. The Second Senate had made these findings on the occasion of the conviction of Dithmar and Boldt.[56]

11.2.2. Practice of Suspensions (*Nolle Prosequi)*

That only 12 war crimes trials could be conducted in Leipzig was the result of a practice of the German authorities to issue suspensions or *nolle*

[51] James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Press, London, 1982, p. 137.

[52] PA AA R48433o, Decision a J 95/21-183/XI. 183, pursuant to §§ 359 Nr. 5, 360, paras. 2, 366, 367 and 369 German Code of Criminal Procedure.

[53] Wiggenhorn, 2005, pp. 382–88, see *supra* note 45.

[54] RGBl. 1928 I, p. 195, Law about amnesty from 14 July 1928; RGBl 1930 I S.467: Law amending the Law about amnesty/impunity of 14 July 1928 (RGBl. I, p. 195).

[55] PA AA R 48433o: Decision Fourth Senate for Criminal Matters, *Reichsgericht*, Reprint b J 585/20-101/XII Tgb. 56/1931.

[56] Wiggenhorn, 2005, p. 390, see *supra* note 45.

prosequi decisions during the investigation stage (before a case could reach the indictment or trial stage in front of the *Reichsgericht*). 'Beneficiaries' of these suspensions were those persons who had been on lists of German suspects handed over by the Allied Powers to the German authorities.

The prosecutor's office at the *Reichsgericht* in Leipzig requested suspensions or *nolle prosequi* decisions of many proceedings relating to suspected war criminals. However, the pace of such suspensions varied. In the first three years following the adoption of the law for the prosecution of war crimes and war felonies,[57] the prosecutor's office only suspended 12 criminal proceedings.[58] In mid-September 1922 Ludwig Ebermayer, the senior prosecutor at the *Reichsgericht*, suggested that if suspension of criminal proceedings against war criminals would be possible without causing too much attention, then the files should be submitted to the *Reichsgericht* which would then decide. Forwarding such files should not be done in great numbers all at once, but should be done gradually, because the German Minister of Justice wanted to avoid the appearance of a campaign of *nolle prosequi* decisions that could spark negativity from a foreign policy point of view.[59] Within the next four months, until 30 January 1923, the number of suspensions increased significantly to 210 cases.[60] Thereafter until 26 April 1923, an average of two and a half proceedings were suspended daily, followed by a further increase of suspensions of an additional 122 cases between April and July 1923.[61] Again, between July and October 1923, the number of suspended proceedings increased to 127 cases.[62]

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[57] German *Reichstag, Gesetz zur Verfolgung von Kriegsverbrechen und Kriegsvergehen* (Law to prosecute war crimes and war misdemeanour), German Parliamentary gazette (*Reichsgesetzblatt*) 1919, 18 December 1919; published in RGBl. 1919, ("Law to prosecute war crimes"), pp. 2125–26.

[58] BA Berlin Lichterfelde, R 3001 RMJ 7689, pp. 239–40: ORA Gen. I 30-80 from 25 October 1922 to Reichsministry of Justice.

[59] PA AA R 48415j: Note relating to F 6376u; V F 6485 from 18 September 1922 (von Levinski) relating to consultation on 15 September 1922 in the Ministry of Justice Germany.

[60] BA Berlin Lichterfelde, R 3001 RMJ 7689, p. 7: ORA Gen. I 30-86 from 30 January 1923 to Reich Ministry of Justice.

[61] BA Berlin Lichterfelde, R 3001 RMJ 7689, p. 35: ORA Gen. I 30-100 from 27 July 1923.

[62] BA Berlin Lichterfelde, R 3001 RMJ 7689, p. 41: ORA Gen. I 30-108 from 20 October 1923.

The *nolle prosequi* decisions included also high profile personalities. On 7 June 1923 the *Reichsgericht* suspended the criminal proceeding against Crown Prince Eitel Friedrich of Prussia who had fled with his father, the former Emperor Wilhelm II, to the Netherlands.[63] Independently of these suspensions by the German authorities, the new French Prime Minister, Raymond Poincaré, requested until 1924 the surrender of the prince as a war criminal, but this proved unsuccessful because the British Cabinet refused[64] to support this French initiative. Finally, France gave up on their demand regarding the prince who remained in the Netherlands without ever standing trial for war crimes.[65]

In early 1925, the Fourth Senate of the *Reichsgericht* suspended and thereby terminated criminal proceedings against Ludendorff, who had been on the initial Allied list handed over to the Germans in February 1920.[66] In May 1925 the same Senate terminated the proceedings against Hindenburg, whose name had also been on the same list.[67]

Not only the German, but also the judicial authorities in Belgium and France suspended criminal proceedings against German war criminals. For example, after Hindenburg had been elected as Reich President, the Belgian authorities also suspended criminal proceedings against him.[68] Also the French authorities suspended their own prosecutions against notable public figures, such as Hindenburg, Crown Prince Rupprecht of Bavaria and General Erich Ludendorff, to avoid unwanted reactions from Germany.[69]

63 PA AA R 484727m: Decision of the Reichsgericht b J 507-20/II 67-25 from 7 June 1923.

64 Cabinet meeting, No. 55(23), 14 November 1923, CAB 23/46 (TNA).

65 Willis, 1982, p. 143, see *supra* note 51.

66 PA AA – R 48427n, reprint b J 540/1920 – X 24/25.

67 Decision of the Fourth Senate in Criminal Matters, Reichsgericht, 9 April 1925, PA AA R 48430u: reprint b J 539/1920 – X.128/25.

68 MAE Paris, vol. 585, p. 166, note of M. Corbin dated 29 April 1925 C/42.

69 Poincaré to Ministry of War, No. 1578, 20 July 1922, La Série Europe, 1918–1929, Allemagne, vol. 579, "Sanctions aux violations du droit des gens: Punition des coupables, 1–13 juillet 1922", MAE; Ministry of War to Poincaré, 25 August 1922, La Série Europe, 1918–1929, Allemagne, vol. 580, "Sanctions aux violations du droit des gens: Punition des coupables, 1 août-31 décembre 1922," MAE.

11.2.3. Amnesty

On 20 March 1931, based on the German amnesty law,[70] the Fourth Senate of the *Reichsgericht* decided to suspend the criminal proceedings relating to war crimes against the absconded Patzig.[71] Thereby the only remaining accused of the *Llandovery Castle* case[72] no longer had to face penal sanctions.

11.3. Could the War Crimes Proceedings Initiated in Leipzig Have Any Deterrent Effect?

Since a great number of proceedings against war crimes suspects were terminated by way of suspensions and the remaining 12 criminal trials resulted in acquittals or sentences by the *Reichsgericht* which were perceived to be lenient, the question arises whether these war crimes proceedings could have any deterrent effect.

Deterrence is an "act or process of discouraging certain behavior, particularly by fear; especially as a goal of criminal law, the prevention of criminal behavior by fear of punishment".[73] Thus, the existence of prisons is a major deterrent to crime. As such the concept of deterrence has two key assumptions: that a prison sentence will prevent the convicted offender from committing further crime, and that the abstract fear of punishment will prevent *others* from committing similar crime. In essence, deterrence aims to reduce crime.[74]

Generally, it is hard to measure whether and which particular deterrent effect the prosecution of international crimes has on (potential) perpetrators. Scholars admit that at best there is only anecdotal data on the deterrent effect the prosecutions and judgments may have on criminals in

[70] RGBl. 1928 I, p. 195, Law about amnesty from 14 July 1928; RGBl 1930 I S.467: Law amending the Law about amnesty from 14 July 1928.

[71] PA AA R 48433o: Decision of the fourth senate of the Reichsgericht, b J 585/20-101//XII Tgb. 56/1931.

[72] *Llandovery Castle* case, see *supra* note 30; cf. *supra* section 11.2.1.

[73] Bryan A. Garner (ed.), *Black's Law Dictionary*, 9th ed., West, St Paul, 2009, p. 514.

[74] Compare David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed., Oxford University Press, Oxford, 2011, p. 39.

one conflict, let alone on other potential authors of international crimes in future conflicts.[75]

11.3.1. Trials in Leipzig

Against a deterrent effect the Leipzig War Crimes Trials may have had on the German population, or at least on the members of the German Army and Navy, is the fact that the prosecutor's office at the *Reichsgericht* suspended many criminal proceedings even before they could reach the stage of issuance of arrest warrants against suspects, or of confirming an indictment against alleged suspects of violations of war crimes. Furthermore, the 12 proceedings that were finally litigated in front of the *Reichsgericht* resulted in six acquittals[76] and the sentences of the 10 convictions were low, none exceeding five years.[77]

On the other hand, the Leipzig War Crimes Trials had extensive press coverage, not only in Germany but also abroad, because journalists from several nations attended the proceedings and Belgium, France, the Netherlands and Britain sent observers, who then produced reports about the outcome of these proceedings.[78] Ernest Pollock, the British Solicitor General, predicted the Leipzig War Crimes Trials would have "a wide reaching and permanent effect" in Germany.[79]

That Dithmar and Boldt, the two navy officers sentenced to four years each in the *Llandovery Castle* case, absconded[80] during the first part

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[75] M. Cherif Bassiouni, "Reflections on Contemporary Developments in International Criminal Justice", in Bartram S. Brown (ed.), *Research Handbook on International Criminal Law*, Edward Elgar, Northampton, MA, 2011, pp. 414–15; compare also Dawn L. Rothe and Isabel Schoultz, "International Criminal Justice: Law, Courts and Punishment as Deterrent Mechanisms?", in Willem de Lint, Marinella Marmo and Nerida Chazal (eds.), *Criminal Justice in International Society*, Routledge, New York, 2014, pp. 155–63.

[76] See the penultimate column of Table 1.

[77] *Ibid*., last column.

[78] UK Report, see *supra* note 10, pp. 3–18; van Slooten, 1921, see *supra* note 1; Mullins, 1921, see *supra* note 1; Edouard Clunet, "Les Criminels de guerre devant le Reichsgericht à Leipzig", in *Journal du Droit International*, 1921, vol. 48, pp. 440–47; British Parliamentary Command Paper, "Judicial Decisions Involving Questions of International Law – German War Trials", reprinted in *American Journal of International Law*, 1920, vol. 16, pp. 674–724.

[79] Pollock, 1921, see *supra* note 1.

[80] *S*ee text preceding fn. 45.

of their prison sentences does not militate against the deterrent effect this criminal proceeding had on both men and on the Germany navy. Members of the German navy argued repeatedly against the judgment rendered by the Second Senate in July 1921.[81] These concerns suggest that the German Navy and Army took the pronouncements of the *Reichsgericht* in criminal matters seriously. Furthermore, until the Fourth Senate finally quashed the judgment in the *Llandovery Castle* case, Dithmar and Boldt had to live a life in hiding.

Whether the proceedings against Patzig, the third accused in the *Llandovery Castle* case,[82] had any deterrent effect on him is questionable. Patzig had absconded before the trial against Dithmar, Boldt and himself could begin. Since German criminal procedural law does not provide for a trial *in absentia*, the Second Senate could therefore not convict him. However, the judges made at least certain *obiter dictum* findings regarding Patzig in the judgment convicting Dithmar and Boldt for the same transaction. Hence, Patzig continued his flight from the German judicial organs. Only after the Fourth Senate suspended his case based on the amendment to the German amnesty law[83] did the inherent threat to resume judicial proceedings against him stop. When the Second World War broke out, Patzig reported to the German navy command and served again from 1940 as commander of a German submarine.[84] It is not known whether Patzig again engaged in war crimes. However, though the Allied Powers instituted judicial proceedings against many members of the German navy after 1945, they did *not* institute proceedings against Patzig for any war crime committed during the Second World War.

11.3.2. *In Absentia* Trials in France and Belgium

To assess whether war crimes trials after the First World War had any deterrent effect, the Leipzig War Crimes Trials have to be seen in the wider context of (criminal) proceedings instituted by other nations against

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81 Andreas Michelsen (ed.), *Das Urteil im Leipziger Uboots-Prozess ein Fehlspruch? Juristische und militärische Gutachten*, Staatspolitischer Verlag, Berlin, 1922; compare Wiggenhorn, 2005, pp. 372–78, see *supra* note 45.

82 *Llandovery Castle* case, see *supra* note 30.

83 PA AA R48433o, Decision a J 95/21-183/XI. 183, pursuant to §§ 359 Nr. 5, 360, paragraph 2, 366, 367 and 369 German Code of Criminal Procedure.

84 Rainer Busch and Hans Joachim Röll, *German U-Boat Commanders of World War II: A Biographical Dictionary*, Greenhill Books, London, 1999, p. 41.

German Army members, Navy members and senior civilian leaders. On 18 April 1922 Poincaré ordered the French Ministry of War and Justice to consider prosecuting some 2,000 Germans named in the initial French list, and not only the 334 suspects named in the list furnished to Germany on 3 February 1920.[85] On 23 August 1923, following the initiative of France, the Conference of Ambassadors declared to resume the rights granted by Articles 228 to 230 of the Treaty of Versailles, namely to prosecute war criminals by way of *in absentia* proceedings.[86] In order to not let impunity reign, the French and Belgian authorities conducted trials *in absentia* in Nancy, Lille, Châlons-sur-Marne and Belgian towns where they convicted many German authors of war crimes.[87]

In particular, in January 1919 the Belgian Ministry of Justice adopted a decree that provided for the arrest of suspects of war crimes in Belgium. Most ensuing trials related to mere property issues such as Germans purchasing requisitioned Belgian machinery, with only a few trials relating to war crimes.[88]

French law at that time provided for trials *in absentia* by Articles 145 to 170 of the *Code de Justice Militaire* and Articles 224, 465 to 478 of the *Code d'instruction criminelle*.[89] By December 1924, the Conseil de Guerre of the 1st, 6th and 20th Corps of the French Army had convicted

[85] Note for the President of the Council, 24 June 1922, La Série Europe 1918–1929, Allemagne, vol. 578, *Sanctions aux violations du droit des gens: Punition des coupables, 1 avril–30 juin 1922*; unsigned memorandum on prosecution of Germans, 20 December 1924, La Série Europe 1918–1929, Allemagne, vol. 584, *Sanctions aux violations du droit des gens: Punition des coupables, 1 décembre 1924–31 mars 1925*, MAE.

[86] Note issued by French Prime Minister Poincaré on 23 August 1922, Conference of Ambassadors, sent to Dr. Mayer, paragraph 8 (MAE Paris 580, pp. 35–37: Conférence des Ambassadeurs, Le Président) PA AA R 48415j: telegram Paris Pax of 23 August 1922, note of Conference of Ambassadors, re question of war suspects; BA Berlin Lichterfelde R3003 ORA Gen. 47, pp. 71–76: note of the conference of ambassadors; Conference of Ambassadors to German Embassy in Paris, 23 August 1922, FO 371/7529 (C16860/555/18), Confidential Print 11990; compare Woods to Foreign Office, 16 August 1922, FO 371/7529 (C11741/555/18).

[87] Willis, 1982, p. 142, see *supra* note 51; Jody M. Prescott, "In Absentia War Crime Trials: A Just Means to Enforce International Human Rights?", Thesis, Judge Advocate General's School, United States Army, 4 April 1994, pp. 34–36.

[88] Larry Zuckermann, *The Rape of Belgium: The Untold Story of World War I*, New York University Press, New York, 2004, p. 257.

[89] MAE Paris: 583, p. 57: Ministère de Guerre à Président du Conseil/MAE, No. 1192 from 18 July 1922.

between 941 and 1,200 Germans *in absentia*.[90] For example the Conseil de Guerre of the 20th Corps convicted the General Adolf von Oven and Major Richard von Keiser *in absentia* and imposed the death penalty.[91] Germans who were convicted *in absentia* in France were arrested when they entered French territory. In particular, in November 1924 the German General Wilhelm von Nathusius was arrested in Alsace by the French authorities and was convicted in the course of a retrial in Lille to serve a one-year prison sentence in France for pillaging cloth and a table service.[92] Following a diplomatic intervention by the German authorities, who promised to release a French citizen in return, the French Prime Minister Édouard Herriot pardoned von Nathusius after he had served one month of his sentence in a French prison.[93] Furthermore, Herriot instituted several measures regarding Germans who had been convicted *in absentia* by French courts: secretly he ordered French customs officials and the police to no longer arrest Germans convicted in France for war crimes, but to return them 'discreetly' to German territory. Generally, the French authorities no longer issued this category of Germans any visa to re-enter France.[94]

In mid-October 1925 the French Foreign Minister Briand and his Belgian counterpart agreed in principle to stop *in absentia* trials against Germans for war crimes.[95] By early November 1925 the Belgian government stopped its authorities, having conducted some 80[96] war crimes

[90] The numbers vary between 941 and 1,200: MAE Paris 584, pp. 71 ff., note of 20 December 1924; Wiggenhorn, 2005, p. 366, see *supra* note 45; Zuckermann, 2004, p. 260, see *supra* note 88; Poincaré to Ministry of Justice, No. 148, 24 March 1924, La Série Europe 1918–1929, Allemagne, vol. 577, *Sanctions aux violations du droit des gens: Punition des coupables, 1 janvier–31 mars 1922* MAE; Ministry of War to Poincaré, No. 1386, 9 October 1924, La Série Europe 1918-1929, Allemagne, vol. 578, *Sanctions aux violations du droit des gens: Punition des coupables, 1 avril–30 Novembre 1924*, Willis, 1982, p. 142, see *supra* note 51, particularly text surrounding fn. 106.

[91] Both suspects had also been on the French list of 45 persons submitted to Germany. Wiggenhorn, 2005, p. 360, see *supra* note 45.

[92] Conseil de Guerre permanent de la 1ère region séant à Lille, Jugement par defaut, Nr. 616 du Jugement Art. 140 du code de justice militaire; Willis, 1982, p. 144, see *supra* note 51.

[93] Wiggenhorn, 2005, p. 368, see *supra* note 45, referring to PA AA R 48433d: AA e.o. VF 1751 from 4 December 1924: note regarding the pardoning of General von Nathasius.

[94] Willis, 1982, p. 144, see *supra* note 51; Zuckermann, 2004, p. 260, see *supra* note 88.

[95] Wiggenhorn, 2005, pp. 367–68, see *supra* note 45.

[96] Peter W. Guenther, *A History of Articles 227, 228, 229 and 230 of the Treaty in Versailles*, M.A. Thesis, University of Texas, Austin, 1960, p. 180, referring to George Callier,

trials *in absentia* against Germans, from pursuing further proceedings.[97] In early 1926 Briand gained support from other French politicians to 'quietly' let war crimes trials *in absentia* slide as opposed to officially stopping them, a move which did not affect the policy of denying entry visas to Germans convicted *in absentia*.[98] This visa policy was only abandoned in October 1929 when the French authorities replaced it with the policy that Germans convicted as a result of *in absentia* proceedings could enter French territory, but were put under police surveillance during their stay.[99]

11.3.3. Conclusion on Deterrent Effect

In hindsight, a comparison of the French and the German approaches to war crimes' suspects reveals that the German authorities suspended too many criminal investigations. Also, the *Reichsgericht*, by imposing lenient penalties and by silently quashing the judgment convicting Boldt and Dithmar,[100] did not rigorously ensure the deterrent effect of their judgments. Nevertheless, when the efforts of the *Reichsgericht*, the Belgian and French authorities against suspected war criminals are combined, and when one considers the coverage these proceedings had in academic circles as well as in the media of Germany and the Allied states, the deterrent effect these judicial proceedings had on Germans who committed war crimes on French or Belgium territory, and on those who committed crimes during naval warfare,[101] becomes more apparent.

Minister of Belgium in Washington D.C. to Peter Guenther, 26 January 1959; Zuckermann, 2004, p. 261, see *supra* note 88.

97 MAE Brussels 324 VIII: communiqué, Brussels 7 November 1925; compare PA AA R 28596, p. 430: AA VF 2013 from 21 November 1925 to German Embassy Paris; p. 433: German embassy Paris to foreign office Germany, nr. 884, from 23 November 1925; Friedrich von Keller to Foreign Ministry of Germany, No. 177, 29 October 1925, AA (T-120/1567/D685128); MAE Brussels 324 IX: MAE Direction P/B No. 560; Wiggenhorn, 2005, p. 368, quotes passages of this letter, see *supra* note 45.

98 Willis, 1982, p. 145, see *supra* note 51.

99 *Ibid*., referring in note 126 to Briand to the French Minister of Interior, No. BC/19, 28-Oct-1929 and a Memorandum of a conversation between German Ambassador and Philippe Berthelot, 13 November 1929.

100 See *supra* note 48.

101 Compare Wiggenhorn, 2005, pp. 372–78, see *supra* note 45.

11.4. Hardly Any German Senior Leader Had to Stand Trial in Leipzig

No senior civilian and no member of the German Supreme Command of the Army or of the Admiralty had to stand trial in front of the *Reichsgericht*.

11.4.1. The German Emperor, Wilhelm II

Article 227 of the Treaty of Versailles provided that the German Emperor Wilhelm II of Hohenzollern, should be "publicly arraigned" in front of an international tribunal for a "supreme offence against international morality and the sanctity of treaties". Regarding the nature of this "supreme offence" the Allied Powers clarified:

> *Enfin, ells entendent indiquer clairement que la mise en accusation publique décrétèe contre l'ex Empereur allemande aux termes de l'article 227 n'aura pas le caractère juridique quant au fond, mais seulement quant à la forme. Cette mise en Accusation est une question de haute politique international, le minimum que l'on puisse exiger pour le plus grand des crimes contre la morale international, le caractère sacré de Traités et les règles essentielles de la justice. Les Puissanxes allies et associés ont voulu des forms et une procedure judiciaires ainsi qu'un tribunal régulierement constitué afin d'assur l'accusé, pour sa défense, la plaine jouissance de ses droits et de ses libertés et d'entourer le jugement du maximum de solennité possible.*[102]

Thus, the Allied Powers intended to put the Emperor on trial as an act of high policy, presented in the form of judicial proceedings. However, the United States and Japan objected to this approach.[103] The US made a formal reservation against an option to subject "to criminal and therefore to legal prosecution, persons accused of offences against the 'laws of humanity' and in so far as it subjects chiefs of states to a degree of responsibility hitherto unknown to municipal or international law, for

[102] Report of the Allied Powers accompanying the ultimatum of 16 June 1919, reprinted in Kraus-Rödiger, *Urkunden zum Friedensvertrag von Versailles vom 28. Juni 1919*, 1920–1921, vol. I, p. 622.

[103] M. Cherif Bassiouni, *Introduction to International Criminal Law*, 2003, Transnational Publishers, Ardsley, p. 398.

which no precedents are to be found in the modern practice of nations".[104] Also, the Japanese delegates objected that charges could be brought against "heads of state".[105]

Trying a head of state for having violated norms of international criminal law during the First World War would have been a novelty that would have faced legal complexities. Until the Treaty of Versailles, heads of state were granted immunity from criminal prosecutions.[106] At the beginning of the First World War, a prohibition on going to war did not exist. In 1912, two years before war broke out, Lassa Oppenheim stated that international law "at present cannot and does not object to States which are in conflict waging war upon each other instead of peaceably settling their differences".[107] The prohibition to go to war did not exist until the Kellogg-Briand Pact was codified in 1928 and subsequently ratified.[108] Thus, creating this "supreme offence against international morality and the sanctity of treaties" after the First World War via a peace treaty and attempting to set the Emperor up for a criminal trial was a "hazardous adventure".[109]

A different situation existed regarding the Emperor's responsibility for violations of the *jus in bello*, meaning his responsibility for war crimes. Since the Emperor had fled to the Netherlands and German law did not provide for proceedings *in absentia*, trying the Emperor on German territory for violations of *jus in bello* was not possible. However, the Emperor could have changed his mind during his exile and may one day have chosen to return to Germany. To adequately react to this

[104] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference" ("Commission Report"), 29 March 1919, reprinted in *American Journal of International Law*, 1920, vol. 14, Annex II, USA, *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, p. 135.

[105] *Ibid*., Annex III, Reservation by the Japanese Delegation, 4 April 1919, p. 152. The objection is directed at eliminating the phrase "including the heads of states" on p. 143 of the Commission Report.

[106] Christian Tomuschat, "The 1871 Peace Treaty between France and Germany and the 1919 Peace Treaty of Versailles", in Randall Lesaffer (ed.), *Peace Treaties and International Law in European History*, Cambridge University Press, Cambridge, 2008, pp. 393–94.

[107] Lassa Oppenheim, *International Law: A Treatise*, 2nd ed., Longmans, Green & Co., London, 1912, p. 60.

[108] Tomuschat, 2008, pp. 384, 395, see *supra* note 106.

[109] *Ibid*., p. 393.

situation it would have mattered that the German authorities would have scrutinised the Emperor's potential responsibility for war crimes in order to arrest him in case he would have returned to German territory. However, original German source material, documents from the Allied Powers and secondary academic literature reviewed by the author do not suggest that the *Reichsgericht* and its attached prosecutor's office attempted to investigate the Emperor for his responsibility for crimes committed during the First World War (*jus in bello*).

11.4.2. Other Senior Civilian Superiors and Senior Military Commanders

Though the first and second Allied lists[110] communicated to the Germans contained also senior political and military leaders[111] suspected of war crimes, the German prosecutor's office furnished no prosecutions of senior German leaders to the *Reichsgericht*. Neither a member of the German supreme command (whether from the military or the admiralty) nor of the senior civilian leadership was indicted by the prosecutor's office attached to the *Reichsgericht*.

11.4.2.1. Karl Stenger

This left Lieutenant General Karl Stenger, a mere brigade commander, whom the French had initially put forward on their list sent to the Germans, together with Benno Kruska as the second highest German to

[110] Friedrich Karl Kaul refers to lists from France, Britain, Italy, Poland, Rumania and Yugoslavia in *Die Verfolgung deutscher Kriegsverbrecher nach dem ersten Weltkrieg*, Zeitschrift für Geschichtswissenschaft, 1966, vol. 14, pp. 25–26.

[111] The initial Allied list communicated on 3 February 1920 to the German Baron von Lersner, the German delegate at the Peace Conference in Versailles and then to the German Government, contained 896 names of suspects. Among them were at least three German generals (Hindenburg, Ludendorff and von Mackensen), and a number of admirals including von Tirpitz as well as Crown Prince Rupprecht of Bavaria, the Duke of Württenberg, ex-chancellor Bethman Hollweg, the Imperial Crown Prince of Germany and Count Bismarck, grandson of the "Iron Chancellor". Compare Alexandre Mérignhac and E. Lémonon, *Le droit des gens et la guerre de 1914–1918*, Recueil Sirey, Paris, 1921, p. 593; Robert K. Woetzel, *The Nuremberg Trials in International Law*, Stevens & Sons, London, 1962, pp. 31–32; George A. Finch, "Editorial Comment: Retribution for War Crimes", in *American Journal of International Law*, 1943, vol. 37, p. 83, fn. 7.

stand trial in Leipzig.[112] The prosecutor alleged that in August 1914 Stenger misused his official position as brigade commander by instructing subordinates to commit crimes, namely to issue orders to kill wounded French soldiers or POWs. The prosecutor further alleged that one of the subordinates receiving this order was Major Benno Crusius who then, among other acts, misused his official position by instructing subordinates to directly implement the aforementioned order and thereby commit the killings.[113] As such, the case against Stenger and Crusius related to command responsibility for an order not to give pardon, meaning not to take any prisoners and to kill the wounded.

On 6 July 1921, after a six-day trial, the *Reichsgericht* acquitted Stenger because it considered the allegation that he had given an order not to give pardon as "refuted".[114] This was surprising because witnesses at trial made contradictory statements as to the existence or non-existence of such an order. The written reasons reflect the fact that the judges relied on denials by certain insider witnesses, officers of the immediate staff of Stenger, as to whether such an order was ever given. However, the judgment also acknowledged that two witnesses testified otherwise: the co-accused Crusius testified to have obtained an oral order not to give pardon and the witness Major Müller testified to have forwarded the order from Crusius to others.[115] The judgment of the *Reichsgericht* was silent as to why the judges favoured the denials of witnesses forming Stenger's inner circle over the different version advanced by Crusius and Müller. The latter mutually confirmed each other's version, but also explained why killings of French wounded soldiers and POWs had occurred. Faced with such contradictory versions, the judges should have discussed in

[112] The so-called French list of 45 contained Stenger, the commander of the 58th Brigade, and four other members of this brigade (Captain Crusius, Lieutenant Laule, Commander Müller and Captain Schröder) who were alleged to be involved in passing on or carrying out the order of Stenger not to give pardon to French prisoners (Kaul, 1966, pp. 25–26, see *supra* note 110). However, Schröder and Müller had been killed during the First World War (Wiggenhorn, 2005, pp. 214–15, see *supra* note 45).

[113] Stenger and Crusius, Judgment, reprinted in Weißbuch, see *supra* notes 10 and 22, containing the judgments pronounced due to the German Laws of 18 December 1919 and 24 March 1920, in Negotiations of the German *Reichstag*, I. election period, 1920, vol. 368, dossier number 2584, p. 2563 (2564); Feisenberger, 1921, col. 267, see *supra* note 25.

[114] Stenger and Crusius, Judgment, p. 2566, see *supra* notes 10 and 22.

[115] *Ibid.*

their written reasoning the probability of each version including the reliability of each witnesses supporting it. Instead, the judges simply asserted that the allegations regarding the existence of an order were "refuted" because it would have to be given in written form. This in itself is not convincing, even more so since a French witness from Alsace, where the crimes occurred, testified that a third officer, Captain Schröder, a subordinate of Major Müller, would have also announced the order.[116] Neither the written judgment nor its oral pronouncement in Leipzig mentioned this witness testimony at all,[117] though it contradicts a central finding of the court that no order was ever given by Stenger. Instead of labelling the alleged existence of an order of Stenger as "refuted",[118] the *Reichsgericht* should have discussed in more detail *all* contradictory evidence and assessed the reliability of evidence more carefully. And this should have included a detailed assessment of the credibility of all witnesses on this issue. Moreover, since at least three witnesses, two insiders and one French witness, testified as to the existence of an order not to give pardon, it would have at least been better to base an acquittal of Stenger only on the principle *in dubio pro reo*.

11.4.2.2. Hans von Schack and Benno Kruska

Kruska, a camp commander, was a Major General, the second highest German to stand trial in war crimes proceedings in Leipzig. His superior was von Schack, a Lieutenant General who was the highest commander to stand trial in front of the *Reichsgericht*. The French authorities alleged that both men had been negligent, had intentionally suppressed hygienic measures,[119] and were therefore responsible for the spreading of typhus in a camp in Kassel-Niederzwehren, which caused the deaths of up to 3,000 detained persons. Von Schack had issued an explicit order to Kruska to

[116] Witness Alfred Rubrecht (see stenograhic protocol of the Stenger and Crusius trial, printed in German Federal Archive Berlin-Lichterfelde, R 3003 ORA/RG b J 92/20, vol. 3 and Political Archive German Foreign Office, R 48436q, p. 230. However, this version appears to be contradicted by three witnesses who claimed that Captain Schröder was on holiday in the relevant period of time. Political Archive German Foreign Office, R 48436q, p. 235 (witness General Major Neubauer), p. 236 (witness Dr. Döhner) and p. 341 Senior Lieutenant Laule).

[117] Wiggenhorn, 2005, pp. 227–28, see *supra* note 45.

[118] Stenger and Crusius, Judgment, reprinted in Weißbuch, p. 2566, see *supra* notes 10 and 22.

[119] Von Schack and Kruska Judgment, p. 2574, see *supra* note 28.

mix detainees with Russians who had been infected with lice: "It appears quite harmless, if the French and Brits get from their fellow brothers lice" because it is "in our interest that the Allies mutually know and appreciate one another".[120] Due to the wording of this order Harald Wiggenhorn suggests that the lice plague was spread intentionally.[121] The *Reichsgericht* referred to an order from the German War Ministry from 18 October 1914 in which the wish was expressed to mix the nationalities among the detainees.[122] Throughout the judgment it was pointed out which measures Kruska tried to implement (disinfection, isolation of the affected detainees and destruction of infected mattresses).[123] The judgment omitted a critical report that alleged negligence in combatting this plague on the part of Kruska, and mentioned that countermeasures had been implemented too late.[124] Otherwise the judgment was full of positive assessments of Kruska's personality and was generally critical of those witnesses who produced incriminating evidence.[125] The *Reichsgericht* acquitted both Kruska and von Schack. Seeing in which direction the judges were heading, the French observer delegation departed Leipzig before the judgment was officially pronounced.[126] The French would not return to observe further war crimes proceedings in Leipzig.

[120] Command of garrison Kassel to Command detention camp, diary Nr. 2642, dated 29 October 1914 (BA Berlin-Lichterfelde R 3003 ORA/RG b J 296/20, vol. 1 p. 63) (my translation).

[121] Wiggenhorn, 2005, p. 240, see *supra* note 45.

[122] Von Schack and Kruska Judgment, p. 2577, see *supra* note 28.

[123] These measures were implemented in consultation with the medical staff of the camp. At the same time the judges acknowledged that these measures were "insufficient and could not realize its objective because they could not reach the causative agent of the typhus fever, the louse", *ibid.*, pp. 2576, 2578 (my translation).

[124] Inspection of the Detention Camp, XI. Army Corps, T.B. Nr. 54, Kassel 4 May; see also p. 4: General Major von Tettau, 9 Aug 1919 to Generalstaff, XI. Corps (BA Berlin-Lichterfelde R3003 ORA/RG b J 296/20, vol. 4, pp. 13 *et seq*); Door Heather Jones pointed out that key evidence was ignored by the court. See *Violence Against Prisoners of War in the First World War: Britain, France and Germany – 1914–1920*, Cambridge University Press, Cambridge, 2011, pp. 108–9.

[125] Von Schack and Kruska Judgment, 1921, pp. 2574–79, see *supra* note 28.

[126] Wiggenhorn, 2005, pp. 243–44, see *supra* note 45.

11.5. The Leipzig War Crimes Trials Against the Background of the Criminalisation of Violations of International Humanitarian Law

The Leipzig War Crimes Trials have to be seen in the context of the international humanitarian law existing during the First World War and its subsequent evolution. Prior to 1921 and 1922, when these trials were conducted, several international treaties prohibiting certain methods of warfare on land and on sea had been signed and ratified by up to 37 nations. States agreed in The Hague to three instruments of international humanitarian law: 1) the Convention concerning Bombardment by Naval Forces in Time of War ('1907 Hague Naval Convention'); 2) the Convention respecting the Laws and Customs of War on Land ('1907 Hague Land Convention') which contained in its Annex; 3) the Regulations concerning the Laws and Customs of War on Land ('1907 Hague Regulations') of 18 October 1907.[127] On that day, Germany had signed all three instruments and ratified them on 27 November 1909 with one reservation.[128]

The 1907 Hague Regulations prohibited certain means of warfare on land,[129] while the 1907 Hague Naval Convention prohibited certain conduct at sea.[130] However, a mere prohibition of certain conduct may stop short of criminalising this act or omission. For instance, a certain conduct may be prohibited by certain international norms, but their violation does not automatically amount to a commission of an international crime, because a crime under international law is *only* given if three distinct requirements are met:

a) A prohibition forms part of international law (either conventional or customary international law);[131]

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[127] Thirty-six states ratified the 1907 Hague Naval Convention (http://www.legal-tools.org/doc/5d3857/); 37 states ratified the 1907 Hague Land Convention and its annexed 1907 The Hague Regulations (http://www.legal-tools.org/doc/fa0161/).

[128] Compare James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907*, Oxford University Press, New York, 1915, pp. 132, 162. The reservation related to Article 44 of the annexed 1907 The Hague Regulations and to Article 1(2) of the 1907 Hague Naval Convention, see *supra* note 127.

[129] See Articles 23, 25, 28, 44, 45, 47 and 50, *supra* note 127.

[130] See Articles 1, 4 and 7, *supra* note 127.

[131] Compare Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2008, p. 11, no. 1; Kai Ambos, "Judicial Creativity at the Special Tribunal for

b) The breach of this prohibition is serious, because it affects certain universal values;[132] and
c) The breach entails individual criminal responsibility [133] and is punishable regardless of its incorporation into domestic law.[134]

The two 1907 Hague Conventions and the 1907 Hague Regulations contained prohibitions[135] that protected universal values such as life and well-being. However, whether the 1907 Hague Conventions and Regulations also satisfied the third requirement to provide for individual responsibility is questionable.

A textbook example of an international provision providing for individual criminal responsibility of the violator is Article 1 of the Genocide Convention which states: "The Contracting Parties confirm that genocide […] is a crime under international law which they undertake to

Lebanon: Is There a Crime of Terrorism under International Law?", in *Leiden Journal of International Law*, 2011, vol. 24, no. 1, p. 16.

[132] Cassese, 2008, p. 11, no. 2, see *supra* note 131; Bassiouni, 2003, p. 114, no. 1, see *supra* note 103; Ambos, 2011, p. 16, no. 1, see *supra* note 131; Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, New York, 2008, pp. 3–4; Bruce Broomhall, *International Justice and the International Criminal Court: Between State Sovereignty and the Rule of Law*, Oxford University Press, Oxford, 2003, pp. 44–51; Gerhard Werle, *Principles of International Criminal Law*, 2nd ed., T.M.C. Asser Press, The Hague, 2009, para. 95.

[133] ICTY, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-I-T ("Tadić case"), 2 October 1995, para. 94, in section (IV) ("Tadić Jurisdiction Decision") (http://www.legal-tools.org/doc/866e17/); Special Tribunal for Lebanon, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/I, 16 February 2011, paragraph 103, ("STL Interlocutory Decision") (http://www.legal-tools.org/doc/4c16e9); Cassese, 2008, pp. 33–34, see *supra* note 131; Hans Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht: eine Studie zu den Nu□rnberger Prozessen*, Lothar Ro□hrscheid, Bonn, 1952, p. 374; Claus Kress, "International Criminal Law", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, paras. 10–11; Ambos, 2011, p. 16, no. 3, see *supra* note 131; Michael Cottier, "Article 8 ICC Statute", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, 2nd ed., C.H. Beck, Hart Publishing and Nomos, Munich, 2008, para. 1; Werle, 2009, para. 84, see *supra* note 132.

[134] Ambos, 2011, p. 16, no. 3, see *supra* note 131; Paolo Gaeta, "International Criminalization of Prohibited Conduct", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, 2009, Oxford University Press, Oxford, pp. 69–70; Werle, 2009, para. 84, see *supra* note 132.

[135] See *supra* notes 129–30.

prevent and to punish".[136] The language of the 1907 Hague Conventions and Regulations is not that clear-cut. The Preamble to the 1907 Hague Land Convention talks about "High Contracting Parties" meaning the states themselves as opposed to individuals. Article 3 then continues that a "belligerent party which violates the provisions of the said [1907 Hague] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces". This indicates that the focus of the 1907 Hague Land Convention and its attached Regulations were the obligations of States to pay *compensation* for violations of their armed forces,[137] as opposed to the individual criminal liability of individuals for their own conduct. On the other hand, Article 3 of the Hague Land Convention does also not exclude individual personal responsibility, but acknowledges it only vis-à-vis the perpetrators own state.[138]

The closest provisions of the 1907 Hague Regulations come to introducing individual (criminal) responsibility are Articles 41 and 56(2). The former reads: a "violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained". This provision does not explicitly clarify which authority has the right to sanction, but the context suggests that it is at least the State whose citizens had violated the armistice. Article 56(2) of the 1907 Hague Regulations prohibits seizure, damage and destruction to religious, charity or educational institutions, and directs that such acts "should be made subject of legal proceedings".[139] By contrast, all other prohibitions contained in the 1907 Hague Regulations[140] do *not* contain similar language suggesting punishments, whether by the State whose citizens had carried out the violations, or by the affected state.

The 1907 Hague Naval Convention, which also contains similar prohibitions, clarifies in Article 8 that its provisions "do not apply except

[136] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 (http://www.legal-tools.org/doc/498c38/).

[137] Bassiouni, 2003, p. 92, see *supra* note 103; Cottier, 2008, para. 3, see *supra* note 133.

[138] Jescheck, 1952, pp. 37–38, see *supra* note 133.

[139] See *supra* note 127.

[140] See Articles 23, 25, 28, 44, 45, 47 and 50, see *supra* note 127.

between Contracting Powers", meaning the states themselves as opposed to individuals.[141]

Cherif Bassiouni proposes ten penal characteristics which, if found, would be sufficient to characterise the conduct prohibited by a convention as an international crime.[142] However, having developed these criteria he acknowledged that the 1907 Hague Conventions and Regulations had at best only "limited penal relevance".[143] In conclusion, except for the limited situations provided for in Articles 41 and 56(2) of the 1907 Hague Regulations, all 1907 Hague Conventions and Regulations *only* dealt with obligations of states and did not provide for individual responsibility, let alone for individual criminal responsibility.[144] The only other exception is Article 28 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field ('1906 Geneva Convention').[145]

However, following the 1907 adoption of these Hague Conventions and Regulations and the 1906 Geneva Convention, consideration may be given as to whether the individual (criminal) responsibility of individuals violating these codified prohibitions may have acquired the status of customary international law. This would require that: 1) an *opinio juris*; and 2) a practice to attach individual criminal responsibility to the prohibitions existed.

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[141] See *supra* note 127.

[142] Bassiouni, 2003, p. 115, see *supra* note 103.

[143] *Ibid*., p. 137.

[144] Cottier, 2008, Article 8, para. 1, see *supra* note 133. Compare Tomuschat, 2008, p. 394: "During the relevant period from 1914 to 1918, no international penal law had existed. To be sure, Germany had violated Belgium's neutrality, but its military operations on Belgium territory amounted to nothing more – but also nothing less – than a breach of international law for which Germany was responsible as a collective entity. Individual criminal responsibility is a different matter altogether", see *supra* note 106. Also compare Dirk von Selle, "Prolog zu Nürnberg – Die Leipziger Kriegsverbrecherprozesse vor dem Reichsgericht", *Zeitschrift für neuere Rechtsgeschichte*, 1997, p. 205, fn. 83.

[145] Article 28 (1) of the 1906 Geneva Convention states: "In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention". The 1906 Geneva Convention was adopted in Geneva on 6 July 1906 (http://www.legal-tools.org/doc/90dd83/).

Two international criminal tribunals accepted this two-prong test: the International Criminal Tribunal for the former Yugoslavia ('ICTY') Appeals Chamber required in the Duško Tadić case:

> The following requirements must be met for an offence to be subject to prosecution […] (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[146]

Also, the Special Tribunal for Lebanon ruled,

> to give rise to individual criminal liability at the international level it is necessary for a violation of the *international rule to entail the individual criminal responsibility of the person* breaching the rule. The criteria for determining this issue were again suggested by the ICTY in that seminal decision: the intention to criminalise the prohibition must be evidenced by statements of government officials and international organisations, as well as by punishment for such violations by national courts. Perusal of these elements in practice will establish whether States intend to criminalise breaches of the international rule.[147]

We will now explore whether customary international law existed during the First World War to attach individual criminal responsibility to the prohibitions of international humanitarian law.

11.5.1. *Opinio Juris*

During the First World War governments and academics voiced their opinion to hold perpetrators accountable. For example, in France, the law professors Louis Renault and René Garraud, as well as the practitioners Juda Tchernoff, an advocate, and Jacques Dumas, deputy prosecutor in Versailles, argued that French courts could adjudicate violations of the laws and customs of war committed by foreign troops on French territory.[148] At the same time, no debate occurred in the German Reich as

[146] Tadić Jurisdiction Decision, para. 94, section IV, see *supra* note 133.

[147] STL Interlocutory Decision, para. 103, see *supra* note 133 (emphasis added).

[148] Louis Renault, "Dans quelle mesure le droit pénal peut-il s'appliquer à des faits de guerre contraires au droit des gens?", in *Revue pénitentaire et de droit pénal*, 1915, vol. 39, pp. 423–24, 475–77; René Garraud, "L'application du droit pénal aux faits de guerre", in *Revue Pénitentaire et de Droit Pénal*, 1916, vol. 40, pp. 20–32; Juda Tchernoff, "Les sanctions pénales des abus de la Guerre", in *Revue politique et parlementaire*, 1915, vol. 84, pp. 59–60; Jaques Dumas and Andre Weiss, *Les sanctions pénales des crimes*

to whether to punish senior civilian or military leaders from enemy states.[149] Rather, the debate in Germany focused on whether it would be possible to try ordinary soldiers of enemy states. Initially, the notion was advanced that an enemy soldier could only be tried for crimes *after* his arrest, but not for violations of international humanitarian law before his captivity.[150] However, when French military courts began convicting German soldiers, a German court martial in the field responded by confirming their competence also for crimes committed by enemy soldiers *before* their captivity.[151]

In 1915, neither the British First Lord of the Admiralty, Winston Churchill, nor Prime Minister H.H. Asquith wanted to exclude the possibility that German submarine naval staff arrested by the British forces could face criminal proceedings at the end of the war.[152] Asquith told the British House of Commons that careful records were taken by the British government so that "when the proper hour comes the technical difficulties be as few as possible and the means of convicting and punishing the offenders, whatever the appropriate mode of punishment may turn out to be, may be put in force".[153] Even British academics had mixed reactions to this proposition.[154] For his part, the British elder statesman Sir Arthur Balfour warned that violations of international law

Allemands, Librairie Arthur Rouasseau, Paris, 1916, pp. 7–38; compare Jescheck, 1952, pp. 42–46, see *supra* note 133.

149 Jescheck, 1952, p. 49, see *supra* note 133.

150 German Military Court of the Reich (Reichsmilitärgericht), *Deutsche Juristen Zeitung*, Berlin and Leipzig, 1915, col. 129; Willis, 1982, p. 14, see *supra* note 51.

151 Alfred Verdroß, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten*, H.R. Engelmann, Berlin, 1920, p. 18.

152 Willis, 1982, p. 17, text preceding fn. 59, see *supra* note 51; Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte (1872–1945)*, Ferdinand Schöningh, Paderborn, 2010, pp. 178–79; Bass, 2000, pp. 61–62, see *supra* note 6.

153 House of Commons, United Kingdom, *Parliamentary Debates*, vol. 71, 1915, pp. 651–64, cols. 1201–8.

154 Segesser, 2010, p. 178, see *supra* note 152, referring to Graham Bower, "The Laws of War: Prisoners of War and Reprisals", in *Transaction of the Grotius Society*, 1916, vol. 1, pp. 23–37; Thomas Erskine Holland, *Letters to 'The Times' upon War and Neutrality (1881–1920)*, Longmans, Green and Co., London, 1921, pp. 70–72; Hugh H. Bellot, "War Crimes and War Criminals", in *Canadian Law Times*, 1916, vol. 36, p. 765; Sir Herbert Stephen, Letters, *The Times*, 11 March 1915, p. 9, 19 March 1915, p. 10; Sir Harry Poland, Letter, *The Times*, London, 17 March 1915, p. 9.

would not be dealt with "in isolation, and that the general question of personal responsibility shall be reserved until the end of the war".[155] In hindsight, the British call for justice for German war criminals developed as follows: Churchill, who had contested the POW status of detained German navy members in order to hold them accountable for war crimes, was removed from office. In order to protect British POWs in German hands, the government had to mute its own demands for trials on war crimes charges.[156] Even weeks before the conclusion of the war, the British Cabinet was cautious regarding war crimes trials:

> It was suggested that we might make it a condition of the peace that those individuals who had been responsible for the ill-treatment of our prisoners should be tried by a court of law. It was pointed out, however, that it would be very difficult to fix responsibility. In addition, no nation, unless it was beaten to dust, would accept such terms. If England had been beaten in this war, we should never agree to our officers being tried by German tribunals.[157]

In the US at the beginning of the war, President Woodrow Wilson was more concerned with keeping American neutrality than with remanding German leaders with criminal responsibility for their deeds. Despite Republican outrage over German atrocities in their use of poison gas, and regardless of criticism from Henry Stimson or Theodore Roosevelt, Wilson emphasised American neutrality. This meant that the US had no obligations unless its own citizens were affected by German actions.[158] Only after German or Austrian submarines sank the *Lusitania*, the *Ancona* and the *Sussex*, killing American citizens each time, did Wilson begin to criticise submarine warfare. However, the main American politicians said little, if anything, about war crimes trials.[159] Bass observes: "Despite America's occasional rumbles about war crimes trials the Wilson administration did not associate itself with the war crimes provisions of the Treaty of Versailles".[160]

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[155] House of Commons, United Kingdom, *Parliamentary Debates*, vol. 72, 1915, pp. 267– 68.

[156] Bass, 2000, pp. 61 ff., see *supra* note 6.

[157] CAB 23/8, War Cabinet 484 and Imperial War Cabinet 35, 11 October 1918, 16 hours (TNA)

[158] Bass, 2000, p. 94, see *supra* note 6.

[159] *Ibid*., pp. 95–99.

[160] *Ibid*., p. 100.

The Allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties not only created a list of 32 possible charges but also dealt in a special chapter entitled "Personal Responsibility" with issues of command responsibility, the non-immunity of a sovereign, and the responsibility of the German Emperor.[161] The US made a formal reservation against an option to subject

> to criminal and therefore to legal prosecution, persons accused of offences against the 'laws of humanity' and in so far it subjects chiefs of states to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations.[162]

Furthermore the American representatives argued that

> nations should use the machinery at hand, which had been tried and found competent, with a law and 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.[163]

In essence, the US would neither participate in the creation of the envisaged international tribunal nor would it send cases relating to their citizens before it.[164] In a similar manner to the US, the Japanese delegates also formulated their reservations and posed the following question: "It may be asked whether international law recognizes a penal law as applicable to those who are guilty".[165]

Sheldon Glueck commented regarding the efforts of the Allied Powers to create an *opinion juris*: "for the Allies to have made several solemn pronouncements that war criminals would be punished and then to have let the entire matter go by default was worse than if they had said nothing about war criminals".[166]

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[161] Commission Report, 1919, pp. 114–17, see *supra* note 104.

[162] *Ibid*., Annex II, USA, *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, p. 135.

[163] *Ibid*., p. 142.

[164] Bass, 2000, pp. 102–3, see *supra* note 6.

[165] Commission Report, 1919, p. 152, see *supra* note 104.

[166] Glueck, 1944, p. 34, see *supra* note 2.

11.5.2. Practice: To Attach Individual Criminal Responsibility to the Prohibitions of International Humanitarian Law including to the 1907 Hague Law[167]

During the First World War, France had set up special military courts to try German prisoners of war and in October 1914, three Germans were convicted for pillage with further trials following.[168] However, when the German Reich 'retaliated'[169] by arresting French citizens, France stopped its proceedings until the end of the First World War, engaged with Germany in secret talks about an exchange of prisoners and otherwise negotiated in secret with the UK about the establishment of a war crimes tribunal to be established after the end of the hostilities.[170]

In 1915, the German authorities tried the British nurse Edith Cavell, then head of the school for training purposes, for having participated in a scheme to shelter enemy soldiers from the occupation authorities in Brussels.[171] The nurse's behaviour was considered a crime under the German Military Penal Code (*Militärstrafgesetzbuch*) and incurred sanctions. Yet it is doubtful whether her behaviour was prohibited under international humanitarian law and even more doubtful whether international law attached penal responsibility for such conduct. Therefore, this trial by the German authorities does not qualify as a valid 'practice' of attaching individual criminal responsibility to norms of international humanitarian law.[172]

On 7 May 1915, a German U-boat torpedoed and sunk the British ocean liner *RMS Lusitania* some 11 miles south of the Old Head of Kinsale in the county of Cork in Ireland, resulting in 1,198 dead persons.[173] A day later, Dr. Bernhard Dernburg, a German spokesman claimed that the *Lusitania* had "carried contraband of war" and "was

[167] See *supra* note 127.

[168] Bass, 2000, p. 83, see *supra* note 6; Jescheck, 1952, p. 46, see *supra* note 133.

[169] Bass, 2000, p. 83, see *supra* note 6; Verdroß, 1920, see *supra* note 151.

[170] Bass, 2000, p. 83, see *supra* note 6.

[171] Willis, 1982, pp. 27–28, see *supra* note 51.

[172] Even Britain's law officers considered that Edith Cavell had been treated fairly, although harshly, by the German authorities. "Committee of Enquiry into Breaches of the Laws of War", *Third Interim Report*, 26 February 1926, CAB 24/111. C.P. 1813, pp. 418–28 (TNA).

[173] Bass, 2000, p. 62, see *supra* note 6.

classed as an auxiliary cruiser". He continued that "vessels of that kind" could be stopped, seized and destroyed under the Hague rules and that a prior search would not have been necessary.[174] Notwithstanding such allegations, a British coroner's jury of Kinsale confirmed an indictment against the German Emperor and the German government only days later:

> This appalling crime was contrary to international law and the conventions of all civilized nations and we therefore charge the officers of the submarine and the German Emperor and the Government of Germany, under whose orders they acted, with the crime of wilful and wholesale murder.[175]

In late July 1916, the German Reich tried and executed the British Captain Charles Fryatt, a commander of an unarmed cross-channel steamer, for attempting to ram a German submarine with his ship in 1915.[176] The trial and the execution of Fryatt marked a further escalation. Earlier in 1915, the Germans had protested against what they considered to be illegal attacks on submarines by merchantmen who they alleged had been armed by British authorities to resist U-boats.[177] However, the execution of Fryatt caused an outrage in the British public, concerned the official authorities and prompted the British Prime Minister Asquith to warn to "bring to justice the criminals".[178] Still, British courts did *not* conduct any war crimes trials against German citizens during the First World War.[179] Similarly during the First World War, the US also did not conduct any war crimes trials against Germans suspected of having committed war crimes.[180]

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[174] Francis W. Halsey, *The Literary Digest History of the World War: Compiled from Original and Contemporary Sources: American, British, French, German, and Others*, Funk & Wagnalls, New York, 1919, p. 255.

[175] "Kaiser is Accused in Ship Inquest Verdict", *Chicago Examiner*, vol. 13, no. 120, 11 May 1915, p. 1.

[176] Sir Archibald Hurd, *Official History of the War: The Merchant Navy*, Longmans, Green & Co., London, 1921–1929, vol. 2, pp. 308–36; British Admiralty to Foreign Office, 18 July 1916, FO 383/195/140584 (TNA); Maxse to Foreign Office, 28 July 1916, FO 383/195/147519 (TNA).

[177] Willis, 1982, pp. 30–31, see *supra* note 51.

[178] House of Commons, United Kingdom, Parliamentary Debates, vol. 84, 1916, pp. 2080–81.

[179] Compare Willis, 1982, pp. 31–36, see *supra* note 51; Bass, 2000, pp. 62–64, see *supra* note 6.

[180] Compare Bass, 2000, pp. 92–105, see *supra* note 6.

In conclusion, during the First World War there was some limited, but certainly no consistent practice of states trying enemy soldiers, navy staff or civilians on allegations of international war crimes originating from the 1907 Hague Conventions and Hague Regulations or any other international humanitarian law in force at this time.

11.5.3. Application of International Humanitarian Law in the German Reich: Between 1907 and the Leipzig War Crimes Trials

On 27 November 1909 the German Reich ratified the 1907 Hague Conventions and Hague Regulations.[181] Following the conclusion of the First World War on 18 December 1919, the German Parliament adopted the law to prosecute war crimes and war misdemeanours.[182] Its Article 1 determined that the *Reichsgericht* would be *exclusively* competent to investigate and adjudicate crimes and misdemeanours that a German citizen within or outside Germany had committed against enemy citizens during the war until 18 June 1919. Article 2 further determined that the prosecutor at the *Reichsgericht* is obliged to prosecute *according to German law* criminal conduct mentioned in Article 1, even if the transaction occurred abroad and was there subject to penal sanctions according to the local laws in force.

With both provisions the German Parliament cemented the German demand to request exclusive jurisdiction for war crimes possibly committed by its own citizens, providing the *Reichsgericht* in Leipzig as the only appropriate forum. Regarding possible war crimes proceedings in Leipzig, the German legislator made the fundamental decision that *only* German law and not international treaty law or international customs would be the applicable law. In the eyes of the German legislator the *Geltungsgrund*, meaning the basis for validity, of penal sanctions was not that a certain conduct may have violated international law prohibiting such conduct, but that it was the mere *will* of the German state that certain international rules should be adhered to. As such, at the beginning of the Weimar Republic, the German legislator adopted a strict dualistic

[181] See *supra* note 128.

[182] Law to Prosecute War Crimes, pp. 2125–26, see *supra* note 57.

approach regarding the relationship of German domestic law and international (humanitarian) law.[183]

The *Reichsgericht*, bound by this political decision of the German legislator, further elaborated in its judgments the relationship between international law and German law. Overall, the judges of the Second Senate observed the parameters set by the German legislator but managed to expand the influence of international law as follows:

In the Stenger and Crusius judgment the Second Senate elaborated that "the application of the ordinary domestic Penal Code […] to war acts which meet the elements of an offence sanctioned with a penalty raises no concerns".[184] So far the judges mirrored the approach of the German legislator. They then continued:

> Regarding the evaluation of the lawfulness or illegality of war acts, the provisions of international law are authoritative. The will of a state which conducts war and whose laws as to the question of legality or illegality are decisive, corresponds to the killing of an enemy during war only insofar as these acts meet the requirements and observe the conditions and limits imposed by international law. The state which enters the war against another state submits itself regarding the international law at least as far as he is obligated by international agreements with the adversary. Every action, including the negligent killing of a human being, which occurs under violation of provisions of international law, is therefore objectively illegal. It is also subjectively illegal, if the perpetrator was conscious regarding his duty to act otherwise, or, by negligent commission, was not aware of this out of negligence. That the killing of a defenceless wounded person runs contrary to international law needs no further explanation.[185]

Further, in the *Llandovery Castle* case, the Second Senate stated that the

> firing on the [life]boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not

[183] Wiggenhorn, 2005, p. 228, see *supra* note 45.

[184] Stenger and Crusius Judgment, p. 2568, see *supra* note 22 (my translation).

[185] *Ibid*. (my translation). The first part of this argumentation was repeated in the judgment against Dithmar and Boldt, *Llandovery Castle* case, see *supra* note 30, Weißbuch, p. 2585, see *supra* note 10, and "Judicial Decisions involving Questions of International Law", in *American Journal of International Law*, 1920, vol. 16, p. 721.

> allowed (compare the [1907] Hague Regulations as to the war on land, section 23(c)[186]), similarly in war at sea, the killing of shipwrecked people, who have taken refuge in lifeboats, is forbidden. It is certainly possible to imagine exceptions to this rule, as, for example, if the inmates of the lifeboats take part in the fight. But there were no state of affairs in the present case […] Any violation of the law of nations in warfare is, as the Senate has already pointed out, a punishable offence, so far as in general, a penalty is attached to the deed.[187]

During the First World War and thereafter during the time of the Leipzig War Crimes Trials, the German Criminal Code only contained very few offences[188] that would penalise conduct relating to international humanitarian law. The *Reichsgericht* adjudicated according to ordinary German criminal law conduct such as killing of hostages or of the wounded, mistreatment of prisoners, destruction of houses and sinking of (hospital) ships.[189] Thus, in all trials in which convictions occurred, the *Reichsgericht* based these on offences codified in German law, either in the domestic Criminal Code or the Military Penal Code. For example, in the first trial related to the First World War, the *Reichsgericht* convicted all three accused for plunder, an offence under German law, namely § 129 of the Military Penal Code.[190] The latter section protects the army's discipline and fulfils the obligations under international law as contained in Articles 28 and 47 of the 1907 Hague Regulations which prohibit plunder.[191]

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[186] See *supra* note 127.

[187] *Llandovery Castle* case, p. 2585, see *supra* note 30, and "Judicial Decisions involving Questions of International Law", *in American Journal of International Law*, 1920, vol. 16, p. 721.

[188] Jescheck, 1952, p. 51, see *supra* note 133, notes that at least some German provisions of the ordinary German Penal Code (namely § 87, 89–91) and of the Military Penal Code (namely § 57, 58, 160 and 161) provided for punishment of offences for violations of the laws and customs of war.

[189] Compare Ludwig Ebermayer, *Fünfzig Jahre Dienst am Recht: Erinnerungen eines Juristen*, Gretlain, Leipzig, 1930, p. 190.

[190] Lottmann, Niegel and Sangerhausen Judgment, see *supra* note 8.

[191] A.M. Romen and C. Rissom, *Militärstrafgesetzbuch*, 3rd ed., J. Guttentag, 1918, para. 3; Gerd Hankel, "Deutsche Kriegsverbrechen des Weltkrieges 1914-18 vor deutschen Gerichten", in Wolfram Wette and Gerd R. Ueberschär (eds.), *Kriegsverbrechen im 20. Jahrhundert*, Wissenschaftliche Buchgesellschaft, Darmstadt, 2001, p. 88.

The following offences of German law were adjudicated at the *Reichsgericht* during the Leipzig war crimes trials: insults,[192] illegal deprivation of liberty,[193] theft and plunder,[194] misuse of official position by instigating subordinates to criminal acts,[195] assault (of POWs),[196] assault in exercise of the office,[197] (negligent) manslaughter,[198] killing[199] and murder.[200]

11.6. Defence of Obedience to Superior Orders

The Leipzig War Crimes Trials mark a significant step in the history of international criminal law because at least four judgments developed the defence of obedience to superior orders making it the first significant body of case law. The defence of superior orders is today recognised in the statutes of all *ad hoc* international criminal tribunals as well as in Article 33 of the ICC Statute.[201] Generally, national systems obligate subordinates to obey orders or instructions from their superiors or military commanders who assume (co-)responsibility for the subordinate's act in carrying out the order. As long as the content of the order or instruction is in accordance with the current domestic and international law, this system functions seamlessly. However, the responsibility of the subordinate is

192 Müller Judgment, see *supra* note 12; Heynen Judgment, see *supra* note 10.

193 Ramdohr Judgment, see *supra* note 21.

194 Lottmann, Niegel and Sangerhausen Judgment, see *supra* note 8; Grüner Judgment, see *supra* note 34.

195 Stenger and Crusius Judgment, see *supra* note 22.

196 Heynen Judgment, see *supra* note 10; Müller Judgment, see *supra* note 12; Robert Neumann Judgment, see *supra* note 16; Michelson Judgment, see *supra* note 32.

197 Ramdohr Judgment, see *supra* note 21.

198 Stenger and Crusius Judgment, see *supra* note 22; Laule Judgment, see *supra* note 26.

199 Stenger and Crusius Judgment, see *supra* note 22.

200 Karl Neumann Judgment, see *supra* note 19; Schack and Kruska Judgment, see *supra* note 28; Dithmar and Boldt Judgment, see *supra* note 30.

201 Statute of the International Criminal Court (http://www.legal-tools.org/doc/7b9af9/). Compare Article 7 (4) Statute of the International Criminal Tribunal for crimes committed in ex-Yugoslavia (http://www.legal-tools.org/doc/b4f63b/), Article 6 (4) Statute of the International Criminal Tribunal for Rwanda (http://www.legal-tools.org/doc/8732d6/); Article 6 (4) Statute for the Special Court for Sierra Leone (http://www.legal-tools.org/doc/aa0e20/); Article 29 (4) Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (http://www.legal-tools.org/doc/9b12f0/).

more problematic when the order or instruction he or she received is contrary to existing (domestic or international) laws.

In Leipzig, several accused persons attempted to defend and thereby absolve themselves from criminal responsibility by seeking recourse to superior orders. The *Reichsgericht*'s rulings on this defence constitute landmark decisions. They are one of the origins for what was later termed the *conditional liability* theory.

11.6.1. Origin of the Conditional Liability Theory

In 1915, the Austro-Hungarian Military Court ruled that

> penal responsibility of a subordinate if it has not exceeded the received task, is limited to those actions which clearly and manifestly are in conflict not only with criminal law but also with the customs of war of civilised nations and which cannot be excused by a situation of duress.[202]

The Austro-Hungarian Military Court had accepted the principle that a superior order can amount to a complete defence, if *objective* criteria such as the action carried out by the subordinate was not in clear and manifest conflict with existing domestic and international law (the customs of war of civilised nations).

11.6.2. Absolute Liability Theory

By contrast, both International Military Tribunals after the Second World War followed the so-called "absolute liability theory", according to which obedience to superior orders or instructions *cannot* be a complete defence, but can be considered only in mitigation of penalty. Namely, Article 8 of the London Agreement stated:

> The fact that the defendant acted pursuant to the order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of

[202] My translation. The excerpt of the original judgment states: "[d]ienststrafrechtliche Verantwortlichkeit des Untergebenen, den Fall der Überschreitung des erhaltenen Auftrages ausgenommen, ist nur auf jene Handlungen beschränkt, die klar und offenbar nicht nur gegen das Strafgesetz, sondern auch gegen die Kriegsgebräuche gesitteter Völker verstoben und durch eine Zwangslage nicht entschuldigt werden können" (*Entscheidungen des kaiserlichen und königlichen Obersten Militärstrafgerichtshofes*, 30 December 1915, reprinted in Albin Schager, vol. III 1, 1920, No. 184, 17 (at 20).

> punishment if the Tribunal determines that justice so requires.[203]

Article 6 of the Charter of the International Military Tribunal for the Far East provided similar language.[204]

11.6.3. Defence of Superior Orders in the Leipzig War Crimes Trials

At least four judgments of the *Reichsgericht* developed the defence of superior orders along the lines of the conditional liability theory. The legal basis for the *Reichsgericht* was § 47 of the German Military Penal Code which stated:

> If the execution of an order pertaining to the service violates a penal law, then the superior issuing the order is alone responsible. The obedient subordinate is to be punished as an accomplice
>
> a) If he went beyond the order issued to him, or
>
> a) If he knew that the order of the superior concerned an act which aimed at a civil or military crime or misdemeanour.[205]

11.6.3.1. Case Against Robert Neumann

At the *Reichsgericht*, the defendant Robert Neumann was charged with ill-treatment of British POWs. Most of these instances related to

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[203] Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, Decree issued on 8 August 1945, London, reprinted in United Nations Treaty Series, No. 251, 1951, pp. 280 ff. (http://www.legal-tools.org/doc/64ffdd/).

[204] General Douglas MacArthur, Supreme Commander of the Allied Powers in Allied occupied Japan, Decree dated 19 January 1946, containing the Charter of the International Military Tribunal for the Far East; see also USA Treaties and other International Acts Series, 1589, reprinted in C.F. Bevans (ed.), *Treaties and Other International Agreements of the USA (1776–1949)*, vol. 4, Department of State, Washington, DC, 1970, p. 20.

[205] My translation. The original German law read: "Wird durch die Ausführung eines Befehls in Dienstsachen ein Strafgesetz verletzt, so ist dafür der befehlende Vorgesetzte allein verantwortlich. Es trifft jedoch den gehorchenden Untergebenen die Strafe des Teilnehmers: 1) wenn er den ihm erteilten Befehl überschritten hat, oder 2) wenn ihm bekannt gewesen, daß der Befehl des Vorgesetzten eine Handlung betraf, welche ein bürgerliches oder militärisches Verbrechen oder Vergehen bezweckte". Militär Strafgesetzbuch für das Deutsche Reich, 20 June 1872 (Military Penal Code for the German Reich).

Neumann's behaviour *without* any prior authorisation or order from his commander. Only in one instance did Neumann have such authorisation: on 1 April 1917 the British POWs announced they would not go to work. Neumann's superior, Sergeant Trienke, tried in vain to get them to give in, and attempted to persuade them with friendly means to give up their resistance before phoning his superior commander for instructions. Trienke then gave the order to his subordinates, including Neumann, to "set about" the POWs. Robert Neumann participated in this event and mistreated Florence, a Scottish POW, with his fist and feet. The judges in the Second Senate ruled:

> The accused can*not*, however, be held responsible for these events. He was covered by the order of his superior which he was bound to obey. According to §47 of the [German] Military Penal Code a subordinate can only be criminally responsible under such circumstances, when he *knows* that his orders involve an act which is a civil or military crime. This was not the case here. Before the non-commissioned officer Trienke gave this order [to "set about" the POWs] he made telephone inquiries of the commandant of the camp at Altdamm. Therefore he himself clearly acted only upon the order of a superior. As matters stood there could be no doubt about the legality of the order. Unless there is irreparable damage to military discipline, even in a body of prisoners, disorderly tendencies have to be nipped in the bud relentlessly and they have to be stamped out by all the means at the disposal of the commanding officer and if necessary even by the use of arms. It is of course understood that the use of force in any particular case must not be greater than is necessary to compel obedience. It has not been established that there was excessive use of force here.[206]

Similar to the Austro-Hungarian Military Court, the *Reichsgericht* in Leipzig also accepted the principle that a superior order can amount to a *complete* defence. However, different than the Austrian-Hungarian precedent, the German judges did not explicitly check whether the order from Trienke could have been "*clearly and manifestly*"[207] in conflict with

[206] Robert Neumann Judgment, p. 2554, see *supra* note 16 (emphasis added). English translation taken from "Judicial Decisions involving Questions of International Law", in *American Journal of International Law*, 1920, vol. 16, p. 699.

[207] See *supra* note 202.

law. Rather, the judges (only) considered whether the force used to reinstate discipline was proportional. The *Reichsgericht* required that the subordinate himself had to *know* that the order requires an act from him which is a crime. Hence, the *Reichsgericht*'s test for illegality of an order is a subjective one (focusing on the *mens rea* of the subordinate). In contrast, the Austro-Hungarian court had focused on an objective test, namely whether the order was "clearly and manifestly" illegal.

11.6.3.2. The *Dover Castle* Case[208]

In the *Dover Castle* case, Karl Neumann, a commander of a German submarine admitted to having torpedoed and thereby sunk the hospital ship *Dover Castle*, but claimed that he had done so on instructions of the German Admiralty. His defence relied on a 1917 declaration of the German government that claimed that foreign hospital ships had been used for military purposes in violation of the 1907 Hague Naval Convention. The *Reichsgericht* acquitted Karl Neumann:

> It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of the criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible […]
>
> The Admiralty Staff was the highest service authority over the accused. He was duty bound to obey their orders in service matters. So far as he did that, he was free from criminal responsibility […]
>
> According to § 47 Nr. 2 of the [German] Military Penal Code a subordinate who acts in conformity with orders is also liable to punishment as an accomplice, when he *knows* that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanour. There has been no case of this here. The memoranda of the German government about the misuse of enemy hospital ships were known to the accused. The facts set out in them he held to be conclusive, especially as he had received, as he explained, similar reports from his comrades. He was therefore of the opinion that the measures taken by the German government

[208] *Dover Castle* case, see *supra* note 19.

> against the misuse of enemy hospital ships were not contrary to international law, but legitimate reprisals […]
>
> The accused accordingly sank the *Dover Castle* in obedience to a service order of his highest superiors, an order which he considered to be binding. He cannot, therefore, be punished for his conduct.[209]

Again, consistent with its previous ruling in the Robert Neumann case, the *Reichsgericht* accepted that an order (here in form of a manual from the German Admiralty) could have the effect of completely exempting the subordinate. Consistent with its previous ruling, the judgment in the Neumann case applied a *subjective* test regarding the possible illegality of the order: it focused on the *mens rea* of the subordinate. Since Neumann believed that the memorandum was in accordance with the law, he was acquitted.

11.6.3.3. The *Llandovery Castle* Case[210]

In the *Llandovery Castle* case, the Second Senate for the first time held that an order could not absolve a subordinate from guilt. In this case, the German submarine commander Patzig, who had absconded before the trial in Leipzig began, had ordered an attack on the hospital ship *Llandovery Castle* in the Atlantic Ocean, southwest of Ireland, on 27 June 1918. After the ship sank, three lifeboats remained. Patzig then ordered his subordinates to open fire on the lifeboats, sinking two of them. While this action was underway, Dithmar and Boldt, two officers, had been on their observation post on the submarine. When they stood trial in Leipzig they defended themselves by referring to the order of Patzig. The judges of the second senate held:

> Patzig's order does not free the accused from guilt. It is true that according to section 47 of the [German] Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the laws as is punishable, the superior officer issuing such an order is alone responsible.

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[209] Karl Neumann Judgment, p. 2557, emphasis added, see *supra* note 19. English translation taken from "Judicial Decisions involving Questions of International Law", in *American Journal of International Law*, 1920, vol. 16, pp. 707–8.

[210] *Llandovery Castle* case, see *supra* note 30.

> According to [section 47] No. 2 [of the German Military Penal Code] however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the present case of the accused. It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can exist, if such an order is *universally known to everybody, including also the accused, to be without any doubt whatever against the law* […] [I]t was perfectly clear to the accused that the killing defenceless people in the life-boats could be nothing else, but a breach of the law […]
>
> They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of the law. They should therefore, have refused to obey. As they did not do so, they must be punished.[211]

With this ruling the Second Senate no longer relied only on the subjective views of the accused Boldt and Dithmar on the legality of Patzig's order to sink the *Llandovery Castle* and its lifeboats. Rather, emphasising the universal rules[212] in effect at the time, the judges *supplemented* the accused's personal knowledge regarding the legality of Patzig's order with universal knowledge on the same subject.[213] Still, the accused's knowledge of the illegality of the order was the litmus test to hold him criminally responsible, but the fact that an order is directed at something that is universally known to be illegal, was an auxiliary test to

[211] Dithmar and Boldt Judgment, *Llandovery Castle* case, p. 2586, see *supra* note 30 (emphasis added). English translation taken from "Judicial Decisions involving Questions of International Law", in *American Journal of International Law*, 1920, vol. 16, pp. 721–22.

[212] "The firing on the [life-]boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed (compare the [1907] Hague Regulations as to the war on land, section 23(c)), similarly in war at sea, the killing of shipwrecked people, who have taken refuge in life-boats, is forbidden […] Any violation of the law of nations in warfare is […] a punishable offence, so far as in general, a penalty is attached to the deed" (Dithmar and Boldt Judgment, *Llandovery Castle* case, p. 2585, see *supra* note 30) and "Judicial Decisions involving Questions of International Law", in *American Journal of International Law*, 1920, vol. 16, p. 721.

[213] Dinstein, 2012, pp. 16–17, see *supra* note 4.

establish an accused's personal knowledge about the illegality of an order.[214]

11.6.3.4. Stenger and Crusius Case[215]

In the Stenger and Crusius case, the latter claimed to have acted under an order from Stenger to kill wounded French POWs in August 1914. The Second Senate ruled that Crusius had the

> illegality of such an order not included in his consciousness […] The incorrectness and impossibility of his notion *should have come to his consciousness* […] Under application of the necessary care expected of him, he could have not missed what was immediately apparent to many of his people, namely that the indiscriminate killing of all wounded was a monstrous, in no way justifiable war measure.[216]

The *Reichsgericht* further clarified that

> for the evaluation of the legality or illegality of war measures the provisions of international law are relevant […] That the killing of defenceless wounded runs contrary to the provisions of international law requires no further explanation.[217]

The judges for the first time argued that an accused *should have* been aware that an order (here to kill wounded prisoners) was apparently illegal. Thereby, the judges no longer focused on what the accused *actually* had in mind when committing the criminal act he was charged with. Rather, the judges relied on external evaluations, such as the parameters of international law, to come to the conclusion that the accused *should have* been aware of the manifest illegality of an order given to him. Hence, with the Stenger and Crusius judgment, the *Reichsgericht* turned the consideration of manifest illegality of an order into the principal touchstone.[218] It can be further argued that the *Reichsgericht* used the principal illegality of an order under domestic or international law as an "auxiliary, technical contrivance of the law of

[214] *Ibid.*, p. 17.

[215] Stenger and Crusius Judgment, see *supra* note 22.

[216] *Ibid.*, reprinted in German language in Weißbuch, p. 2567, see *supra* note 10 (my translation, emphasis added).

[217] *Ibid.*, p. 2568.

[218] Dinstein, 2012, p. 18, see *supra* note 4.

evidence, designed to ease the burden of proof lying on the prosecution, insofar as the subjective knowledge of the accused is concerned".[219]

11.7. Conclusion

The Leipzig War Crimes Trials relating to violations of Germans during the First World War were at least an attempt in the history of international criminal law to carry out justice. In tandem with the *in absentia* trials in Belgium and France, these trials caused a limited deterrent effect, although the sentences imposed were lenient.

The judges clarified the relationship between national law and international law. The German Reich, belonging to the continental law tradition and having adopted a strict dualistic approach, refrained from prosecuting war crimes on the basis of existing international humanitarian law. In fact, with the exception of a few international provisions,[220] the prohibitions of international humanitarian law during and immediately after the First World War did not (yet) provide for personal criminal responsibility. Hence, at the *Reichsgericht* international law was not used as a basis to prosecute, but merely as a benchmark to assess the legality or illegality (*Rechtswidrigkeit*) of offences defined by German law. The prohibitions of international humanitarian law were relevant to create an exception to the defence of superior orders. Insofar the *Reichsgericht* produced significant case law forming a basis for the conditional liability theory. Generally, the *Reichsgericht* considered obedience to superior orders as a complete defence.

However, due to restrictive case selections the war crimes proceedings in Leipzig were limited in so far as they targeted only either civilians or low- and middle-ranking soldiers and Admiralty staff. Seldom did military superiors stand trial. Keeping in mind which cases were *not* selected and prepared for trials, the entirety of procedures conducted in Leipzig signalled an unwillingness of an otherwise able German state to vigorously pursue criminal behaviour during the First World War: The prosecutions and trials in Leipzig did *not* even touch the German civilian leadership regarding its responsibility for any of the crimes committed in the First World War. Also, the highest military leaders of the German

[219] *Ibid*., p. 29.

[220] See text preceding *supra* notes 139, 144 and 145.

Reich, the members of the supreme Army command and Admiralty, were not prosecuted at all. Thus, the twelve judgments focusing on isolated cases and targeting only low- or mid-level Army staff or civilians were unable to distil the widespread or systematic nature of certain wrongdoing by the German Army leadership, whether in the conduct of hostilities[221] or in overall policy of the German Army staff or civilian leadership.

Since the domestic judicial authorities could conduct investigations and trials on German territory against German citizens, and since the Allied Powers rendered assistance and co-operation in legal matters, *access* to documentary evidence, witnesses or crime scenes would *not* have been an impediment to prosecute more senior civilian and military leaders. Thus, the German state was clearly *able* to effectively prosecute and punish a greater totality of the criminal wrongdoing by the German authorities during the First World War. Instead, the German authorities pursued a silent campaign of suspensions or *nolle prosequi* decisions. In hindsight, these *in camera* procedures and the 12 public trials at the *Reichsgericht* were part of an "appeasement measure" designed to "provide symbolic justice and little more".[222]

[221] Namely the issue of use of chemical agents at the Western Front, for example, in France.

[222] Maguire, 2002, p. 80, see *supra* note 45.

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Historical Origins of International Criminal Law: Volume 1

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further consolidate this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 1 comprises contributions by prominent international lawyers and researchers including Judge LIU Daqun, Professor David Cohen, Geoffrey Robertson QC, Professor Paulus Mevis and Professor Jan Reijntjes.

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