THE ANATOMY OF THE NUREMBERG TRIALS

A PERSONAL MEMOIR

TELFORD TAYLOR

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A Personal Memoir

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To Toby Golick

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Introduction

In the spring of 1945, I was a reserve colonel in the intelligence branch of the United Stat Army. My duties had to do with information derived from the deciphering of enem messages, the product of which in recent years has become publicly known as "Ultra" "Magic." My base of operations was in southern England, but I had been given gener responsibility for the security of Ultra and its distribution to the principal American army ar air headquarters in Western Europe, and this required frequent trips to the Continent.

By April, it had become apparent that the Third Reich was in its death throes and that total Allied military victory in Europe was imminent. Accordingly, early that month embarked on what I expected to be, and was, the last of my circuits around the comman that we were servicing. On about April 20, en route to General Patton's headquarters Erlangen in northern Bavaria, I drove through nearby Nuremberg, where I had never bee before.

Little of its famed beauty was to be seen. The city had been heavily bombed by the Roy Air Force in January and March and taken, only after heavy fighting during the past fe days, by General Wade Haislip's XV Corps. Most of the city lay in ruins, parts were st burning, and the streets were so choked with rubble that I could hardly get through.

Returning to England a week later, I was met at the airfield by my colleague Lieutena Colonel Ted Hilles (in peacetime a distinguished professor of English literature at Yale bringing a message to me from my superiors at the War Department in Washington. I burden was that Robert H. Jackson, Associate Justice of the Supreme Court of the Unite States, had been appointed by President Truman to represent the United States as chi prosecutor at a projected international trial of "war criminals," to be held as soon as possib after the victorious end of hostilities. The message went on to say that Justice Jackson wa assembling a legal staff to assist him and had asked that the War Department make m available for that purpose.

The tone of the message suggested that the departmental authorities would be pleased if acceded to the Justice's request, but it was made clear that the decision was up to me. Th proposition gave me plenty to think about, both professionally and personally.

I had graduated from Harvard Law School in 1932 and during the next ten years had held succession of federal government legal positions. In 1939 and 1940 I had served briefly as Special Assistant to the Attorney General. During those years Jackson had been Attorne General until his appointment to the Supreme Court. I had met him a few times, heard hi argue several cases, and had myself argued one case before the Supreme Court after Jackso had become a member. I was well aware of and shared the high opinion of his character an ability which was generally held. He was a man under whom I would be proud to serve, and had no doubt that his mission would be a unique and challenging one.

On the other hand, nothing in my legal education or experience had involved internation law in general or war crimes in particular; to me it was unknown territory. Furthermore, had not given "law" a thought since going into the army in 1942, and my military duties ha taken me far afield from cases and courts. I had never been in private practice and ha intended, upon leaving the army, to return to New York to get some badly needed experienc in the private sector and develop an independent footing as a lawyer. At the age of thrit

seven, this was a step which should not be long postponed.

As for the military side of the matter, it was plain that the Germans would surrender in few days and that my own mission in Europe was as good as finished. But the war again Japan was not, and it was feared that a massive invasion of the Japanese mainland might b necessary to bring about a surrender. Many of the senior American officers, particularly th regulars, were anticipating reassignment to the Pacific theater. I myself had expected that would soon be recalled to the Pentagon building and perhaps sent to the "other war." I ha no idea how near Japan was to defeat or whether there was a place for me in the Pacif intelligence structure. But I was somewhat reluctant to get out of uniform until the war as whole was over, and therefore I decided to ask permission to return to Washington befo making a final decision about Jackson's invitation.

Personal feelings and problems moved me in the same direction. My marital situation wa in disarray in consequence of an intense relationship with a young Englishwoman who wa married to a British officer of my acquaintance. Returning to my home in Washington migh at least ease immediate tensions and allow time to try to sort things out.

The Pentagon readily approved my request, so I said my farewells in England and flew t Washington, arriving home about May 22. During the next few days I visited Jackson's sta headquarters and discussed the situation in the Pacific theater with my superiors in th intelligence division, particularly with Colonel Alfred McCormack, in peacetime a law partn of John J. McCloy, the Assistant Secretary of War. I knew that McCormack was as we informed and otherwise equipped as anyone to assess the prospects of the war against Japa Whether or not he was in on the secret of the atom bomb I do not know, but he told m categorically that the Japanese military situation was hopeless, that the Emperor's advise knew it, and that intercepted Japanese diplomatic messages revealed their anxiety to mak peace. He thought it highly unlikely that an invasion of the Japanese mainland would b necessary or that the war would last much longer.

As for me, McCormack said that if I wanted an assignment in the Pacific, no doubt th could be arranged, but that there was no real necessity for it. I should feel entirely free t leave the intelligence division and go with Jackson, or (since I had been on overseas duty fo two years and was eligible for immediate discharge) to private law practice, as I saw fit.

I had been home less than a week and already felt restless. The war had not subjected m to much danger, but the exposure to a rapidly changing succession of new places, people, an problems had been exhilarating and, in many ways, rewarding. Europe was obviously on th verge of enormous change, and it would be interesting to be at the scene. I knew that befo long I ought to repatriate myself and settle down to a more stable and less peripatetic lif but I simply did not feel ready for it.

And so I decided to accept Justice Jackson's invitation and went back to his staff offices i the Pentagon and signed on. The unforeseen consequence was that I spent nearly four yea in Nuremberg, the ravaged city that I had passed through five weeks earlier.

My decision to join Jackson's staff was not influenced by any expertise or special intere in the laws of war or international law, none of which I possessed. Nor was it governed b expectations of professional advancement, although I knew that the projected trial would b a major and unique affair which might bring me some publicity. But the wiser cours professionally would have been to get out of uniform and into traditional legal work as soo

as possible.

Certainly I was not moved by vengeful or anti-German feelings. To be sure, I detest Nazism and had been in Germany a few weeks earlier when the Dachau and Buchenwa concentration camps were captured and the inmates liberated by American troops. But like s many others, I remained ignorant of the mass extermination camps in Poland, and the fu scope of the Holocaust did not dawn on me until several months later, at Nuremberg. I a not Jewish and had, as far as I knew, no relations or close friends on the European continen In pre-Nazi times, I had greatly enjoyed travel in Germany and Austria.

Accordingly, I think it would be fair to say that my decision had virtually nothing to d with the subject matter of Jackson's mission and that I would probably have joined any oth attractive American undertaking in postwar Europe. My motivation was derived from m personal circumstances and was, in a word, selfish.

It follows that my initial adherence to the Jackson mission was not a passiona commitment. This was, indeed, a limiting factor on my effectiveness, at least during the fir year of my Nuremberg tenure. But now I may at least hope that this aloofness, if so it may b called, has fostered balance and accuracy in the description and judgments presented in th memoir.

In the course of the first Nuremberg trial it became apparent that the evidence ha disclosed numerous important Nazis, military leaders, and others who could best be tried b civilian tribunals. In the autumn of 1945 it was decided that later trials of such defendan would also be held at Nuremberg, and eventually twelve such trials, presided over b American judges applying international laws of war, were held during the years 1946–1949.

I was appointed Chief of Counsel for War Crimes to serve as chief prosecutor of thes cases, and I hope later to write a description of these subsequent trials, which involved man defendants, problems, and decisions quite different from those of the first Nuremberg trial.

In the preparation of the present account of the first Nuremberg trial, I am deeply indebte to the Columbia Law School; to Jonathan Segal, my editor at Alfred A. Knopf; to Robe Wolfe, of the National Archives; to Nancy Demmon, of the Columbia Law School, fo excellent secretarial assistance; and for helpful counsel to Peter Calvocoressi, Herbe Wechsler, and my wife, Toby Golick.

NUREMBERG AND THE LAWS OF WAR

The plan of this book is to record a personal memoir of the creation of the Internation Military Tribunal (IMT) and of war crimes trials held in Nuremberg from 1945 to 194

I might have written about Nuremberg twenty-five or more years ago, when my ow and others' memories were sharper. I had found time to write other books, so I can hard plead lack of time or opportunity. My disinclination was partly a desire to put my mind at distance from the subject that had engrossed me for four years and to turn my energies other directions. More influential, however, was a belief that my sense and assessment Nuremberg as a whole would benefit from the passage of time, opportunity for reflectio and the illumination that subsequent events might shed upon the past of which Nurembe was a part.

The delay has in one respect complicated my task. In 1945 and for fifteen to twenty yea thereafter, the reading public in the Western world knew a good deal about the structure an record of the Third Reich and the names of its leading personalities—Hitler, Goerin Goebbels, Ribbentrop, Himmler, among others—were household words. Today that is n longer the case; much more by way of historical context is necessary to make such a narrativ meaningful for the new generations. The events of the Nazi era were the stuff of th Nuremberg trials. Indeed, one recent and competent book about Nuremberg devotes as muc space to what happened in those years as to the course of events in the Nurembe courtroom. Since my main purpose is to tell the story of Nuremberg, I have struck a differe balance, in which the history of Hitler's Reich is in the background and the focus is on th trials and their legal and political underpinnings.

I have described this book as a "personal memoir" because it will portray Nuremberg as saw, heard, and otherwise sensed it at the time and not as a detached historian working fro the documents might picture it. And apart from the legal and moral questions stirred by th Nuremberg ideas and judgments, I have sought to convey an impression of the Nurembe participants as a community—an enclave geographically and socially—of the many an varied people crowded into the enclave and following a semicolonial life-style while the wrestled with the professional and personal problems that pressed upon them.

I have titled my book *The Anatomy of the Nuremberg Trials* because it will embrace muc more than the events which took place in open court. This was a complex trial which soug to break new legal ground on major issues of international law.

To be sure, at the time of the trials the defendants were the main focus of public attentio and the press was full of commentary on their personalities, their comparative degrees guilt, and the fairness of the tribunals' judgments. But the defendants and their fates were n the reason why Nuremberg has remained a bench mark in international law and the lodest of thought and debate on the great moral and legal questions of war and peace.

Some twenty-five years ago, widespread controversy arose over the meaning of Nurembe vis-à-vis the Vietnam War. Secretary of State Dean Rusk invoked Nuremberg to justi American military intervention, but thousands of young men contended, to the contrary, th

under the Nuremberg principles they were legally bound not to participate in what the regarded as the United States' aggressive war.

The Nuremberg which is remembered and invoked today is Nuremberg as a source and te of the international law of war. While there are many who deny Nuremberg's validity as source, they are far outweighed by the nations, international institutions, and people wh have accepted Nuremberg's validity or at least look to it for precedent and guidance. Ther are no permanently established means of enforcing the Nuremberg principles, and they ar often flouted, but as a moral and legal statement, clothed with judicial precedent and Unite Nations recognition, the Nuremberg principles are an international legal force to be reckone with.

The ideas which led to the expanded principles of the Nuremberg trials were large developed by a group of New York lawyers during the autumn and winter of 1944–45, mo notably by Henry L. Stimson, John J. McCloy, Murray Bernays, William C. Chanler, Samu Rosenman, Robert H. Jackson, and (though we do not usually think of him as a lawye President Franklin Delano Roosevelt.

Initially and, in my view most important, was the decision of Stimson, then Secretary War, to pass over the military courts-martial generally used for the trial of military crim and establish an international court. On September 9, 1944, he wrote to the President: "I a disposed to believe that at least as to the chief Nazi officials, we should participate in a international tribunal constituted to try them." The result was the unprecedented creation the International Military Tribunal, the most important and, I believe, successful new enti in the enforcement of the laws of war.

The trial, and the judgment of the Tribunal, were of course the public capstone of th Nuremberg enterprise. The subject matter, the notoriety of the defendants, and the caliber some of the witnesses brought about many sensational and shocking revelations. I rememb the stunned silence of the audience that followed the SS officer Otto Ohlendorf's col impassive statement that, in southern Russia, his troops had rounded up and killed som 90,000 Jews. And I remember the sheer panic of the defendant Walter Funk, former President of the Reichsbank (German State Bank), when prosecutor Thomas Dodd, cros examining, suddenly produced, and put into evidence, documents showing that Funk we knew that the Reichsbank was receiving jewels and other valuables, including gold teet which had been taken from the bodies of Jews and other inmates of concentration camps.

But what law was the International Military Tribunal enforcing? Ordinary courts and tria are based on the statutes of sovereign nations. However, the IMT was no ordinary court. was established by the United States and three major European nations, and the laws b which the IMT was bound were not the laws of any of those or of any other nations. For i rules on crime the IMT looked primarily to the international "laws of war," violations which are called "war crimes."

Ask the passerby what the words "war crimes" bring to his mind, and the chances are th the reply will be "Nuremberg." This may be a deserved acknowledgment of the seat of th most famous war crimes trials, but it also fosters the wholly mistaken notion that th Nuremberg trials were the original source of the "laws of war." And in order to understan the anatomy of the Nuremberg trials, it is necessary, first, to know something of the natu and scope of the laws of war before and during World War II and, second, to see wh

additions to the already existing laws of war those who were building the IMT sought t
make.

The root circumstances which gave rise to the laws of war as we know them today are pa
of the great waves of change that swept Western civilization in the eighteenth and nineteen
centuries, including the decline of the Church and the Holy Roman Empire and the rise
nationstates as the main repositories of temporal power, the Industrial Revolution, and th
Age of Enlightenment. Humanitarianism played a part in the development of these laws, b
the prime motivations were commercial and military. They were, in fact, very largely th
product of what Dwight Eisenhower, when retiring from the presidency, called the "militar
industrial complex."

Changes in the "art" of war were the most immediate cause for the customs and practice
limiting the means and manners of warfare, which later turned into rules and then law
From feudal times until well into the seventeenth century, "armies" were composed large
of mercenaries, whose pay was intermittent and who, for lack of a regular supply servic
had to "live off the country." This was devastating both to the effectiveness of the armies an
to the economy of nearby farms and towns. Soldiers were brutalized and undisciplined. Th
Thirty Years War (1618–1648) left much of Europe a shambles; it is estimated that over ha
the German-speaking population was wiped out, and famine and pestilence were widespread

From these disastrous years, military lessons were learned. Soldiers who were regularly fe
and paid, and who did not have to forage for food and shelter, could be disciplined an
trained to a pitch of efficiency that greatly raised the tactical level of operations. Troops we
organized under a regular chain of command, in battalions, regiments, and other standar
units. Administrative staffs handled supplies, pay, and other logistical necessities. Militar
police helped enforce discipline, and procedures something like courts-martial we
established to punish offenders.*

Thus soldiering became a profession, and the distinction between soldier and civilian wa
stabilized. And so were born the customs and rules governing the conduct of occupyin
troops, requiring respect for the lives and livelihoods of the civilian inhabitants, as long a
they remained noncombatants.

These rules form a major segment of the laws of war today, but of course at the time
their origin they were not thought of as "international law,"† but merely as sensible militar
regulations. Their consequences in practical application were humane and fitted well with th
libertarian and humanitarian ideas of the philosophers and publicists of the eighteenth
century Enlightenment—the era of thinkers such as Bentham in England, and in Franc
Voltaire and in particular Jean-Jacques Rousseau. In Rousseau's opinion, warfare wa
legitimate only in defense against an aggressor's attack—a principle very close to thos
embodied today in the Charter of the United Nations. In his most famous writing, *The Soci
Contract* (1762), Rousseau put forward the proposition that war was a relation only betwee
states and not between individuals:

> War, then, is not a relation of man to man, but of State to State, in which individuals are enemies only accidentally, and not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders.

The temper of the times, embodying both mercantile and philosophic values, is striking

reflected in a letter dated November 20, 1806, to Napoleon from his foreign minister, Prin de Talleyrand:

> Three centuries of civilization have given Europe a law of nations, for which … human nature cannot be sufficiently grateful.
>
> According to the maxim that war is not a relation between one man and another, but between state and state, in which private persons are only accidental enemies, not as men, nor even as members or subjects of the state, but simply as its defenders, the law of nations does not permit that the rights of war, and of conquest thence derived, should be applied to peaceable, unarmed citizens, to private properties and dwellings, to the merchandise of commerce, to the magazines which contain it, to the vehicles which transport it, to unarmed ships which carry it on streams and seas, in one word, to the person and the goods of private individuals.
>
> The law of war, born of civilization, has favored its progress. It is to this that Europe must ascribe the maintenance and increase of her prosperity, in the midst of the frequent wars that have divided her.

Odd it is to find Talleyrand cribbing from Rousseau to educate Napoleon. But Talleyran was only one of many who tapped that source to the same purpose; in 1871 the King Prussia, marching his men into France, declared that he was fighting French soldiers but n the French people. And this distinction between soldier and civilian, together with th soldier's obligation to respect the rights of noncombatant civilians of enemy countrie remains to this day, despite Hamburg, Dresden, Hiroshima, Tokyo, and Nagasaki, a vital pa of the structure and content of the laws of war.

During these same years, customs and rules for the taking and protection of prisoners war were also developing. The wasteful stupidity of mass killings led increasingly exchanges of prisoners. Often such exchanges were provided for in advance of hostilities; ou own 1785 treaty with Prussia provided, in the event of war, for the humane care of prisone taken on either side.

Still it remained doubtful whether surrender into captivity was a matter of right or grace, and whether "no quarter" could not be declared, at least in some circumstance Napoleon Bonaparte, for one, took a very "practical" view of the matter in 1799, at th unsuccessful end of his campaign in Egypt and Palestine. In March 1799 he captured th fortress of Jaffa, where the Mameluke garrison surrendered on the promise that their liv would be spared. But the promise was not kept, and as Napoleon sailed away, Mamelukes the number of 1,200 (as he reported) or 3,500 (as eyewitnesses testified) were slaughtere on the beaches of the Mediterranean.‡

A few old rules of exception to the obligation to take prisoners lingered on, one of which still alive today: capital punishment for spies. Well settled as it is on the basis that spies d not wear uniforms, this is an odd doctrine, as no moral obloquy now attaches to espionag Witness the case of Nathan Hale, honored by a statue on the old campus at Yale and a plaqu on the wall of the Yale Club in New York City, near his place of execution. The sportin aspect of espionage is underlined by the rule that if a spy succeeds in returning from behin the enemy lines to his own army, his responsibility for espionage is erased and

subsequently captured he must be treated as a prisoner of war—just as the base runne surprised by an improbable catch, will be safe if he can beat the ball back to base.

Today the value of prisoner interrogation for intelligence purposes and the fear of reprisa have ensured among the major powers (though by no means universally) observance of th obligation to accept surrender and grant humane treatment to prisoners of war.

2

Although the foregoing core elements of the laws of war were in place by the middle of th nineteenth century, they remained uncodified. Largely unwritten in any official sense, the were known as "customary law." It was the United States, during the War Between th States, that took the lead in having them systematized and embodied in an officially adopte code.

The principal draftsman of this first codification of the law of war was Francis Lieber, German who, as a young man, had fought under Field Marshal von Blücher against Napoleo A well-educated political dissident, he emigrated to the United States and took citizenship 1832. His talents won him a professorship at South Carolina College, but he detested slaver and in 1857 he moved to New York and became a professor at Columbia College an subsequently at the newly established Columbia Law School.

The War Between the States, in Lieber's words, "knocked rudely at my door," for his elde son was mortally wounded fighting for the Confederacy, whose cause Lieber abominate while his two younger sons were in the Union Army. When one of them lost an arm Tennessee at Fort Donelson, Lieber went west to visit him, and while there met Gener Henry W. Halleck, at that time commander of the Union forces in the West. In July 186 Halleck was appointed military adviser to President Lincoln with the title General in Chief.

Halleck, himself the author of a treatise on international law, had been impressed b Lieber's combination of military, legal, and political pursuits, and in December 1862 h appointed Lieber to propose "a code of regulations for the government of Armies in the fie of battle authorized by the laws and usages of war." Early in 1863 Lieber submitted a dra which was promulgated in May 1863 as General Orders No. 100, entitled "Instructions for th Government of Armies of the United States in the Field." It remained for over half a centu the official army pronouncement on the laws of land warfare.

The Lieber Code contains 157 brief "articles," some of which read more like moral maxim than legal rules. The greater part of the code, however, reflects the history we have trace and deals with prisoners, the rights of noncombatants, partisans, and spies. In a few instanc it prohibits particular means of warfare, such as the use of poisons. The code is humanitaria in its condemnation of cruelty and unnecessary violence and destruction, but the concept "military necessity" is broad; for example, it authorizes a commander to direct his troops give no quarter "in great straits, when his own salvation makes it *impossible* to cumb himself with prisoners."

In its specific content, therefore, the Lieber Code did not constitute a great leap forward a reformist sense. Its great importance was recognition of the necessity of systematizing an articulating the accumulated experience and practices of the previous century. It thus laid th basis for instruction and training of the officers and men of large wartime armies, compose chiefly of drafted civilians unfamiliar with military affairs, and established standards fo

compliance with the rules and for their enforcement by courts-martial and other disciplinar measures.

3

The provisions of General Orders No. 100 were derived from international usage, but th Orders did not purport to be international law; it was a domestic regulation of the Unite States Army. However, it was promulgated at a time when events in Europe, especially th Crimean (1853–1856) and Franco-Austrian (1859) wars, had raised problems which wer moving the major powers toward international agreement as a means of mitigating war ravages.

Despite the progress of medical science, the warring powers in Europe had failed to mak adequate provision for hospitals, doctors, and medical equipment at the scene of hostilitie In the Crimea, Florence Nightingale's administrative reforms and personal dedication to ca for the wounded aroused popular feelings which were intensified in 1862 by the Swi philanthropist Henri Dunant's widely read writings which gave a shocking account of th neglect suffered by the wounded at the Franco-Austrian battle at Solferino in Italy in 1859. A Geneva in 1864, twelve European nations signed a "Convention for the Amelioration of th Condition of the Wounded in Armies in the Field," the first of a series of international Re Cross conventions for this purpose.§

In the field of war crimes, however, the international breakthrough occurred at The Hagu in 1899, when a "Convention with Respect to the Laws and Customs of War on Land" wa signed by the United States, Mexico, Japan, Persia, Siam, and nineteen European nation including all the major European powers. In both organization and content, the Conventio leaned heavily on the Lieber Code and accordingly dealt chiefly with prisoners of war and th relations between occupation troops and noncombatant civilian inhabitants. Unlike the Lieb Code, however, the Convention included an unqualified prohibition of declaring "no quarte or attacking enemy soldiers who have surrendered.

Other conventions signed at The Hague in 1899 forbade the use of expanding (dum-dum bullets, the use of projectiles containing "deleterious gases," and "the launching of projectil and explosives from balloons, or by other new methods of similar nature." In 1907 a secon Hague Convention on the laws of land warfare, differing in no major respect from the 189 Convention, was signed by over forty nations.

In all of these treaties, the laws of war are stated as general principles of conduct, an neither the means of enforcement nor the penalties for violation are specified. However, th substance of many of their provisions was soon incorporated into the military law of th major powers and many other nations.

In the United States, General Orders No. 100 was replaced in 1914 by an army field manu entitled "The Law of Land Warfare" which, updated, is still in force. It sets forth that the law of war are part of the law of the United States and that they may be enforced against bo soldiers and civilians, including enemy personnel, by military or international tribunals.

Such was the state of the laws of war in 1914, when World War I began. Up to this tim the laws of war contained virtually nothing dealing with aerial warfare. The Hagu Convention in 1899 antedated the Wright brothers' famous flight at Kitty Hawk in 1903, an the 1907 Convention came only a few years later. Military aviation was still in its infancy

1914 when major-power warfare was renewed.

The naval situation was wholly different. Over the past centuries of maritime warfar many customs and rules, sometimes embodied in treaties, had been adopted dealing wi such matters as false flags and other ruses, blockade, privateers, and the treatment of neutr shipping.

The Hague meetings produced a number of agreements to internationalize both preexiste and some new naval rules. In 1907, no less than eight naval conventions were adopte covering such matters as the status of enemy ships at the outbreak of hostilities, th converting of merchant ships into warships, minelaying, and coastal bombardment.

Most of these rules were of such a nature that their violation would lead to reprisals, claims for compensation, rather than criminal prosecutions. Navies do not ordinarily occup enemy territory nor take large quantities of prisoners. These factual differences no doul explain why there was no general naval code comparable to the Hague Conventions on lan warfare.

None of the Hague Conventions, nor the predecessor concepts on which they were base imposed any limitation on the sovereign right to make war. Wars had played a large part the rise and proliferation of nation-states, whose leaders generally scorned as sentiment rubbish the "just and unjust war" concept of earlier centuries. To be sure, governments mig still give reasons for resorting to war that stressed the righteousness of their cause, but nor of this was of any legal significance.

Lieber, progressive as he was with regard to the conduct of warfare, had no doubts abo its intrinsic validity, and accordingly General Orders No. 100 declared that "war has come be acknowledged not to be its own end, but the means to obtain great ends of state… Therefore "The law of nations allows every sovereign government to make war upon anoth sovereign state …," and the nation attacked is bound to abide by the laws of war even thoug it regards the enemy "as a wanton and unjust assailant."

And so in 1914 when the "Guns of August" thundered, there was nothing in th acknowledged content of international law that made any state or individual liable criminal charges for declaring and engaging in war. But the Hague Conventions, and oth treaties and conclaves in the preceding half century, had internationalized the whole subje of limits on warfare and laid the basis for an extraordinary expansion of public and politic concern with "war crimes" throughout the course and aftermath of World War I.

4

From the very beginning of that war, Kaiser Wilhelm II and his general staff contrived conduct German war operations in such a way as to raise a worldwide storm of hate and fea almost comparable to that achieved by Adolf Hitler a quarter of a century later. I use th word "contrived" advisedly, for whereas the Hitlerian atrocities reflected fundamental Na doctrine, the crimes and errors of Imperial Germany appear to have been the result clumsiness, arrogance, and sheer brutality.

Historians still debate the apportionment of responsibility for the onset of World War I, b no one contends that Belgium started it by attacking Germany. The German High Comman conceived that their forces needed the deployment space of Belgium for a speedy victory ov France, and as soon as there was a state of war between Germany and France, the Germa

government sent Belgium a demand to allow the transit of German troops. When the Belgia declined, the German Army attacked across the Belgian frontier, in violation of th multinational Belgian neutrality treaty of 1839, which the German Chancellor Theobald vo Bethmann-Hollweg publicly scorned as a "scrap of paper." A few hours later Britain, invoki the 1839 treaty, declared war on Germany.

The Germans' ruthless attack on a small neutral country not only ensured British hostili but also scandalized world opinion. With the invasion came reports of wanton destructio and brutalities by the Germans: the ancient city of Louvain was sacked and its world-famou library destroyed by fire; innocent civilians were taken hostage and often shot; in som places the invading soldiers were said to have raped women and killed adults and childre alike. Soon there were comparable reports from German-occupied areas in France, where th troops of a brigade commanded by General Karl Stenger had denied quarter to Frenc soldiers, including the wounded.

During 1915 the pitch of public indignation climbed even higher. In January the hug German lighter-than-air ships known (after their designer) as zeppelins started bombing rai over England; their military value was slight, but by the end of the year over 200 civilia had been killed and many were terrorized. The following month the German governme proclaimed a "war zone" around the British Isles, in which their submarines would sin enemy merchant ships without warning. In April the huge Cunard liner *Lusitania* was sunk b a U-boat off the Irish coast with the loss of some 1,200 lives. That same month the Germa first employed poison gas as a weapon during the battle of Ypres. At about the same time th "Young Turk" government of the Ottoman Empire (which had entered the war as an ally Germany in November 1914) began the deportation of Armenians to the Syrian desert, whe they were massacred by the thousands. In October the British public was enraged by th Germans' execution of Edith Cavell, the director of a nurses' training school in Brussels. Th following night a zeppelin raid over London killed 127 inhabitants.

This list (far from complete) of German and Turkish actions is certainly adequate to expla why, in both Allied and neutral nations, the Germans came to be referred to as "Huns" an their military policies as "frightfulness." But in nearly every case, there were seriou evidentiary or legal questions whether these acts could rightly be labeled "war crimes."

The neutrality treaty violated by the German invasion of Belgium did not embody crimin sanctions, and as soon as Belgium resisted she ceased to be neutral. As for the conduct German troops in Belgium, most of the stories of indiscriminate murder, rape, and infanticid were later exposed as the fabrications of propagandists. The destruction in Louvain, to b sure, was plainly contrary to several clauses of the Hague Convention, but the taking an even killing of hostages was not so covered, and as late as 1948 was held permissible und the laws of war by one of the Nuremberg tribunals. Edith Cavell publicly acknowledged th in the autumn of 1914 she had been part of an "underground railway" to assist Allied soldie trapped behind the German lines to escape capture and rejoin their compatriots. He execution was draconian, and from a public relations standpoint stupid, but it was no wa crime.

The zeppelin raids ushered in the era of urban bombardment from the air, but violated n law of war—the Hague Conventions on land warfare forbade the bombardment of *undefende* cities, but London was not undefended; the separate 1907 Hague Convention prohibiting th

discharge of explosives from “balloons, or by other new methods of a similar nature” was n
in force, as neither Germany nor France had signed it. No international agreement governi
submarine operations had been adopted, and, except for hospital ships, German U-bo
attacks on enemy shipping violated no international law, save in the few cases in whi
survivors of a sinking ship were attacked. However, the use of poison gas was much le
defensible, as the Hague Convention on land warfare explicitly forbade the use of “poison
poisoned arms.” But even here, questions might be raised under the Hague Convention
“asphyxiating or deleterious gases,” which was limited to their diffusion by “the use
projectiles.” The Armenians were citizens of the Ottoman Empire; there was no formal sta
of war between Armenians and Turks, and so the Hague Conventions were whol
inapplicable. In May 1915 a joint Allied declaration denounced the Turkish actions as “crim
against humanity and civilization,” but that was a concept quite outside the scope of a
treaties or recognized doctrine.

5

Such negative arguments were overwhelmed by the tide of anger against Imperial Germa
which engulfed the Allied and many neutral peoples. Initially, public rage focused on t
Kaiser; before the war was a month old there were published demands for his exile to S
Helena, Devil’s Island, or some other suitable place. Almost as soon, however, voices we
raised insisting upon trial and punishment by law, preferably before an international tribuna

Pressure for punitive action against the Kaiser and other German war criminals w
strongest in Britain, which was bearing the brunt of the U-boat and zeppelin operations.
1916, Prime Minister Herbert Asquith told the House of Commons that his government w
“determined to bring to justice the criminals, whoever they may be and whatever the
station.”

In February 1917 the German government declared a new zone around the British Isles
which U-boats would sink enemy *and neutral* shipping alike, without warning or regard f
the safety of crews or passengers. This was so contrary to maritime practice, and
hazardous to American lives and property, that two months later the United States declare
war against Germany. A year later over a million American soldiers had joined the Allie
forces in France.

Since American sympathies had lain with the Allies from the beginning of the war, it is n
surprising that in the United States there had been almost as much discussion of war crim
trials as in Britain. In both countries the general public’s wrath was directed at the Kaiser, b
in legal and academic circles there was a strong current of opinion that judicial trials wou
promote the development of international law as an instrument of peace. This fitted we
with Wilsonian internationalism and the President’s insistence that the war was a crusade:
war “to end war” and “to make the world safe for democracy.”

When victory came via the Armistice in November 1918, it was accompanied by t
Kaiser’s flight to Holland, a country with a long tradition as a haven for political refugee
This was a complicating factor, but did nothing to quell the public demand for h
punishment. In Britain, Prime Minister David Lloyd George and his Cabinet pledged suppo
for a trial of the Kaiser as part of their successful parliamentary election campaign
December 1918.

In France, the public appetite for war crimes trials had increased, partly because th Germans had carried out what amounted to a "scorched earth" policy in their final retre through northern France. The practical French were, however, much more concerned abo reparations and future national security than international justice. As for the Kaiser, he w one of the guilty, but there was opposition to his exile to St. Helena—a proposal which w condemned as an insult to Napoleon and the French nation!

There was no unity of viewpoint about war crimes among the three major powers whe the delegates assembled, on January 18, 1919, at the opening session of the Paris Pea Conference—a conclave dominated by Lloyd George, Georges Clemenceau, and Woodro Wilson. For the first-named, the establishment of an international tribunal to try the Kaise and provisions for the trial and punishment of other war criminals, was both a politic necessity and a program which reflected his own and a majority of his countrymen's stron desires. But for both Clemenceau and Wilson, war crimes were collateral to their larger aim for Clemenceau, reparations and security; for Wilson, a moderate peace, a viable democrat government for Germany, and, most of all, a League of Nations to secure future peace.

The war crimes issue was the first item on the conference's agenda, and a Commission o the Responsibility of the Authors of the War and the Enforcement of Penalties w established to study and report back on the matter. The chairman and dominant figure w the American Secretary of State, Robert Lansing, whose views on war crimes issues we fiercely conservative; he did not really believe in any supranational law and opposed an international punitive action against the Kaiser or the establishment of international cour for war crimes trials.

The commission's report, submitted in March 1919, charged Germany and her allies (th Central Powers) with extensive violations of the laws of war. Some offenders could be trie before national tribunals, but those in high authority and responsible for crimes on a larg scale would be brought before a twenty-two-member international High Tribunal. Th commission also found that the Central Powers had, with premeditation, launched a "war o aggression" in violation of treaties, but that this conduct did not provide the basis for criminal charge under existing international law; it should, however, be strongly condemne and made a penal offense for the future. As for the Kaiser, the commission recommended h trial before an international tribunal on the charge that he was responsible for Germa violations of the laws of war.

The report was nominally unanimous, but the American "reservations" were s fundamental that they amounted to a dissent. President Wilson was not as rigid as Lansing o these issues, but he was worried about "victors' justice" and had told Lansing that he wante "a minority report rejecting High Tribunal and opposing trial of the Kaiser." Lloyd Georg however, made it clear that he could not sign a treaty that failed to provide for the Kaiser punishment. Confrontation then gave way to compromise, embodied in Articles 227 and 23 of the Treaty of Versailles, signed in June 1919.

Under Article 227 the Kaiser was to be tried before a "special tribunal" of five judges, on each from the United States, Great Britain, France, Italy, and Japan. He was not to b charged with responsibility for war crimes, but with "a supreme offence against internation morality and the sanctity of treaties." The three ensuing articles called for trials of "perso accused of having committed acts in violation of the laws and customs of war" befo

"military tribunals" of the aggrieved nations, and required the German government to "har over" the individuals so accused to any of the "Allied and Associated Powers" so requestin Provisions comparable to Articles 228–230 were included in the later peace treaties wi Austria, Hungary, and Bulgaria.

Thus the hopes of Lloyd George and other European statesmen to use the victorious peac as an occasion for confirming and expanding the international law of war foundered on th rocks of American opposition. Wilson and Lansing had won. There would be no internation war crimes courts. There would be no trial to determine the Kaiser's criminal guilt. Th charge against him was stated in terms that were opaque and had no roots in internation legal doctrine. Furthermore, this boded ill for the prospects of persuading the Dutch to mak him available for trial.

6

President Wilson left France the day after the Versailles Treaty was signed and embarked o his unsuccessful campaign to obtain Senate ratification. His eventual failure in March 192 was followed by his severe illness, and Washington's role in treaty matters rapidly dwindle America's virtual withdrawal weakened both the League of Nations and the treaty, and th European Allies soon learned that it is one thing to get a treaty signed and quite another t enforce it.

Holland was duly asked to make the Kaiser available for trial, but the Allied camp wa divided on the wisdom of the project, and the Dutch received hints that the demand was pr forma and there would be no coercion. The Allied request was refused, on the legal groun that the offense charged against the Kaiser was unknown to Dutch law, was not mentioned i any treaties to which Holland was a party, and appeared to be of a political rather than criminal character. The Kaiser never left Holland, and died in his castle at Doorn in 1941.

No part of the Versailles Treaty aroused more anger in Germany than Article 228, requirin the government to deliver up its own citizens for trial on war crimes charges before tribuna constituted by the victorious army. Credible information reached the Allied leaders th compliance with such demands would threaten the stability of the Weimar Republic an might even lead to a Communist takeover. Lloyd George and Clemenceau were deepl troubled; there was strong demand from their respective publics for strict enforcement o Article 228, but it was obvious that revolution in Germany would jeopardize reparations an have other serious consequences. Nevertheless, on February 3, 1920, the Allies presented t the Germans a list of 854 individuals, including many famous military and political figure for turnover.

There was an immediate explosion of indignation and defiance in Germany, but within tw weeks the immediate crisis was resolved. Accurately sensing Allied misgivings, the Germa had come forward with a proposal that those accused of war crimes be tried before th German Supreme Court in Leipzig. Lloyd George prevailed on the French to accept th solution, and on February 17, 1920, the Germans were so notified.

The Allies then presented the Germans with an initial list of forty-five individuals fo prosecution, and a year later the Leipzig trials began. The first accused were four named b the British. Three German enlisted men charged with beating British prisoners with rifle but were convicted and given sentences of six to ten months. A U-boat commander who had sun

a British hospital ship was acquitted on the ground of superior orders.

The court then heard a Belgian case against a German military policeman charged wi torturing small children arrested on suspicion of sabotage. The court acquitted the defendan the Belgians at once repudiated the trials and refused further participation.

The Leipzig court then took up the case of General Stenger and his subordinate Majo Cruscius on the charge of denying quarter and murdering French prisoners. Major Crusciu admitted shooting French wounded, and accused General Stenger of ordering the killing Stenger denied the charge and was acquitted; Cruscius was sentenced to two year imprisonment. The trial was turbulent, and the French delegates were taunted and spat upo by the crowd. Four other Germans accused by the French were then acquitted. The Frenc withdrew their delegation and participated no further.

The British had listed for trial Lieutenant Patzig, commander of a U-boat which had sunk hospital ship and then destroyed two lifeboats with survivors.‖ Patzig was unavailable fo trial, but the German prosecutor on his own initiative brought charges against tw subordinates, Lieutenants Dithmar and Boldt. The court ruled that they well knew tha Patzig's order to attack the lifeboats was unlawful, convicted them of manslaughter, an sentenced them to four years' imprisonment. Within a few months both escaped, apparentl with the connivance of the jailers.

Dismal as the Leipzig record was from a prosecution standpoint, the British did not shar the outrage of the French and Belgians, and refused to join in French proposals for sanction By way of compromise, however, in August 1922 the British joined in an Allied note t Germany declaring that the Leipzig court's decisions would not be recognized as valid an reserving all rights under Articles 228–230 of the Versailles Treaty.

There were few other post-World War I war crimes trials worthy of note. A French cou convicted two prominent Saarland industrialists, Robert and Hermann Roechling, of wartim spoliation of French-owned property, but the verdict was set aside on appeal. The Allie showed no interest in pursuing war criminals in Austria or Hungary. Among the victorio Balkan states, only Yugoslavia pressed for the punishment of war criminals—in this instanc Bulgarians. Eager for good relations with the Yugoslavs, the Bulgarian government brought t trial and convicted a number of its own soldiers for crimes against Yugoslav civilians.

Allied, and especially British, interest in Turkish crimes was much greater, with regard bo to the Armenian massacres and to the mistreatment of British prisoners. The Sultan government was submissive to Allied demands, and in April 1919 a Turkish military tribun convicted two officials, one of whom went to the gallows, of murdering Armenians. But th Turkish nationalist movement was growing, and Greek atrocities against Turks in Smyrna pu a hypocritical cast on the war crimes issue. The word "genocide" had not yet been coined, bu that is what the Armenian massacres were. The Allies failed to establish the criminality of th massacres by judicial process, and in 1923 the Treaty of Lausanne covered the perpetrato with the shield of amnesty.

As for the war crimes provisions of the Versailles Treaty, the best that can be said is th "the mountain labored and brought forth a mouse."

Thus the war crimes prosecutions moved offstage, but the enormous carnage of World Wa I stimulated public demand for measures to prevent a recurrence of such slaughter an destruction. Military and diplomatic interest was rekindled in the use of multination

treaties not only to limit armaments, but also to govern their use. The airplane, th submarine, and poison gas had profoundly affected the conduct of war, and it was to thes relatively new weapons, largely untouched by the Hague Conventions, that attention no turned.

The first efforts, at the five-power Washington Conference of 1922 on the limitation armaments, failed. The conference also found it impossible to formulate a treaty limiti aerial warfare, but provided for a Commission of Jurists to study and report on the proble Early in 1923 the commission submitted proposed rules which included a prohibition again "bombardment for the purposes of terrorizing the civilian population" and limiting aeri bombing to specified "military objectives." The rules were never adopted in legally bindi form.

Success in these areas was first achieved by the prohibition against the use of poison gas the 1925 Geneva Protocol, which was soon ratified by most nations and generally recognize as legally binding. The United States, however, did not ratify the protocol until 1975, a both the United States and Great Britain have expressed reservations about its application tear gas and herbicides.

The 1930 London Treaty for the limitation of naval armaments, signed by eleven nation provided that "with regard to merchant ships, submarines must conform to the rules International Law to which surface vessels are subjected" and explicitly required that, unle the merchant ship refused to stop or attacked the submarine, it could not be sunk unless th "passengers, crew and ships papers" had first been put "in a place of safety," with due rega to location and sea and weather conditions. In 1936, pursuant to the London Protocol of th year, these rules were circulated to all other nations, and by the time World War II began had been accepted by forty-eight countries, including Germany and all other major powers.

For air warfare there were no further treaty developments, and in retrospect it is easy see why the 1923 draft failed to win adherents. In 1921, the Italian air general Giulio Douh had published a widely read book, *Command of the Air*, preaching the doctrine that in futu years air power would be decisive—a view congenial to the British air staff, which soon wa planning a large investment in heavy bombers as the best deterrent to German air attac against the homeland. The United States was similarly developing the four-engined B-17 a B-24 strategic-range bombers that were to play a major role in World War II. Public opinio during the years between the two world wars, settled into a fatalistic acceptance that futu wars between the great powers would surely involve urban infernos produced by bombe and that nothing could be done about it. So firm was this belief that, when such attacks faile to materialize during the first months of World War II, people called it the "phony war."

Of more general importance than these discussions and agreements was the 1928 Treaty Paris, which sought to outlaw war itself. The late 1920s was a period of international amit which had begun in 1925 with the Locarno security pact among Britain, France, Germa Belgium, and Italy guaranteeing the German-French and German-Belgian frontiers. Th foreign ministers of France and Germany, Aristide Briand and Gustav Stresemann, we seeking to allay old animosities; the French ended their occupation of the Ruhr; Germa resumed reparations payments and in 1926 was admitted to the League of Nations. That ye the two men shared the Nobel Peace Prize.

The tenth anniversary of the United States' entry into World War I fell on April 6, 192