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War Crimes, Politics and International Law, 1918-1945: Some Selected Issues

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War Crimes, Politics and International Law, 1918-1945:
Some Selected Issues[1]

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1 Introduction

This short overview provides students of international relations with some introductory information about three important historical aspects of international law against war crimes: (1) the first international attempts to punish German war criminals after the Great War, (2) the development of the law of maritime war in the inter-war period, and (3) the criminal German legislation and jurisdiction against civilians during the Second World War. These issues are less well-known and hardly covered by standard textbooks on international law. Nevertheless they provide important foundations and motivations for the development of international law against war crimes after 1945, which has led to the far better known progress of international criminal law from the International Military Tribunals (IMT) of Nuremberg and Tokyo of 1945-1947 to the present International Criminal Court (ICC).

2 Allied aims concerning German war crimes and the Versailles Treaty (1919)

Due to public pressure and wartime propaganda in France, the UK and Belgium as well as some idealist conceptions of a new post-war international order, punishment of German war crimes became a major Allied war aim during World War I. As a consequence, the governments of the Allied nations, albeit somewhat reluctantly, embraced the idea of individual responsibility for war crimes in the Versailles Treaty of 28 June 1919 which laid down the conditions of peace with defeated Germany. The main areas of concern vis-à-vis the war crimes issue were the breach of Belgian neutrality by Germany in 1914, atrocities against civilians and POWs, and the conduct of submarine warfare 1914-18.

[1] Paper based on articles prepared for L. Hufford und E. Pugliese (Hg.), *War Crimes and Trials: A Historical Encyclopedia, from 1850 to the Present*, Santa Barbara (ABC-CLIO, forthcoming).

Thus, apart from article 231, ascribing the sole responsibility for the war to Germany and her allies, massive limitations of the German armed forces (restricted to 130,000 men of army and navy, without heavy equipment, airforce or submarines), and an unlimited German liability for reparations, the peace treaty also contained rules concerning German politicians and military personnel accused of war crimes in articles 227 to 230.

Article 227 announced the will to prosecute the former German Kaiser Wilhelm II who had abdicated and fled to the neutral Netherlands in November 1918, „for a supreme offence against international morality and the sanctity of treaties." He was to be held (at least morally) responsible by an international tribunal appointed by the main Allies, i.e. the U.S., Great Britain, France, Italy and Japan. In article 228, the „German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. (...) The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war (...)."

According to article 229, war criminals should be brought before military tribunals of the country against whose nationals they had committed the crimes. If more than one country were concerned, international tribunals should be in charge. Finally, article 230 laid down that the German government should support the tribunals by making available any information and documents of relevance for the lawsuits. Similar articles could be found in the Treaties of Saint-Germain-en-Laye (10 September 1919), Neuilly-sur-Seine (27 November 1919), Trianon (4 June 1920) and Sèvres (10 August 1920) with the other defeated Central Powers (or their successor states) Austria, Bulgaria, Hungary and Turkey, respectively.

3 Problems of implementation and the Allies' claims

Implementation of the war crimes articles was difficult from the start. While the U.S. and Japan neglected the principle of legal responsibility of heads of state altogether, the Netherlands refused to extradite Wilhelm II due to the Dutch tradition of granting political asylum. In Germany, there was massive resistance in great parts of the society, especially by conservative and nationalist parties and groups which denounced war crime trials of any sort as an unacceptable national humiliation. Threatened by right-wing and left-wing radicals, the

German government declared that the Allies' insistence on extradiction of alleged war criminals would endanger the fragile stability of the new German Republic. As soon as in November 1919, it asked the Allies to renounce extradiction and suggested trials in Germany.

In December 1919 the German National Assembly passed a law on the prosecution of war crimes according to which each German who had committed a crime against enemy nationals or their property between August 1914 and June 1919 should be tried before the *Reichsgericht* (supreme Imperial Court) in Leipzig. The Allies refused this proposal and produced a list of 1,590 war criminals to be extradited, including many of the political and military leaders of wartime-Germany (like e.g. Bethmann Hollweg, Hindenburg and Ludendorff).

Following Lloyd George's growing doubts, a reduced list of 890 names was handed over to the German government in early February 1920. Among these, France and Belgium claimed 334 each, Britain 97, Poland 51, Rumania 41, and Italy 29. Corrected for multiple nominations, a total of 853 persons were accused in 1,058 cases, most of which concerned German atroctities against Belgian and French cilvilians in 1914 (396 cases) and the deportation of Belgian and French civilians between 1914 and 1918 (169 cases). Due to the Allies' (especially British) interest in maintaining the status quo in Germany, however, the Allies finally accepted the German proposal of trials in Germany, and a list of 45 persons to be tried was submitted to the Germans as a test in mid-February 1920.

4 The *Reichsgericht* trials of 1921/22

Consequently, after lengthy preparations, between January 1921 and November 1922, 17 cases (of which 6 were not on the Allied list) were heard before the Reichsgericht. Of 3 generals, 6 other officers, 1 NCO, 5 privates, 1 military doctor and 1 military policeman accused, only 4 officers (of whom 2 were rehabilitated in 1928), the NCO and the privates were found guilty. Most importantly, the Imperial Court ruled for the first time that the restrictions of the international law of war were binding for any military personnel despite not being explicitly laid down in German military law. Nevertheless, it turned down most of the accusations due to lacking evidence or legitimized the committed acts of violence as necessary according to the contemporary perception of the military situation or at least excusable because of the good faith of the commanding officers.

As a consequence of this biased performance of the Imperial Court, French and Belgian envoys stopped attending the trials in mid-1921, and in early 1922 the Allies ceased any cooperation with the *Reichsgericht*. As a consequence, the Court closed more than 1,600 cases without further investigations until 1927. While the British preferred to allow the problem to fade away in order to improve relations between the Allies and the Germans, France and Belgium turned to prosecuting war criminals by themselves, and tried hundreds of Germans *par contumace* (in absence) until 1925, when relations with Germany began to normalize after the Locarno Treaty.

Thus, despite some aspects of modernizing international and national (German) law, the project of prosecuting war criminals after the Great War failed due to fundamental legal doubts in some countries, a lack of resolve of the Allies, and German resistance. Only after the Second World War, with Germany (and Japan) totally vanquished, was it possible to prosecute war crimes of a then far greater scale.

5 The development of the law of maritime war in the inter-war period

During the inter-war period of the 1920s and 1930s, there were several attempts to limit naval armaments, especially among the United Kingdom, the United States and Japan, and to codify restrictions of naval warfare. The Washington Naval Treaty of 1922 between the U.S., the United Kingdom, Japan, France and Italy established maximum replacement tonnages of capital warships in a relation of 5:5:3:1.8:1.8 among the contracting powers. Article I of an additional Treaty Relating to the Use of Submarines and Noxious Gases in Warfare declared that merchant vessels were not to be attacked unless they refused to submit to visit and search after warning, and not to be destroyed unless the crew and passengers had been first placed in safety. Otherwise a submarine should have to "permit the merchant vessel to proceed unmolested." Violations of these rules should be treated as acts of piracy and be punished by civil or military authorities of any power (article III). Since France did not ratify the treaty, however, it did not become effective.

The Washington Naval Treaty of 1922 was amended by the London Treaty for the Limitation and Reduction of Naval Armaments of 1930 which expanded its quantitative provisions to smaller ships. It also declared a code of conduct for submarine warfare as "established rules of international law" similar to the failed 1922 approach. Part IV (article 22) said that "except

in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sind or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board." France and Italy did not ratify the London Naval Treaty.

In 1934 Japan announced its withdrawal from the Washington and London Naval Treaties which then ceased to be in effect at the end of 1936. This, however, did not affect the rules of submarine warfare laid down in the London Treaty since article 23 explicitly emphasized the unlimited validity of Part IV. Moreover, according to a procès-verbal relating to Part IV, all major seapowers, including Japan and rearming Germany, confirmed the rules agreed upon in 1930 (London Protocol of 1936). This also included France and Italy which ratified a re-amended version of the London Treaty in November 1936.

6 Maritime war crimes in the Second World War

During World War II the rules of naval warfare codified by the London Naval Treaty were violated by all principal seapowers. On 30 September 1939, Hitler's *Führer* Directive no. 5 declared that hostile merchantmen and troop ships as well as ships sailing without lights in the waters around the British Isles were to be attacked without warning by German ships. On 18 January 1940 unrestricted German naval warfare in enemy waters was ordered. After the declaration of war against the U.S. on 11 December 1941, the whole Northern Atlantic became the area of unrestricted German U-boat war.

As a consequence, between September 1939 and May 1945, German submarines sank 2,828 Allied ships of 14.7 million tons, most of them without a warning and without providing any help for the survivors. The U.S. merchant marine alone suffered losses of about 700 ships and 6,000 dead seamen during the Battle of the Atlantic.

Concerning the Allies, Britain started to arm merchantmen as early as in September and October 1939. During the Norwegian campaign, on 8 May 1940 the British Admirality ordered all German ships to be sunk as opportunity served. On 7 December 1941, the US

Chief of Naval Operations, Admiral Chester Nimitz, ordered unrestricted submarine warfare against the Empire of Japan. On the same day, a Japanese submarine sank the SS *Cynthia Olson*, the first of about 180 Allied merchantmen sunk (of about 0.9 million tons) by Japanese submarines.

While Japan had neither an adequate naval doctrine nor the strategic aim of waging an unrestricted submarine warfare like Germany (resulting in e.g. relatively small U.S. losses of about 100 merchantmen not involved in invasion operations during the Pacific war), U.S. submarines sank about 1,300 Japanese merchant vessels of more than 5 million tons between December 1941 and August 1945.

7 Naval war crimes and the IMTs of Nuremberg and Tokyo

As a consequence of the general non-adhesion to the London rules of naval warfare, including Britain and the United States, the IMT of Nuremberg concluded that the Commanders in Chief of the German submarines and Navy during WWII, Admirals Karl Dönitz and Erich Raeder, were culpable for violating the London rules of 1930 but were not sentenced on the ground of this breach of the international law of submarine warfare. Similarly, the IMT for the Far East found Japanese Admirals Takasumi Oka and Shigetaro Shimada guilty of ordering the shooting of shipwrecked sailors from torpedoed Allied ships, but not of waging an unrestricted submarine war.

8 German special courts as an element of Nazi war crimes

After taking over power in January 1933, the National Socialists reorganized the German judicial system according to their view that the law should not be based on individual rights and equality but solely on the interests of the *Volksgemeinschaft*. Defined as ethnically bound characteristics of the German people, the supreme aims of the law should be the protection of the German (“Arian“) race, national honor, defense capabilities and public order. For political opponents and so-called “anti-socials“ as well as Jews and “*Fremdvölkische“* (ethnical “foreigners“) special, tougher laws were introduced succesively, in order to secure their total obedience to the new regime or to eliminate them.

Implementation of the special laws was the task of *Sondergerichte* which were established on the level of regional courts of appeal in March 1933. In April 1934 the *Volksgerichtshof* was added as a special court for crimes of high treason. From April 1936 it also covered crimes of serious damage of military assets, espionage and defeatism. The rights of defendants before these courts were massively reduced. There was no court of appeal, and legal remedies were only available to the prosecuting attorney aiming at increasing a penalty. The procedures of a trial could be further simplified and shortened by the judge in order to reduce the time needed to convict a defendant. As early as in 1940, about 40 per cent of all penal cases were heard in such a short track procedure.

While the number of Special Courts rose from 26 in 1933 to 74 in 1942, the *Volksgerichtshof* played a particular role in prosecuting opponents of the National Socialist regime, especially after judge Roland Freisler took charge of its primary chamber in August 1942. He considered the special courts as the "*Panzer* force of law" and became infamous for his aggressive way of presiding trials, aiming at total humiliation of the defendants.

9 Criminal German laws for civilians in World War II

After the beginning of the Second World War, the number and toughness of the laws and decrees on which the Sondergerichte and the Volksgerichtshof acted, increased dramatically. The *Kriegssonderstrafechtsverordnung* (Wartime Special Penal Code) of August 1938 had already introduced the death penalty for espionage, guerilla activities and defeatism. In late 1939 several additional decrees broadened the use of the death penalty to crimes of sabotage, damage of military assets, theft under extraordinary wartime conditions (e.g. pillage during and after air bombardments) and all crimes of violence. These laws aimed at Germans as well as other nationals.

Following the attack on the Soviet Union and increasing resistance in the occupied territories, however, a special penal code for Jews and Poles in the eastern territories annexed by the *Reich* (i.e. western Poland and the Czech part of former Czechoslovakia) was issued on 4 December 1941 (*Polensonderstrafrechtsverordnung*). It introduced extraordinarily harsh sentences, including death, punishment camp or transfer to the Gestapo, for any kind of disobedience against the German occupants.

Concerning the other occupied territories, Hitler issued the *Nacht und Nebel-Erlass* on 7 December 1941: Persons suspected of resistance against the *Reich*, whose cases were not clear-cut enough to legitimize a death penalty by a court-martial, should be deported to Germany without trace where they were to stand trial before a special court or simply vanished in a concentration camp without being heard. The resulting lack of information and insecurity in the occupied territories was intended to reduce active resistance again the Germans.

10 The consequences of criminal German legislation and civilian jurisdiction

The *Nacht und Nebel-Erlass* resulted in about 7,000 victims, most of them French. Based on the special laws, the Sondergerichte issued about 11,000 death verdicts between 1933 and 1945 while the Volksgerichtshof added another 5,200 of which about 50 per cent concerned members of the resistance in the occuppied countries. With rising German problems in the war, the judges‘ preparedness to actually use the harshness of the law surged clearly.

Between 1937 and 1939 1,700 cases were heard before the Volksgerichtshof of which 85 resulted in the death penalty (5 per cent) and 146 (9 per cent) in acquittal (the others in imprisonment of various duration). For the period of 1940 and 1941, these numbers increased to 2,328, 155 (7 per cent) and 150 (6 per cent), respectively, while between 1942 and 1944 they were 10,289, 4,951 (48 per cent) and 777 (8 per cent). Moreover, between 1939 and 1943, extreme penalties were mainly used against *“Fremdvölkische“* and foreigners, especially on the basis of the special penal code decree for Jews and Poles.

In 1941 more than 90 per cent of all verdicts of life imprisonment and 50 per cent of all death sentences were issued by special courts in the annexed eastern provinces where only 16 per cent of the *Grossdeutsche Reich*‘s population lived. Of 3,363 death penalties issued in 1942, 1,857 concerned persons from the annexed territories, and the 1,556 death verdicts in the rest of the *Reich* included Germans as well as foreigners. Consequently, about 55 per cent of all persons sentenced to death in 1942 were foreign nationals or *“Fremdvölkische“*.

Thus, despite vastly incomplete records, one can estimate that at least some fifteen thousand persons from the occupied and annexed terrtories, mainly from Poland and France, were sentenced to death contary to contemporary international law of war by German Special

Courts and the *Volksgerichtshof* (or simply disappeared according to the *Nacht und Nebel-Erlass*) between 1939 and 1945. Further tens of thousands were sentenced to jail or forced labor. These numbers, however, do not even include (partly formally illegal) executions without trial by the military, the police or the SS. Neither do they take account of the officially legalized "administrative" prosecution of alleged criminals (i.e. their immediate execution) by the military, especially in the Soviet Union since 1941, and by the police, the Gestapo or the SS which actually took over penal jurisdiction after 1943.

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